THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0007

BETWEEN:

VALERY ROGALSKIY

Appellant

and

[1] JSC MCC EUROCHEM
[2] EUROCHEM TRADING GMBH

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Steven Rubin, QC, with him, Mr. Andrew Willins for the Appellant
Mr. Justin Fenwick, QC, with him, Mr. Dan Wise for the Respondents

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2017: May 10;
July 14.

Interlocutory appeal – Cross-examination order on asset disclosure affidavit – Whether foreign deponent subject to the jurisdiction of the court – Whether the BVI court has the power to order a foreigner who has not submitted to the jurisdiction to attend the BVI court sitting in the BVI or elsewhere to be cross-examined on his asset disclosure affidavit given in compliance with an order of the court – Whether the court has jurisdiction to make a cross-examination order in these circumstances and if so how should it exercise its discretion in making the order – What is the mechanism for making such a cross-examination order – What are the safeguards to be included in the cross-examination order to protect the deponent

This interlocutory appeal arises out of an order of the Commercial Court that directed the appellant, Mr. Valery Rogalskiy, a Russian national and resident, to attend the court for cross-examination on his asset disclosure affidavit either in person or by video link at a

venue to be agreed between the parties, or in default of agreement, to be fixed by the court on the application of the respondents, JSC MCC Eurochem and Eurochem Trading GMBH (jointly referred to as "Eurochem").

Mr. Rogalskiy was employed by Eurochem as its sales and marketing director from April 2003 to May 2014. On 15th May 2014, Eurochem terminated his employment for allegedly being involved in a bribery scheme with Eurochem's trading partners. Eurochem claims that the main perpetrators of the scheme are said to be Mr. Rogalskiy and Mr. Dimitry Pomytkin ("Mr. Pomytkin"), and that the bribes were paid to various entities controlled by Mr. Rogalskiy, including British Virgin Islands companies.

On 7th August 2015, Eurochem commenced proceedings in the Commercial Court against 18 defendants including Messrs. Rogalskiy and Pomytkin and several British Virgin Islands companies. On 19th November 2015, a judge of the Commercial Court, Farara J, granted permission to Eurochem to serve the claim form on Mr. Rogalskiy and other foreign defendants outside the jurisdiction. Mr. Rogalskiy disputes that he was served and has unwaveringly maintained that he has not submitted to the jurisdiction of the BVI court.

On 9th February 2016, another judge of the Commercial Court, Bannister J, granted injunctive relief against some of the defendants in the court below but denied granting similar relief against Mr. Rogalskiy on the basis that the claim against him had no connection with the BVI. Eurochem appealed ex parte on 25th February 2016 against the judge's order in relation to Mr. Rogalskiy. The Court of Appeal granted a freezing order against Mr. Rogalskiy and others restraining them from disposing of, dealing with or diminishing the value of their assets worldwide to the values set out in the freezing order. The freezing order also included an ancillary disclosure order requiring Mr. Rogalskiy and the other respondents to, among other things, inform the appellants' solicitors of all their assets worldwide which individual value exceeds US$10,000.

Mr. Rogalskiy did not comply with the asset disclosure order and on 21st July 2016 Eurochem applied for permission to serve him with an application to sequester his assets for his non-compliance with the asset disclosure order and for an order that he be declared to be in contempt of court ("the Contempt Application"). The Contempt Application was set for hearing on 11th October 2016 and on the day before the hearing, Mr. Rogalskiy filed his asset disclosure affidavit. The Contempt Application was adjourned to 20th October 2016 to give Eurochem's attorneys time to consider the disclosure affidavit.

Eurochem filed the cross-examination application on 28th November 2016. It was heard by Wallbank, J on 7th February 2017. The learned judge delivered an oral judgment on 15th February 2017 granting Eurochem's application to cross-examine Mr. Rogalskiy on his asset disclosure affidavit. In giving his decision on the cross-examination application, the learned judge referred to and relied on rule 30.1 of the CPR which provides that where an affidavit is to be used in evidence the deponent can be ordered to attend for cross-examination and if he does not attend the affidavit cannot be used in evidence except with the court's permission. The judge found that the rule is in broad terms and is not subject to any requirement that the deponent must have submitted to the jurisdiction or that the court

otherwise has jurisdiction over him. He qualified this finding by saying that Eurochem's application is not necessarily covered by rule 30.1. He also adopted Bannister J's preliminary findings that Messrs. Rogalskiy and Pomytkin were the instigators and perpetrators of a serious fraud and that the evidence against them was sufficient for the grant of an injunction. The learned judge also found that Mr. Rogalskiy's disclosure affidavit was deficient in many respects and in relation to his second affidavit the learned judge regarded the statement by Eurochem's attorney as 'no more than a simple statement of fact, not of purpose'. He also indicated that a cross-examination hearing would enable the court to gauge Mr. Rogalskiy's demeanour and thereby his credibility. Based on the foregoing, the learned judge held that he had the power to order Mr. Rogalskiy to attend to be cross-examined on his affidavit in person or by video link and that it was just and convenient to so order.

Being dissatisfied with the learned judge's order, Mr. Rogalskiy applied for and was granted leave to appeal and a stay of the order pending the hearing and determination of the appeal by the Court of Appeal. Mr. Rogalskiy appealed on the bases that the BVI court does not have the power to order a foreigner who has not submitted to the jurisdiction to attend the BVI court sitting in the BVI or elsewhere to be cross-examined on his asset disclosure affidavit given in compliance with an order of the court; and even if the court does have that power it exercised its discretion improperly in making the order.

