THE EASTERN CARIBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0031

BETWEEN:

[1] ANDREY ADAMOVSKY
[2] STOCKMAN INTERHOLD SA

Appellants

and

[1] ANDRIY MALITSKIY
[2] IGOR FILIPENKO

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Peter McMaster, QC, with him, Mr. Andrew Willins and Mr. Sebastian Said for the Appellants
Mr. Justin Fenwick, QC, with him, Mr. George Spalton and Mr. Dan Wise for the Respondents

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2015: May 19
2017: February 3.

Commercial appeal – Anti-suit injunction – Anti-enforcement injunction – Whether learned trial judge erred in restraining enforcement of foreign judgment – Whether learned trial judge erred in holding that different considerations apply to restraining litigation and restraining enforcement of judgment – Whether learned trial judge applied or correctly applied principles governing grant of anti-enforcement injunction – Whether learned trial judge was justified in making findings of fact about motive of first appellant in bringing foreign proceedings – Whether foreign proceedings were vexatious or oppressive

The first appellant ("Mr. Adamovsky") and the respondents were business associates/partners in Ukraine. An unfair prejudice claim which had been brought by the

respondents against the appellants in the Virgin Islands ("BVI") resulted in the decision of Bannister J dated 1st October 2014, which was in favour of the respondents ("the 1st October Judgment"). In that claim, the respondents alleged that the appellants had misappropriated some US$75 million from a BVI company called Oledo Petroleum Limited ("Oledo") in which they (the respondents) owned 50% of the shares and Mr. Adamovsky, Oledo's sole director, owned the remaining 50%. Judgment was given in the sum of US$35.8 million.

A shareholders agreement between the respondents and the first appellant ("the SHA") dated 6th December 2007, governed the future relationship between the parties to the agreement so far as it concerned their interest in a group of companies referred to at trial as "the Holding". The SHA had nothing to do with the parties' relationship as shareholders of Oledo; this was outside and unconnected with the Holding. Profits from the Holding relationship were split in the following way: Mr. Adamovsky received 50%, Mr. Filipenko, 32.5%, and Mr. Malitskiy, 17.5%. The SHA altered that distribution, reducing Mr. Adamovsky's profit share by 10% to 40%, leaving the respondents with 60% of the profits. Mr. Adamovsky contended that he was assured that in return for the 10% reduction, the respondents would invest further money of their own into the Holding. The SHA provided for further elements of compensation to Mr. Adamovsky.

The unfair prejudice claim brought by the respondents in the BVI had nothing at all to do with the Holding, its activities, or the parties' relationships with regard to the Holding. What had been claimed was that the appellants had unfairly prejudiced the respondents as members of Oledo by misappropriating the company's only asset, cash of US$75 million, and paying it over to the second appellant, Stockman Interhold SA ("Stockman"). Mr. Adamovsky, however, relied upon the history of the parties' relationship regarding the Holding and upon what he alleged was an agreement between himself and the respondents that all of the assets in the Holding companies (which he claimed included Oledo) were available to settle liabilities of any other company in the Holding and that he had applied his share as well as that of the respondents in the Oledo money to discharge those liabilities. Mr. Adamovsky filed a counterclaim, contending, among other things, that there had been an agreement that the Holding was to participate in an arrangement whereby profits of the Ukrainian State Railways were to be diverted to certain individuals and that although he was assured by Mr. Filipenko that 12.5% of all such diverted profits would be accounted for to the Holding, Mr. Filipenko not only retained a large portion of these profits for himself and Mr. Malitskiy, but he lent them on to the Holding at steep rates of interest as if it was their own to do so and in satisfaction of their obligation to make further advances to the Holding in return for the adjustment of shares effected by the SHA. Mr. Adamovsky contended in his counterclaim that he was beneficially entitled to a share of these excess retained profits.

Very shortly before trial of the respondents' action in the BVI, Mr. Adamovsky sought permission to amend his counterclaim to add a claim for rescission of the SHA on the grounds that he had been wrongly induced to enter into it by the respondents' assurances that they would inject new money of their own in exchange for the adjustment of the shares in the Holding. There was no allegation in the body of the proposed amendment that Mr. Adamovsky had suffered any loss or damage as a result of entering into the SHA and

there was no claim for payment of any such loss or damage in the proposed amended prayer to the counterclaim. Permission to amend was refused by Bannister J, who expressed the view that the SHA had nothing to do with the Oledo claim and that it would have been more appropriately dealt with, if anywhere, in the Ukraininan courts. The trial accordingly proceeded on the basis of the respondents' claim to recover the misappropriations from Oledo; the appellants' general defence that Oledo's assets were available to settle debts of each and every company in the Holding; and the counterclaim, which included a claim to a personal entitlement in the profits from the railway monies which had been withheld from the Holding. By the 1st October Judgment, the claim to recover the misappropriations from Oledo succeeded, but Mr. Adamovsky's defence and counterclaim both failed.

The appellants commenced proceedings in Ukraine against the respondents for the rescission of the SHA the day after the 1st October Judgment was handed down. The claim also sought damages aggravated under Ukrainian law by reason of the fraud alleged to have induced Mr. Adamovsky to enter into the SHA. On 19th November 2014, the appellants obtained from the Ukrainian courts a judgment for US$49.5 million as well as an order rescinding the SHA ("the Ukrainian Judgment").

The respondents had applied, on 5th November 2014, for an anti-suit injunction in an effort to prevent the prosecution in Ukraine of the appellants' claims for rescission of the SHA and damages. However, the Ukrainian Judgment was handed down prior to this application being determined; Bannister J was informed of the Ukrainian Judgment in the course of hearing the anti-suit application. The learned judge accordingly proceeded with the application as one for an anti-enforcement injunction and, on 21st November 2014, granted an order to restrain the appellants from enforcing in the BVI and elsewhere in the world (except in Ukraine), the Ukrainian Judgment ("the Anti-Enforcement Order"). In particular, the learned judge ruled that the aim of the Anti-Enforcement Order was to prevent the appellants from thwarting enforcement by the respondents of the 1st October Judgment for US$35.8 million. He found as a fact that: (i) Mr. Adamovsky suffered no loss by entering into the SHA; (ii) he was fully compensated for the loss of his 10% by the arrangements contained within the SHA itself; (iii) the arrangements contained in the SHA were carried forward and partially performed in a "Dissolution Agreement" [1] ; (iv) Mr. Adamovsky had no difficulty accepting and retaining very substantial benefits under the Dissolution Agreement; and (v) Mr. Adamovsky had not received 10% less or any percent less than he would have otherwise received on dissolution of the Holding. In particular, the learned trial judge formed the view that Mr. Adamovsky's motive in commencing the Ukrainian proceedings and in ensuring that Stockman jointly obtained the benefit of any judgment in the Ukrainian proceedings, was 'to arm himself and Stockman with a set off for the purpose of extinguishing this Court's judgment'.

The appellants appealed the Anti-Enforcement Order on the basis that the learned judge erred both in law and in fact in making such a determination. The appellants argued, among other things, that: the learned judge having ruled in the 1st October Judgment that

[1] This was an agreement prepared sometime around April/May 2009 by which it was agreed that the assets and debts of the Holding should be divided between Mr. Adamovsky and the respondents.

Ukraine (and not the BVI) was the proper forum for the determination of the validity of the SHA and having also found that there was never any basis for restraining Stockman or Mr. Adamovsky from litigating the rescission claim in Ukraine, it was wrong for him to interfere in the enforcement of the judgment that resulted from it; the jurisdiction to restrain litigation of a cause of action and the enforcement of a judgment given on that cause of action should be exercised on the same or substantially the same basis; and there is a difference in quality between re-litigating the merits of a BVI claim and seeking enforcement of a money judgment obtained abroad on a different issue and accordingly, the learned judge's finding that there is no 'difference in quality' between the two types of conduct is an error of law. The respondents sought to uphold the trial judge's grant of the Anti-Enforcement Order but cross appealed, arguing that the trial judge, having properly morphed their anti-suit application into an anti-enforcement application, erred in law in not granting the restraining order on the grounds of issue estoppel, *Henderson v Henderson* abuse and abuse of process.

