EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)

CLAIM NO. BVIHC (COM) 134 OF 2018

Between:

[1] Olga Vladimirovna Scherbakova (2) Alexander Scherbakova

Claimants

and

[1] Brigita Morina Scherbakova
[2] Elena Nikolayevna Scherbakova
[3] Luca Alexi Morina (a minor by his Next Friend, William Hare)
[4] Mateo Nathanael (a minor by his Next Friend, William Hare)
[5] Olivya Daria Morina (a minor by his Next Friend, William Hare)
[6] Chan See Khow
[7] Topmax Worldwide Limited
[8] Key Platinum Holdings Limited

Defendants

Appearances:

Mr. Dakis Hagen QC and Mr. Brian Lacy with him of Ogier for the Claimants
Mr. Gilead Cooper QC of Conyers for the First Defendant
Mr. Andrew Willins and Mr. Fraser Mitchell of Appleby for the Second Defendant
Mr. Robert Nader of Forbes Hare for Mr. William Hare as Litigation Friend for the Third, Fourth and Fifth Defendants
Ms. Sara-Jane Knock of Withers for the Sixth Defendant
Ms. Claire Goldstein of Harneys for the Seventh Defendant
Mr. Ben Mays of Carey Olsen for the Eighth Defendant

2018: October 18, 25

JUDGMENT

[1] Adderley J: This is an application by fixed date claim form for an order *ad colligenda bona* appointing interim administrators of the estate in the Territory of the British Virgin Islands (the Estate) of Vladimir Alexkseyevich Scherbakova, deceased (the Deceased), and for the appointment of a Receiver over the 8th defendant.

[2] The evidence was taken from various affidavits which I read and which will be referred to in my order.

[3] The Estate located in the British Virgin Island (BVI) which consists of movables, namely shares in BVI companies is relatively large, (at least a nine figure dollar value), succession to which is being contested in England and Belgium.

[4] The dispute is about (i) the law governing the succession; (ii) whether the Estate falls to be distributed in accordance with the English will or in accordance with rules of intestacy in Belgium. A determination is sought of the Deceased's place of domicile at the time of his death to determine which country and which person is entitled to carry out probate of the will or as the case may be the administration of the Estate in case of an intestacy.

[5] The deceased left a Russian will which deals with all of the Deceased's property in Russia, and there is a copy of a will (the original has not yet been found) dated 15 October 2014 made in England dealing with all his worldwide estate outside Russia. The original of the latter cannot be found and prima facie is presumed lost and revoked by destruction but that is to be determined in the pending English proceedings.

[6] On 8 May, 2018, the claimants issued a summons in Belgium seeking an order to liquidate and distribute the Estate, and a declaration that the English will is invalid.

[7] If the claimants (the adult children) succeed:

a. Belgian law will govern the succession;

b. The Deceased will have died intestate (except in respect of assets in Russia which are the subject matter of an unchallenged will) and his adult children, and (subject to proof of paternity) his other children, the third and fifth defendants (Luca and Olivya) will inherit the Estate. The first defendant (Ms Morina) and the minor child Mateo will be excluded.

[8] In such case a Belgian court appointed person would be the proper person to give a grant of letters of administration to replace any interim appointment that may have been made.

[9] If the first defendant succeeds: English law will govern succession to movables: The English will shall govern in respect of assets (except in Russia). The first defendant as executor named in the English will shall be entitled to administer the estate. The sixth defendant was named joint executor but he has indicated that he would renounce.

[10] As set out in the will, the first claimant will receive nothing, the second claimant (the Deceased's son) will receive certain assets in Belgium, France, Singapore, and the BVI, and 10% of the residuary estate, and the seventh defendant (Topmax) will be shared as to 40% to the first defendant, 30% each to the minors Luca (third defendant), and Mateo (fourth defendant).

[11] The relationship between the main protagonists (the claimants and the first defendant) has become extremely acrimonious and litigious. The claimants are moving apace in the Belgian proceedings to have the court determine in their favor, similarly the first defendant in the English proceedings in her favour.

[12] It started with a legal battle of who should have the rights of burial of the Deceased. On 3 August 2017, the first defendant issued a summons before the Justice de Paix in Belgium seeking carriage of the Deceased's burial arrangements.