Held: allowing the appeal, setting aside the order of the learned judge and ordering the respondents to pay the appellant's costs in this court and in the court below, that:

1. Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** is the source for making cross-examination orders of deponents who make asset disclosure affidavits. The section also allows the court to make freezing injunctions with ancillary orders. The ancillary orders extend to and include orders that are necessary to make the injunction effective. The court's powers under this section extend to and include the power to order a defendant who has made an asset disclosure affidavit in compliance with the court's order and is within the court's territorial jurisdiction to attend to be cross-examined on that affidavit. However, it is an exceptional power that should be rarely exercised by the court.

   Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap. 80** applied; **House of Spring Gardens Ltd and another v Waite and others** [1985] FSR 173 applied.

2. Where a foreigner has submitted to the jurisdiction the court, in exercising its wide powers under section 24, has the power to order him to attend for cross-examination on his asset disclosure affidavit. However, ordering a foreigner to attend for cross-examination on an affidavit that he gave in compliance with the court's order is an exercise of an exorbitant jurisdiction and could have extensive implications. In the case of a foreigner who is challenging the court's jurisdiction, a cross-examination order could include issues of sovereignty and comity, as well as service and submission to the jurisdiction; and may impose significant inconvenience and expense on the foreigner. The absence of authority on this

issue is at the very least an indication that the settled practice and therefore wider jurisdiction of the court is not to issue a cross-examination order against a foreigner who is disputing service and challenging the court's jurisdiction. Based on the foregoing, the BVI court does not have jurisdiction in the wide sense to order Mr. Rogalskiy or any other person in his position who is disputing service and the court's jurisdiction, to attend the BVI court, whether in person or by video link, to be cross-examined on his asset disclosure affidavit.

Black Swan Investment ISA v Harvest View SA and another BVIHCV2009/0399 (delivered 23rd March 2010, unreported) distinguished; **Motorola Credit Corp. v Uzan** [2003] EWCA Civ 752 distinguished.

3. Even if the court has jurisdiction to order Mr. Rogalskiy to attend for cross-examination that would be an exceptional order and an exercise of exorbitant jurisdiction. In making the cross-examination order the learned judge misdirected himself in the exercise of his discretion and erred by (a) relying in part on rule 30.1 of the CPR and not identifying an alternative basis for finding that the court had jurisdiction to make the cross-examination order; (b) giving insufficient weight to the issue of sovereignty; (c) failing to satisfy himself that there were sufficient safeguards in place regarding the use of the cross-examination information, leaving that issue to be resolved at a subsequent hearing; and (d) introducing the issue of credibility into the cross-examination process. As a result of these matters, the learned judge's decision to order a foreigner who is disputing service and the court's jurisdiction to attend the BVI court in person or by video link for cross-examination exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly wrong.

   Rule 30.1 of the **Civil Procedure Rules, 2000** considered; in **Dufour and others v Helenair Corporation Ltd and others** (1996) 52 WIR 188 applied; **Kensington International Limited v Republic of Congo and another** [2006] 2 CLC 588 considered.

JUDGMENT

[1] **WEBSTER, JA [AG.]**: This is an interlocutory appeal against an order of the Commercial Court made on 15th February 2017 that directed the appellant, Valery Rogalskiy ("Mr. Rogalskiy"), a Russian national residing in Moscow, to attend the court for cross-examination on his asset disclosure affidavit either in person or by video link at a venue to be agreed between the parties or in default of agreement to be fixed by the court on the application of the respondents.

Background

[2] The first respondent, JSC MCC Eurochem, is a Russian joint stock company and the second respondent, Eurochem Trading GMBH, is its wholly owned subsidiary and the conduit through which it traded in fertilizers and chemicals on the international market. For convenience only the respondents are referred to together in this judgment as "Eurochem". Mr. Rogalskiy was employed by Eurochem as its sales and marketing director from April 2003 to May 2014. On 15th May 2014, Eurochem terminated his employment for allegedly being involved in a bribery scheme with Eurochem's trading partners by which he is said to have received over $45 million in bribes. It is Eurochem's case that the bribes were paid to various entities controlled by Mr. Rogalskiy including British Virgin Islands companies. The main perpetrators of the scheme are said to be Mr. Rogalskiy and Mr. Dimitry Pomytkin ("Mr. Pomytkin"), the 9th defendant in the court below.

[3] Eurochem launched proceedings against Mr. Rogalskiy and others in Singapore, Cyprus, Moscow and the Netherlands, with apparently limited results. The reliefs obtained by Eurochem included a disclosure of assets order against Mr. Rogalskiy by the court in Cyprus, which order was set aside by that court for non-disclosure by Eurochem on 11th November 2015. On 7th August 2015, Eurochem commenced proceedings in the Commercial Court against 18 defendants including Messrs. Rogalskiy and Pomptkin and several British Virgin Islands companies.

[4] On 19th November 2015, a judge of the Commercial Court, Farara J, granted permission to Eurochem to serve the claim form on Mr. Rogalskiy and other foreign defendants outside the jurisdiction. This suggests that the learned judge was satisfied that there were serious issues to be tried on the merits of the claim, there was a good arguable case that the claim fell within one or more of the classes of claims in Part 7.3 of the **Civil Procedure Rules, 2000** ("CPR"), and, by extension and subject to service, that the BVI was the more appropriate court for the trial of the claim.