Held: allowing the appeal, dismissing the cross appeal and setting aside the order granting the anti-enforcement injunction; and ordering that the appellants are entitled to their costs here and in the court below to be assessed by the court below unless agreed within thirty days with the costs in the appeal where assessed fixed at two thirds of the assessed costs below, that:

1. The principles on which English and BVI courts will act to restrain the bringing or continuing of foreign proceedings abroad are the same for the exercise of a power to restrain enforcement of a foreign judgment in the BVI or worldwide. The court will have the power to do either of these provided that the following requirements are satisfied: firstly, the party to be restrained must be amenable to the court's jurisdiction; secondly, it must be the case that either: (1) the injunction is required to protect against the invasion or threat of invasion of a legal or equitable right; or (2) unconscionable conduct on the part of the party to be restrained has been made out. Once these requirements are met, the trial judge must go on to evaluate whether it would be a right exercise of discretion to grant the injunction. In the present case, it being clear that the appellants were amenable to the jurisdiction of the court, and with neither the application for the anti-suit injunction nor the application for the anti-enforcement injunction being hinged on protection against an invasion or threatened invasion of a legal or equitable right of the respondents, principle required the trial judge to proceed to the next level of evaluation in order to identify evidence to satisfy unconscionable conduct, at least at a vexatious level. Considerations of comity and the need for caution are critical to this evaluative stage.

   Ellerman Lines, Limited v Read and Others [1928] 2 KB 144 applied; **British Airways Board v Laker Airways Ltd. and Others** [1985] AC 58 applied; **Kenneth M. Krys et al v Stichting Shell Pensioenfonds** BVIHCVAP2011/0036 (delivered 17th September 2012, unreported) followed; **South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provincien" N.V.** [1987] AC 24 applied; **Star Reefers Pool Inc. v JFC Group Co. Ltd.** [2012] EWCA Civ 14 applied; **Lord Collins of Mapesbury, Dicey, Morris and Collins on The Conflict of Laws** (15th edn., Sweet & Maxwell 2012), Vol. 1, para. 12R-001 cited.

2. While the weakness or hopeless/baseless nature of a case sought to be pursued in the foreign court is a factor to be taken into account in deciding whether conduct is unconscionable, it must be considered along with more weighty factors. The present case was not one in which the learned trial judge was entitled to take a view that the claim was baseless as a factor in determining unconscionable conduct, having found: that the claims relating to the SHA should be dealt with in Ukraine; that action estoppel, issue estoppel and *Henderson v Henderson* abuse did not apply to the claim in Ukraine; that the appellants had the right to bring the action in the courts of Ukraine.

3. The learned trial judge could not properly find any unconscionability on the part of the appellants for doing precisely what he had indicated was within their legal right to do. To pursue a juridical advantage in a foreign court which is the court of forum is not, without more, unconscionable conduct. The fact that the appellants filed the claim in Ukraine the day after the 1st October Judgment was handed down is not sufficient to draw a conclusion that the jurisdiction of the courts of Ukraine was cynically invoked. The learned judge applied the wrong test in determining whether to grant the anti-enforcement judgment (i.e., whether the appellants should be permitted to use the Ukrainian Judgment to cancel out the 1st October Judgment) and accordingly, he made an error of principle. Rather, the questions which he ought to have posed, having regard to the facts and circumstances of this case were: (1) whether the appellants acted vexatiously/unconscionably by invoking the jurisdiction of the Ukraine court; and (2) whether, in the circumstances, the 'ends of justice' called for the grant of the anti-enforcement injunction.

   Star Reefers Pool Inc. v JFC Group Co. Ltd. [2012] EWCA Civ 14 applied.

4. An anti-enforcement injunction may be granted against a party in pursuit of the ends of justice although the party did not act vexatiously or oppressively in invoking the jurisdiction of the foreign court. In exercising the discretion, the court must look at the respective interests of the appellants and the respondents and balance these interests, having regard to considerations of comity. In the present case, the trial judge erred in principle in failing to undertake any weighing and balancing of the injustice to the respective parties if the injunction was granted or refused.

   Elektrim SA v Vivendi Holdings 1 Corp. [2008] EWCA Civ 1178 applied.

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JUDGMENT

[1] **KENTISH-EGAN JA [AG]:** Before the Court is an appeal and a cross-appeal from the order of the trial judge Bannister J dated 21st November 2014 ("the Anti-Enforcement Order"). The first appellant (for convenience referred to as

"Mr. Adamovsky") and the respondents were business associates/partners in Ukraine. The Anti-Enforcement Order was granted in order to restrain the appellants from enforcing in the BVI and worldwide (except in Ukraine), a judgment for US$49.5 million which the appellants obtained from the courts of Kyiv in Ukraine on 19th November 2014 ("the Ukrainian Judgment"). In particular, the aim of the Anti-Enforcement Order was to prevent the appellants from thwarting enforcement by the respondents to recover the fruits of a judgment of Bannister J dated 1st October 2014, for US$35.8 million.

[2] By their claim in the proceedings leading to the Ukrainian Judgment, the appellants sought rescission of a Shareholders Agreement dated 6th December 2007 ("the SHA") as well as damages, on the basis that they had been fraudulently induced to enter into it by the respondents. In particular, they contended that they (or at least Mr. Adamovsky) had only entered into the SHA on condition that the respondents contribute additional finance to a group of companies referred to at trial as "the Holding" from their own funds. The Holding is further explained in paragraph 5 below.

[3] As the claim in Ukraine relied in part on findings of fact in the 1st October 2014 Judgment ("the 1st October Judgment") concerning the source of additional funds which the respondents did introduce into the Holding, there is a measure of intertwinement between factual content which gave rise to the 1st October Judgment and the Ukrainian Judgment. For this reason some elucidating background is necessary to understand the featured role that the SHA played in the four week trial leading up to the 1st October Judgment.

Background facts as found by Bannister J in the 1st October 2014 judgment

[4] The 1st October Judgment was delivered in favour of the respondents, in an unfair prejudice claim brought by them for the misappropriation of some US$75 million by the appellants from a BVI company, Oledo Petroleum Limited ("Oledo"), in which they owned 50% of the shares. Mr. Adamovsky owned the remaining 50% and is

the company's sole director. The trial judge gave judgment in favour of the respondents in the sum of US$35.8 million.

[5] The SHA governed the future relationship between the respondents and Mr. Adamovsky so far as it concerned their interest in the Holding,[2] but had nothing to do with their relationship as shareholders of Oledo which was outside and unconnected with the Holding. The Holding relationship had been on-going since about 2002 and based on the informal arrangement between the parties the profit split was 50% to Mr. Adamovsky, 32.5% to Mr. Filipenko and 17.5% to Mr. Malitskiy. The SHA changed that distribution, reducing Mr. Adamovsky's profit share by 10% to 40% and the respondents between them sharing 60%. Mr. Adamovsky says that he was assured that in return for the 10% reduction, the respondents would invest further money of their own into the Holding.

[6] With the exception of certain particular projects, the respondents agreed to compensate Mr. Adamovsky for this reduction by payment of a sum equal to 10% of the overflows of US$17.6 million out of the total which had by then been invested in the Holding (which total, at then current exchange rates, of US$37.2 million). In effect, Mr. Filipenko and Mr. Malitskiy were now liable to pay Mr. Adamovsky the sum of US$1.76 million, together with interest from 1st January 2007, which was credited to Mr. Adamovsky's loan account. The SHA provided for further elements of compensation to Mr. Adamovsky.

[7] The respondents' unfair prejudice claim in the BVI proceedings had nothing at all to do with the Holding, its activities, or the parties' relationships with regard to the Holding. The claims were that Mr. Adamovsky and the second appellant ("Stockman") had unfairly prejudiced them as members of Oledo by misappropriating its only asset, cash of US$75 million, and paying it over to Stockman.

[2] Mentioned in para. 2 above.

[8] Mr. Adamovsky relied upon the history of the parties' relationship regarding the Holding and upon what he alleged was an agreement between himself and the respondents, but not Stockman, that all of the assets in all of the Holding companies, which he claimed included Oledo, were available to settle liabilities of any other company in the Holding and that he had applied not only his share of the Oledo money but the respondents' share in discharging those liabilities. The SHA was part of that history.

[9] Mr. Adamovsky counterclaimed and claimed, among other matters, that there had been an agreement that the Holding was to participate in an arrangement (characterised by the trial judge as 'an unsavoury arrangement'), whereby profits of the Ukrainian State Railways were to be diverted to managers and their friends. Mr. Adamovsky says that he was assured by Mr. Filipenko that 12.5% of all such diverted profits would be accounted for to the Holding, but that Mr. Filipenko not only retained a large portion of those profits for himself and Mr. Malitskiy, but lent them on to the Holding at steep rates of interest as if they were their own to do so and in satisfaction of their obligation to make further advances to the Holding in return for the adjustment of shares effected by the SHA. In his counterclaim, Mr. Adamovsky sought, among other things, an account of his alleged aliquot share of these excess retained profits on the footing that he had a beneficial entitlement to them.

