EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 103 of 2011

BETWEEN:

VTB CAPITAL plc

Applicant/Claimant

and

(1) NUTRITEK INTERNATIONAL CORP
(a company incorporated in the BVI)

Defendant

(2) MARSHALL CAPITAL HOLDINGS LIMITED
(a company incorporated in the BVI)

Respondent/Defendant

(3) MARSHALL CAPITAL LLC
(a company incorporated in Russia)

Defendant

(4) KONSTANTIN MALOFEEV

Respondent/Defendant

Appearances:
Mr Murray Rosen QC, Mr Richard Evans and Mr Jerry Samuel for the Claimant
Mr Stephen Rubin QC, Mr John Carrington QC for the second defendant and Mr Robert Nader for the fourth Defendants

JUDGMENT

[2013: 29, 30 July; 18 September]

(Proceedings issued for sole purpose of obtaining ancillary relief in support of proceedings in England by claimant against identical defendants and stayed before any further steps taken – English proceedings dismissed because order permitting claimant to serve defendants out of the jurisdiction set aside – claimant

in BVI wishing to prosecute stayed BVI proceedings and applying for stay to be lifted – whether stay should be lifted – procedure to be adopted when applying for orders in aid of foreign proceedings - whether permission to be given to serve third and fourth defendants out of the jurisdiction - whether BVI the appropriate *forum* – whether foreign court available forum - whether refusal to permit service out would unjustly deprive claimant of legitimate personal or juridical advantage)

[1] **Bannister J [Ag]:** This is an application by the Claimant ('VTB') for the stay imposed in these proceedings on 21 September 2011 to be lifted; for the grant of a worldwide freezing order against the fourth Defendant ('Mr Malofeev'); and for directions. Mr Malofeev applies, if I lift the stay, for an order setting aside the order of Hariprashad-Charles J giving VTB permission, on 24 August 2011, to serve these proceedings on him out of the jurisdiction. The second Defendant ('Marcap BVI') applies, if I lift the stay generally, for the proceedings to be stayed against it on the grounds that the BVI is not the proper forum. In fact, the proceedings were served on Mr Malofeev within the jurisdiction through his then lawyers, McW. Todman & Co, who reserved, on his behalf, the right to challenge jurisdiction on *forum* grounds. The proceedings were subsequently 'served' on Marcap BVI, although given the pendency of the stay when that was purportedly done, there must be some considerable doubt whether that was of any effect. As it happens and as will be seen, nothing turns on the point.

[2] I am not going to give a review of the facts. They are exhaustively set out in the judgments of Arnold J,[1] the Court of Appeal[2] and the United Kingdom Supreme Court[3] in the main proceedings in England between the same parties. The outcome in those proceedings was that they were dismissed on the grounds that VTB had failed to show that England was clearly or distinctly the most appropriate forum for resolution of the dispute, with the result that the Master's order permitting VTB to serve out on Mr Malofeev and the other defendants was discharged. The

[1] 29 November 2011
[2] 20 June 2012
[3] 6 February 2013

freezing orders granted to VTB by the English Courts (which, apart from the original freezing injunction granted by Roth J, were each 'holding' orders, granted to preserve the position pending the hearing of appeals from the decisions of Arnold J and of the Court of Appeal respectively) fell away accordingly.

Lifting the stay

[3] The BVI proceedings were commenced for the purposes of obtaining freezing orders in this jurisdiction against the two BVI incorporated defendants and Mr Malofeev ancillary to those granted, as I have described, by the High Court in London. Instead of using the procedure under what is now commonly referred to as the **Black Swan** jurisdiction, VTB chose to resort to what I understand to have been the former practice, which was to issue what had the form and appearance of substantive proceedings, and then immediately apply for them to be stayed once the freezing relief had been obtained. Freezing orders were granted here in the BVI in August 2011 on the back of this procedure. When the UK Supreme Court finally discharged the English freezing order on 6 February 2013, VTB applied for the BVI stay to be lifted and Mr Malofeev applied to discharge the BVI freezing order. Mr Malofeev's application came on first and I discharged the injunction on 27 March 2013, for the reasons set out in my judgment of that date. For various reasons, VTB's application for the stay to be lifted and for a fresh freezing order to be granted did not come on for hearing until 29 July 2013. This is my judgment on that application.