[13] Since then the claimants have attempted to have the Belgian court make a determination and make a distribution of the Estate in accordance with Belgian law. On 16 August 2017, a European Succession Certificate was issued by a Belgian Notary under the European Union Succession Regulation 650/2012. It recorded that: (a) the Deceased died habitually resident in Belgium (b) Belgian Law governs the succession of the Deceased's estate; (c) the Belgian courts have jurisdiction to rule on the succession as a whole; and (d) the Deceased died intestate.

[14] The first defendant commenced proceedings in Belgium on 7 September 2017 challenging the European Succession Certificate. She had not joined the claimants to those proceedings so they later applied to intervene. On 18 September 2017 the Justice de Paix gave judgment ruling that the claimants should keep control of the Deceased's burial arrangements based on their finding that the first defendant had not established that she was still romantically attached to the Deceased at the time of his death. The first defendant appealed that decision. The appeal is set to be heard on 15 January 2020.

[15] On 21 March 2018, the Belgian court ordered the re-opening of the European Succession Certificate proceedings. A week later, on March 28 2018, the first defendant launched English proceedings on behalf of the third and fourth minor children and on her own behalf challenging the applicability of Belgian law and asserting that the Deceased died domiciled in England and Wales and asking that a grant of probate in solemn form be made of a copy of the English will dated 28 October 2015. The original of the will has not been found and the claimants are relying on the presumption under English law that a will whose original is missing is presumed destroyed with an intention of revocation.

[16] On 8 May 2018, the claimants issued a summons in Belgium seeking a notary to liquidate and distribute the Estate, along with a declaration of invalidity of the English will (or an earlier one).

[17] It is therefore evident that the time it will take for the determination of the issues between the protagonists in the two different jurisdictions so that the position in respect of the Estate is finally resolved, is indeterminate. It will certainly take months, and possibly years.

[18] Consequently until the disputes are determined it is uncertain who has authority to deal with the Estate. Furthermore parts of the Estate unknown at present, may be being dissipated without anyone's knowledge because those interested may be ignorant that they exist.

[19] This is relevant because there is evidence that a significant portion of the Estate has not yet been discovered.

[20] This became evident from the documents discovered in the Deceased's possession when he was found dead. The deceased was found dead in his apartment on 10 June 2017. He was currently under criminal investigation by the Russian authorities. The Affidavit of Alison Jane Regan of Russell-Cooke LLP, London, set out background evidence as summarized below.

[21] Upon news of his death Belgian lawyers for the claimants and the first defendant and their respective bailiffs visited the home of the Deceased, carried out a search of his residence in the presence of the lawyers and located a number of documents in his possession. They included company structure charts.

[22] The structure charts showed that the Deceased made extensive use of BVI companies as his holding companies which in turn owned numerous subsidiaries in numerous jurisdictions around the world. The flowcharts also showed work in progress on shareholder changes in various companies.

[23] Searches have been done on the relevant public registers of the BVI, the United Kingdom, and Singapore, which confirm a complex international structure of investment and property holding businesses spread across multiple jurisdictions.

[24] To the best of the claimant's information and belief, the most valuable asset in the Estate is the beneficial ownership of the entire issued share capital in the seventh defendant, based on its underlying value because of the numerous valuable operating subsidiaries.

[25] The chart showed a number of entities and individuals who as far as the claimants are aware have no known association with the Deceased. However, it cannot be ruled out that those individuals were in fact connected with the Deceased, and further investigation may reveal further assets of the Estate.

[26] The same picture emerges from an interview with Chan See Khow, the sixth defendant. As he was a close confidant of the Deceased, worked with him as a director of his companies and, indeed is the co-executor on one of the Deceased's wills, the claimant's and first defendant's lawyers met with him on 16 January 2018. From that interview when names which appeared in the breakdown

of the companies were put to him, Mr Chan did not know or was not sure of 12 out of 19 of the names put to him. So it is not known what their involvement is with the assets of the companies.

[27] Added to this it is evident that the Deceased used a large number, and varied nominees to hold his assets. His nominees appeared to have included at least:
the first defendant in respect of Topmax, Mr Chan in Aquarius Intertrade Ltd via declarations of trusts, Yulia Bertison for various companies related to the Deceased projects, Svetland Afenddyck, the Deceased's cleaning lady who on the documents found in the office was at one time listed as shareholder of the eighth defendant, a very valuable property.