[5] The evidence in the record as to the service of the claim form is unclear and heavily disputed. It appears that on 29th March 2016 Eurochem applied for or requested permission to serve Mr. Rogalskiy using the procedures in the Hague Convention. Service was attempted in July 2016. Mr. Rogalskiy disputes that he was served and he has steadfastly maintained at every opportunity that he has not submitted to the jurisdiction of the BVI court. He has filed an application under Part 9.7 of the CPR challenging the court's jurisdiction and asking for a declaration that he has not been served. We were advised by counsel that that application is scheduled to be heard on 19th July 2017. In the circumstances, we cannot make a finding on service and submission to the jurisdiction and we will proceed as if there has been no proper service of the proceedings on Mr. Rogalskiy and that he has not submitted to the jurisdiction.

[6] On 9th February 2016, another judge of the Commercial Court, Bannister J, granted injunctive relief against some of the defendants in the court below but denied granting similar relief against Mr. Rogalskiy on the basis that the claim against him had no connection with the BVI. Eurochem appealed against the judge's order refusing to grant injunctive relief against Mr. Rogalskiy. The Court of Appeal heard the appeal ex parte on 25th February 2016 and granted a freezing order against Mr. Rogalskiy and others restraining them from disposing of, dealing with or diminishing the value of their assets worldwide to the values set out in the freezing order. The freezing order included an ancillary disclosure order requiring Mr. Rogalskiy and the other respondents:

> "… within 14 days of service or notification of this Order and to the best of each Respondent's ability inform the Appellants' solicitors in writing of all its assets worldwide whose individual value exceeds US$10,000 whether held in its own name or not, and whether solely or jointly owned, giving the title held in, location (street address, city, state/province and country), encumbrances on and other details of all such assets."

[7] Mr. Rogalskiy did not comply with the asset disclosure order and on 21st July 2016 Eurochem applied for permission to serve him by email at the offices of Carey Olsen in the BVI with an application to sequester his assets for his non-compliance

with the asset disclosure order and for an order that he be declared to be in contempt of court ("the Contempt Application"). The Contempt Application was set for hearing on 11th October 2016. Just after 4 p.m. on the day before the hearing, Mr. Rogalskiy filed his asset disclosure affidavit. The Contempt Application was adjourned to 20th October 2016 to give Eurochem's attorneys time to consider the disclosure affidavit.

[8] Mr. Rogalskiy filed a second affidavit in February 2017 in which he stated that when the Contempt Application came back on for hearing on 20th October 2016 counsel for Eurochem advised the court that Eurochem was in the process of preparing an application to cross-examine Mr. Rogalskiy on certain deficiencies in his asset disclosure affidavit and that the cross-examination would be highly material to the Contempt Application.[1] Counsel therefore asked the court to adjourn the Application generally with permission to restore it. This evidence was not disputed by Eurochem and I will deal with its significance below.[2]

[9] Eurochem filed the cross-examination application on 28th November 2016. It was set down for hearing on 7th February 2017. On the evening prior to the hearing, Mr. Rogalskiy served his second affidavit on the attorneys for Eurochem. Eurochem's counsel did not object to the late service of the affidavit and the cross-examination application proceeded the following day as scheduled. The learned judge reserved his decision and delivered an oral judgment on 15th February 2017 granting Eurochem's application to cross-examine Mr. Rogalskiy on his asset disclosure affidavit. This was followed by further submissions by counsel on both sides on 16th February to settle the terms of the cross-examination order.

[10] Wallbank J, in the course of the hearing of the application for the cross-examination order, adopted Bannister J's preliminary findings that Messrs. Rogalskiy and Pomytkin were the instigators and perpetrators of a serious

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[1] See: record of appeal, p. D/589.
[2] See: para. 49 below.

fraud and went on to find that: "… the evidence against the Defendants, including the Eighth and Ninth Defendants, were (sic) strong enough for the Applicants to cross the threshold requirements for the grant of an injunction." [3]

[11] The learned judge also found that:

> "Consider this, here there is a case where there is a strong prima facie evidence that the Eighth Defendant, a sophisticated and clearly astute businessman, has orchestrated and perpetrated a dishonest scheme which is a very serious type of fraud, that he was one of the puppet masters of a network of offshore companies used by him to do so, directly and/or indirectly succeeding in acquiring significant wealth through this scheme."[4]

[12] The learned judge was also very dissatisfied with the content of Mr. Rogalskiy's disclosure affidavit finding, among other things, that it begs numerous questions.[5]

[13] There is evidence to support the preliminary findings of the judges in the court below that Mr. Rogalskiy was involved in a fraudulent scheme that resulted in significant amounts of money being paid to companies controlled by him, and that his disclosure affidavit was deficient in many respects. This Court will decide this appeal on the basis of these preliminary findings.

[14] Having made the foregoing findings against Mr. Rogalskiy, the learned judge proceeded to find that it was just and convenient to order him to attend to be cross-examined on his affidavit in person or by video link.[6] The parts of the judge's order that are material to this judgment are paragraphs 1, 2, 3 and 8 which are set out hereunder:

> 1. "The Eighth Defendant [Mr. Rogalskiy] do attend this court in person or by video link at an address to be agreed between the parties by Friday, 10th March 2017 failing which the Claimant [Eurochem] has permission to apply for further directions in relation to the location of the video conference. The said video conference is to be fixed by the

[3] See: record of appeal, p. 56.
[4] See: record of appeal, p. 79-80.
[5] See: record of appeal, p. 81
[6] See: record of appeal, p. 82.