[4] The proceedings commenced in the BVI in August of 2011 were not designed to result in the determination of any issue between the parties. On the contrary, it was expressly stated in the evidence sworn in support of the injunction granted by Hariprashad-Charles J that the relief sought was wholly ancillary to the then ongoing proceedings in the English High Court. It is true that that evidence also explained that it was not the intention to pursue the BVI proceedings 'providing that England remains an appropriate forum' or 'unless the BVI became the only available forum,' but I do not think that those attempts at qualification help VTB. I do not consider that what was the merest of procedural devices designed (in my judgment on no valid legal foundation) to get round the absence in this jurisdiction of a provision equivalent to section 25 of the UK Civil Jurisdiction and Judgments Act 1982, can be converted, after it has ceased to serve its purpose and some two years down the line, into substantive proceedings. Apart from anything else and although it may

not matter very much on the present facts, I do not consider that it would be right for a claimant to be able to defeat an otherwise available limitation defence that had arisen before application made to lift the stay by a contention that two years previously he had issued wholly artificial proceedings of this type and was thus the beneficiary of a commencement date falling within the relevant period. This seems to me to demonstrate the injustice of permitting devices of this sort to be converted into substantive proceedings.

[5] No one would argue that proceedings invoking the **Black Swan** jurisdiction could be converted, at a whim, into substantive proceedings. Proceedings of the type that were launched here in August 2011 cannot stand in any better position. For these reasons I refuse to lift the stay. The procedure by way of claim form/stay should not be used in future in cases where orders are sought in aid of foreign proceedings. It has no secure legal foundation and is calculated only to cause confusion – as this case has demonstrated.

The jurisdictional challenge

[6] I heard full argument on the question whether, if these proceedings could have been made live, they should be stayed in favour of Mr Malofeev and Marcap BVI on *forum* grounds. Since there are, as a result of my refusal to lift the stay, no proceedings in front of me, that application now has nothing to bite upon. But in the circumstances and in order to avoid costs being wasted, it seems to me that the right course is for me to treat as being before me an application for permission to serve Mr Malofeev and the third Defendant (a Russian incorporated entity) out of the jurisdiction with a claim intended to be issued in identical terms to the proceedings stayed in September 2011 and to consider, on that hypothetical application, whether VTB should have permission to serve such proceedings out of the jurisdiction.

[7] There being no dispute that VTB could show, on the allegations made in such hypothetical proceedings, a serious issue for trial here in the BVI and a good arguable case that one of the gateways permitted by CPR 7.3 is available to it, the question is whether VTB discharges the burden of showing that the BVI is clearly or distinctly the appropriate forum for trial of these issues or, to put it another way, whether it is the *forum* in which the case can be most suitably tried in the interests of all of the parties and the ends of justice: see **Spiliada Maritime Corporation v**

Cansulex Ltd[4] ('the Spiliada'): or, as CPR 7.7(2)(c) puts it, in the negative, whether the case is a proper one for the Court's jurisdiction.

[8] At first blush it seems odd that VTB should spend the better part of two years contending that England is clearly the most appropriate *forum* for trial of its claims, only now to stand on its head and maintain that, on the contrary, it is the BVI that is clearly the most appropriate jurisdiction. All its arguments in support of an English *forum* must be treated as jettisoned in favour of a contention, never previously advanced, that, while the English Courts unaccountably failed to spot the point, it is the BVI which are clearly the most appropriate place for trial of these issues. Still, I must deal with the submission as I find it.

[9] Seven of the nine English judges who heard VTB's *inter partes* application for permission to serve out and the successive appeals from the refusal by Arnold J to grant it found that Arnold J was either right, or at any rate could not be shown to have gone wrong, in deciding that Russia was the appropriate *forum* for trial. The other two judges, members of the UK Supreme Court, found that the proper *forum* was England, on the basis that the tort relied upon was practiced upon the Claimant (which is an English company) in England (and thus to be tried under English law) and that the facility agreement by which VTB advanced funds to the borrower was governed by English law. It is not suggested by Mr Stephen Rubin QC, who appeared together with Mr Robert Nader for Mr Malofeev and Marcap BVI, that I am bound by the decision of Arnold J or those of any of the judges who considered the matter subsequently, but it would seem to me that I should have regard to factors identified by the judges who, concurring with Arnold J, considered that the appropriate *forum* for determination of the dispute was Russia, while at the same time forming my own conclusion for my own reasons.