[28] A number of things came out of the January meeting with Mr Chan: the Deceased was giving consideration to the liquidation of Wideland Resources, a company with assets in the eighth figure range, and that the Deceased had recently changed his service provider for Topmax from Singapore because he wanted to protect confidential information. On the evidence he did not disclose his interest in Topmax in his divorce proceedings.

[29] Because of the Deceased's penchant to hide his assets, especially in light of the Russian criminal investigation, there is a likelihood that the Estate has valuable assets which have not yet been identified.

[30] All parties, without exception, and all are represented at this hearing, agree that it is necessary to investigate with a view to identifying and preserving the assets of the Estate and for that purpose an independent interim administrator or administrators should be appointed.

[31] Only one party, the first defendant, is of the view that it should not be done now. She is of the view that it should await a hearing on the appointment of an administrator pending suit which is set down for hearing in England on 11 December 2018 in claim number PT-2018-000247.

[32] Mr Cooper, QC, gave several reasons for that view. At an English hearing the court would be able to have a choice of administrators as his client would nominate persons as well. He also stated that there is immovable property in England and none located in the BVI and that if England is found to be the domicile of the Deceased that will be the seat of the probate proceedings. Having obtained

a grant in England it could be resealed in the BVI. He was prepared to agree to the interim grant provided it would last only until the hearing and determination of the application before the English court listed for hearing on 11 December.

[33] When asked by the court why did he not propose nominees for appointment of interim administrators at this trial of a fixed date claim for which the requisite notice had been given and other requirements under the CPR had been complied with, in effect he said that he did not want to give legitimacy to this hearing by doing so, because he did not share the view that there was the urgency being propounded by the claimants. He felt that a grant in the BVI before hearing the application for the appointment of an administrator pending suit in England due to be heard 11 December would result in chaos. By this I took him to mean the possibility of inconsistent findings.

[34] Mr Hagen QC observed that although immovables were not located in the BVI, the vast value of the identified assets of the Estate (a 9 figure value of which there was undisputed evidence) was located in the BVI, and the assets located in England were miniscule in comparison. Furthermore, because of the liquid nature of the assets in the BVI compared to the illiquid nature of the assets in England it made more sense and would be more beneficial to the interest of the Estate to obtain the grant in the BVI where liquid assets could be used to fund the investigations for the benefit of all the interested parties. Further, the BVI was the jurisdiction of choice by the Deceased in which to form his companies and in which to repose the overwhelming volume of his assets. Also, there was nothing to prohibit the grant obtained in the BVI being resealed in England. He noted that the same nominees are being proposed by the claimants in the English action so there will be no chaos. The nominees are with a firm (Ernst and Young) which has offices in every jurisdiction where assets are known to be located. Mr Hagen QC referred to Mr Cooper's remarks as patronizing the BVI court which Mr Cooper denied.

[35] I must confess that while listening to the submissions and observing the demeanor of counsel I got the distinct impression that the genesis of Mr Cooper 's concerns, might not be that matters were being rushed by the claimants through the BVI court, but that he would feel more comfortable to wait until 11 December, 2018, to have a Master on the English court decide the matter in preference to a London-trained Judge of the Commercial Court of the BVI who concurrently serves

as a Court of Appeal judge in another common law jurisdiction. It does not mean that we will necessary get it right, however, from my personal experience the BVI commercial court routinely hears matters involving claims in the 9 figure range or more, and multi-jurisdiction cross-border disputes are represented before this court almost daily, so there is no reason for anyone to feel uncomfortable.

The law

[36] In his submissions Mr Hagen QC stated that the court has a variety of jurisdictions for making the grant sought which historically was known as a grant *ad collingenda bona* whose object was to preserve and enable the gathering in or the "goods" of the estate, while leaving their distribution to a later donee of a full and unfettered grant.

[37] The court's jurisdiction to make such an order is contained in the Eastern Caribbean (Non-Contentious Probate and Administration of Estates) Rules 2017. It was submitted that the court's jurisdiction could be derived from either Rule 28, Rule 45, or Rule 47. In reality, on the facts of this case, rule 45 where the court can exercise its discretion in exceptional circumstances seems the only appropriate gateway.

