IN THE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION)

CLAIM NO: BVIHC (COM) 0020/2018

BETWEEN

DONNA UNION FOUNDATION

Claimant/Applicant

And

[1] SVOBODA CORPORATION
[2] KOSHIGI LIMITED

Defendants/Respondents

Appearances:

Mr Andrew Willins with Mr Fraser Mitchell of Appleby on behalf of the Applicant

Mr Robert Nader of Forbes Hare on behalf of the First Respondent

Mr Mark Forte with Ms Tameka Davis of Conyers Dill & Pearman on behalf of the Second Respondent

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2019: February 21
2019: March 20

JUDGMENT

Contempt of Court for breach of ancillary disclosure orders - whether Respondents have purged their contempt – appropriate sanction for contempt – whether cross examination should be ordered – whether further disclosure should be ordered on an "unless" basis

[1] GREEN J [Ag.]: This is the adjourned hearing of the Applicant's application dated 30 October 2018 whereby the Applicant seeks declarations that the Respondents have committed contempts of court and further orders consequential on such declarations. The application was first before me on 5 February 2019. The Respondents, both then represented by Forbes Hare, had served sworn affidavits the day before that hearing in purported compliance with the orders of which they were said to be in breach. Even though the Applicant managed to respond to one of those affidavits the same day (there was one that had been served unsworn on 1 February 2019), maintaining that the Respondents remained in breach, I decided that the application would have to be adjourned, so that the Respondents could address the Applicant's evidence. I gave directions for the service of that evidence.

[2] The position as at the date of the adjourned hearing was that the Second Respondent, Koshigi Limited ("Koshigi") is now represented by Conyers Dill & Pearman. The First Respondent, Svoboda Corporation ("Svoboda") filed an affidavit in response; Koshigi has not filed any evidence since the last hearing.

[3] Mr Willins on behalf of the Applicant has pursued the application and is asking the Court to make findings in respect of the Respondents' alleged contempts; he wants further disclosure orders; and he is seeking "unless orders" in respect of the alleged contempts and further orders whereby the Respondents should be debarred from being heard on or making any application in these proceedings. There is also a question as to whether I should order cross-examination on the Respondents' affidavits in order to determine whether they are in contempt. The Respondents both say that the application should be dismissed because they have now complied with the orders and purged their contempt and the Applicant is not entitled to any further disclosure on the back of the contempt application.

Background

[4] There is a complicated chronology both to these proceedings and to the attempts by the Respondents, as the Applicant puts it, to move and dissipate assets so as to make them judgment proof. That "judgment" is an arbitration award on the underlying dispute between the parties in respect of their joint venture in a Maltese corporate vehicle called Ulmart Holdings Limited ("UHL"). The London Court of International Arbitration tribunal ("LCIA Tribunal") appointed in this matter has found that the Respondents acted in concert to prejudice the Applicant's interests in UHL and has ordered the Respondents to purchase the Applicant's shares at the value of US$67,159,546. In order to try and prevent the Respondents from disposing of assets, the Applicant has obtained freezing and receivership orders from this Court which included, as is normal, ancillary disclosure orders so as to be able to police the freezing and receivership orders. It is non-compliance with those disclosure orders that forms the majority of the allegations of contempt and it is only those allegations that are presently being pursued.

[5] A summary procedural chronology is as follows:

(1) 5 October 2017, proceedings before the LCIA tribunal concluded;

(2) 7 February 2018, on the *ex parte* application of the Applicant, Chivers J made the first freezing order against the Respondents ("First Freezing Order"); the Applicant undertook to seek retrospective sanction from the LCIA Tribunal, as it had not yet delivered its award;

(3) 3 March 2018, the LCIA Tribunal decided that it had no jurisdiction to grant retrospective sanction (the Applicant's position, in any event, was that sanction from the LCIA Tribunal was not needed);

(4) 6 March 2018, the LCIA Tribunal granted prospective permission to seek relief from this Court;

(5) 7 March 2018, this was the return date for the First Freezing Order and Chivers J continued the First Freezing Order ;

(6) 21 March 2018, the LCIA Tribunal delivered its award on liability in favour of the Applicant ("First Award");

(7) 20 April 2018, the Applicant served an application to discharge the First Freezing Order and for it to be replaced with another freezing order plus the appointment of a receiver;[1]

[1] This was done, so the Applicant says, to avoid a sterile debate as to whether the First Freezing Order was ineffective because the LCIA Tribunal had dismissed the application for sanction. As referred to above the Applicant did not consider that it needed

(8) 9 May 2018, eventually the application came on *inter partes* before Adderley J who granted the freezing and receivership order ("Second Freezing and Receivership Order") but directed that it should be reconsidered on 5 June;

(9) 5 June 2018, Adderley J reserved judgment but continued the Second Freezing and Receivership Order;

(10) 19 June 2018, single Judge of the Court of Appeal, Michel JA, stayed the receivership and disclosure orders pending the hearing of the Respondents' appeal;

(11) 28 June 2018, the parties attended before Adderley J – although the learned Judge's judgment was not then ready, he delivered a short interim judgment in which he said that "*the contempt of the Defendants borders on the contumelious*";

(12) 2 July 2018, Adderley J gave his reasons for making the Second Freezing and Receivership Order on 9 May 2018;

(13) 16 July 2018, the LCIA Tribunal issued its Second Partial Award valuing the shares of UHL at US$67,159,546 ("Second Award");

(14) 19 July 2018, Adderley J gave his judgment from the hearing on 5 June and made a modified freezing and receivership order ("Third Freezing and Receivership Order"); this effectively removed the stay imposed on 19 June by Michel JA;

(15) 19 August 2018, the LCIA Tribunal varied the buy-out mechanism in its awards;

(16) 30 October 2018, hearing of the Respondents' appeals from both the Second and Third Freezing and Receivership Orders; on the same day this application for contempt was filed;

(17) 20 December 2018, the Applicant issued an application for the appointment of liquidators over the Respondents; this is not due to be heard until 30 April 2019;

(18) 19 January 2019, the Court of Appeal dismissed the Respondents' appeals recording in its judgment that the Respondents had not complied with the disclosure orders and their counsel had admitted at the hearing that his clients were in contempt;

(19) 4 February 2019, the Respondents' first disclosure affidavits served; the Applicant responded on the same day with a further affidavit;

(20) 5 February 2019, first hearing of the application before me which I adjourned to 21 February with directions for evidence.