[10] It seems to me obvious that Russia is clearly the most appropriate *forum* for determination of this dispute: the lending was made by VTB's Russian parent and only channeled through VTB for purposes irrelevant to and not impinging upon the economic reality; the borrower was Russian; the loss was suffered in Russia by VTB's parent; the fraud, if there was a fraud, was orchestrated in Russia by Russians; lies, if there were lies, were told in Russia, in Russian, to Russians. The underlying

[4] [1987] 1 AC 460

assets the subject of the alleged fraud were Russian companies actively trading within the Russian Federation.

[11] The vast bulk of documentation needed for trial will be situated in Russia and written in the Russian language. The majority of the witnesses will be found in Russia. Since the trial will be a fraud trial, it will be clearly preferable that witnesses give their evidence (a) in their native tongue and (b) directly in the face of a Court which can understand what they are saying. Although I was shown no evidence as to the powers of Russian Courts to compel reluctant witnesses, it can at any rate be said with certainty that they would not be compellable from the BVI.

[12] Mr Rubin also urged another, rather less tangible consideration: that a Russian Court will have a feel, impossible to inculcate in the BVI Court, for the commercial background, practices and standards against which these events unfurled. The Russian Court will, he submits, be inherently better placed to evaluate the evidence than would a Court sitting here in the BVI. I think that there is force in the submission.

[13] Mr Murray Rosen QC, who appeared together with Mr Richard Evans and Mr Jerry Samuel for VTB, urged that it was clearly appropriate for this Court to hear the claim because two out of the five parties to it are incorporated in the BVI – the first Defendant ('Nutritek') which was the supposed seller under the transaction and Marcap BVI, which is alleged to have been beneficially owned by Mr Malofeev and another gentleman and to have played some part in the alleged conspiracy.

[14] While I accept that the BVI will almost invariably be the natural forum for the resolution of disputes over the ownership or control of BVI registered companies or over their constitution and (as between their members) the conduct of their affairs, I cannot accept that there is any reason why a dispute over whether BVI registered companies (among others) were involved in a fraud orchestrated and carried out in Russia should be heard in the BVI in preference to any other *forum*. Relationships, whether tortious or contractual, between BVI companies and persons otherwise unconnected with them are, in my judgment, in themselves neutral for *forum* purposes. The only relief claimed in the former statement of claim against Nutritek and Marcap BVI is for damages for conspiracy. VTB did not even trouble to seek freezing relief against them. The real target is Mr Malofeev and his assets.

[15] I therefore find that the Courts of the Russian Federation are clearly the most appropriate *forum* for the trial of the issues raised by the hypothetical claim.

[16] The question that then arises is whether those Courts are an 'available' forum for the purposes of the considerations which arise in the service out cases. The question is relevant because the risk that a claimant may not obtain justice in the natural forum may influence the Court's decision whether or not to subject the foreigner to its own exorbitant[5] jurisdiction. It is plain that the nature of that inquiry will be fact specific. At one end of the spectrum will be found cases such as **OJSC Oil Company Yugraneft v Abramovich**,[6] in which the Court may be faced with the fact that it may be impossible, or next to impossible, to pursue a claim in delict in the Russian Federation without the evidential foundation of a criminal conviction relating to (or given in) the same proceedings - something which it will not be within the prospective claimant's power to bring about. In such a case it is wrong, in my judgment, to treat the foreign tribunal as unavailable to the claimant seeking permission to serve out. The forum is clearly available. It is just that there may be a pre condition to be satisfied before its jurisdiction may be satisfactorily invoked. That, however, does not make the forum unavailable. It is simply a feature peculiar to the jurisdiction in which the principal actors reside and in which they chose to do business.[7] In my judgment a party seeking permission to serve out cannot rely upon supposed[8] procedural deficiencies of the natural forum in order to assert that it is not available. I am fortified by the fact that this seems to have been the view taken by Christopher Clarke J in **Yugraneft** itself.[9]

[17] At the other end of the spectrum will be found cases such as **AK Investment CJSC and ors v Kyrgyz Mobil Tel Limited and ors**.[10] In that case the issue was not whether the applicants for permission to

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[5] which in its original sense means 'outside the scope of the law'

[6] [2008] EWHC 2613

[7] I appreciate that VTB is an English company and that some of the formal transactions were effected in London, but in essence this was lending by Russians arranged and negotiated in Russia and for the purposes of assessing availability of *forum* I consider that the English element is to be ignored

[8] it seems far from obvious to me that they are to be considered deficiencies at all. They represent a different, but not necessarily less valid, approach to the problems which are inevitably raised by the interrelation in any given case between the criminal law and the law of tort, but that does not mean that they are to be treated as defects

[9] at paragraph 497

[10] [2011] UKPC 7

serve out might arguably have to overcome some procedural hurdles if left to their devices in the natural forum, but whether there was a risk that they would not obtain *justice* if they had to sue in the natural forum. The applicants had already been subjected to serial and egregious injustices at the hands of the Kyrgyz Courts and their prospects of remedying them were, as a matter of fact, zero. To have left the applicants to relitigate matters in the Kyrgyz Courts would have been to have perpetuated the injustices to which they had already been made subject. In the present case it is very properly not suggested by Mr Rosen that there is a risk that VTB will not obtain just treatment at the hands of the Courts of the Russian Federation.[11]

[18] I therefore find that the Russian Courts have at all material times been and remain available to VTB.

[19] That leaves only the question whether VTB would (1) be deprived, if unable to sue in the BVI, of a legitimate advantage which it would obtain if permitted to bring the third Defendant and Mr Malofeev here and (2) of which it would be unjust to deprive it by compelling it to sue, if at all, in Russia (or in some other as yet unspecified jurisdiction other than the BVI).

[20] The Court read evidence on this aspect of the matter from Professor AP Sergeev, Chair of the Department of Civil Law, Faculty of Law of Saint Petersburg State University of Economics ('Professor Sergeev') and from Dr Alexander Muranov, a highly qualified practicing Russian lawyer ('Dr Muranov'). There was no oral evidence and therefore no cross examination.

[21] The following facts appear to be common ground. The Russian Courts would not decline jurisdiction in the current circumstances. It would be open, in the sense of possible, for VTB to bring a civil claim in Russia against Mr Malofeev for fraud – i.e. for loss suffered as a result of tortious deceit. The limitation period for such a claim would be three years from the date of actual or imputed knowledge. Any limitation point would have to be expressly taken by the defendants. If criminal proceedings (i.e. a criminal case at second instance) were commenced against Mr Malofeev, alone or together with others, it would be open to VTB to mount a civil claim within the umbrella of such proceedings, whether or not the civil limitation period had by then expired. Such

[11] no such suggestion was made in the English proceedings

criminal proceedings would, however, have to be abandoned unless they had been concluded within the ten year limitation period for serious (on the basis of the allegations made) fraud. As I understand it, the civil element of such proceedings would fall with the criminal element. If, on the other hand, at some time before the expiry of the criminal limitation for proceedings to be brought against Mr Malofeev (on the facts, probably some time in 2017) a criminal verdict was brought in against Mr Malofeev, then VTB would benefit from a new limitation period of three years running from the date of that conviction within which to mount civil proceedings against him.

[22] The experts' reports diverged, however, on the importance, for the purposes of successfully prosecuting a civil fraud claim, of the availability of a relevant prior criminal conviction. Professor Sergeev says that in the case of a major fraud, it would be difficult to obtain a successful result in the absence of a prior criminal conviction in respect of the same subject matter. This is not the result of any rule of law but of the care taken by the Russian civil Courts not to get in the way of or prejudice criminal proceedings, particularly where criminal proceedings (in the BVI sense[12]) are actually on foot. Further, Professor Sergeev says that the absence of a criminal conviction where serious allegations of fraud are made may incline a Court to question whether they have any substance. Finally, he says that he has found no serious fraud case which has succeeded in the absence of a prior criminal conviction.

[23] Dr Muranov disagrees with the views of Professor Sergeev on the prospects of success in a major civil fraud case in the absence of a prior criminal conviction. He says that Professor Sergeev's examples of cases which failed in the absence of a criminal conviction are cases which failed because the claimant had neither a criminal conviction to rely upon as evidence of fraud nor anything else. He produces a case originating in the Arbitrazh Court for Eastern Siberia, referred to at the hearing, as **Rudnik Kluchi**, in which a civil claim ultimately succeeded in the absence of a criminal conviction and he cited some other cases in addition.

[24] There was a further dispute between the experts as to whether it would be open to VTB to commence proceedings in the Arbitrazh Courts or whether it would be confined to the general Courts of the Russian

[12] Russian criminal law includes the laying of charges and pre-trial investigations within the meaning of criminal proceedings

Federation. This dispute impacted upon a further disagreement as to whether it would have been possible for VTB to open protective proceedings and have them stayed pending resolution of proceedings in another jurisdiction in order to preserve time. Professor Sergeev's evidence is that it would not have been open to VTB to take any protective step to avoid the impact of the three year civil limitation period.