Registrar in conjunction with counsel between 24th April 2017 and 5th May 2017, with a time estimate of two days, for the Eighth Defendant to be cross-examined on his affidavits of assets provided in accordance with the Freezing Order made against him by the Court of Appeal on 25th February 2016 … The hearing will take place in camera subject to paragraph 3 below.

2. The cross-examination shall be conducted on behalf of the Applicants by a legal practitioner of their choosing who is admitted to practise in the BVI. A representative of each of the Applicants and the Eighth Defendant will be entitled to be present at the video link venue.

3. Notwithstanding paragraph 5 of Schedule B to the Freezing Order, which restrictions and conditions remain in full force and shall apply to any information and documents disclosed to Applicants during the course of the cross-examination, the Applicants will not disclose any evidence given at the cross-examination hearing or documents disclosed by the Eighth Defendant to any third party, without the permission of the Court.

4. The Eighth Defendant must confirm to Applicants within 7 days of this order that he will attend the cross-examination in person or by video link, to avoid any costs and expenses of preparation being wasted."

Paragraphs 4 and 5 of the order contain provisions requiring Mr. Rogalskiy to disclose additional documents and information to Eurochem. There is no suggestion that he has not complied with these parts of the order.

[15] Mr. Rogalskiy was dissatisfied with the learned judge's order and on 3rd March 2017 applied to the Court of Appeal for leave to appeal and for a stay of the order pending the hearing and determination of the appeal. While that application was pending and in the absence of agreement between the parties on the location for Mr. Rogalskiy's cross-examination, Eurochem applied to the Commercial Court to fix the address for the cross-examination, suggesting its offices in Moscow. Mr. Rogalskiy objected to this proposal and in correspondence on 29th March 2017 suggested that if a stay of his appeal is not granted, or the appeal fails, he will attend for cross-examination by video conference in Geneva, Switzerland.

[16] On 20th April 2017, the Court of Appeal granted Mr. Rogalskiy leave to appeal and a stay of the cross-examination order pending the outcome of the appeal.

The Appeal

[17] The notice of appeal was filed on 27th April 2017. It lists eight grounds of appeal. The 8th ground concerns procedural issues at the hearing of the cross-examination application on 16th February 2017. This ground of appeal was not pursued by counsel for Mr. Rogalskiy. I have, with the assistance of counsel, distilled the remaining seven grounds of appeal into the following issues:

(a) **Jurisdiction** – The power of the BVI court to order a foreigner who has not submitted to the jurisdiction to attend the BVI court sitting in the BVI or elsewhere to be cross-examined on his asset disclosure affidavit given in compliance with an order of the court.

(b) **Discretion** – If the court has jurisdiction to make a cross-examination order in these circumstances, how it should exercise its discretion in making the order.

(c) **Mechanism** – The mechanism for making such a cross-examination order.

(d) **Protection** - The safeguards to be included in the cross-examination order to protect the deponent.

Jurisdiction

[18] Learned counsel for Mr. Rogalskiy, Mr. Steven Rubin, QC, submitted that the BVI court does not have the power to compel a person who is a foreign national residing outside the Territory, who has not been served, has not submitted to the jurisdiction and is contesting the jurisdiction of the court against him, to make an order compelling him to submit himself, either in the BVI or elsewhere, for cross-examination on pain of being held in contempt of court, or of being forbidden to advance his challenge to the jurisdiction and his defence to the claim.

[19] Learned counsel for Eurochem, Mr. Justin Fenwick, QC, submitted that the court has jurisdiction to grant a freezing injunction with an ancillary order for the respondent to disclose his assets on affidavit. The disclosure requirement is to assist the applicant, in this case Eurochem, to police the freezing injunction and make it effective. A corollary of this power is that in an appropriate case the court can order Mr. Rogalskiy to attend for cross-examination on his disclosure affidavit. He relied on the case of **Motorola Credit Corp. v Uzan and others**[7] which I will deal with below.

Analysis

The power to order disclosure and cross-examination – persons within the court's territorial jurisdiction

[20] It is now established beyond debate that the courts in England and the British Virgin Islands have a statutory jurisdiction to grant pre-trial freezing injunctions (formerly Mareva injunctions) with ancillary orders relating to disclosure of the defendant's assets. The relevant section in England is section 37(1) of the **Supreme Court Act, 1981**, subsequently renamed the **Senior Courts Act, 1981**, ("the 1981 Act"). The equivalent section in the BVI is section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**[8] which reads:

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just."

[21] The often-stated reason for granting a pre-trial freezing injunction, which usually requires the defendant to disclose confidential information about his assets, is to preserve assets of the defendant so that they can, if necessary, be available to satisfy a judgment if the claimant is successful in the proceedings. These orders are usually made ex parte before trial. They represent a serious but justifiable intrusion, in appropriate cases, on the defendant's privacy and his ability to deal

[7] [2003] EWCA Civ 752.

[8] Laws of the Virgin Islands, Cap. 80.

with his property. The purpose of the ancillary asset disclosure order is to ensure the effectiveness of the freezing injunction. These basic principles were repeated by Slade LJ in the Court of Appeal in the case of **House of Spring Gardens Ltd and another v Waite and others**[9] when he referred to section 37 of the 1981 Act and continued:

> "Though the members of this court in the Bekhor case (supra) differed as to the exercise of the discretion on the particular facts of that case, they all seem to have been unanimous in the view that section 45(1) of the Supreme Court of the Judicature (Consolidation) Act 1925, the predecessor of section 37(1) of the 1981 Act conferred on the court not only the power to grant a Mareva injunction to restrain a party to any proceedings from removing assets from the jurisdiction, but also a power to make all such orders, including an order for discovery, as it appears to the court to be just and convenient for the purpose of ensuring that the exercise of the Mareva jurisdiction should be effective to achieve its purpose."[10]

[22] The **House of Spring Gardens** case also supports the position that the court's power under section 37 of the 1981 Act to grant ancillary orders in support of a freezing injunction includes the power to order the defendant to give oral evidence of his assets or to be cross-examined on an affidavit disclosing those assets. Slade LJ opined at page 180 of the judgment that:

> "In my opinion, however, it is by no means inconceivable that cases, albeit perhaps rare cases, could arise where the court could properly take the view (1) that the defendant in an action appeared determined both to put or keep his assets beyond the reach of the plaintiff and to conceal the true nature and extent of these assets from the court; and (2) that, in the particular circumstances of the case, an immediate order for oral examination or cross-examination of the defendant was the only "just and convenient " way of ensuring that he would not deal with his assets, so as to deprive the plaintiffs of the fruits of any judgment. … I consider it reasonably clear that section 37 would be wide enough to give the court the requisite power to make an immediate order obliging the defendant to give oral evidence, as "just and convenient" relief ancillary to the Mareva order."

[9] [1985] FSR 173.
[10] ibid, p. 179.

[23] As a general rule, legislation operates territorially and section 24 applies to a defendant who is within the territorial jurisdiction of the court. There is nothing in the cases cited by counsel on both sides, including **House of Spring Gardens**, that takes away from this basic position. The court's powers under section 24 of the **Supreme Court Act** extend to and include the power to order a defendant who has made an asset disclosure affidavit in compliance with the court's order and is within the court's territorial jurisdiction to attend to be cross-examined on that affidavit. However, it is an exceptional power that should be rarely exercised by the court.

Asset disclosure and cross-examination in relation to foreigners

[24] The next step is to decide whether the court's ancillary powers to order asset disclosure by affidavit and cross-examination extend to foreigners, and in particular foreigners who are challenging the jurisdiction of the court.

[25] In the case of a foreigner who has submitted to the jurisdiction it is trite that the court, in exercising its wide powers under section 24 to make ancillary orders in support of a freezing injunction, has the power to order him to attend for cross-examination on his asset disclosure affidavit. His submission to the jurisdiction is effectively a waiver of any sovereignty issues that would have applied to him. Mr. Rubin did not dispute this position but submitted that the power does not extend to ordering Mr. Rogalskiy, a foreigner disputing jurisdiction, to attend for cross-examination on his affidavit. In paragraph 3.1(A) of his submissions he defined a foreigner as "… a respondent contesting the jurisdiction of the court to determine the case." He then posited at paragraphs 32 and 33 of his submissions that:

> "32. It is well-established practice in cases where freezing orders are made for the court to issue orders that defendants, even those who contest or are likely to contest the jurisdiction, should serve an affidavit of assets. Such an order does not involve a challenge to the sovereignty or jurisdiction of any country where the defendant might happen to be, because the making of an affidavit by the party so ordered is a private act that does not involve the person in any official proceedings. The order of the BVI court is not given extra-territorial effect. If it is not obeyed, it might

> have consequences for the person to whom it is addressed but that is his choice, and the consequences will be solely in the BVI.
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> 33. However, the question whether the Court has jurisdiction to order that a deponent who is a foreigner (as defined above) [can] be cross-examined, is not so straightforward. The parties have not been able to cite authority in England which considers this question. The question is: does the BVI Court have inherent power to order that a deponent who is a foreigner (as defined) should be cross-examined on his asset disclosure affidavit?"

[26] This is an important submission by Mr. Rubin because it concedes that the court has the power to order Mr. Rogalskiy, a foreigner who has not been served and is contesting jurisdiction, to file an asset disclosure affidavit. However, the concession does not extend to ordering Mr. Rogalskiy to attend the BVI court to be cross-examined on that affidavit. This is the issue that has divided the parties most noticeably in this case. It is therefore important to determine whether the court has the jurisdiction to make a cross-examination order in these circumstances and, if it does, identify the source of the jurisdiction and decide whether it should be exercised on the facts of this case.

[27] In giving his oral decision on the cross-examination application, the learned judge referred to and relied on rule 30.1 of the CPR which provides that where an affidavit is to be used in evidence the deponent can be ordered to attend for cross-examination and if he does not attend the affidavit cannot be used in evidence except with the court's permission. The judge found that the rule is in broad terms and is not subject to any requirement that the deponent must have submitted to the jurisdiction or that the court otherwise has jurisdiction over him. The judge qualified this finding by saying that Eurochem's application is not necessarily covered by rule 30.1. The judge went on to find that he had power to order Mr. Rogalskiy to be cross-examined on his affidavit although he did not identify the source of this power other than the reference to rule 30.1.

[28] Mr. Fenwick supported the judge's reliance on rule 30.1 by submitting that once an affidavit is being used any party can apply for cross-examination of the deponent.