[10] In May 2014, very shortly before the trial, Mr. Adamovsky asked for permission to amend his counterclaim by adding a claim for rescission of the SHA on the ground that he had been wrongly induced to enter into it by the respondents' assurances that they would inject new money of their own in exchange for the shares adjustment. In fact, the SHA had contained its own internal consideration for the adjustments. This was in the form of upward adjustments to the amount to which Mr. Adamovsky would become entitled on exit from the Holding relationship. There was no allegation in the body of the proposed amendment that Mr. Adamovsky had suffered any loss or damage as a result of entering into the

SHA and there was no claim for payment of any such loss or damage included in the proposed amended prayer to the counterclaim.

[11] Permission to amend was refused with the trial judge expressing the view that the SHA had nothing to do with the Oledo claim and that in any case it would be more appropriately dealt with, if anywhere, in the Ukrainian courts. The trial proceeded on the basis of: (1) the respondents' claim to recover the misappropriations from Oledo; (2) the appellants' general defence that Oledo's assets were available to settle debts of each and every company in the Holding and; (3) a counterclaim which included a claim to a personal entitlement in the profits from the railway monies which had been withheld from the Holding. By the 1st October Judgment, the claim to recover the misappropriations from Oledo succeeded. Mr. Adamovsky's defence and counterclaim failed.

[12] The day after the 1st October Judgment was handed down, the appellants brought proceedings in Ukraine against the respondents, for the rescission of the SHA, the parties to which were the respondents and Mr. Adamovsky. Stockman, was not a party to the SHA. That claim also sought damages aggravated under Ukrainian law by reason of the fraud alleged to have induced Mr. Adamovsky to enter into the SHA. The Ukrainian Judgment for US$49.5 million was the end result of this claim. I should note that it included an order rescinding the SHA. The Civil Procedure Code of Ukraine requires that judgment must generally be rendered within two months of the start of proceedings. The Ukrainian Judgment was handed down on 19th November 2014.

The Application for the Anti-Suit Injunction and the Ruling

[13] The present appeal has its origins in the respondents' application dated 5th November 2014, for an anti-suit injunction to prevent the prosecution in Ukraine of the claims for rescission of the SHA and damages. An interesting feature of this appeal is the fact that the Anti-Enforcement Order was an initiative of Bannister J,

who was informed of the Ukrainian Judgment on 20th November 2014, in the course of hearing the anti-suit application.

[14] With the Ukrainian Judgment a reality, an anti-suit injunction was no longer possible. Bannister J proceeded with the application as one for an anti-enforcement injunction and granted an order to restrain the appellants from enforcing in the BVI and worldwide (except in the Ukraine), the Ukrainian Judgment. In particular, he ruled that the aim of the Anti-Enforcement Order was to prevent the appellants from thwarting enforcement by the respondents to recover the fruits of the 1st October Judgment for US$35.8 million.

[15] The question which Bannister J posed was whether the appellants should be permitted to use the Ukrainian Judgment to cancel out the 1st October Judgment which ordered Mr. Adamovsky to pay US$35.8 million to the respondents. He decided not to grant them permission on an examination of their conduct and motive. These were his findings of fact in that regard: (i) Mr. Adamovsky suffered no loss at all by entering into the SHA; (ii) he was fully compensated for the loss of his 10% by the arrangements contained within the SHA itself; (iii) the arrangements contained in the SHA were carried forward and partially performed in a "Dissolution Agreement";[3] (iv) Mr. Adamovsky had no difficulty accepting and retaining very substantial benefits under the Dissolution Agreement; and (v) Mr. Adamovsky had not received 10% less or any percent less than he would have otherwise received on dissolution of the Holding.[4]

[16] Springing from these findings, he formed a view of Mr. Adamovsky's motive in commencing the claims in Ukraine. In his words:

> "The only conceivable purpose, therefore, for his commencing the Ukrainian proceedings and for ensuring that Stockman, which was never a party to the SHA, jointly obtained the benefit of any judgment in the

[3] This was an agreement prepared sometime around April/May 2009 by which it was agreed that the assets and debts of the Holding should be divided between Mr. Adamovsky and the respondents.
[4] See Transcript of Open Court Proceedings dated 21st November 2014, p. 9 lines 22-25 and p. 10 lines 1-6.

Ukrainian proceedings, was to arm himself and Stockman with a set off for the purpose of extinguishing this Court's judgment.

"I do not think that the Court is obliged to sit and watch while a litigant thwarts its purposes in this way. Although the sort of behaviour displayed by Mr. Adamovsky in this case took the form of obtaining a money judgment rather than re-litigating the merits of the Claimant's claim, as in Masri, I can see no difference in quality between the two types of conduct. One is an attempt to get a foreign Court to declare contrary to the judgment of the home Court, the other is mounting a baseless claim for losses never suffered, or claimed in the original proceedings, or sought to be claimed in the original proceedings for no other purpose than frustrating the Order of the home Court. Each is conduct on the part of someone who has submitted to its jurisdiction designed to interfere with the processes of the Court: See *Masri* at paragraph 95."[5]

[17] Thus fortified, the trial judge restrained the enforcement of the Ukrainian Judgment in the BVI and worldwide except in the Ukraine. The appellants contest the Anti-Enforcement Order on the basis of errors of law and errors of fact. Principally they contend that:

(1) Having ruled in the 1st October Judgment that Ukraine and not BVI was the proper forum for the determination of validity of the SHA and having also found in that judgment that there was never any basis for restraining Stockman or Mr. Adamovsky from litigating the rescission claim in Ukraine, it was wrong to interfere in the enforcement of the judgment that resulted from it. (**Ground 1**).

(2) The jurisdiction to restrain litigation of a cause of action and to restrain the enforcement of a judgment given on that cause of action should be exercised on the same or substantially the same basis. The trial judge's finding that '[q]uite different considerations' apply to restraining litigation and to restraining enforcement of a judgment was an error of law. Vexation or oppression is required in either case. Anti-enforcement injunctions appear to have been granted in aggravated cases of vexation and oppression. The trial judge made

[5] See Transcript of Open Court Proceedings dated 21st November 2014, p. 10 lines 6-25 and p. 11 lines 1-5.

no attempt to identify what different considerations arise in enforcement cases and anti-suit cases. (**Ground 2**).

(3) There is a difference in quality between re-litigating the merits of a BVI claim and seeking enforcement of a money judgment obtained abroad on a different issue. Re-litigating the merits is objectionable as it is re-litigating what is res judicata. Enforcing a foreign money judgment obtained on a different issue is not as it entails the assertion of an independent cause of action. It is a denial of right to restrain enforcement of the money judgment unless it is successfully impeached as infringing res judicata or on some other proper ground. The trial judge's finding that there is no 'difference in quality' between the two types of conduct is an error of law. Having expressly found that the Ukrainian proceedings did not involve litigation of matters on which there was cause of action estoppel, issue estoppel or *Henderson v Henderson* abuse, the trial judge should have dismissed the application. (**Grounds 3 and 4**).

(4) The Ukrainian Judgment was res judicata yet the trial judge undertook a re-examination of the merits of the claims already decided upon by the Ukrainian Judgment and armed with no information or supporting evidence relevant to the inquiry, made findings of facts that upended the findings and decision of the Ukrainian court without knowing the reasons for the decision. In so doing he acted as a Court of Appeal over Golosiyivsky court of Kyiv City. (**Grounds 5 and Ground 6**).

(5) The trial judge made an order on a summary basis with dual effect: (1) to pre-empt proceedings in the BVI to recognise and enforce the Ukrainian Judgment, when the correct course would have been to allow the application for enforcement to be made and determine it on its merits; and (2) to deny recognition and enforcement to the Ukrainian Judgment worldwide in circumstances where the judgment

identified no sufficient basis even for denying such recognition in the BVI. In neither case was consideration given to the established tests for recognition and enforcement of foreign judgments, which provide the gateway for impeachment of a foreign judgment. (**Ground 7**).

(6) The finding that Mr. Adamovsky had suffered no loss when he entered into the SHA and that his claim was baseless, was a summary determination of an issue: a) on which the trial judge had made no determination at the trial on what if any loss had resulted to Mr. Adamovsky by entering into the SHA; b) for which on 21st November 2014, there was no valuation evidence or any other adequate evidence before him going to the actual value of Mr. Adamovsky's 10% and none going to the value of the notional adjustments/benefits that Mr. Adamovsky received in return. (**Ground 8**).

(7) The trial judge's erroneous characterisation of the Commercial Court as the "home court" (when he had already found that the natural forum for the claims for fraudulent inducement of the SHA was Ukraine), seems to be his starting point that what has the effect of extinguishing the liability under his judgment should not be tolerated and to be the reason for his according primacy to the orders of the BVI court. (**Ground 9**).