[25] While bearing in mind the dangers of reaching conclusions on untested evidence, I derive the following propositions from this material. It is open to VTB to bring a civil claim in the Russian Courts based upon the complaints which it made in the English proceedings. That claim may well be statute barred in Russia as things presently stand, although it is not possible to be sure of that since VTB has not disclosed when it first knew about the alleged fraud. Any claim brought by VTB in Russia will likely therefore need to be brought either in the context of a criminal trial or following a criminal conviction. Despite a criminal complaint laid by VTB with the prosecuting authorities on 23 November 2011, there is no evidence that any such proceedings have commenced, or to suggest that they ever will be. It appears to be common ground that whether a criminal trial ever takes place is outside the hands of VTB. VTB will therefore be without possibility of remedy in Russia unless a criminal trial (a) commences and (b) concludes before some time in about 2017. If, contrary to what appears likely, it is still open to VTB to bring a civil claim without being challenged on limitation grounds, then I prefer the evidence of Professor Sergeev that it will likely fail in the absence of a criminal conviction obtained before its conclusion. The **Rudnik Kluchi** case relied upon by Dr Muranov may, as Dr Muranov says, be a fraud case or it may, as Professor Sergeev states, be a case in mistake. The translation shown to the Court is internally inconsistent. For that reason, I do not think that the evidence which the Court has is of sufficient weight to trump Professor Sergeev's cogently argued position about the need, in major civil fraud claims, for the claimant to be able to rely upon a conviction in a concluded criminal case against the defendant. As to the other cases relied upon by Dr Muranov, I consider that Professor Sergeev is right when he says that they are not fraud cases – or at any rate not fraud cases on all fours with the type of complaint made in this case.

[26] The position, therefore, is that VTB is entirely in the hands of the Russian prosecuting authorities as to whether it will ever be in a position

to bring civil proceedings in Russia against Mr Malofeev. If it ever is, the date at which it will be able to do so may be some way down the line.

[27] Does this conclusion mean that it would be practically unjust to leave VTB to proceed, if and when it can, in Russia (or, possibly, in some other jurisdiction which can be prevailed upon to accept jurisdiction), rather than to permit it to bring Mr Malofeev and the third Defendant here into the BVI, where it is not suggested that the complications which arise in Russia would affect it?

[28] In my judgment, the analogy, pursued by both Counsel at the hearing, with the time bar cases discussed by Lord Goff in the **Spiliada**,[13] is not a good one. VTB's problem in Russia, on its own evidence, is not, or not principally, limitation, but the absence of a criminal trial or conviction. In that respect, VTB's position before the Russian Courts is no worse now than it was when it first discovered the alleged fraud – apart from the fact that a significant portion of the ultimate ten year criminal limitation period will have run. Nevertheless, the current position is that VTB's prospects of bringing proceedings in Russia remain live. If they become extinguished, it will be because the Russian prosecuting authorities will not have been minded to bring proceedings within the criminal limitation period and see them to completion within the same period.

[29] On its own evidence, VTB has suffered no prejudice in the appropriate jurisdiction as a result of the lapse of time since it first discovered the alleged fraud. Its difficulty is the absence of any criminal proceedings or conviction, a difficulty which, from a practical/procedural perspective, is inherent in its Russian cause of action. On its own evidence, there were no steps which VTB could have taken in Russia to protect itself against the consequences of the Russian Court's attitude to the hearing of large scale civil fraud cases. The question whether VTB acted reasonably in not seeking until now to commence substantive proceedings in the BVI against the Russian defendants, or in failing to take protective steps in Russia, therefore, simply does not arise.

[30] VTB prefers to sue anywhere but in the obviously appropriate jurisdiction. It produces no evidence that it will suffer any injustice if it is confined to seeking relief in Russia. Nor does it produce any evidence that it has acquired or should be helped to acquire some procedural advantage of which it would be unjust to deprive it by refusing it

[13] at pages 482-484

permission to sue here. To put it another way, VTB fails to show that practical justice requires that it be granted permission to bring Mr Malofeev and Marshall Capital LLC here for a trial in what is clearly a wholly inappropriate *forum*.

Conclusion

[31] Had there been an application before me for permission to serve out upon Mr Malofeev and the third Defendant, I would, for the above reasons, have refused it.

Commercial Court Judge
18 September 2013