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sanction and the decision by the LCIA Tribunal was that it had no jurisdiction to grant retrospective sanction. There is no doubt that the First Freezing Order was fully effective between 7 February and 3 March.

[6] The Applicant is convinced that the Respondents embarked on a judgment proofing exercise immediately after the end of the LCIA Tribunal hearing on 5 October 2017. It has identified a number of transactions involving transfers of shares in other companies by both Respondents in respect of which it is seeking explanations from the Respondents. The Applicant further says that the disclosure affidavits, which basically state that the Respondents have no assets save for the shares in UHL are "*transparent lies*", "*incredible*", "*incapable of belief*" and "*astonishing in its mendacity*". These are strong words, perhaps reflective of the level of distrust and anger between the parties.

[7] The Respondents have been in very serious breach of the Orders of this Court in not providing any disclosure for just under a year. Any explanation they give must be regarded with considerable scepticism. Having said that, this is a contempt application and it is necessary to look closely at, and strictly construe, the terms of the orders said to have been breached. I further remind myself that I have to apply the criminal standard of proof and that I have to be sure, beyond any reasonable doubt, that the Respondents remain in breach.

The Parties

[8] The Applicant is a Liechtenstein Foundation. Its ultimate beneficial owner is Mr Mikhail Vasinkevich. The Applicant has disclosed in the LCIA proceedings that it has a third party funder of its claims against the Respondents, namely the A1 Group Limited, an investment arm of the Alfa Group Consortium. Its lawyers in London are Bryan Cave Leighton Paisner and one of their partners, Mr Roman Khodykin has sworn the main affidavits on behalf of the Applicant in these proceedings.

[9] Svoboda is a company that was originally incorporated in the British Virgin Islands ("BVI"). On 24 April 2018, after the First Freezing Order and after the Applicant had issued its application for the Second Freezing and Receivership Order, Svoboda was discontinued in the BVI and continued in Anguilla. Svoboda relied on its redomiciliation to argue both before Adderley J and the Court of Appeal, that this Court had no jurisdiction to make the Orders against Svoboda. Those arguments

did not succeed but it indicates the purpose behind the move to Anguilla. Svoboda's sole director is Mr August Meyer, who appears to have total control over it. In the First Award, Mr Meyer is described as Svoboda's ultimate beneficial owner.

[10] Koshigi is also a company incorporated in the BVI but it has remained domiciled in the BVI. Its sole director is Mr Dmitry Kostygin and he appears to have total control over it. In the First Award, Mr Kostygin is described as Koshigi's ultimate beneficial owner. Until 12 November 2018, Mr Kostygin was under house arrest in Russia as a result of criminal charges brought against him for alleged fraud.

[11] The Applicant has identified a number of companies in respect of which it says that either or both of the Respondents held an interest at some time. As the Respondents both now say that they do not have any assets save their interests in UHL, the Applicant is not unreasonably keen to find out what has happened to the assets they once had, or alternatively for them to account for the proceeds of sale. The Applicant says that either they must account for the proceeds or this Court should infer that the Respondents remained as beneficial owners of those assets. The shares identified as once being owned by the Respondents include the following:

(1) Koshigi owned shares in two Cypriot companies: Ulybka Investments Limited ("Ulybka") and Kohuhu Enterprises Limited ("Kohuhu"). On 5 October 2017 (the day the LCIA Tribunal hearing on liability concluded), Koshigi transferred its interest in Ulybka to a BVI company called Volya Corporation ("Volya"). On 19 November 2017, Koshigi transferred its interest in Kohuhu to Volya.

(2) Both Respondents were shareholders in Elshtere Limited ("Elshtere"), that was originally a BVI company but which on 12 May 2018 successfully redomiciled to Wyoming. By May 2018, the Receiver was told by the registered agents of Elshtere that the Respondents were not then shareholders of Elshtere.

(3) Svoboda owned shares in a Russian company called LLC Big Box ("Big Box"). On 23 January 2018, Svoboda transferred its interest in Big Box to Bavaria LLC, a company that had been incorporated on 27 November 2017 in Wyoming.

(4) In 2013, Svoboda had an interest in a Bahamian company called Arcor Holdings Limited ("Arcor"). Arcor held an interest in a valuable Russian company called LLC

Instroi ("Instroi") but on 10 April 2018 Arcor transferred that interest to Mr Meyer's wife, Inna.

[12] It can be seen that all of the dates set out above for when it is known that the Respondents have transferred their interests (items (1) and (3)) pre-date the First Freezing Order, albeit that it was after the LCIA Tribunal liability hearing had concluded. In relation to Elshtere and Arcor (items (2) and (4)) there is no evidence before me as to when the transfers took place (if there was a transfer in the case of Arcor). The Applicant is keen to have this information, for obvious reasons. Some of the information set out above was before the Court when the Orders were made and was relied upon as evidence of risk of dissipation. It is clear that the Applicant has been after this information for some time. But the question for the Court is whether it was entitled to this information under the existing Orders or whether the Court should now order this information to be provided.

The Orders

[13] It is necessary now to look at the Orders that form the subject-matter of this application. It is important to make clear that the Orders were made against the Respondents, not Mr Meyer and Mr Kostygin. It seemed to me that there was a certain confusion in the Applicant's position in relation to this as Mr Willins continually referred to the beneficial ownership of one or other of the subsidiary companies, not by reference to the Respondents but instead by reference to Messrs Meyer and Kostygin. There can be no room for such confusion in the interpretation of these Orders for the purposes of contempt proceedings.

[14] The UK Supreme Court has emphasised that the "flexibility principle" has no application in the construction of a freezing order. In JSC BTA Bank v Ablyazov (No 10)[2] at p. 4762 Lord Clarke of Stone-Cum-Ebony JSC said:

> "17. In para 5 of his judgment in the Court of Appeal, Beatson LJ said that the context in which the scope of the freezing order falls for decision is one in which a court might be tempted to stretch legal analysis to capture what are seen as the merits or lack of merits of the case before it, but it is important not to succumb to that temptation. I agree. The question is simply what the freezing order means. If it is desirable that a broader meaning

[2] [2015] 1 WLR 4754

should be given to it than is appropriate applying ordinary principles, the solution is not to give it a meaning which it does not have but to vary the order (and the relevant standard form of order) appropriately for the future…

18. In this appeal both Mr Smith for the bank and Mr Crow, as advocate to the court, agree that the Court of Appeal was wrong to have regard to what Beatson LJ described as the flexibility principle. It is agreed that, whatever the position might be if the court were construing a contract, the flexibility principle has no role in the construction of the freezing order as an order of the court. As Mr Crow colourfully put it, the flexibility principle is that the court must be agile in this game of cat and mouse between claimants and defendants to make sure that it is making new orders to meet new avoidance measures, but that is not a justification for the expansive interpretation of an order which has already been made. I agree."

[15] While the factual background and context are not relevant to the interpretation of a freezing order, they are certainly relevant to an assessment of the credibility of the Respondents' evidence and as to whether they are in breach. I am very much alive to the possibility that there has been a deliberate blurring on the Respondents' side as to the actual ownership of assets to make it as difficult as possible for the Applicant and indeed the Court. Furthermore, the Respondents' coordinated disobedience to the Court Orders for such a long period reflects a very poor attitude on their part, and their controllers, Mr Meyer and Mr Kostygin, to compliance with Court Orders and they have shown a willingness to take every single point both at first instance and on appeal, however bad, in order to avoid giving the Applicant anything. I can and do take this into account in assessing the Respondents' evidence and whether it complies with the ancillary disclosure orders.

[16] One further matter that should be said before looking at the Orders. This is not a fraud claim in which the Claimant is seeking to trace its assets. There is no proprietary or tracing claim; indeed there is no allegation of fraud in these proceedings. The Orders were obtained by way of interim measures under s.43 of the Arbitration Act 2013 as ancillary to the Awards of the LCIA Tribunal. No attempt has actually been made by the Applicant to domesticate and then enforce the Awards under the Arbitration Act and CPR Part 43. Instead the Applicant is seeking to enforce the Awards by way of its application for liquidators to be appointed based on it being a creditor or contingent creditor. Its entitlement to proceed by way of an application for liquidators to be appointed will be challenged by the Respondents, I imagine quite vigorously.

[17] (a) <u>The First Freezing Order</u>

The First Freezing Order of 7 February 2018 was a freezing order over the Respondents' assets in the total sum of US$175m. At that stage the parties had not received any award from the LCIA Tribunal. This was presumably the amount that the Applicant was expecting the LCIA Tribunal to value the UHL shares plus costs. A number of companies were specifically identified in the First Freezing Order as being companies in which the Respondents appeared to hold an interest and which were covered by the order. These companies included: Elshtere, Bavaria LLC, Big Box, Kohuhu, Arcor and Ulybka. Some bank accounts were also identified.

[18] Paragraphs 9 and 10 of the First Freezing Order were in the following terms (underlining added):

> "9. Unless paragraph 11 applies, the Respondent[3] must within 72 hours of service of this Order and to the best of its ability inform the Applicant's legal practitioners of all its assets[4] worldwide exceeding $25,000 in value whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.
>
> 10. Unless paragraph 11 applies, the Respondent must within 5 working days of service of this Order swear and serve on the Applicant's legal practitioners an affidavit verifying the accuracy of the information provided pursuant to paragraph 9 above."

[19] This was a completely standard disclosure order ancillary to a freezing order designed to protect assets against which the Applicant would ultimately be hoping to enforce. Disclosure of assets is necessary so as to make the freezing order both effective and able to be policed. As the Court of Appeal said in this case in paragraph 64 of the judgment of Blenman JA:

> "There is nothing remarkable about the disclosure order that the learned Judge made. In fact, to the contrary, it was in standard form. If there was ever a case which necessitated the court making a disclosure order, this was it. Svoboda and Koshigi seemed to have taken steps to conceal their assets. [The Applicant] has no way of knowing where their

[3] References to the Respondent means both or all of them – paragraph 4(a)

[4] By paragraph 5 "assets include any asset which they have the power, directly or indirectly, to dispose of or deal with as if it were their own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions."

assets are without the benefit of a disclosure order. The disclosure order was a key part of the freezing order."

[20] (b) The Second Freezing and Receivership Order

The Second Freezing and Receivership Order was actually two separate Orders made by Adderley J on 9 May 2018. The freezing order was in the same amount as the First Freezing Order, namely US$175m and the same companies identified as assets of the Respondents were specified. Paragraphs 11 and 12 of the freezing order were in the same terms as paragraphs 9 and 10 of the First Freezing Order, save that the period for compliance was shortened to 48 hours and 3 days respectively.

[21] The Receivership Order appointed Mr Paul Pretlove as a Receiver "*on an interim basis of the business and assets of each of the Respondents*". The Order contained its own disclosure order in the following terms (underlining added):

> "12. Without prejudice to the Respondent's obligations under the Freezing Injunction which continue in full force and effect, the First and Second Respondents (by a director duly authorised) are each ordered within five working days after service of this Order upon them respectively to disclose to the Receiver in writing full details of their assets to include (without limitation) full particulars of:
>
> (i) Any bank accounts maintained by them, the name and address of the bank, the account holder, the person authorised by any relevant banking mandate to operate that account, and the current balance;
> (ii) The shares of any companies in which they might have a legal or beneficial interest, to include the name of the company, the number of shares held, the percentage shareholding, the names and contact details of any other shareholders and the jurisdiction of incorporation;
> (iii) Any dividends due and declared or payable to them;
> (iv) Any debts due or sources of credit currently available to them.
>
> 13. The Respondents shall provide such other information as may be reasonably requested by the Receiver, from time to time, in order to carry out his duties and functions as a Receiver under the terms of this Order."

[22] I am unaware of any disclosure having been made by the Respondents to the Receiver as per the Order above. I imagine they will say that their affidavits of 4 February 2019 were also in

compliance with the Receivership Order, the only additional disclosure required being the identification of bank accounts, if they had any. This order was temporarily stayed by the single Court of Appeal Judge on 19 June 2018.

[23] (c) Third Freezing and Receivership Order

The Third Freezing and Receivership Order made by Adderley J on 19 July 2018 was in similar but not precisely the same terms. First of all, it should be noted that the Freezing Order was now reduced by approximately $100m to $75,159,146, reflecting the fact that by then the parties had the Second Award and knew the amount that was required to be paid by the Respondents for the Applicant's shares in UHL.

[24] Paragraphs 9 and 10 of the Third Freezing Order were in the same terms as the Second Freezing Order, save that paragraph 9 specified that the disclosure of the Respondents' assets had to be as at two dates: (i) the date of the Order (19 July 2018); and (ii) as at the date of the First Freezing Order (7 February 2018). The purpose of this is clear – so that the Applicant can test if assets have been disposed of between those two dates. The Receivership Order's disclosure provisions were the same as contained in the Second Freezing and Receivership Order.

[25] All the Orders set out above are limited to the Respondents' assets as at the date of the particular Order, with the Third Freezing and Receivership Order additionally requiring disclosure as at the 7 February 2018. There is no requirement on the Respondents to disclose dealings with their assets prior to 7 February 2018; nor do they have to account for the proceeds of sale of any such assets, if such proceeds were not owned by them as at 7 February 2018. This is not a tracing claim. Neither Mr Meyer nor Mr Kostygin are mentioned in any of the orders and their assets have not been frozen. There appears to be no obligation on them to disclose or account for their own personal assets.

The Respondents' affidavits

[26] Until the 4 February 2019, the day before the application was to come on for hearing before me, there had been no compliance of any sort by the Respondents with the above Orders. The Applicant had a fairly straightforward case for contempt. As noted above, the Respondents' leading Counsel at the Court of Appeal hearing on 30 October 2018 admitted that the Respondents were in contempt. And Blenman JA said this in the Court of Appeal's judgment on the Respondents' appeal:

> "62. It is passing strange, to say the least, that [the Respondents] have not complied with the disclosure orders and that, as Mr Midwinter quite properly admitted, they are in contempt of court. What is more egregious is the fact that learned Queen's Counsel Mr Midwinter, who appeared on their behalf, indicated that his own view was that the court's order ought to be complied with, but did not even attempt to offer an explanation for [the Respondents'] "contemptuous" conduct. Ordinarily, [the Respondents] should not have been heard until they had purged their contempt. However insofar as this point was not argued by [the Applicant], I will refrain from making any further comments on that matter. For what it is worth, however, there was cogent evidence before the judge and before this Court that both [Respondents] have ignored the disclosure orders."

[27] On 4 February 2019, Mr Meyer on behalf of Svoboda and Mr Kostygin on behalf of Koshigi swore what purport to be disclosure affidavits. Both are in remarkably similar form (Forbes Hare were acting for both Respondents at the time). They both give a somewhat qualified apology for not having complied with the Second and Third Freezing and Receivership Orders. The qualification or excuse given is that they considered that the Orders had been wrongly made and that they would be overturned on appeal. They also try to put in context these proceedings and make some serious allegations as to the motive of the Applicant in pursuing this application. Mr Willins described these paragraphs of the affidavits as an irrelevant "*rant*". I do not disagree with him. No adequate explanation for their failure to comply with the disclosure orders has been given.

[28] The material disclosure parts of the affidavits are summarised below.

(1) Mr Meyer's affidavit of 4 February 2019 dealing with Svoboda's assets says as follows:

(a) In paragraph 10, Mr Meyer states that Svoboda has for several years been merely a "*management company for the assets of a family trust*." He goes on to assert that Svoboda did not own any assets beneficially and any that are registered in its name are actually held by Svoboda for beneficiaries under the family trust.

(b) In paragraph 11, Mr Meyer states that the only assets "*since 7 February 2018*" registered in its name are the shares in UHL.

(c) In paragraph 13, Mr Meyer refers to certain alleged legal claims that he says Svoboda has, including against the former trustees of the family trust and against the Applicant.

(d) In paragraph 14, Mr Meyer states: "*To the best of my knowledge, [Svoboda] does not hold any assets other than the assets described above, either legally or beneficially*."

(e) In paragraph 15, Mr Meyer says that Svoboda does not have any bank accounts.

(f) In paragraph 16, Mr Meyer says that Svoboda does not have any receivables and is not due any dividends and is not a creditor of any other person or entity.

(g) In paragraph 17, Mr Meyer states: "*I can confirm that no assets have been transferred out of [Svoboda] since 7 February 2018, the date of the first freezing injunction made in these proceedings*."

(2) Mr Kostygin's affidavit of 4 February 2019 dealing with Koshigi's assets says as follows:

(a) In paragraph 11, Mr Kostygin identifies Koshigi's "*principal asset*" as being its shares in UHL. He appears to accept that Koshigi beneficially owns this and its other assets.

(b) In paragraph 13, Mr Kostygin identifies two further companies, Panarisco Trading Limited and European Prime Ltd, shares in which are owned by Koshigi.

(c) In paragraph 14, Mr Kostygin says that these are the only assets of Koshigi.

(d) In paragraph 15, Mr Kostygin says that Koshigi has no bank accounts and no current sources of credit.

(h) In paragraph 16, Mr Kostygin says that Koshigi does not have any receivables and is not due any dividends and is not a creditor of any other person or entity.

(i) In paragraph 17, Mr Kostygin, like Meyer, states: "*I can confirm that no assets have been transferred out of [Koshigi] since 7 February 2018, the date of the first freezing injunction (which [the Applicant] discharged*)"

[29] Mr Khodykin on behalf of the Applicant filed an affidavit on 4 February 2019 that only responded to Mr Meyer's affidavit (he had not seen Mr Kostygin's at the time). On 12 February 2019, Mr Meyer swore a second affidavit on behalf of Svoboda in which he attempted to deal with some of the criticisms in Mr Khodykin's affidavit. In paragraph 11 of that affidavit, Mr Meyer provided a little more by way of an explanation as to the ownership of Svoboda and its assets. He said that the shares of Svoboda were held by the trustees and he exhibited an encumbency certificate showing this. In relation to the assets held in the name of Svoboda, Mr Meyer asserted that it never received any consideration for any shares that were transferred because it was never the beneficial owner of those shares.

The Applicant's criticisms of the Respondents' affidavits

[30] This disclosure, while probably not being much of a surprise to the Applicant, does leave it in a very difficult position. On the face of it, if the Respondents now truly do not have any substantial assets, it shows that there must have been a concerted judgment proofing exercise carried out by the Respondents. Furthermore, this seems to have largely taken place, at least so far as the Respondents are concerned, prior to 7 February 2019. It is also possible that the affidavits are untruthful and that assets have been transferred since 7 February 2018 in breach of the Freezing Orders. The Applicant invites me to conclude that the affidavits are so incredible that I can dismiss them out of hand and find that the Respondents have not purged their contempts. It says that I do not need cross-examination in order to come to that conclusion. Mr Willins relied on Lexi Holdings plc v Luqman [2007] EWCA Civ 1501 in which Mummery LJ said as follows:

> "28. The issue before Briggs J arising from the alleged deficiencies in the respondent's written evidence related to the effective policing of and ensuring compliance with the protective orders of the court. In these circumstances the court has to make a decision now about the respondent's evidence that he has no assets or only negligible assets. If the

> court takes the view that the respondent's written evidence about his assets and property is incredible, there is no need for cross-examination to establish that it is incredible. This course is pointless and simply postpones appropriate measures for dealing with a person who has submitted incredible evidence to the court. If, however, the court takes the view that the evidence is not incredible and it is contested, the proper course was not to postpone the issue of cross-examination, but to order it in order to determine the position on alleged non-disclosure of assets."

[31] The Applicant's point, made in Mr Khodykin's Ninth and Tenth Affidavits and forcefully by Mr Willins in his submissions to me, is that sophisticated and experienced businessmen such as Mr Meyer and Mr Kostygin would not give assets away for nothing and where it appears that the Respondents have transferred assets, either they must have received substantial proceeds of sale or, if they did not, the inference must be that they retained the beneficial ownership of those assets. In both cases, the Respondents were obliged under the disclosure orders to identify those proceeds or what they did with them, or to include the assets themselves in their disclosure. Furthermore, Mr Willins said that particularly in the case of Svoboda which is said to be owned on behalf of Mr Meyer's family trust, that neither Mr Meyer nor the trustees could have possibly allowed Svoboda to give away valuable assets. Mr Willins therefore submits that the affidavits are on their face "*incredible*" such that I can disbelieve them without cross-examination and find that the Respondents remain in contempt.

[32] Mr Willins sought to demonstrate his argument by reference to a number of examples in relation to the companies described briefly in paragraph [11] above.

[33] (a) <u>Elshtere</u>

Elshtere held a very valuable interest, through a Cypriot company, Polnamon Trading & Investments Ltd ("Polnamon"), in Rive Gauche, the well-known Russian fashion retailer. At some point both Respondents held shares in Elshtere as demonstrated by its Memorandum and Articles. Steps were taken from 21 February 2018 onwards through the Respondents' legal practitioners, Forbes Hare, to re-domiciliate Elshtere in Wyoming which was finally achieved on 12 May 2018, after the Second Freezing and Receivership Order was granted. On 3 April 2018, Elshtere transferred its shareholding in Polnamon to Lenka Investments Limited and to Mrs Inna Meyer. The

Receiver was told, soon after his appointment by Elshtere's registered agent, that the Respondents were not shareholders in Elshtere.

[34] Mr Willins took me to a newspaper article dated 7 December 2018 which was an interview with Mr Kostygin. In that interview, one of his answers suggested that he, Mr Kostygin, retained a stake in Rive Gauche. From that and the fact that Forbes Hare were acting for Elshtere without any apparent conflict of interest, Mr Willins invited me to infer that the Respondents retained a beneficial interest in Elshtere (or perhaps Polnamon). While I can see that I might be able to infer that in one way or another Mr Meyer and/or Mr Kostygin and/or their respective families have retained an interest in Elshtere or Polnamon, I do not see that I can infer that the Respondent companies have, certainly not if I am applying the criminal standard of proof.

[35] The Respondents have not disclosed when they disposed of their shares in Elshtere, save that both Mr Meyer and Mr Kostygin have both said that there were no transfers of assets by the Respondents after 7 February 2018. From that, the Respondents case must be that those shares were transferred prior to 7 February 2018 and that they do not need to account for them, or I assume any proceeds of sale, if received, pursuant to the existing disclosure orders.

[36] The Applicant is seeking, as part of its further disclosure application, for the transactional documents and details of the transfer of the shares in Elshtere and Elshtere's transfer of the Polnamon shares together with an account of what happened to the proceeds of sale in respect of both transfers. If there was evidence that the transfer of the Elshtere shares took place after 7 February 2018, there would be a justification for ordering further disclosure in relation to that transfer, which would have been a breach of the First Freezing Order. If there is not such evidence, I think that further disclosure of a transaction that took place before 7 February 2018 would amount to a considerable broadening of the original disclosure orders and could not be so as to police the Freezing Orders. As for the disposal of the Polnamon shares by Elshtere, I do not see how that can be ordered as it does not involve the Respondents.

[37] (b) <u>Arcor</u>

At some stage Svoboda held shares in Arcor. Arcor was the sole shareholder in Instroi which in turn owned a company called JS Lyubimyi Krai, a valuable confectionary business in Russia. In a similar pattern to Elshtere, Arcor transferred its interest in Instroi to Mrs Meyer on 10 April 2018.

[38] Mr Willins took me to the same interview with Mr Kostygin in the newspaper article of 7 December 2018. Mr Kostygin accepted that the bail of RUB25m required for him to be released from house arrest was paid by JS Lyubimyi Krai. Mr Willins said that this showed that in some way Svoboda must have retained an interest in Arcor and this ought to have been disclosed. I point out that Svoboda is Mr Meyer's company so it is a little difficult to follow how Mr Kostygin's bail money should lead one to the conclusion that Svoboda retained an interest in Arcor. The transfer of Instroi to Mrs Meyer is however consistent with keeping the valuable asset within the family. But it does not really say anything about when or if Svoboda transferred its shareholding in Arcor.

[39] Mr Meyer has sworn that there was no transfer of assets by Svoboda after 7 February 2018. That means that the Arcor shares must have been transferred before then. There is no evidence to contradict that. The Applicant seeks further disclosure, including transactional documents, as to that transfer and the proceeds of sale, whenever it took place. I do not think that disclosure can properly be ordered.

[40] (c) <u>Big Box</u>

The register of Big Box shows that Mrs Meyer originally held 100% of the shares. On 20 December 2016, she transferred 13.03% to Svoboda and on 1 September 2017, she transferred a further 17.98%. So by the end of 2017, Svoboda held 31.01% of Big Box and Mrs Meyer held the remaining 68.99%. There is no evidence as to any consideration paid by Svoboda for those shares.

[41] On 27 November 2017, Bavaria LLC was incorporated in Wyoming and on 23 January 2018, Svoboda's 31.01% shareholding was transferred to Bavaria LLC. This transfer was only two weeks before the First Freezing Order and the Applicant not unreasonably asks what has happened to the

proceeds of sale. If there were no proceeds, then the Applicant says that Svoboda must have retained its beneficial ownership of the shares.

[42] Mr Meyer says in his second affidavit that as Svoboda was never the beneficial owner of any of the shares held in its name, that it received no proceeds of sale. Mr Willins says that this situation is "*wholly incapable of belief*" and that it is inconceivable that Mr Meyer would have gone to the trouble of settling Svoboda's shares on a family trust with professional trustees while at the same time also settling Svoboda's assets on trust (presumably the same family trust). This does seem curious and designed to obfuscate. No doubt the Applicant would like full disclosure as to the trust and how Svoboda's assets were held as a purely bare trustee. But the fact is that the Big Box shares were transferred prior to 7 February 2018 and Svoboda is not obliged to account for assets transferred at that time. It is also noteworthy that until late 2016 Big Box was wholly owned by Mrs Meyer, perhaps indicating that Svoboda was only being used to hold family assets and did not itself have a beneficial interest.

[43] (d) <u>Ulbyka and Kohuhu</u>

As stated above, Koshigi transferred its shares in Ulbyka and Kohuhu to Volya on 5 October 2017 and 19 November 2017 respectively. Shortly after the First Freezing Order, Forbes Hare set in motion the redomiciling of Volya from the BVI to Wyoming. On 18 February 2018, Volya transferred its shares in Ulbyka to Mrs Meyer; and on 5 March 2018, Volya transferred its shares in Kohuhu to Mrs Meyer. On 13 March 2018, Volya was redomiciled to Wyoming. Then on 1 May 2018, Volya was dissolved.

[44] It is odd, to say the least, that Mr Kostygin's company, Koshigi, should transfer to Mrs Meyer and certainly indicates that Mrs Meyer is not holding the shares beneficially. But does it show that she is holding the shares for Koshigi? The consistent redomiciliation of companies to Wyoming through the auspices of Forbes Hare, together with the transfers of assets to Mrs Meyer are also strange and suspicious features of the activities of Mr Meyer and Mr Kostygin and indicate a coordinated strategy of judgment proofing.

[45] Once again, the Applicant says that if Koshigi does not disclose the proceeds of sale that it must have received for the transfer then the "*ineluctable conclusion*" must be that Koshigi retains a beneficial interest in these assets. The Applicant wants disclosure of the transactional documents for the transfer of the shares to Volya, which pre-dated the 7 February 2018, and also an explanation as to what happened to the proceeds. Once again I cannot see that this is information it is entitled to at this stage.

Cross-examination

[46] At the hearing on 5 February 2019, I raised the question of cross-examination as the Respondents had just served their disclosure affidavits and the Applicant was submitting that they were incredible and untruthful. My first reaction was as to whether I could determine that the affidavits were untruthful without cross-examination and so I suggested that the Applicant might like to consider that as a possibility over the adjournment.

[47] No specific application has been made by the Applicant for cross-examination. It is not mentioned in the Applicant's skeleton argument. At the hearing, Mr Willins submitted that there is an exceptional jurisdiction to order cross-examination but he certainly was not pressing for cross-examination and he stuck to his primary submission that I could disbelieve the affidavits without the need for cross-examination. The Applicant would prefer an order for disclosure and for that to be on an unless basis.

[48] Having now also been presented with some of the relevant authorities, I have concluded that this is not a case where cross-examination should be ordered. Quite apart from the exceptional nature of such an order, I do not see that cross-examination could be effective in this case without there being the further disclosure that the Applicant seeks, which would be the necessary material for the purposes of testing the truth of the affidavits to be put to Mr Meyer and Mr Kostygin. If I do not order such further disclosure, I consider that cross-examination would likely be a pointless exercise

that would be met with a refusal to answer questions about what might have happened before 7 February 2018 or what the Respondents have done with the proceeds of sale of their assets.

[49] Mr Nader on behalf of Svoboda resists any order for cross-examination on a number of grounds. (Mr Forte on behalf of Koshigi also resists such an order.) Mr Nader not unreasonably submits that any such order requires there to have been an application on notice containing properly articulated grounds. He says that that is even more important where the individuals concerned are out of the jurisdiction. Somewhat less convincingly, he also relies on the fact that Svoboda is now an Anguillan company and continues to protest the jurisdiction of this Court.

[50] There is power in the Court, under section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969, to order cross-examination on disclosure affidavits, though it is an exceptional power that should be rarely exercised; see Bayer AG v Winter[5]; and House of Spring Gardens v Waite[6]. Both of these authorities indicate that cross-examination may be more readily ordered in the course of contempt proceedings rather than simply to test disclosure affidavits in order to police a freezing order. But it would still be an exceptional order.

[51] While the jurisdiction to order cross-examination has been recognised in the BVI in a case that has strong similarities to the present in terms of the disclosure that had been given, there are serious difficulties in respect of a foreign defendant who is challenging the jurisdiction of this Court and the settled practice is not to order such cross-examination – see the Court of Appeal decision in Rogalskiy v JSC MCC Eurochem.[7] Although there is no extant challenge by the Respondents to the jurisdiction, Mr Meyer and Mr Kostygin are foreign-based and are not themselves parties.

[52] Given the lack of any real application or apparent enthusiasm from the Applicant for cross-examination at the hearing and the exceptional nature of such an order, I will not order it. The contempt application and any further orders that I have to consider will have to be based on my assessment of the written evidence that has been filed.

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[5] [1986] 1 WLR 540
[6] [1985] FSR 173
[7] (Appeal No. BVIHCMAP2017/007)

Purging of contempt

[53] Based on my assessment of the Respondents' disclosure affidavits, have the Respondents purged their contempts? Based on my analysis above of the Applicant's submissions concerning the disclosure, I am not satisfied beyond reasonable doubt that the Respondents remain in breach of the disclosure orders and in contempt. There are some highly suspicious elements to that disclosure, in particular the contention of Mr Meyer that Svoboda is both owned by the family trust and also holds (or held) its assets on trust for others, presumably the same beneficiaries of the family trust, is both illogical and implausible. Nevertheless Mr Meyer has gone on oath to say that any such assets, except for the UHL shares, have not since 7 February 2018 been owned (whether legally or beneficially) by Svoboda. Without cross-examination and/or further disclosure, I cannot be sure that that evidence is untruthful. The position in relation to Koshigi is the same, although Mr Kostygin does not assert that Koshigi's assets were all held on trust.

Further disclosure

[54] At the hearing on 5 February 2019 and in the light of the very late service of the disclosure affidavits, Mr Willins helpfully prepared a new draft Order for me to consider if I was minded to adjourn the application. Included in that was an order for further disclosure with a Schedule attached setting out the disclosure that the Applicant was seeking in relation to Elshtere, Big Box, Arcor, Ulbyka and Kohuhu including all transactional documents and identification of the whereabouts of the proceeds of sale. He was also seeking details of the Respondents' bank accounts which they hold "*or have held*". One further item related to legal fees which was the subject matter of alleged Contempt 11 but which has not been pursued before me.

[55] The application for further disclosure has been put on two bases:

(1) As part of the contempt application, so as to test whether there has been proper compliance with the ancillary disclosure orders; or
(2) As a self-standing application so that the Applicant can properly police the freezing order.

[56] I probably encouraged the application to be made by directing on 5 February 2019 that I would consider "*what further or other orders for disclosure should be made in relation to these assets*".[8] There is no doubt that the Applicant is entitled to have made this application without the need for a formal application to have been issued. I have now had the benefit of hearing argument in relation to this application.

[57] In relation to the application as a "*subset*" of the contempt application, I have already held that on the present state of the evidence, it has not been proved that the Respondents remain in contempt. I have also held that there should not be cross-examination. Accordingly I cannot order the further disclosure in order to test compliance with the existing ancillary disclosure orders.

[58] As to the self-standing application, it seems to me that this is dependent on such an order being necessary to police the existing freezing orders. In this regard, there is an important distinction to be made between a proprietary and an ordinary freezing order. In the normal case, the sole purpose of a freezing order is "*to prevent the dissipation of assets which would otherwise be available to meet a judgment*" per Patten LJ in JSC BTA Bank v Solodchenko [2011] 1 WLR 888 at para 49(1). A proprietary freezing order, by contrast, is aimed at protecting the applicant's property and would generally include orders designed to enable the applicant to trace what has happened to its property and/or the proceeds.

[59] This was an ordinary freezing order to protect the assets that should be available to the Applicant to enforce against, when it has a judgment to enforce or, as it has chosen to apply for liquidators to be appointed, for such assets to be preserved for the liquidators to deal with. The First Freezing Order was made on 7 February 2018, so it can only be assets of the Respondents that were held by or for the Respondents as of that date that are protected. Disclosure as to what has happened to assets prior to that date where they are said not to be held by or for the Respondents as of 7 February 2018 cannot be necessary in order to police the Freezing Orders. While I understand the Applicant's frustrations in this process and its desire to find out what has happened to assets that the Respondents appear to have owned at one stage or another, I am unable to see that this wide

[8] The "assets" were defined as those identified in Mr Khodykin's Ninth Affidavit and were essentially Elshtere, Big Box, Arcor, Ulybka and Kohuhu.

form of disclosure is appropriate to support and police these normal Freezing Orders. I am not therefore going to Order further disclosure.

Other appropriate orders

[60] Mr Willins fairly points out that the Respondents' contempts in not providing disclosure for nearly a year are very serious and, if it had been an individual, there would be likely to have been a committal to prison for a substantial period. It is important that the Court expresses in a meaningful way that it will not tolerate deliberate flouting of Court Orders. As Rix LJ said in his magisterial judgment reviewing the Court's powers to deal with breaches of its orders in JSC BTA Bank v Ablyazov (No 8)[9]:

> "The authorities demonstrate that it is vital for the court, in the interests of justice, to have effective powers and effective sanctions. Without these, it would be possible for a defendant (or, in a different situation, a claimant) to flout the orders of the court, which are the court's considered means by which to keep the scales of justice for the parties even. If once it became known that the court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice. Those wrongly accused of fraud would be relieved of a certain amount of inconvenience, but fraudsters would rejoice and hitch a free ride to interminable litigation on the back of ill-gotten gains."

[61] The Applicant has asked the Court to make an "*unless order*" in respect of compliance with the existing orders or in respect of the further disclosure orders it was seeking. It wanted an order that unless the Respondents complied with those orders by a certain time, they would be debarred from defending any application that the Applicant might make to enforce the LCIA Tribunal Award or to be heard on their own applications or appeals. There would clearly be jurisdiction to make such orders – see Stolzenburg v CIB Mellon Trust Co Ltd[10] and JSC BTA Bank v Ablyazov (No. 8)[11]. It could also be done under the principles explained in Hadkinson v Hadkinson[12].

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[9] [2013] 1 WLR 1331, para 188
[10] [2004] EWCA Civ 827
[11] supra at paras 183-184
[12] [1952] P 285

[62] However, having found that I am not satisfied to the requisite standard of proof that the Respondents are still in contempt and having decided not to order further disclosure, I cannot make any form of unless order.

[63] What I can do is to make the declarations sought in the application that the Respondents have committed the contempts of court as set out in the Schedule attached to the draft order. The Respondents' failure to provide any disclosure until 4 February 2019 constitutes Contempts numbers 1 to 10 in the Schedule, with Contempts 7 to 10 being amended to show the Respondents' failures from 23 July 2018 to 4 February 2019. I consider it important that there is recorded in a Court Order that the Court has found the Respondents to have been in contempt for such a long period. Even though the Applicant is not asking for a fine to be imposed or, as I understand it, for a sequestration order to be made, it is only because this application has been brought that there was some sort of compliance by the Respondents.

[64] While I am prepared to hear the parties on costs, my provisional view is that it would be an appropriate expression of the Court's disapproval of the behaviour of the Respondents to order the Respondents to pay the Applicant's costs of this application including this hearing. I have already ordered the Respondents to pay the Applicant's costs up to the 5 February 2019 hearing and this further hearing was necessitated by the very late disclosure on 4 February 2019 and this was a matter that had to be brought before the Court for it to consider as to whether the Respondents remained in breach of Court Orders. The conduct of the Respondents both before and during the proceedings is a factor to take into account in deciding who should pay costs under CPR 64.6(6)(a) and where I have found that the Respondents were in contempt of court for nearly a year albeit that I have not granted the Applicant the further relief it was asking for, I think that it would be a proper response for the Court to order the Respondents to pay the costs. As I have said, if the Respondents wish to argue against this, they will have the opportunity to do so.

Conclusion

[65] The result of the above, is that I will make declarations as to the Respondents' contempts of Court in failing to provide any disclosure for many months pursuant to the ancillary disclosure orders in

the various Freezing and Receivership Orders. However I do not order either cross-examination or further disclosure. I would ask the parties to draw up a suitable Order that incorporates the above.

Hon Mr Justice Michael Green QC
Commercial Court Judge [Ag]

By the Court

Registrar