[18] The respondents naturally seek to uphold the trial judge's grant of the Anti-Enforcement Order on the premise that he was right for the reasons he gave in reliance on the principle in **Masri v Consolidated Contractors International (UK) Ltd and Others (No 3)**.[6] They also seek to uphold the restraining order on the additional or alternative basis identified in the cross appeal which was in essence that the trial judge, having properly morphed their anti-suit application into an anti-enforcement application, the plinths on which they rested the application for the

[6] [2009] QB 503.

anti-suit injunction – issue estoppel, *Henderson v Henderson* abuse and general abuse of process – remained viable supports for the grant of the Anti-Enforcement Order on the vexatious and oppressive ground. The respondents contend that the trial judge was wrong in his conclusions that none of the elements of the three estoppels had been made out in relation to the Ukrainian Judgment in particular on the abuse of process point. He therefore erred in law in not granting the restraining order on these grounds.

[19] The two broad questions in this appeal are whether the trial judge applied or correctly applied the legal principles governing anti-enforcement injunctions; and whether there was evidence before him to justify the findings of fact he made.

[20] The appellants have fashioned their grounds of appeal to say that the trial judge was plainly wrong in the findings of fact identified in their grounds of appeal and wrong in law in the legal tests that he applied or indeed failed to apply to the issues before him.

[21] The respondents caution at the outset that ultimately, what is under attack in the appeal is the trial judge's exercise of a discretion in deciding to grant the Anti-Enforcement Order. They underscore what is now axiomatic. Unless it can be shown that the trial judge was plainly wrong, the appellate court must not disturb the lower court's exercise of discretion. They rely on **Dufour and Others v Helenair Corporation Ltd and Others**[7] and Floissac CJ's formulation of the principle:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in

[7] (1996) 52 WIR 188.

> principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[8]

The Issues

[22] 1. Did the trial judge apply or correctly apply the principles governing the grant of an anti-enforcement injunction?

2. Was he justified in making the findings of fact about Mr. Adamovsky's motive in bringing the proceedings in Ukraine?

The Law

[23] The authorities amply demonstrate that the principles on which English/BVI courts will act to restrain the bringing or continuing of foreign proceedings abroad, are the same for the exercise of a power to restrain enforcement of a foreign judgment in the BVI or worldwide. **Dicey, Morris and Collins**[9] condenses the principle in Rule 38(5):

> "[A]n English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgments, where it is necessary in the interests of justice for it to do so."

[24] This condensed expression of the principle is nuanced by judicial formulation. Of the many formulations, four suffice as embodiments. In **Ellerman Lines, Limited v Read and Others**[10] a case in which an anti-enforcement injunction was granted nearly six decades ago, Lord Justice Atkin stated:

> "The principle upon which an English Court acts in granting injunctions is not that it seeks to assume jurisdiction over the foreign Court, or that it arrogates to itself some superiority which entitles it to dictate to the foreign Court, or that it seeks to criticize the foreign Court or its procedure; the English Court has regard to the personal attitude of the person who has obtained the foreign judgment. If the English Court finds that a person subject to its jurisdiction has committed a

[8] At pp. 190-191.
[9] Lord Collins of Mapesbury, Dicey, Morris and Collins on The Conflict of Laws (15th edn., Sweet & Maxwell 2012), Vol. 1, para. 12R-001.
[10] [1928] 2 KB 144.

> breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment."[11]

[25] In **British Airways Board v Laker Airways Ltd. and Others**,[12] opining on the power of the English court to restrain the bringing of suit in foreign proceedings, Lord Scarman stated:

> "[T]he power of the English court to grant the injunction exists, if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a 'wide and flexible' equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice."[13]

[26] The basis of the jurisdiction exercised by this Court in anti-suit cases was established by Pereira JA in **Kenneth M. Krys et al v Stichting Shell Pensioenfonds**.[14]

> "[20] There is no doubt that the court has jurisdiction *in personam*, where 'the ends of justice' so require, to restrain a person amenable to its jurisdiction from commencing or continuing with proceedings in a court abroad. … Parameters within which this jurisdiction must be exercised must not be fixed but remain fluid or flexible as equity must adapt and find new solutions to new problems in fulfilling 'the ends of justice'. …
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> …
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> "[32] [T]he most obvious example in which the jurisdiction will be exercised is where the conduct of the claimant pursuing foreign proceedings is said to be vexatious or oppressive or otherwise unconscionable."

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[11] At p. 155.
[12] [1985] AC 58.
[13] At p. 95F-G.
[14] BVIHCVAP2011/0036 (delivered 17th September 2012, unreported).

[27] Two requirements go to establishing jurisdiction. Firstly the precedent requirement that the person to be restrained must be amenable to the court's jurisdiction. This is clearly the case here. Mr. Adamovsky and Stockman appeared on the anti-suit application and participated in the injunction hearing unconditionally. Once personal amenability is established, the court will grant an injunction in two situations. Situation (1): where the injunction is required to protect against the invasion or threat of invasion of a legal or equitable right. Situation (2): where unconscionable conduct on the part of the person to be restrained has been made out.[15] Accordingly, once the personal amenability requirement is met and at least one of the above two situations is made out, the trial judge must go on to evaluate whether it would be a right exercise of discretion to grant the anti-enforcement order. Considerations of comity and the need for caution are critical to this evaluative stage.

Amenability

[28] This is not in issue. As said before, Mr. Adamovsky and Stockman appeared on the anti-suit application and participated in the morphed proceedings unconditionally. Situations (1) and (2) were summarised in the speech of Lord Brandon of Oakbrook in **South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provincien" N.V.**[16] at page 40*:*

> "The effect of these authorities [*Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera S.A.* [1979] AC 210; *Castanho v Brown & Root (U.K.) Ltd.* [1981] AC 557; and *British Airways Board v Laker Airways Ltd.* [1985] AC 58], so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action

[15] South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provincien" N.V. [1987] AC 24 at p. 40.
[16] [1987] AC 24.

> has behaved, or threatens to behave, in a manner which is unconscionable."

[29] In **Masri** Lord Justice Lawrence Collins gave recognition to the two situations (albeit that his examination of situation (2) was to aid in reaching a conclusion germane to an issue in that appeal, namely that in an application for an injunction sought on a complaint of unconscionable conduct or vexation/harassment, the applicant did not have to identify a separate legal or equitable right (in the sense of cause of action legal or equitable), not to be sued.[17]

[30] Neither the application for the anti-suit injunction (nor its morphed relative the anti-enforcement injunction), was hinged on protection against an invasion or threatened invasion of a legal right or equitable right of the respondents. Bringing or threatening to bring an action abroad in breach of a contract/exclusive jurisdiction clause or obtaining a judgment in breach of such a contract are examples of breach of a legal right. Lord Diplock in **British Airways Board v Laker Airways Ltd.** at page 81, gave a list of defences which would amount to an equitable right not to be sued in a foreign court. He referred to:

> "… estoppel in pais (which was also a defence at common law), promissory estoppel, election, waiver, standing by, laches, blowing hot and cold – to all of which the generic description of conduct that is 'unconscionable' in the eye of English law may be given."

Restraining Unconscionable Conduct – Situation (2)

[31] As stated earlier, Mr. Adamovsky and Stockman were amenable to the jurisdiction of the court. In the circumstances of this case, principle required the trial judge to proceed to the next level of evaluation in order to identify evidence to satisfy unconscionable conduct, at least at a vexatious level. A finding of unconscionable conduct does not entail the exercise of discretion. It involves a probing of the evidence in order to arrive at a determination that unconscionable conduct does exist. I extract this principle from what Lord Justice Rix opined in **Star Reefers Pool Inc. v**

[17] Masri v Consolidated Contractors International (UK) Ltd and Others (No 3) [2009] QB 503 at para. 48.

JFC Group Co. Ltd.[18] Though lengthy, I will set out in full the dictum of Lord Justice Rix as I found it very instructive in reasoning my way through this appeal.

> "The essential question which arises on this appeal is whether Teare J was right to say that JFC's Russian proceedings were vexatious or oppressive. It is suggested on behalf of Star Reefers that that finding was an exercise in discretion, and that no effective appeal can be mounted against it. In my view, however, such a finding is an evaluative judgment, and a condition precedent to the grant of any injunction in such a case as this, where no exclusive English jurisdiction or arbitration clause has been agreed between the parties. In this respect it is analogous to the concept of abuse of process: see *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] 2 WLR 945 at [53]. In both cases, those of vexatious or oppressive conduct and abuse of process respectively, an evaluative assessment has to be made, which is not an exercise of discretion but a matter on which there is, in theory, a right or wrong answer. If the answer is that such conduct exists, there then arises a question of discretion as to whether an injunction against foreign proceedings in the one case, or a stay of domestic proceedings in the other case, will be granted. It may be of course that the finding of vexatious conduct or of an abuse of process carry the court almost the whole way to its decision to grant an injunction or a stay: but that does not affect the fact that the prior finding is not itself an exercise of discretion. Factors which may come in at the second, discretionary, stage in the context of an anti-suit injunction include the important matter of comity."[19] (My emphasis).