Further, in this case there is an affidavit which is being used in response to the freezing order and the service of the affidavit does not constitute a submission to the jurisdiction. As such, the court may grant a cross-examination order of the deponent pursuant to rule 30.1 or pursuant to the court's power to grant a freezing injunction. He relied on the case of **Kensington International Limited v Republic of Congo and another**[11] in which the deponent made an affidavit in compliance with a disclosure order made by a judge and another judge granted a cross-examination order of the deponent on his affidavit. This case does not assist counsel on the rule 30.1 argument for two reasons. Firstly, the deponent resided in England and there was no issue of jurisdiction, and secondly, because the cross-examination order was made under section 37 of the 1981 Act and the court's Norwich Pharmacal jurisdiction, and not under part 32 of the **English Civil Procedure Rules** which is roughly equivalent to our rule 30.1. However, the case is authority for the proposition cited in paragraph 23 above that the court can order cross-examination of a deponent on his disclosure affidavit using its more general powers under section 37 of the 1981 Act (our section 24 of the **Supreme Court Act**).

[29] I do not think that rule 30.1 applies to Mr. Rogalskiy's situation. The rule applies to a situation where a party intends to use an affidavit at a trial or hearing and the opposing party wishes to cross-examine the maker of the affidavit. In that situation, the party wishing to cross-examine the deponent must apply for a cross-examination order and if the court makes the order and the deponent does not attend for cross-examination, the party relying on the affidavit would not be able to use it in evidence unless the court permits such use.

[30] Mr. Rubin submitted that the power to cross-examine a foreigner on his asset disclosure affidavit can only be introduced by legislation and in the absence of such legislation the court should not imply such a power under its inherent jurisdiction to make its orders effective.

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[11] [2006] 2 CLC 588.

[31] He submitted that even if the power could be implied it would only be in a case where service has been effected on the defendant or he has submitted to the jurisdiction. Since Mr. Rogalskiy denies that he was served (and there is an ongoing dispute about service and submission to the jurisdiction), the court's jurisdiction will only be engaged when the claim form has been served on him. He relied on **Deutsche Bank AG v Sebastian Holdings Inc. and another**[12] where Cooke, J sitting in the Commercial Court said:

> "Service is however a different concept from notice and whilst a prime purpose of service is to bring the issue of the proceedings to the attention of the defendant, there is more to it than that because it is the formal act of service which engages the court's jurisdiction in respect of the defendant."

[32] Wallbank J did not accept that this principle applied in all situations. While I agree with the judge that the principle does not apply in all situations, I think there are limits to the court's powers before the defendant is properly served or while he is challenging jurisdiction, as will appear from my findings below.

[33] Mr. Fenwick's submission in reply was that the court has jurisdiction pursuant to section 24 of the **Supreme Court Act** to order a foreign defendant against whom a freezing injunction has been made to file an affidavit disclosing his assets and, in an appropriate case, to attend court to be cross-examined on his affidavit. He did not cite any cases from the Eastern Caribbean supporting this position. He relied on the decision of the English Court of Appeal in **Motorola Credit Corp. v Uzan**.[13] Motorola brought proceedings in the United States against four defendants alleging fraud and dissipation of assets. Motorola also launched proceedings against the defendants in England and obtained freezing injunctions, disclosure orders and orders to attend for cross-examination against the four defendants. The defendants were Turkish nationals residing outside of England. They did not comply with the orders. In the case of the second and third defendants their non-compliance was on the ground that the English court did not have jurisdiction over

[12] [2014] EWHC 112 (Comm), para 16.
[13] supra, note 7.

them. All the defendants were proceeded against and found guilty of contempt of court for their failure to comply with the disclosure orders and to attend for cross-examination about their assets. On appeal, the Court of Appeal set aside the disclosure and cross-examination orders against the second and third defendants on the ground that their connections with England were tenuous or nonexistent so that no sanctions were available against them in the event of their disobedience. However, the Court of Appeal decided that the freezing and cross-examination orders were not made in excess of the court's jurisdiction, thereby confirming that on the facts of the case and under the law in England the court had jurisdiction to order the defendants who were disputing the court's jurisdiction over them to attend for cross-examination on their assets.

[34] Mr. Fenwick relied on this case to support his position that the court can make disclosure and cross-examination orders against foreigners who are challenging the jurisdiction. However, I am reluctant to rely on the **Motorola** case for any issue relating to the BVI court's jurisdiction to make cross-examination orders against foreigners because the case was decided on the basis of statutory provisions in England that do not apply to the BVI. The Court of Appeal relied on section 37(1) of the 1981 Act which is referred to above and does have an equivalent provision in section 24 of our **Supreme Court Act**. However, the Court of Appeal also relied on section 25 of the **Civil Jurisdiction and Judgments Act, 1982** and rule 6.20 of the **Civil Procedure Rules** (UK), neither of which applies in the BVI. Section 25 empowers the court to grant interim relief in aid of foreign courts and rule 6.20 permits a claim to be served outside the jurisdiction if the claim falls under section 25. These are important provisions giving the English courts wide powers to make orders to assist foreign courts. In the absence of similar legislation in the BVI, I would be reluctant to rely on the **Motorola** case to make findings that the BVI court has jurisdiction to make a cross-examination order against a foreigner who has not submitted to the jurisdiction and is challenging the jurisdiction.