[38] Rule 28(1) applies where a deceased person died domiciled outside the BVI. It is common ground that the Deceased's domicile was not the BVI.

[39] In such cases a grant may be made under rule 28:

> "(2) Where the deceased left a will in the English language which is admissible to proof, a grant may be made to the person named as executor therein
> (3) where the will describes the duties of a named person, in terms sufficient to constitute him or her executor, according to the tenor of the will
> (4) where the whole or substantially the whole of the estate consists of immovable property, a grant of probate may be made to the person who would have been entitled to a grant had the deceased died domiciled in that member state.
> (5) In any other case, the court may order that the grant be issued to any of the following persons
>
> (a) to the person entrusted with or entitled to the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled;
>
> (b) where there is no person so entrusted, to the person beneficially entitled to the estate by law of the place where the deceased died domiciled or if there is more than one person so entitled, to such of them as the court may direct

(c) if in the opinion of the court the circumstances so require, to such person as the court may direct [emphasis added]

[40] Because of the ongoing dispute as to domicile nothing in (a) or (b) applies so the applicants must seek to come under (c).

[41] After the person is authorized by the court to apply, Rule 29 sets out how to apply for the grant.

[42] Under Rule 29(1) they must file in the registry an oath including the following recitals

(i) the authority of the applicant to obtain the grant, whether by order of the court or otherwise

(ii) the domicile of the deceased: and the gross value of the estate

[43] On the facts of this case it appears that the applicant would be unable to provide the information on domicile required by (ii) in order to obtain a grant.

[44] Rule 47 refers to emergency grants. It provides as follows:

> "An application for an emergency grant may be made if it is shown that the estate of a deceased person is in danger of spoliation or for any other reasons urgent steps are required to be taken for the custody or preservation of any property forming part of the estate of the deceased owing to the circumstances, it is not possible to constitute a general personal representative in sufficient time to meet the needs of the estate.

[45] In such case the grant shall be limited for the purpose of collecting, getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until further representation be made or in such other way as the court may direct.

[46] After the court has given its authorization the applicant must apply for the grant by filing an affidavit. Rule 48(2) provides:

i. "an application for an order for an emergency grant shall be made to the court and shall be supported by evidence on affidavit stating:
The reason why the grant is urgent
That the person entitled to the grant cannot be located or is abroad or incapacitated; and
ii. That the applicant for the emergency grant is a fit and proper person"

[46] It seems that the applicant would not be able to meet the requirement of Rule 48(2)(b) to swear "that the person entitled to the grant cannot be located, or is abroad, or incapacitated" unless "located" is given an extraordinarily broad interpretation.

[47] The route that appears most appropriate is Rule 45. That states:

> "45 (1) An application for an order for a grant of letters of administration under the discretionary powers conferred on the court under the relevant statutory provision of [the Territory of the Virgin Islands] shall be made to the court in the first instance, and such application shall be supported by affidavit evidence setting out the grounds of the application
>
> iii. (2)The application for an order under paragraph (1) shall include in its title the statutory provision and Act under which the application is made.

[48] In the Territory of the Virgin Islands the relevant statutory provision for an order for a grant of letters of administration under the discretionary powers conferred on the court is section 116 of the England and Wales Senior Courts Act 1981, as incorporated into the law of the Territory by section 11[1] of The West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80; (see Liao Chen Toh v Liao Hwang Hsiang BVIHPB 93 of 2011 per Olivetti J at [10] – [11])

[49] Section 116 provides:[2]

> "(1) if by reason of any special circumstances it appears to the High court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
>
> (2) Any grant of administration under this section may be limited in any way the court thinks fit."

---

[1] "11 Practice in Civil Proceedings and in Probate, Divorce and Matrimonial Causes

The jurisdiction vested in the High Court in civil proceedings, and in Probate, Divorce and Matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in [the Virgin Islands] and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administrated for the time being in the High Court of Justice in England."

[47] The section applies when the deceased died domiciled abroad (Gudavadze v Kay [2012] WTLR 1753 per Sales J). The order can be made on application to a High Court judge (Joint Stock Co. Aeroflt-Russian Airlines v Berezovskaya [2014] EWCA Civ 431 at [10] and [14]). In appropriate circumstances the jurisdiction can even be used to make a grant *ad collogenda bona* see Pakistan v NatWest [2015] EWCH 3052 (Ch) and it was so used in Liao (supra).

[48] The test is that there are "special circumstances". "Special circumstances" should be given a wide meaning. Ewbank J in Re Clore [1982] Fam. 113at 116 said this:

> "since this is a section giving discretion to the court, I would not impose any limitation on the words "special circumstances". I would say that the words "special circumstances are not necessarily limited to circumstances in connection with the estate itself or its administration, but could extend to any other circumstances which the court thinks are relevant.

[49] I would adopt Ewbank J's view

[50] Upon obtaining the order the person who seeks the grant of letters of administration shall file at the registry the usual papers for grant of letters of administration under Rule 13 and the oath shall include the following recitals: the date and effect of the order of the court including the relevant statutory provision and the Act under which the order was made and; the limitations if any, imposed by the court.

[51] A copy of the order of the court directing that the grant be made to the applicant pursuant to the discretionary powers of the court shall be filed.

[52] The usual papers to be filed under Rule 13 are set out in the schedule to Act.

Conclusion

[53] There are special circumstances in this case. Due to the Deceased's proclivity to hide his assets, exacerbated by the special circumstances which existed with the Russian authorities before he died, there is a likelihood that a portion of the assets of the Estate have not been discovered. The longer the problem remains unresolved the greater the risk that the person or persons holding those assets can unlawfully dissipate them without the knowledge or consent of those ultimately

entitled. Also, because of the pending suits in Belgium and England, the domicile of the Deceased at the time of his death is unknown.

[54] A consequence of all of this is that the applicants cannot comply with Rule 13 in order to apply for the grant because they cannot supply the information required (domicile of the Deceased, value of the assets of the Deceased, and so forth). Nevertheless under section 45 the court has the discretion to order that the grant be given.

[55] While it is submitted by Mr Cooper QC, and I agree, that this is not a classic case of urgency envisaged by an application *ad colligenda bona*, all the parties agree that the urgency is such that there needs to be an appointment of an interim administrator as soon as possible. To that extent it is fair to all the parties including the first defendant.

[56] The evidence that the bulk of the assets of the Estate are located in the BVI is consistent with an interim administrator being appointed in the BVI.

[57] While the claimants have applied in England for the appointment of an administrator pending suit under section 177 of the Courts Act 1981, they have nominated the same persons and all the parties, except one, have agreed to the appointment of those persons. The person who disagreed had an opportunity to nominate interim receivers at this hearing but, for whatever reasons, declined to do so.

[58] I therefore order pursuant to Rule 45 based on section 116 of the England and Wales Senior Courts Act 1981, as incorporated into the law of the BVI by section 11 of The West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80, that the persons nominated by the claimants, namely Roy Bailey, Simon Edel, and Alan Hudson ("Interim Administrators") may apply for letters of administration of the Estate. In the exercise of my discretion I direct that a grant be made to them upon their application.

[59] The powers of the Interim Administrators shall be limited to locating, getting in, and preserving the assets of the Estate, with the power, and authority to carry out the necessary investigations and make the necessary inquiries concerning the assets of the Estate, and incur the necessary

expenditure to locate identify and preserve the assets. In an effort to avert conflicts, their appointment shall last until the date the appointment of an administrator or administrators pending suit in the English proceedings is ordered to take effect or until further order of this court. The expenditure including the Interim Administrators' remuneration shall be borne from the assets of the Estate. The first defendant has made certain fixed advances to the Interim Administrators to fund this application and the application pending suit in the English proceedings and may be reimbursed for those advances in due course.

[60] The parties shall have liberty to apply.

No need for receivership

[61] In light of the undertaking agreed during the hearing on behalf of the eight defendant, the claimants have withdrawn their application for the appointment of a receiver of that company.

Costs

[62] Parties may submit short written submissions on costs within the next 14 days.

Hon Mr. Justice K. Neville Adderley (Ag)
Commercial Court Judge

By the Court

Registrar