[32] The trial judge seemingly found guilty behaviour on the part of Mr. Adamovsky for obtaining a money judgment in Ukraine and for doing so on a baseless claim. He viewed as behaviourally similar, obtaining a money judgment and re-litigating the merits of a claim. He said:

> "Each is conduct on the part of someone who has submitted to its jurisdiction designed to interfere with the processes of the Court. See *Masri* at paragraph 95."[20]

Paragraph 95 of **Masri** was not uplifted to his judgment.

[33] The finding of a baseless claim was the critical factor which the trial judge took into account in order to assess unconscionable conduct. The authorities referred to in paragraphs 34 and 35, below, establish the following: (i) the weakness or

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[18] [2012] EWCA Civ 14.
[19] At para. 2.
[20] See Transcript of Open Court Proceedings dated 21st November 2014, p. 11 lines 2-5.

hopeless/baseless nature of a case sought to be pursued in the foreign court is a factor to be taken into account in deciding whether conduct is unconscionable; (ii) the weakness of the claim must be considered along with more weighty factors; (iii) to treat the weakness of the case alone as a separate and distinct ground of unconscionability is problematic; (iv) cases in which a claim can be assessed as bound to fail are rare; (v) each case will turn on its particular facts and circumstances; (vi) circumspection is required in the assessment process as the court is not exercising a summary jurisdiction.[21]

[34] In **Midland Bank Plc and Another v Laker Airways Ltd. and Others**[22] Lord Justice Lawton put the matter in this way:

> "It would be wrong, so it seems to me, for English judges to regard themselves as examining magistrates, deciding whether the plaintiff in the United States court had made out a case fit for trial. That is the function of the United States judge after the conclusion of the pre-trial discovery. Cases might occur, as Lord Diplock recognised in the *British Airways* case [1985] A.C. 58, 86, in which it was plain that the United States suit was bound to fail so that the making of it was frivolous and vexatious. In such cases an English court could interfere; but they are likely to be rare."[23]

[35] Lord Justice Lawrence Collins in **Elektrim SA v Vivendi Holdings 1 Corp.**[24] identified some of the reasons why an English judge should not undertake a summary determination of the issues that are before the foreign court. One of the questions under review in **Elektrim** was whether the trial judge was right to find that the foreign proceedings were vexatious on the ground that the claim was bound to fail. On the facts, the court of appeal held that the judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion. At paragraphs 120 and 121 Lord Justice Lawrence Collins said this:

> "120. I accept that, in considering whether a cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the

[21] See dicta of: Lawton LJ in Midland Bank Plc and Another v Laker Airways Ltd. and Others [1986] QB 689 at 700; Lawrence Collins LJ in Elektrim SA v Vivendi Holdings 1 Corp. [2008] EWCA Civ 1178 at paras. 120 and 121; and Rix LJ in Star Reefers Pool Inc. v JFC Group Co. Ltd. [2012] EWCA Civ 14 at para 31.
[22] [1986] QB 689.
[23] At p. 700D-E.
[24] [2008] EWCA Civ 1178.

English judge should not conduct a summary determination under English law principles without regard to the fact that the foreign system of pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England should not be made without existing evidence. I also accept that an error or omission in a foreign pleading should not be considered fatal, if it can be cured by amendment.

> "121. But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be sceptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus). In my judgment, the judge was entitled to take the view that reliance on the press releases was plainly a cynical device to establish an independent cause of action in Florida, and that it was inherently incredible that Everest could have relied on a press release rather than on the Awards themselves or on the advice of the bondholders' lawyers, Bingham McCutchen. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion."

[36] In my view, where the alleged unconscionable conduct turns on the hopeless or baseless nature of the claim, the trial judge in assessing this factor, must exercise great care that he does not burrow into the foreign court's jurisdiction and decide issues of fact that fall squarely within the adjudicative role and function of the foreign court applying its law as the forum court. For the reasons which I now set out, I do not consider this to be one of those rare cases in which the trial judge was entitled to take a view that the claim was baseless as a factor in determining unconscionable conduct.

[37] Reason 1: The trial judge had, six months earlier, in May 2014, ruled that claims relating to the SHA should be dealt with in Ukraine ("cheered on" he said by the respondents). Consistent with this earlier ruling, he was not taken in by the respondents' arguments in the hearing of the anti-suit application, that cause of action estoppel, issue estoppel and *Henderson v Henderson* abuse applied to the Ukrainian claim and as such provided the bases for granting the Anti-

Enforcement Order. Having prefaced with the statement that the application for the anti-suit injunction is based upon cause of action estoppel, issue estoppel, the rule in *Henderson v Henderson,* and what might be called the Masri principle, after the decision in **Masri v Consolidated Contractors International (UK) Ltd**, the trial judge made the following clear cut findings:

> "The claim in Ukraine is founded upon the claim for which I refused permission to amend in May of 2014. It was accordingly never adjudicated upon here. It seems to me to be impossible in those circumstances to find any cause of action estoppel to prevent Mr. Adamovsky, and certainly not Stockman, from suing upon it in the Ukrainian Court.
>
> "Nor, in my opinion, is there any issue estoppel. Although it is true that Mr. Adamovsky, although not Stockman, is bound by my holding that he has no personal entitlement to any part of the excess profits from the Ukrainian Railways enterprise, that does not seem to me to prevent him from claiming in a foreign court, or for that matter here in the BVI, that he was fraudulently induced to enter into the SHA and for any relief to which he might be entitled under Ukrainian law if that was established.
>
> "*Henderson and Henderson* is plainly beside the point in circumstances where Mr. Adamovsky tried to litigate the rescission claim here, although he did not seek to claim damages in respect of his entry into the SHA, but was refused permission to do so by the Court, cheered on by the Claimants.
>
> "So in my judgment there has never been any justification for restraining Mr. Adamovsky or Stockman from litigating the rescession [sic] claim in the Ukrainian Court."[25]

[38] Although challenged by the respondents in their cross-appeal, these were all sound findings in my judgment. In my view, in the particular circumstances of this case, these findings were the evaluative criteria by which to judge unconscionable conduct on the part of Mr. Adamovsky.

[39] Reason 2: The trial judge left no doubt that the BVI court recognised that Mr. Adamovsky and Stockman had the right to bring an action in the courts of

[25] See Transcript of Open Court Proceedings dated 21st November 2014, p. 8 lines 15-25 and p. 9 lines 1-16.

Ukraine challenging the validity of the SHA on the basis of fraudulent inducement and to obtain any relief to which they might be entitled under Ukrainian law if that was established. This was in effect an acceptance that theirs was the right to take advantage of whatever legal or equitable causes of action and remedies the law of Ukraine afforded them on a claim for rescission of the SHA. The natural corollary of this is that it was for the Ukrainian court to adjudge whether the claim before it was hopeless/baseless.

[40] Reason 3: Having recognised Ukraine as the natural forum in which the appellants had the right to pursue any relief available to them for fraudulent inducement of the SHA, there was hardly room for the BVI court to comment on the relative strength or weakness of the case brought in the foreign proceedings pre or post judgment. There was no room at all to superimpose its view of the merits of the claim after the judge in the Golosiyivsky District Court of Kyiv City had rendered judgment on the merits. In such a scenario, the baseless or hopeless nature of the case cannot or ought not to be taken into account as a deciding factor of unconscionable conduct. The trial judge ought not to have found himself on it as the principal reason for finding Mr. Adamovsky's conduct to be unconscionable.

[41] The dictum of Lord Justice Rix in **Star Reefers Pool Inc.** is a guiding light; but first a brief summary of the facts. This was a case of concurrent proceedings in Russia and England in respect of the same subject matter. In this respect, as the appellants point out, it was a stronger case of vexation than the present because (as the learned judge's explicit findings make clear) there was no commonality of subject matter in the present case. The issue in **Star Reefers Pool Inc.** was whether JFC was liable to Star Reefers under two guarantees for payment of unpaid hire and damages for repudiation of two charterparties hired by Kalistad, a nominee company of JFC. JFC's proceedings were issued on 23rd June 2010 and were first in time. It sought declaratory relief that the guarantees were ineffective. Star Reefers commenced its claim for payment of the unpaid hire and damages on

13th October 2010. On 15th October 2010 Star Reefers obtained without notice to JFC an anti-suit injunction which ordered JFC not to pursue or take any further step in its Russian proceedings on the basis that the guarantees were governed by English law, England was the natural forum, and JFC's action in Russia was vexatious and oppressive.

[42] On the inter partes hearing before Teare J, he upheld the injunction. He found vexation on two fronts. First that the 'Russian proceedings were commenced with a view to frustrating the determination of the dispute in England'; and second, that the 'apparent weakness of the point sought to be taken in Russia suggests that the proceedings are vexatious and oppressive, notwithstanding that the point is supported by evidence from a Russian lawyer'.[26]

[43] Lord Justice Rix overruled Teare J and had this to say at paragraph 36 about the finding that commencing the Russian proceedings amounted to unconscionable conduct:

> "The second principal matter relied on by the judge was the apparent weakness of JFC's case under Russian law. However, even on the judge's findings, this case does not fall into that special category where it can be said that the foreign proceedings are based on a hopeless claim, or one doomed to failure."

[44] The reasoning he applied to come to this conclusion is found in paragraphs 36 and 38 where he said:

> "36. … In the circumstances, the judge appears to have entirely overlooked the circumstance that JFC had a juridical advantage in the Russian court, unavailable to it, as it turned out, in England, namely the application of Russian rather than English law to the substance of the parties' dispute. Unless that juridical advantage can be said to be hopelessly and cynically invoked, it is a legitimate advantage. It is hard to see that a party can be said to be acting unconscionably when it seeks a legitimate juridical advantage in a foreign court, especially where that is the court of its domicile, the place where any obligation falls to be performed, and the place where, if there was a contract of guarantee created

[26] See para. 19 of Star Reefers Pool Inc. v JFC Group Co. Ltd. [2012] EWCA Civ 14.

by the posting of the guarantee letters to Star Reefers from Russia, those contracts were made."

"38. In sum, I do not know of any case which has gone as far as this in finding unconscionable conduct on the part of a foreign party who has not agreed to litigate or arbitrate in England; has been the first to issue court proceedings; has an arguable, if apparently, at any rate to English eyes, weak case under the admittedly applicable law of the foreign forum; therefore has a legitimate juridical advantage in seeking to litigate in Russia, which is the forum of its domicile and its disputed obligation; and who has not submitted to or participated in the English proceedings.

"39. In consequence, there is, as it seems to me, something of a touch of egoistic paternalism in an English Court injuncting continuation of the foreign proceedings in such a case."

[45] The respondents assert that the trial judge was entitled to take a broad approach when considering the application, taking into account (among other things), the conduct of the appellants in obtaining the Ukrainian Judgment and having regard to the requirement to ensure that the ends of justice were met. I will construe the reference to conduct here as a reference to unconscionable conduct and will agree that the role of the trial judge in exercising his discretion to grant or refuse the injunction is to ensure the ends of justice are met. The essential question is, could the trial judge properly find any unconscionablilty on the part of Mr. Adamovsky or Stockman for doing precisely what he said was within their legal right to do, and which the authorities recognise as a right in the circumstances, to press their juridical advantage in the courts of Ukraine.

[46] Judging unconscionable by our law,[27] I find that he could not find unconscionable conduct and rely on the reasons set out in paragraphs 36 to 39 above. To pursue a juridical advantage in a foreign court which is the court of forum is not, without more, unconscionable conduct. The fact that the appellants filed the claim in

[27] Per Neill LJ in E.D. & F. Man (Sugar) Limited v Yani Haryanto [1991] I L Pr 393 – "It is true that unconscionability has to be judged by reference to English law …"; See too Dillon LJ's dictum in Midland Bank Plc and Another v Laker Airways Ltd. and Others [1986] QB 689 at 701-702 speaking in the context of the assessing the weakness of the case. "[T]he question whether it is unconscionable that Laker Airways should be allowed to pursue the plaintiff banks in a United States antitrust suit must be decided by the criteria of English law ...".

Ukraine the day after the judgment of 1st October was handed down is not sufficient to draw a conclusion that the jurisdiction of the courts of Ukraine was cynically invoked.

[47] I accept the force of the appellants' submission that if by his own findings the trial judge could not restrain the issuance of the proceedings in Ukraine as being vexatious, it was illogical to think that he could restrain the judgment which was the outcome of those proceedings when res judicata did not apply and no other ground for impeachment had been advanced or shown. I also agree with their submission that res judicata was a reason for not granting the injunction. The court with jurisdiction over the SHA disputes in which the appellants had the juridical advantage, had spoken on the merits.

[48] With the utmost respect to the learned trial judge, it is my view, that he missed the link between the sound findings he made on res judicata doctrine in *Henderson v Henderson*, and the inevitability of a finding that obtaining the Ukrainian judgment in the circumstances in which they did, was not tainted by unconscionable conduct. It was conduct in pursuit of legitimate legal claims before a foreign court of competent jurisdiction in which they had the juridical advantage and which the BVI court had declared was the forum court. There could be nothing unconscionable about that.

[49] The trial judge erred in this regard because he failed to take into account that the findings he made on res judicata and *Henderson v Henderson,* formed an important part of the evaluative criteria for assessing vexation and that absent for example considerations of invasion or threatened invasion of a legal right of the respondents, policies of forum of the BVI court, these findings in my view, became the principal criteria for determining vexation/unconscionable conduct in this case. The result was he applied the wrong test – should Mr. Adamovsky and Stockman 'be permitted to use the judgment which they have obtained to cancel out the

judgment of this Court'.[28] This was an error of principle. The questions which he ought to have posed having regard to the facts and circumstances of this case were: (1) did Mr. Adamovsky and Stockman act vexatiously/unconscionably by invoking the jurisdiction of the Ukraine court; and (2) in the circumstances, does the 'ends of justice' call for the grant of the injunction.

[50] I do not accept the respondents' submission that if the court is satisfied (as the judge was here) that the conduct in bringing or maintaining the foreign proceedings or seeking to enforce their fruits was designed to frustrate an order of the court or its processes, then that provides jurisdiction to the court to exercise the discretion to grant an injunction. It was precisely such a finding that Lord Justice Rix rejected in **Star Reefers Pool Inc.**

[51] I must return to the dictum of Lord Scarman in **British Airways Board v Laker Airways Ltd.** and recite as well the principles adduced in **Elektrim** at paragraphs 82 to 85, for an appreciation of the extent to which this is a misleading oversimplification of the jurisdiction. In **British Airways Board v Laker Airways Ltd.** Lord Scarman said:

> "[T]he power of the English court to grant the injunction exists, if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a 'wide and flexible' equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice."

[52] In **Elektrim** Lord Justice Lawrence Collins adduced the following principles from the authorities:

> "82. … An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with the ends of justice, account must be taken not only of

[28] See Transcript of Open Court Proceedings dated 21st November 2014, p. 9 lines 19-20.

injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: *Soc Nat Ind Aerospatiale v Lee Kui Jak* [1987] AC 871, 896 (PC).

"83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English action brought earlier: see Dicey, Morris and Collins, *Conflict of Laws* (14th edn, 2006), para. 12-073.

"84. But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which may support a case which otherwise appears unlikely to succeed: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor.

"85. In particular, an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England: *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625; [2008] 1 CLC 887, at [83]-[88.]."

[53] In my view, the fourth principle outlined by Lord Lawrence Collins (see paragraph 52 above), the Masri principle, does not provide the court with a roving charter to protect its process including its judgments from any subjectively perceived undermining assault as the trial judge seemed to think. In the particular circumstances of this case, the assailing conduct must bear the imprints of conduct that goes against the grain of equity and good conscience. This brings me to the next stage of inquiry.

The exercise of the discretion

[54] This court will not interfere with the trial judge's exercise of discretion unless he was guilty of some error of principle, misconception of fact or was plainly wrong. I

remain mindful that an anti-enforcement injunction like any other injunction is granted in the exercise of discretion to serve the ends of justice.

[55] Such an injunction may be granted against Mr. Adamovsky and Stockman in pursuit of the ends of justice although they did not act vexatiously or oppressively in invoking the jurisdiction of the Ukrainian courts.[29] It is well settled that the injunction will be granted where the foreign litigant has violated the principles of equity and conscience making it inequitable on his part to seek to enforce the judgment obtained in breach of such principles.[30] In exercising the discretion the court must look at the respective interests of the appellants and the respondents and balance these interests having regard to considerations of comity.

[56] I have little hesitation in finding that the trial judge erred in holding that the claim brought in Ukraine was baseless and to make the further findings of fact that: (i) Mr. Adamovsky was fully compensated for the loss of his 10 percent by the arrangements contained within the SHA itself; (ii) the arrangements contained in the SHA were carried forward and partially performed in the Dissolution Agreement; (iii) Mr. Adamovsky had no difficulty accepting and retaining very substantial benefits under the Dissolution Agreement; and (iv) Mr. Adamovsky had not received 10 percent less or any percent less than he would have otherwise received on dissolution of the Holding.[31]

[57] In my judgment, once the trial judge had declined jurisdiction over the SHA on the basis that Ukraine was the proper forum, these findings (if at all material) were for the Ukrainian court to make, based on the supporting or rebuttal evidence adduced by the parties to the proceedings. Certainly they were beyond his purview. In any event I agree with the appellants that there was no valuation evidence before the trial judge from which to arrive at these assessments. I adapt

[29] House of Lords in Airbus Industrie GIE v Patel & Others [1998] CLC 702; Stichting Shell Pensioenfonds v Krys and Another [2014] UKPC 41 at paras. 17, 18 and 41.
[30] Ellerman Lines, Limited v Read and Others [1928] 2 KB 144.
[31] See Transcript of Open Court Proceedings dated 21st November 2014, p. 9 lines 22-25 and p. 10 lines 1-6.

the language of Steyn J, the judge at first instance in **E.D. & F. Man (Sugar) Limited v Yani Haryanto**,[32] to hold that in all the circumstances of this case, 'that it would be an affront to the [Ukrainian courts], and an illegitimate interference (albeit indirectly) with the processes of courts worldwide, to grant an injunction, the expressed objective of which is to prohibit [the appellants] from relying on the [Ukrainian] judgment'.

Basis for disturbing Bannister J's exercise of discretion

[58] I found earlier that the trial judge was wrong in making the finding that the Ukrainian Judgment was obtained on a baseless claim. I go further to find that the trial judge erred in principle in exercising his discretion by his failure to take into account and give sufficient weight to these relevant factors. Factor (1): His ruling that Ukraine was the proper forum for SHA disputes. Factor (2): His rulings that the claim in Ukraine was never adjudicated upon by the BVI court and as such there was no cause of action estoppel, no issue estoppel nor *Henderson v Henderson* abuse of process. In relation to the latter he underscored that Adamovsky had tried to litigate the rescission claim in the BVI but had been refused permission. Factor (3): His ruling that there was never any justification for restraining Mr. Adamovsky or Stockman from litigating the rescission claim in the Ukrainian Court. Factor (4): That these rulings meant in effect that the respondents had no equitable right to restrain Mr. Adamovsky and Stockman from bringing the proceedings in the Ukraine. Factor (5): That the judgment of the Ukrainian Court was already in existence. Factor (6): It was given in proceedings began by Mr Adamovsky in a jurisdiction where he was entitled to avail himself of whatever juridical advantages the law of that jurisdiction gave him. Factor (7): It was a final judgment (subject to the right of appeal) of a court of competent jurisdiction given on the merits untainted by any vitiating factors. Factor (8): The correctness of the Ukrainian judgment as a matter of Ukrainian law cannot be questioned. Factor (9): The foregoing factors in combination would militate against a conclusion that the Ukrainian proceedings were not an attempt to litigate genuine rights but were

[32] [1991] I L Pr 393. See paras. 62-64 below.

designed to frustrate (in the sense of preventing enforcement) of the 1st October Judgment.

[59] Regarding Factor (4) – In **Elektrim** Lord Justice Lawrence Collins gave invaluable insight into what should be put into the scales when balancing the equities in pursuit of the ends of justice. He said at paragraph 82:

> "[S]ince the court was concerned with the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him ..."

I find that the trial judge erred in principle in failing to undertake any weighing and balancing of the injustice to the respective parties if the injunction was granted or refused.

[60] I find further that the trial judge erred in principle by giving too much weight to what Lord Justice Lawrence Collins said in paragraph 95 of **Masri** without taking account of the distinguishing factual milieu of that decision. The trial judge had made an express finding that the claim in Ukraine was never adjudicated in the BVI. In contrast, in **Masri** the foreign proceedings were restrained because they amounted to a re-litigation abroad of the merits of a case which they had lost after a long trial. Lord Justice Lawrence Collins coupled vexation with the interference with the court's process. At paragraph 95 he described what happened in **Masri** as 'a classic case of vexation and oppression, and of conduct which is designed to interfere with the process of the English court in litigation to which the judgment debtors submitted'. The trial judge's reliance on Lord Justice Lawrence Collins' dictum resulted in an exaggerated view of the need to protect the processes of the BVI court from interference.

[61] The interference he apprehended was the motive of Mr. Adamovsky 'to arm himself and Stockman with a set off for the purpose of extinguishing this Court's

judgment'.[33] He described it as conduct 'designed to interfere with the processes of the Court. See *Masri* at paragraph 95.'[34] In those instances where motive is a relevant factor, the motive or purpose or design required to successfully invoke the court's protective jurisdiction of its processes and judgments from interference (the *Masri* Principle), must in my judgment, involve a violation of the principles of equity and good conscience and is therefore 'improper' in this sense.

Comity

[62] The in personam jurisdiction to grant an anti-enforcement order must be exercised with caution as it is inhibited by principles of comity and restraint in interfering in the conduct of foreigners abroad.[35] At paragraph 69 of **E.D. & F. Man (Sugar) Limited v Yani Haryanto**[36] Lord Justice Mann encapsulated the principle thus:

> "The jurisdiction with which the Court is concerned is not asserted against foreign courts but is asserted against a person. However, that being said, the courts have always exercised the jurisdiction with caution. The reason for caution is that an exercise of jurisdiction does involve an indirect interference with extant or future proceedings before a foreign court."

[63] He endorsed as the right one, the approach Steyn J took by looking first at the respective interests of Man and of Haryanto and then at considerations of comity. I agree with this approach. I set out briefly the facts of **E.D. & F. Man (Sugar) Limited** followed by the passages from Steyn J's judgment where he reasoned through to the decision to exercise his discretion by refusing the injunction.

[64] Man had prevailed in a claim for a declaration in the English courts. Haryanto then sought and obtained a declaration to the contrary effect in the courts of Indonesia. Man returned to the English courts and sought further declarations, together with injunctions restraining Haryanto from relying on the Indonesian judgment in that country or elsewhere, to bring or defend proceedings brought by Man. Steyn J

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[33] See Transcript of Open Court Proceedings dated 21st November 2014, p. 10 lines 11-13.
[34] See Transcript of Open Court Proceedings dated 21st November 2014, p. 11 lines 3-5.
[35] See Kenneth M. Krys et al v Stichting Shell Pensioenfonds BVIHCVAP2011/0036 (delivered 17th September 2012, unreported) per Justice of Appeal Pereira at para. 20; Castanho v Brown and Root (UK) Ltd [1981] AC 557 per Lord Scarman at p. 573; British Airways Board v Laker Airways Ltd. and Others [1985] AC 58 per Lord Scarman at p. 95.
[36] [1991] I L Pr 393.

approached the question of injunctive relief on the basis that Man had no legal or equitable right not to be sued by Haryanto outside England but that he was prepared to assume, without deciding the point, that it would be unconscionable for Haryanto to institute or continue proceedings abroad. He nevertheless declined to grant the injunction. His reasoning process is set out in the following passages.

> "Injunctive relief with extraterritorial effect, as here proposed, must be an exceptional remedy. It ought only to be granted in exceptional circumstances. It is, after all, inconsistent with normal relations between friendly sovereign states, and it is subversive of the best interests of the international trade system. The importance of these considerations are underlined in the present case by the fact that there are pending in Indonesia proceedings brought by Mr. Haryanto for an injunction against Man. The possibility of conflicting injunctions by the English and Indonesian courts is an unattractive and undesirable prospect.
>
> "Features which in combination distinguish this case from other cases involving extraterritorial injunctions which have come before the English courts are the following: there is already in existence an Indonesian Judgment. It was given in proceedings begun by Man. It was unsuccessfully appealed by Man. The Indonesian court was a court of competent jurisdiction. The procedure adopted is not criticised. The correctness of the Indonesian judgment as a matter of Indonesian law cannot be questioned. Reliance on that judgment was only defeated on the ground of English principles of *res judicata* and English public policy.
>
> "In all the circumstances it seems to me that it would be an affront to the Indonesian courts, and an illegitimate interference (albeit indirectly) with the processes of courts worldwide, to grant an injunction, the expressed objective of which is to prohibit Mr. Haryanto from relying on the Indonesian judgment. Balancing the competing private and public interests as best I can, I conclude that Man will have to be content with declaratory relief, leaving it to courts in foreign jurisdictions to choose (if the matter arises) whether to recognise the judgments of the English or Indonesian courts."[37] (My emphasis).

Unlike the approach taken by Steyn J, nowhere in the judgment does the trial judge attempt to evaluate and balance the respective rights or interests of the respondents and the appellants. This, in my view, was an error in the exercise of his discretion.

[37] See para. 47 of E.D. & F. Man (Sugar) Limited v Yani Haryanto [1991] I L Pr 393.

[65] Lord Justice Rix in **Star Reefers Pool Inc.** at paragraph 40, found that the trial judge took no account of considerations of comity and held that this was an error in the exercise of the discretion. At paragraph 38 he enumerated the circumstances that gave rise to considerations of comity in that case. JFC had not agreed to litigate or arbitrate in England; it was the first to issue court proceedings; it had an arguable, if apparently weak case under the admittedly applicable law of the foreign forum; it therefore had a juridical advantage in seeking to litigate in Russia which is the forum of its domicile and its disputed obligations; and it had not submitted to or participated in the English proceedings.

[66] In the final passage (see paragraph 64 above), Steyn J referred to the exercise of '[b]alancing the competing private and public interests'. In the court of appeal Lord Justice Mann gave his elucidation of what Steyn J meant by 'public interests'. He explained:

> "I regard it only as a convenient way of referring to those considerations which require caution. Those considerations are of respect for decisions of foreign courts properly given within their jurisdictions and of not constraining, albeit indirectly, the ability of foreign courts to apply their local law in regard to the recognition and enforcement of judgments."[38]

[67] I adopt this elucidation and apply it as illustrating the considerations of comity that the trial judge paid no regard to in this case in the exercise of the discretion. The checklist of findings that led him to reject the respondents' contentions that the claims in Ukraine were res judicata, exemplified the circumstances in this case which gave special importance to considerations of comity.[39] These were the circumstances that should have caused him to pause long and hard before granting the injunction. The trial judge's failure to weigh considerations of comity was an error in the exercise of discretion. As such it cannot be said that the anti-enforcement injunction was made in the interests of justice.

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[38] At para. 71 of E.D. & F. Man (Sugar) Limited v Yani Haryanto [1991] I L Pr 393.
[39] See para. 37 above.

[68] It is clear from all that I have said to this point, that my ultimate conclusion on this appeal is that the trial judge made several errors of principle and made findings of fact which were not open to him at all. These resulted in errors in the exercise of the discretion that permit this court to look at the matter afresh, which it has done.

[69] The appellants made fairly heavy weather of the contention (which formed a ground of appeal), that the trial judge could not exercise the discretion to grant an anti-enforcement order until he had before him the appellants' application to enforce the Ukrainian judgment in the BVI and applied the established tests for recognition and enforcement of judgments – fraud, public policy and natural justice. I have spent no time at all on this submission because I do not think it is right in principle. It does not sit well with the principles on which the court will exercise its jurisdiction to grant injunctions where it is appropriate to serve the ends of justice.

The Cross-Appeal

[70] The respondents cross-appealed. They rely principally on the ground that the proceedings in Ukraine were an abuse of process. The abuse of process on which they rely seems to fall into what has been described as 'the more general procedural rule against abusive proceedings', per Lord Sumption JSC in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)**.[40] At paragraph 25 he drew the distinction between this abuse of process and res judicata:

> 'Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation."

[71] In paragraphs 14(d), 15 and 23 of their submissions, the respondents assert that the proceedings were abusive because: (i) Mr. Adamovsky could have litigated the

[40] [2014] AC 160 at para. 17.

issues relating to the SHA long before he did. (ii) The current proceedings are an attempt to re-litigate the issue of his rights under the Ukrainian Railways project and Mr. Filipenko's wrong doing. (iii) The Ukrainian proceedings were commenced the day after Bannister J handed down the 1st October Judgment. Stockman was not a party to the SHA yet in the Ukrainian proceedings he was alleged to be a party. (iv) They represent a collateral attack on Bannister J's judgment and an attempt to circumvent the judgment. (v) They were brought for the improper purpose of setting up an inflated cross claim (the claim for quadruple damages), on behalf of Stockman for the purpose of setting aside a statutory demand based on the judgment. (vi) They are unfairly burdensome on the claimants given that they had already defended Mr. Adamovsky's counterclaims in a five-week trial and face an appeal against the dismissal of those counterclaims.[41] (vii) The prospect of double recovery exists if the appellants are successful in those proceedings and on appeal or there is the possibility of inconsistent judgments if the Ukrainian proceedings succeed and the appeal fails. (viii) The appellants are pursuing parallel claims for overlapping relief in two jurisdictions. (ix) They must be made to abide by their choice to trouble the BVI court with their disputes over the Holding and be restrained from bringing parallel proceedings designed to prevent enforcement of the judgment in this claim.

[72] The appellants object to the respondents' labelling of their conduct as abusive. They point out that the trial judge never said that the appellants' conduct was abusive nor did he use that word in his judgment. This is a non-point in my view. I understand the respondents to be using the word 'abusive' to leverage their argument on the abuse of process point.

[73] I have given serious consideration to the respondents' arguments as well as to their reliance in paragraph 24 on those aspects of Bannister J's judgment which they say support their position. I will comment briefly on points (ii), (iv), (v), (vii)

[41] That appeal has since fallen away due to failure of the appellant to comply with an order requiring security for costs.

and (viii) which are the more telling of the above points. Point (iv) is dealt with in paragraph 76 below. Regarding point (ii) – re-litigating Adamovsky's rights under the Ukrainian Railway project – I infer from the way in which Bannister J addressed this point,[42] that he was taking on board the likelihood that the point he decided was being brought up in Ukraine in materially different circumstances, that is in the context of a fraudulent inducement claim.

[74] Point (v) – Setting up an inflated claim for the purpose of setting aside a statutory demand based on the judgment. In light of the expert witness testimony on which the appellants rely to prove their right to triple damages under the Civil Code of Ukraine, and the Ukrainian court having concluded, applying their law, that they were so entitled, it is hardly open to BVI court to set itself up as an examining magistrate over the findings of the Ukraine court and to decide the issue of damages contrary to their finding. Further obtaining a foreign judgment on the merits from a court of competent jurisdiction, which was the court of forum and using that judgment as a set off against liabilities under a BVI judgment, is not without more abusive.

[75] Point (vii) – Prospect of double recovery and inconsistent judgments. In light of the trial judge's ruling to refuse jurisdiction over the rescission claim, it would have been a counsel of prudence to have these form part of the meat of their defence in the Ukrainian proceedings. Point (viii) – The appellants are pursuing parallel claims for overlapping relief in two jurisdictions. This is a stretch. The words of Bannister J resonate the answer. "The claim in Ukraine is founded upon the claim for which I refused permission to amend in May of 2014. It was accordingly never adjudicated upon here. It seems to me impossible in those circumstances to find any cause of action estoppel to prevent Mr. Adamovsky, and certainly not Stockman, from suing upon it in the Ukrainian Court."[43]

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[42] See Transcript of Open Court Proceedings dated 21st November 2014, p. 8 lines 22-25 and p. 9 lines 1-6.
[43] See Transcript of Open Court Proceedings dated 21st November 2014, p. 8 lines 15-21.

[76] Point (iv) – Collateral attack. The respondents defended the anti-enforcement injunction on the basis that it was manifestly a collateral attack on or challenge to Bannister J's judgment in the BVI. Seemingly Bannister J was of the same mind. I sought to show that the trial judge applied the wrong test when he posed the question whether the appellant should be permitted to use the Ukrainian Judgment to cancel out his judgment. I showed from the authorities what the correct test is and what considerations he ought to have in the foreground in applying the test.

[77] I make the general observation in relation to the several points, that it was open to the respondents to raise all of them as defences/merits points in the Ukrainian proceedings.

[78] On the foregoing analysis, I find that the respondents have not made out their contention that the Ukrainian proceedings were an abuse of process. I am not persuaded that the cross-appeal has merit and would therefore dismiss it.

Conclusion

[79] In my judgment the trial judge should not have granted the anti-enforcement injunction, as it was a wrong exercise of the discretion. It was not required in the interests of justice. On the exercise of discretion, in brief what was found was that the trial judge failed to take account of and place sufficient weight on relevant factors; that he overvalued his misconception of Mr. Adamovsky's motive in obtaining the judgment in Ukraine – 'to arm himself and Stockman with a set off for the purpose of extinguishing this Court's judgment'[44] ; that he failed to balance the interests of the respondents and the appellants; and that he failed to balance considerations of comity having regard to the special circumstances which he himself had identified.

[80] I would therefore allow the appeal and set aside the order granting the anti-enforcement injunction. The appellants are entitled to their costs here and in the

[44] See Transcript of Open Court Proceedings dated 21st November 2014, p. 10 lines 11-13.

court below to be assessed by the court below unless agreed within thirty days with the costs in the appeal, where assessed, fixed at two thirds of the assessed costs below

[81] I am grateful to counsel for their very helpful submissions and marshalling of their argument. This judgment has been long overdue for which I offer my profound apologies to the parties and their counsel as well as to the court. I offer in mitigation debilitating health factors which took quite some time to overcome and which made sooner delivery of this judgment impossible.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar