IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 20 of 2018

BETWEEN

DONNA UNION FOUNDATION

Claimant

and

[1] KOSHIGI LIMITED
[2] SVOBODA CORPORATION

Defendants

Appearances:

Mr Andrew Willins and Ms Laure-Astrid Wigglesworth of Appleby for the Applicants
Mr Stephen Midwinter QC and Mr Robert Nader of Forbes Hare for the Respondents
In attendance: Mr Michael Fay QC of Advocates BVI for the Receiver, and Ms Anna Silver of KALO acting as Receiver.

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2018: June 5

July 19, 23

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JUDGMENT

[1] Adderley J: The claimant Donna Union Foundatrion ("DUF") is the recipient of a LCIA award against the defendants on liability in an unfair prejudice action. The Tribunal had ordered that the defendants buy out its shares in Ulmart Holdings Ltd ("UHL") one of the largest retailers in Russia at the share price as of February 2016. The Tribunal has since delivered its Award fixing the value of DUF's shares in UHL at $67,159,546.

[2] DUF is a foundation established in Liechtenstein which holds a shareholding in UHL, a Maltese company. A dispute erupted between the shareholders of UHL, and DUF brought proceedings before the London Court of International Arbitration (LCIA) alleging that it had been subjected to unfair prejudice by the majority shareholders in UHL, Koshigi Limited ("Koshigi"), and Svoboda Corporation ("Svoboda"). Because Koshigi and Svoboda have throughout made common cause within the LCIA proceedings, they have become known in those proceedings as the KS Shareholders (the "KS Shareholders").

[3] The LCIA directed that the proceedings before them (the LCIA Proceedings) should be tried in two phases: liability and quantum. The liability phase of the trial was heard over two weeks in September and October 2017, concluding on 5th October 2017.

[4] On 23 March 2018 the LCIA delivered its award, and directed the KS Shareholders to acquire DUF's shareholding in UHL at a price to be determined, but to be measured on a historic valuation basis. The trial on quantum took place in April 2018. The award on quantum was awaited on the return date, but has since been delivered.

[5] An on notice hearing took place on 9 May 2018 at which time the court imposed a worldwide freezing injunction and appointed a receiver over their assets and business in aid of enforcement of the award. Notice of that hearing was given on 20 April 2018. The parties agreed that the 9 May hearing was interim and that this hearing would be the return date hearing where the respondents would present their arguments.

[6] DUF applies to continue the injunction and receivership orders. The respondents contend that DUF's application should be dismissed for nine reasons. I have set out the reasons seriatim followed by a short discussion and, where necessary, a finding under each.

First Submission

[7] FIRST SUBMISSION: The court has no power to grant the relief sought against Svoboda. No substantive cause of action is advanced against either Koshigi or Svoboda in the British Virgin Islands. Any relief must therefore be based on the power recognized in Black Swan Investments SA v Harvest View Ltd [2010] BVIHCV 2009/399 ("Black Swan") to grant freezing orders against a respondent domiciled in the Virgin Islands in support of litigation taking place against a respondent domiciled outside the Virgin Islands is support of litigation taking place in another forum. Svoboda is domiciled outside the jurisdiction (in Anguilla). The power to grant Black Swan ancillary relief is not available against a party domiciled outside the Virgin Islands. He relied on Mercedes Benz AG v Leiduck [1996] AC 284.

[8] Mr Willins referred to Practice Direction 4 of 2008 which states that the jurisdiction of the court extends to the six independent member states namely Antigua, Dominica, Grenada, St. Kitts, St Lucia and St. Vincent, and three overseas territories namely Anguilla, Montserrat and the Territory of the Virgin Islands.

[9] So, continuation is not by any means a 'get out of jail free' card. Svoboda was a BVI company when the proceedings were issued and when the application was served. Svoboda has voluntarily submitted to the jurisdiction by counsel. So the court was exercising in persona jurisdiction and continues its personal jurisdiction over Svoboda.

[10] Further or alternatively DUF claims to have accrued rights under s.184(5) of the BVI Business Companies Act 2004 ("the Act").

[11] Under the Act when a company continues out of the jurisdiction, under s.183(5)(d):

> "service of process may continue to be effected on the registered agent of the company in the Virgin Islands in respect of any claim, debt, liability or

obligation of the company during its existence as a company under the Act";

Under section 183(5)(c)

" no proceedings, whether civil or criminal, pending at the time of the issue by the Registrar of a certificate of continuation against any member, director, officer of agent thereof are abated or discontinued by its continuation…"

"...but the proceedings may be enforced, prosecuted, settled or compromised by or against the company or against the member, director, officer or agent thereof , as the case may be

and under 183(5)(a)

(a) "The company continues to be liable for all of its claims, debts, liabilities and obligations that existed prior to its continuation…"

[12] Additionally, because this is a claim for an interim measure in aid of an international Arbitration outside the BVI, the jurisdiction for interim relief exists separate and apart from Black Swan, pursuant to s.43(2), (5) and (7) of the Arbitration Act. Under section 42(2) on the application of a party, the court may in relation to any arbitral proceedings which have been or are to be commenced in or outside the Virgin Islands, grant an interim measure. Under s 43(7) in exercising the power conferred under section 2 [to grant an interim measure] the court shall have regard to the fact that the power is-

(a) ancillary to the arbitral proceedings outside the Virgin Islands and

(b) for the purpose of facilitating the process of a court or arbitral tribunal outside the Virgin Islands that has primary jurisdiction over the arbitral proceedings.

[13] In this case the power is being used to facilitate enforcement by one of the parties to the arbitration.

[14] In addition, although this was not a point argued on the return date, by an order dated 29 May 2018 the Chief Justice pursuant to Part 69.B(2) transferred jurisdiction to the commercial court here in the Virgin Islands to hear all applications made by DUF to the Anguillan Court, made with a view to enforcing the LCIA award against Svoboda.

[15] In my judgment for the reasons set out above, the court had jurisdiction to grant the relief sought against Svoboda and, of course, Koshigi. I would therefore dismiss this ground of the defendants.

Second Submission

[16] SECOND SUBMISSION: This application was made on 31 May by which time the respondent was no longer domiciled in the BVI. Each application for a continuation of the injunction is a fresh one and at the time of the application Svoboda had already changed its domicile. Furthermore as it was an application for ancillary relief, there were no accrued rights because there was no action. Therefore there was no claim or debt against Svoboda at the time the application notice was to be served.

[17] DUF's answer to that is that the application was made by notice dated 20 April and was an on notice application. The notice was issued and served on the respondents by their attorneys and registered office. Indeed the respondents requested a later date than the original hearing date of 23 April. This all took place before Svoboda's continuation. Under s.185 of the Act the argument is also dismissed.

Third Submission

[18] THIRD SUBMISSION: The order sought includes worldwide asset disclosure orders. Such orders are not available under the Black Swan ancillary jurisdiction. Even if they were, it would not be appropriate to make such orders when DUF has advanced and can advance no reason why it has not sought the relief from the arbitration tribunal. Mr Midwinter QC relied on Yukos CIS Investments Ltd et al v Yukos Hydrocarbons Investments Ltd (BVIHCVAP 2010/028) [37] [138], [139], [142], [145], and Osetinskaya v Golante Management Ltd [2013] (BVIHCV 37/2013). In Osetinskaya Bannister J stated at [15]:

> "The applicant also seeks orders for disclosure by Usilett of details of its assets worldwide. It seems to me that that is to misunderstand the nature of the Black Swan jurisdiction. The Black Swan jurisdiction applies to prevent non cause of action defendants from disposing of identified assets which might be available to satisfy a future judgment of a foreign Court in proceedings to which the owner, or person who is arguably the owner, of such assets is defendant. It does not entitle the claimant in the Black Swan proceedings in this jurisdiction to interrogate the respondent to them about assets generally. This will be the function of the foreign proceeding."

[19] In Rogalskiy v Jsc Mcc Eurochem et al BVIHCMAP2017/0007 the Court of Appeal held that the BVI court does not have jurisdiction in the wide sense to order any person who is disputing service and the court's jurisdiction to attend a BVI court whether in person or by video-link to be cross examined on his asset disclosure affidavit.

[20] However, where a foreigner has submitted to the jurisdiction of the court, under s. 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, the court can exercise that power but it is an exorbitant Jurisdiction. Webster JA also stated at [20] of that case:

> "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…."

and at [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 the trial. They represent a serious but justifiable intrusion, in appropriate cases, on the defendant's privacy and his ability to deal with his property. The purpose of the ancillary asset disclosure order is to ensure the effectiveness of the freezing order. 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 [1985] FSR 173…)

A fortiori these principles apply where an Award has already been obtained and disclosure is being sought as a means to aid enforcement, as in this case.

Fourth Submission

[21] FOURTH SUBMISSION: The receivership orders are unnecessary and inappropriate. They were imposed on the apparent basis that they were necessary because Koshigi and Svoboda had breached disclosure obligations under an ex parte order, despite the fact that the ex parte order was ineffective on its own terms. There is no proper basis for their continuation. Moreover, the receivership orders are particularly inappropriate in purporting to authorize the receiver to seek information about the worldwide assets of Koshigi and Svoboda (when such relief is neither available under the Black Swan jurisdiction nor appropriate) and to interfere in the ongoing business of Koshigi and Svoboda, including by changing the composition of the boards of companies in which they hold direct or indirect shareholdings, without any proper basis for so ordering.

[22] Furthermore there is no jurisdictional basis for the imposition of a receiver over Svoboda. The power to appoint over foreign companies only exists to support substantive claims before the Virgin Islands court. It is based on Black Swan which is based on the respondent being domiciled in the Virgin Islands.

[23] The Court of Appeal per Kawaley JA speaking for the majority in Yukos made the following statement of principle:

> "[137] There can be little doubt that whenever the BVI Court is capable of exercising in personam jurisdiction over a defendant, the statutory power to grant an interlocutory injunction or appoint a receiver "…in all cases in which it appears to the Court or Judge to be just and convenient…" may potentially be exercised in support of a claim primarily pursued in foreign proceedings in a general sense.. "
>
> "[138] … the BVI court clearly has personal or territorial jurisdiction in the strict sense to grant a freezing injunction or appoint a receiver in respect of the local assets of BVI resident companies in aid of foreign proceedings."

[24] What one can distill from the authorities referred to (Rogalskiy, Osetinskaya and Yukos) is that an injunction to restrain the dealing with assets outside the jurisdiction can only validly be granted if those assets are held or the dealing in them is controlled by a person (which includes a company) over which the court has *in personam* or territorial jurisdiction. If the court has such jurisdiction, it can make an order prohibiting the person from disposing of those assets wherever they may be located in the world. Hence the jurisdiction to impose a worldwide freezing injunction.

[25] Following from the grant of a freezing order, there naturally arises, as observed by Webster JA in Rogalskiy, the need for disclosure of the person's assets in support of the injunction in order to place the recipient in a position to be able to police and enforce the injunction which otherwise could be ineffective and meaningless. In the case of a worldwide freezing order this would necessarily mean a corresponding disclosure in respect of worldwide assets. Pre-judgment the disclosure would be ancillary to the freezing order; post-judgment it would be independent of the freezing order as a means of execution or enforcement. The court's discretion to order disclosure under the statutory regime of the Arbitration Act (s.43), as applies in this case, is not limited to the common law Black Swan jurisdiction set out in Osetinskaya. The broader jurisdiction of the court when it is acting in aid of arbitration proceedings emerges from the thorough analysis and application of the court's jurisdiction to act in aid of foreign arbitral proceedings under section 43 [Arbitration Act] undertaken by Farara J in PT Ventures v Vidatel BVIHCM 2015/0017.

[26] The above view in relation to disclosure is supported by first instance English authority. In Gidrxslme Shipping Co. Ltd v Tantomar-Transportes Maritimos LDA. 1 W.L.R 299.The court (Coleman J) observed that under section 37(1) of the Supreme Court Act 1981 (the equivalent of section 24 of the Eastern Caribbean Supreme Court Act) there was a jurisdiction to make an order for disclosure, and when made post-judgment or post award the court has a jurisdiction to extend it to worldwide assets even if the injunction was confined to assets within the jurisdiction. He stated it this way:

> "Where, by contrast, one has the position that a judgment has been already obtained or an award made and where a Mareva injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and independently of the injunction as a power in support of the execution of the judgment or award.
> …That being so, there is a very firm jurisdictional basis for an order, made post judgment or post award, which includes both a Mareva injunction confined to assets within the jurisdiction and a disclosure order in respect of worldwide assets."

Gidrxslme Shipping was followed in Cruz City 1 Mauritius Holdings v Unitech Limited [2013] EWHC 1323 (Comm).

[27] For the above reasons, in this case as I have found that the court has *in personam* jurisdiction over Svoboda, and personal and territorial jurisdiction over Koshigi, the jurisdictional objection to the continuance of the freezing and disclosure orders is dismissed.

Fifth Submission

[28] FIFTH SUBMISSION: While Mr Midwinter QC conceded that a receiver may be appropriate where the evidence indicates that it is likely that a respondent will ignore a freezing order, there is no such evidence in this case and also there is no evidence that either company has disposed of any assets since February 2018 when the freezing order was imposed.

[29] The defendants have clearly shown and admitted that they willfully ignore court orders by their failure to comply with disclosure orders, the latest being 9 May. The disposal of assets is set out in the discussion under the Ninth Submission.

Sixth Submission

[30] SIXTH SUBMISSION: The claimant has not first sought the relief from the LCIA tribunal or the English Court. Mr Willins' answer to this is that there are no extant court proceedings in England where DUF could apply; the matter is under the Arbitration regime. Furthermore, the tribunal only has jurisdiction over the property which is the subject matter of the arbitration, namely UHL; it has no jurisdiction to issue worldwide freezing injunctions in respect of the assets of Svoboda or Koshigi. Nor can the tribunal appoint a receiver. Furthermore, the arbitrator has said that a claimant has sanction to make an application to this court for relief.

[31] To take out proceedings in the English courts, as the respondent suggests to be an option, would be meaningless because none of the companies have any relation to England, and any order obtained in England would be ineffective because, among other things, it is doubtful if a third party country would recognize an English order over a BVI company as Koshigi is, and Svoboda was. That is why taking action in the country of incorporation of the companies makes more sense.

[32] In any event the regime under sections 43(2), (5) and (7) allows interim measures to be granted by the court irrespective of whether or not similar powers may be exercised by an arbitral tribunal.

[33] I find that in the circumstances it was certainly reasonable and proper for DUF to use the BVI to pursue its interim relief. I would therefore dismiss this ground of objection.

Seventh Submission

[34] SEVENTH SUBMISSION: The freezing order contains an injunction restraining Koshigi from changing its domicile. Nothing in Black Swan justifies an order of this kind and it is wholly inappropriate. There is no juridical basis for preventing a company from changing its domicile provided the statutory criteria are met. It is equivalent to a writ of *ne exeat regno* which requires that there be a liquidated debt.

[35] Having regard to the provisions of section 185 of the Act there is no discernible advantage at this stage for Koshigi to continue to another jurisdiction. In any event in light of the statement by Mr Midwinter QC that Koshigi has no plans to do so, I treat it as a moot point which does not require a decision at this time.

Eighth Submission

[36] EIGHTH SUBMISSION: The orders sought are inappropriate in circumstances where DUF delayed for over 18 months after commencing the underlying arbitrations before making the applications.

[37] Mr Willins stated that when they became aware of the commencement of the dissipation of assets in January 2018 they acted with reasonable dispatch by launching proceedings in the month of January. The defendants do not claim to have suffered any prejudice because of the delay, if any. I agree.

Ninth Submission

[38] NINTH SUBMISSION: The evidence does not establish a real risk of dissipation of assets by Koshigi or Svoboda. DUF has proceeded in an extraordinarily high-handed way, as though this were a fraud claim. It is not. It is an ordinary commercial dispute between shareholders who have fallen out. There is no reason to believe that Koshigi or Svoboda will seek to avoid paying any sum that they are

required to pay by any final award that might be made. They are using it as security for their debt which security they applied for from the arbitration tribunal but failed

[39] There was a clear risk of dissipation found by Chivers J in February 2018 and it appears to be continuing. The court was taken to the organization chart of the group of companies owned by the KS Shareholders (Koshigi Ltd and Svoboda Corporation) and showed how since 5 October 2017 after the completion of the liability stage of the LCIA Arbitration assets in the group have been disposed of. Among other things company searches show that the assets of the Cyprus company Ulybka Investments Limited was transferred on 5 October the very day the arbitration hearings ended by Koshigi to Volya Corporation (BVI) which is not a Koshigi entitly. On 18 February Volya transferred not to Mr Kostygin's wife but to Inna Meyer, Mr Meyer's wife. Mr Meyer is the beneficial owner of Svoboda. That transfer was made after Chivers J made the freezing order on 7 February so to the extent that Volya was holding on trust for Koshigi it was a breach of the injunction.

[40] Kohuhu Enterprises Ltd in which Koshigi was 99.14 % owner was transferred to Volya on 19 November 2017 and on 5 March transferred to Mrs Meyer. That 5 March transfer occurred 2 days after (3 March) when the respondents declared that Chivers J's order ceased to have effect on its own terms.

[41] Also Elshtere Ltd (BVI) which was 75% owned by the Koshigi/Svoboda parties has been disposed of. This can be verified from the structure chart. On 3 April 2018 Elshtere transferred its shares in Polnamon Trading & Investments Ltd (Cyprus) to Linka Investments and Linka to Inna Meyer.

[42] Volya was continued out of the BVI jurisdiction on 13 March 2018.

[43] Other assets transferred included the disposal of Big Box after 150 million rubles of joint venture capital had been placed in it to acquire two land plots. The respondents state that the LLC Bigbox (Russia) disposal involved an acquisition by Bavaria LLC (SA) on 23 January 2018 which was both made and disposed of after the arbitration had begun and could not therefore possibly be seen as an attempt to dissipate assets. Further they maintain that the other transfers was simply transferring assets from one holding company to another, and there was nothing in it from which an attempt to dissipate assets can be inferred.

[44] When all of the transfers are seen within the context of the clear tendency of the respondents to ignore court orders as they have done by their default in complying with the Chivers J disclosure order between 14 February and 3 March 2018, and in their admitted intentional failure to comply with the Adderley J's disclosure order from 9 May until recently stayed, the risk of dissipation is real.

[45] The sequence of the transfers after the October conclusion of the LCIA hearings to Volya outside the Koshgi/Svoboda group and ultimately Mrs Meyer, the continuance of Volya to another jurisdiction, the timing of the continuation of Svoboda to Anguilla having taken place on 24 April, the day after the hearing for the worldwide freezing order and receivership order was scheduled to take place, the fact that the re-domiciliation was only communicated to DUF on 9 May 2018 (despite the affidavit of Mr Bruce), together with the breach of the Court orders, as well as their non-cooperation with the appointed Receiver to date, constitute in my judgment cogent evidence that there is a real risk of dissipation now existing, and it is even stronger than at the time of Chivers J's finding to that effect. I therefore find that there is still a real risk of dissipation.

The Receiver

[46] I also find for essentially the same reasons that on the facts, the test for appointing a Receiver as enunciated by the Court of Appeal in Norgulf Holdings Limited & another v Michael Wilson Partners Limited (Civil Appeal No 8 of 2007), is satisfied. I will continue the appointment of the Receiver but his power of replacing directors in the subsidiaries will be subject to the sanction of the court. The court should know in advance the specific facts surrounding the purported need to replace the directors in a particular subsidiary. I have also taken into consideration the matters set out in the affidavit of the UK lawyer, Mr Matveichuk.

[47] The respondents ask that should the court not agree with their arguments, DUF be required to fortify its undertaking, because there is no evidence that it has sufficient means if called upon to meet any liability in damages that might ensue under its undertaking. In this regard the LCIA tribunal has ordered that DUF's shares in UHL be purchased by the defendants. This will yield a substantial sum. In my judgment there is no need for them to fortify their undertaking.

[48] For the above reasons I continue the injunction and the appointment of a receiver with the powers set out in the draft order as amended. DUF will continue to have a good arguable case even if the appeal by the respondent under section 68 of the English Arbitration Act succeeds, the balance of convenience favours the claimant and in the circumstances it is just and convenient to continue the injunction and the receiver. I therefore continue their appointment and dismiss the application of the respondents.

[49] Costs to DUF to be assessed if not agreed.

Hon. K Neville Adderley
Commercial Court Judge (Ag.)
23rd July 2018

By the Court

Registrar