[35] Having reviewed the submissions of counsel and the authorities, I am satisfied that the source for making cross-examination orders of deponents who make asset disclosure affidavits is section 24 of the **Supreme Court Act**. The section allows the court to make freezing injunctions with ancillary orders. The ancillary orders extend to and include orders that are necessary to make the injunction effective. It is common ground between the parties that these powers include ordering the making of an asset disclosure affidavit by a foreign defendant. The cases of **Kensington v Republic of Congo**[14] and **Yukong Line Limited of Korea v Rendsburg Investments Corporation of Liberia and Others**[15] are authorities for saying that a defendant who makes such an affidavit is liable to be cross-examined on the affidavit in order to make the freezing injunctions effective. The deponents in these two cases were resident within and therefore subject to the jurisdiction of the court and the cases are therefore of limited assistance in resolving the main issue of cross-examination of a foreigner.

[36] Counsel for both parties informed the Court that they did not find any authorities that make the additional point that the court will order a foreigner to attend for cross-examination, and in particular one who has not been served and is disputing jurisdiction. Mr. Fenwick did rely on the **Motorola** case but I have already indicated that I do not want to rely on that case to resolve this very important point.[16] This Court will therefore have to decide the issue from first principles.

[37] The starting point for me is to determine the way the word 'jurisdiction' been used in this context. In **Black Swan Investment ISA v Harvest View SA and another**[17] Bannister J set out three meanings of the word:

> "Mr. Carrington, for Black Swan, submits that (1) that it is necessary to distinguish between jurisdiction in the territorial sense (which answers the question by what geographical limits, if any, the powers of the Court are restricted); and jurisdiction in the sense of power (which answers the question whether an act is beyond any power of the court to order,

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[14] supra, note 11.
[15] [1996] EWCA Civ 759.
[16] See: para. 34 above.
[17] BVIHCV2009/0399 (delivered 23rd March 2010, unreported).

> whether the defendant is within the territorial jurisdiction of the court or not). To that I would add that the word jurisdiction is frequently used in a third sense to mean proper exercise, according to the practice and procedure laid down by the court, of its strict jurisdiction;".

[38] It is the third meaning of jurisdiction used by Bannister J, the proper exercise of the court's strict jurisdiction according to the practice and procedure laid down by the court,that I think is most relevant to resolving the extent of the court's jurisdiction to order a foreigner to attend for cross-examination. Bannister J was not breaking new ground when he referred to this third meaning of the word 'jurisdiction'. In 1915 in **Guaranty Trust Co of New York v Hannay & Co.**,[18] Pickford J made the same point:

> "The first, and in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the Court has power to decide the question it will not according to its settled practice to do so except in a certain way and under certain circumstances."

Lord Diplock made the same point in **Garthwaite v Garthwaite**.[19] After referring to the judgment of Pickford LJ in **Guaranty Trust** and the court's jurisdiction in its narrow sense he continued:

> "In its wider sense [jurisdiction] embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances."

[39] In considering this matter, I have had regard to the development of the law relating to freezing injunctions and how the common law has expanded the courts statutory powers to preserve the assets of an alleged fraudster so that they can be available to satisfy money judgments of successful claimants. However, ordering a foreigner to attend for cross-examination on an affidavit that he gave in

[18] [1915] 2 KB 536, p. 563.
[19] [1964] P 356, p. 387

compliance with the court's order, whether in person in the BVI or by teleconference from his home country or another country, is an exercise of an exorbitant jurisdiction and has the potential of imposing the court's sovereignty on the foreigner. As stated above,[20] the court has jurisdiction to order cross-examination of a foreigner as a necessary part of its wide powers in policing freezing injunctions and making them effective. However, it would be an order that could have far-reaching consequences. In the case of a foreigner who is challenging the court's jurisdiction, a cross-examination order could include issues of sovereignty and comity, as well as service and submission to the jurisdiction, both of which are disputed matters which are still outstanding in this matter, and impose significant inconvenience and expense on the foreigner. It is not surprising that experienced and able counsel in this matter were not able to find an authority that could be applied in the BVI showing that the court can exercise jurisdiction to order cross-examination of a foreigner in comparable circumstances. The absence of authority is at least an indication, albeit in a negative way, that the settled practice and therefore wider jurisdiction of the court is not to issue a cross-examination order against a foreigner who is disputing service and challenging the jurisdiction of the court.

[40] In all the circumstances I find that even if the court has jurisdiction in the strict sense to make a cross-examination order against a foreigner, it does not have jurisdiction in the wider sense contemplated by the cases cited above, including Bannister J in the **Black Swan** case, to order a foreign defendant who has not been served with the proceedings, or having been served, is challenging the court's jurisdiction, to attend the BVI court in person or by video link from Russia, Geneva or elsewhere to be cross-examined on an affidavit that he gave to comply with the court's order.

[41] To sum up on the issue of jurisdiction, I find that the BVI court does not have jurisdiction in the wide sense to order Mr. Rogalskiy or any other person in his

[20] See: para. 25 above.

position who is disputing service and the court's jurisdiction, to attend the BVI court, whether in person or by video link, to be cross-examined on his asset disclosure affidavit. This is sufficient to dispose of the appeal by setting aside the learned judge's cross-examination order, but in the event that I am wrong and the court does have jurisdiction to make cross-examination order against Mr. Rogalskiy, I will, in summary form, deal with the alternative position of how I would have exercised my discretion if I had found that the court has the power to make the cross-examination order against Mr. Rogalskiy.

Discretion

[42] It is common ground between the parties[21] and clearly established by the authorities that ordering a person to be cross-examined on his asset disclosure affidavit is an exceptional order. In the **House of Spring Gardens** case, Slade LJ said that cross-examination order should only be made "... in rare cases"[22] and in the **Yukong** case Phillips LJ emphasised that "... an order for cross-examination is an exceptional measure. There can be no question of such orders becoming a routine feature of Mareva proceedings." Both cases concerned applications for cross-examination orders against persons resident within and subject to the court's jurisdiction. The bar for getting such an exceptional order against a foreigner who has been served and has submitted to the jurisdiction must be much higher, and would be even higher for a foreigner who has not been served and is disputing the court's jurisdiction. This, in my opinion, would make the granting of a cross-examination order against Mr. Rogalskiy, assuming the court has jurisdiction to make the order, not just a rare case but, to borrow an expression from the criminal law, "the rarest of the rare"[23] case.

[43] The following basic principles are also relevant to cross-examination orders. Such orders are designed to assist the claimant in locating assets of the defendant which may be dissipated before the case goes to trial. The information from the

[21] Eurochem's skeleton argument, para 28.
[22] supra, para. 22.
[23] Trimmingham v R [2009] UKPC 25, per Lord Carswell.

cross-examination cannot be used to resolve disputed issues between the parties, to incriminate the defendant or to further an application for contempt. Nor can the information be used to assess credibility issues. Finally, as stated above, the order should not assert the sovereignty of the BVI court over a foreigner or his country. There is substantial agreement between the parties about these principles. It is in the application of the principles that they disagreed.

[44] Taking the last point first I note from the Supreme Court decision in **Abela and others v Baadarani**,[24] and in particular the opinion of Lord Sumption, that the courts should now adopt a more flexible approach to the issue of sovereignty. That case involved sovereignty in the context of the service of proceedings outside the jurisdiction where a foreigner is being directed by the court's order to respond to a claim against him, failing which consequences such as a default judgment could follow. Mr. Rogalskiy situation is far more serious. If he does not respond to the cross-examination order he can be held in contempt of court and may be debarred from defending himself against the claim unless and until he purges his contempt. Further, if he is to respond to the order it will mean leaving his own country and going to the BVI or elsewhere to be cross-examined. The evidence in the case is that Eurochem has not put in place the formal arrangements and approvals with either Russia or Switzerland to host a video conference which is an essential step in ensuring that there is no encroachment on the sovereignty of those countries.

[45] Notwithstanding the recent developments in the law, the issue of sovereignty is still a significant factor to be considered in making an order against Mr. Rogalskiy and it appears that the judge did not accord to it the importance that it deserved.

[46] I am also not satisfied that the judge dealt with the information to come out of the cross-examination in a satisfactory manner. The undisputed evidence of

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[24] 2013 UKSC 44.

Mr. Rogalskiy in his second affidavit[25] is that counsel who appeared for Eurochem at the sequestration hearing said that the cross-examination would be highly material to the application to sequester the assets and asked that the sequestration application be adjourned generally because he was preparing the application for cross-examination. In giving his decision the judge downplayed the importance of this statement by counsel by saying that "…it was no more than a simple statement of fact, not of purpose."[26] This is a finding of fact by the judge with which this Court will not lightly interfere but it is an extraordinary statement for counsel to make in the context of the issues that were before the judge.

[47] The judge also misdirected himself at page 82 of the record when he said: "Lastly, a cross-examination hearing will also enable the court to gauge the Eight Defendant's demeanour and thereby his credibility which would be impossible with correspondence." This is not one of the aims of this type of cross-examination and it is impossible to say how much this affected the judge's overall exercise of his discretion to grant the cross-examination order and how any findings on credibility could affect other proceedings in the case.

[48] This is an appeal against the exercise of discretion by the learned judge and applying the test laid down by Chief Justice Sir Vincent Floissac in **Dufour and others v Helenair Corporation Ltd and others**[27] I am satisfied that the judge misdirected himself and erred by relying in part on rule 30.1 of the CPR and not identifying an alternative basis for finding that the court had jurisdiction to make the cross-examination order against Mr. Rogalskiy; that he gave insufficient weight to the issue of sovereignty; that he did not satisfy himself that there were sufficient safeguards in place regarding the use of the cross-examination information, leaving that issue to be resolved at a subsequent hearing; that he introduced the issue of credibility into the cross-examination process; and that as a result of these matters his decision to order a foreigner who is disputing service and the court's

[25] See: record of appeal, p. 71 and p. 589.
[26] See: record of appeal, p. 71.
[27] (1996) 52 WIR 188.

jurisdiction to attend the BVI court in person or by video link for cross-examination exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly wrong. As such, this Court can exercise its own discretion and I would do so by setting aside the order that he made for all of the reasons set out above.

Conclusion

[49] In all the circumstances, I find that the learned judge did not have jurisdiction to make the cross-examination order against Mr. Rogalskiy, a foreigner who is disputing that he was validly served with the proceedings and is challenging the court's jurisdiction. Alternatively, if the court had jurisdiction to make the order it is an exorbitant jurisdiction and the judge misdirected himself and erred in the exercise of his discretion in making the cross-examination order. These findings make it unnecessary to deal with the issues of mechanism and protective measures referred to in paragraph 17 above.

[50] I would make the following orders:

(1) The appeal is allowed and the order of the learned judge is set aside.

(2) Costs to appellant in this Court and in the court below to be assessed by a master if not agreed within 21 days.

[51] The Court expresses its gratitude to counsel on both sides and those assisting them for their very helpful written and oral submissions.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar