EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2013 /0160

BETWEEN:

ABC GRANDESERVUS LIMITED

Applicant

and

EMMERSON INTERNATIONAL CORPORATION

Respondent

Appearances:
Mr. Brian Child for the Applicant
Mr. Robert Weekes with him Ms. Colleen Farrington and Mr. Daniel Burgess for the Respondent

---

2019: May 9 (oral delivery)
May 27 (written hand-down)

JUDGMENT

[1] JACK, J [Ag.]: There are cross applications before the Court. ABC Grandeservus Limited, a Cypriot company, issued an application dated the 6th of February 2019 seeking various relief arising out of the obtaining of a freezing order against it. The freezing order had been obtained by Emmerson International Corporation, which is a BVI company, from Justice Wallbank on the 31st of December 2018,

although the order was actually only approved on the 2nd of January 2019 and filed on the 4th of January 2019.

[2] Emmerson have issued a cross application dated the 16th of April 2019. They seek, pursuant to CPR rule 18.12, a determination that there have been various admissions which are said to result from ABC's alleged failure timeously to serve a defence to Emmerson's ancillary claim.

Background

[3] The background to the current issues is a dispute between two wealthy Russians, Mikhail Abyzov and Viktor Vekselberg. Each have a large number of companies in various jurisdictions. These companies and various associates of theirs are also parties to the current litigation. The two men knew each other since the early part of this century.

[4] Mr. Vekselberg had a business called Integrated Energy Systems. This was held from 2006 onwards through a Belize company, Integrated Energy Systems Limited, which I shall call IES Belize. IES Belize in turn, owned all the shares in a Cypriot company, also called Integrated Energy Systems Limited, which I shall call IES Cyprus. IES did a lot of business with Gazprom, the Russian energy giant.

[5] In 2005 and 2006, it is said that Mr. Abyzov and Mr. Vekselberg entered a joint venture with each other and another Russian, Mr. Slobodin. Virtually everything about the joint venture, as varied from time to time, is in dispute, even including the question as to which parts of the men's agreement are legally binding. There are many allegations of misrepresentation and fraud.

[6] In 2007, there is said to have been a variation of the joint venture so that 85 percent of the shares in IES Belize were held by Mr. Abyzov and Mr. Vekselberg in entities controlled by them in the proportions 49 to 51. The balance of 15 percent of the shares was held by Mr. Vekselberg and Mr. Slobodin on terms agreed between those two gentlemen.

[7] By the end of 2011, Mr. Abyzov says he and his companies had invested $522 million into the joint venture. Mr. Vekselberg should, it is alleged, have invested some $800 million in the Joint Venture.

[8] The Abyzov Parties say that they were tricked; Mr. Vekselberg did not invest anything like that.

[9] The primary claim of the Abyzov Parties against the Vekselberg Parties is what is said to be a contractual exit clause under the Joint Venture Agreement. By this clause, the Abyzov Parties make, as of the 6th of February 2018, a claim in debt for $893,470,360. ABC is neither an Abyzov nor a Vekselberg company. It is an independent corporate administrator and is owned by the Tsirides family in Cyprus. ABC was incorporated in Cyprus in 2010 or 2011. It was a corporate director of IES Cyprus.

[10] In 2011, it said that the Vekselberg Parties stripped IES Belize of almost all its assets. All the shares in IES Cyprus were transferred to a company called Starlex.

[11] Subsequently in 2015, the shares in IES Cyprus were further transferred to Renova Bahamas and Sunglet. All these three companies are Vekselberg entities.

[12] Emmerson say that ABC was involved in an actionable conspiracy and used unlawful means to harm it by its involvement in the 2011 and 2015 transfers. These allegations are the subject of what is being called the Third Ancillary Claim. I shall come back to the pleadings shortly.

[13] The main claims as between the Abyzov Parties and the Vekselberg Parties were listed for a 12-day trial in the middle of last year. Shortly before the trial date, however, the United States of America put Mr. Vekselberg on its sanctions list, thereby freezing all his assets insofar as they are amenable to the American jurisdiction. This meant that the main firm of litigation attorneys in the United

States who had been acting for the Vekselberg Parties could not continue to act for him. The trial, was, by consent, adjourned.

[14] Subsequently, the Abyzov Parties became aware that there appeared to be a dissipation of assets from one of Mr. Vekselberg's main companies, Renova Holdings Limited. Renova Holdings Limited had an indirect subsidiary, Berdwick Holdings Limited, a Cypriot company. This company, Berdwick, held all the shares in a Swiss company called, Liwet Holdings AG. Liwet in turn held shares in a number of valuable Swiss companies, Schmolz-Bickenbach AG and OC Oerlikon Corporation AG.

[15] Over half of the shares in Liwet were transferred, as to 38.9 percent for the benefit of two business associates of Mr. Vekselberg, a Mr. Kramer and Mr. Olkhovik, and as to the other 16.63 percent, to six senior employees of Mr. Vekselberg and his various companies.

[16] The transfers were effected to three trusts governed by Cypriot law: the Polaris Trust, the Olympia Trust and the Next Generation Trust. The trustee in each case was ABC. For completeness, I should say there is another company, Tiwel Holdings AG, which holds shares in a valuable company called Sulzer AG. It is said to be beneficially owned by Mr. Vekselberg, but plays no role in the issues affecting ABC.

[17] I should also say in fairness to Mr. Vekselberg that he disputes that there is anything inappropriate in any of the 2011, 2015 or 2018 transfers. They are all, he says, legitimate transactions for legitimate commercial purposes. I do not need to determine anything about that. ABC concede that Abyzov Parties have a good arguable case that the transfers were improper.

The pleadings

[18] I turn then to the pleadings. These rather resemble the Hydra and share the regrettable tendency of the Hydra's heads to multiply. Justice Wallbank calculated that there were over 70 different pleadings to date in the action. Sadly, there is as yet no King Eurystheus to summons Hercules to thin them down.

[19] Because of the way the arguments have been put to me, I need to give an overview of the relevant pleading documents. The case commenced in December 2013 with the Claim Form issued by four Vekselberg entities against various Abyzov entities including Emmerson and Mr. Abyzov personally. The claim sought a declaration that a put option purportedly exercised by these Abyzov Defendants was ineffective. These Abyzov Defendants, including Emmerson, counterclaimed for a declaration to the opposite effect. This is how the Courts of this Territory come to be seised of the matter. The counterclaim has since been substantially amended and I shall come back to the current position.

[20] In June 2017, Emmerson issued what has become known in these proceedings as the Third Ancillary Claim. Emmerson was the sole claimant by way of Third Ancillary Claim. Mr. Vekselberg himself was a Defendant, as were other Vekselberg entities. Non-Vekselberg entities who were added as defendants to the Third Ancillary Claim included members of the Tsirides family and, as Fourteenth Defendant, ABC.

[21] The allegations against ABC were of conspiracy, causing loss by unlawful means and dishonest assistance, all in relation to the 2011 transfers. ABC acknowledged service and submitted to the jurisdiction in respect of the Third Ancillary Claim. It is represented in those proceedings by Campbells Legal (BVI) Limited. Because it was recognized that the claims in the Third Ancillary Claim depended on the Abyzov Parties establishing the impropriety of the 2011 transfers, it was agreed by all interested parties that the Third Ancillary Claim was parasitic on the main claim. In 2017, an order was made that the Third Ancillary Claim should be separately

case-managed. Although no formal stay was ordered, it was anticipated that the case would stand to be tried only after the trial of the main proceedings.

[22] In the meantime, there had been substantial amendments to the Original Claim and Counterclaim. An Ancillary Claim, which I shall call the First Ancillary Claim, was issued in the name of Mr. Abyzov and four of his companies (but not including Emmerson) against Mr. Vekselberg and 17 of his companies and associates. The detailed Statement of Case at Bundle 1, tab 4H, page 262 runs to 158 pages before the addition of Schedule 6. ABC were not parties to this First Ancillary Claim. This was the state of the pleadings prior to the hearing before Justice Wallbank on the 31st of December 2018.

The *Chabra* Application

[23] Going back to the Liwet transfers, once Emmerson learnt of these, it sought an asset disclosure order against Renova Holdings and Mr. Vekselberg personally. That order was granted on the 29th of October 2018. Renova Holdings failed to comply, but Mr. Vekselberg did provide some documents (although Emmerson complain of their adequacy). At any rate, based on the documents provided, Emmerson decided it should seek Chabra relief against Tiwel, Liwet, Berdwick and ABC. I shall call Tiwel, Liwet and Berdwick together "TLB".

[24] A *Chabra* order is a specialized form of freezing injunction. The object of the order is to freeze assets which may become available for enforcement against a future judgment debtor. In particular, the respondent to a *Chabra* order is in the jargon a non-cause of action defendant or NCAD. In other words, the applicant for a *Chabra* order has no direct claim against the *Chabra* respondent. His hope is that in the fullness of time, he will be able to issue execution against the assets held by the *Chabra* respondent on behalf of the putative judgment debtor: see TSB Private Bank International Bank SA v Chabra [1991] 1 WLR 231. That is not to say that it is not possible to have an ordinary *Mareva* and a *Chabra* order against the same defendant where the Defendant holds assets, both as trustee for

a putative judgment debtor, and assets beneficially for himself which are answerable for a separate direct cause of action against him, but the bases of the two types of injunctions must not be confused and such cases are likely to be unusual.

[25] The application for a *Chabra* order against TLB and ABC was issued on the 3rd of December 2019. It sought, first of all, a freezing order against the Respondents, that is Mr. Vekselberg himself, ABC and TLB.

[26] Paragraph 2, asked for an Order pursuant to CPR rule 17.1(1)(e) requiring the Respondents to provide information about relevant property or assets.

[27] Paragraph 3 said:

> "Permission to amend the counterclaim and ancillary claims herein as appropriate to join the third parties as defendants and seek declarations that ABC and the third parties each hold certain assets as nominee for Mr. Vekselberg and/or Renova Holdings."

[28] And then there is a request for permission to serve outside the jurisdiction.

[29] On the 10th of December 2018, Emmerson filed its skeleton argument in support. In section 2(D), it outlined the law relating to *Chabra* in a perfectly balanced and fair way, as it did in relation to the facts said to show that TLB and ABC held assets for Mr. Vekselberg or Renova Holdings.

[30] Mr. Doctor, QC, who appeared for ABC, accepted that Emmerson had shown a good arguable case for *Chabra* relief against ABC. It is important to emphasize that Emmerson only sought *Chabra* relief against ABC and that the evidence adduced by Emmerson against ABC only went to that issue.

[31] So far as service is concerned, Emmerson sought leave to serve outside the jurisdiction on TLB. It relied on CPR rule 17.3(2)(a) (that TLB are necessary and proper parties to a real issue which it was reasonable for the Court to try) and rule

7.3(10) (a claim under an enactment which confers jurisdiction on the Court). The enactment relied on for rule 7.3(10) purposes was section 24 of the West Indies Supreme Court Act, 1961, but in the event Emmerson placed no reliance on it either before Justice Wallbank or before me. Emmerson did not seek leave to serve ABC outside the jurisdiction on the basis that it considered that ABC were already parties to the action and thus should be served at the offices of Campbells, their attorneys of record in the Third Ancillary Claim.

Service on ABC

[32] It is convenient to deal with this point of service on ABC separately.

[33] Mr. Doctor submitted that the additional relief sought against ABC and the amendments to the pleadings were such as to add a new claim to the action. Therefore, he submitted that the Emmerson had to find a gateway in rule 7.3 to allow the claim to be brought against, and then served on, ABC in Cyprus.

[34] Mr. Weekes, by contrast, submitted that once ABC was a party to the action only the ordinary rules as to amending to add new claims applied. There was no need to serve outside the jurisdiction. Service on Campbells, he submitted, was perfectly legitimate.

[35] In my judgment, the position in law lies somewhat between these two extremes. As to Mr. Doctor's submissions, "new claim" can have two meanings. The expression can refer to issuing a claim form in a fresh action. Such a claim form can only be served outside the jurisdiction if the Claimant can satisfy one of the gateways. However, a new claim can also refer to adding a new cause of action in an existing action. This is the terminology used by the CPR in rule 20.2(2) which provides:

> "The Court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect to which the party

wishing to change the statement of case has already claimed a remedy in the proceedings."

[36] Where an amendment to add a new cause of action in an existing action is permitted, service must, in my judgment, be on the attorney on record: see CPR rule 6.3.

[37] On the other hand, Mr. Weekes' submission does not properly recognize the special position of parties domiciled abroad who are only before the Court as a result of Court permitting a claim to be served outside the jurisdiction under, what used to be called, the Court's extraordinary jurisdiction. Take the case of a defendant against whom the claimant wants to bring claims in contract and in tort. When the claimant applies to serve outside the jurisdiction, suppose the Court allows service of the contract claim but refuses to allow the tortious claim to be served abroad. It would be absurd if the defendant, once he had acknowledged service to answer the contract claim and submitted to the jurisdiction of the Court for that purpose, could then face an application by a claimant to add the tortious claim on the ordinary domestic principles applicable to the amendment of claims.

[38] In my judgment when considering whether to allow an amendment to add a fresh cause of action against a foreign defendant who only appears because of service out of the jurisdiction, the Court should consider whether the fresh cause of action passes through one of the gateways. However, once the new claim does pass the gateway, it can be served at the defendant's address for service within the jurisdiction.

The 31st December hearing

[39] I revert then to the hearing before Justice Wallbank on the 31st of January 2018, which unfortunately was the earliest that the matter could be listed. There were, in fact, no Commercial Division judges on the Island at that time, so this had to be listed virtually. Justice Wallbank was in Paris; Mr. Phillip Marshall, QC, Mr.

Weekes and a senior associate of Walkers were in London; and the other BVI attorneys of the Abyzov parties were in Tortola. All the materials were delivered to Justice Wallbank electronically. Unfortunately Bundle C could not be opened by him. This contained at Bundle C, File 1, page 1, the Draft Re-Re-Amended Ancillary Claim Form for the Counterclaim and Amended Ancillary Claim Form for the Ancillary Claim of the First, Second and Fourth Claimants by way of ancillary claim as three time amended.

[40] The parties which were proposed to be added were TLB and ABC. They were going to be the Twenty-second, Twenty-third, Twenty-fourth and Twenty-fifth Defendants to the counterclaim. The only addition which was made to this Ancillary Claim Form (which is the First Ancillary Claim) was at the end. There was a claim under paragraph 9A which sought declarations (a) in respect of Tiwel's holdings of shares in Sulzer, Liwet's holdings in Schmolz-Bickenbach and OC Oerlikon, and Berdwick's holding of shares in Liwet, as well as some in Schmolz-Bickenbach and in OC Oerlikon; (b) that the Polaris Trust, the Olympia Trust and the Next Generation Trust were sham trusts and of no legal effect; and lastly (c) that ABC holds 506,000 shares in Liwet as nominee for Mr. Vekselberg and/or Renova Holdings. These were the only amendments which were sought in the proposed amended counterclaim.

[41] We have a transcript of the hearing before Justice Wallbank on the 31st of December. It starts with the lawyers introducing themselves. At Bundle 1, tab 4E, page 144, Mr. Marshall starts to introduce the application, in particular, in relation to Mr. Vekselberg. At page 162, he mentions the concerns about the trusts and says that the trusts are discretionary trusts and the trustee is ABC Grandeservus. This Cypriot company was operated, he said, by Mr. Tsirides who had featured in the case before. Various trust beneficiaries were listed in the schedule. He said they were senior people within the Renova Group.

[42] At page 180, he starts to deal with the form of the Draft Orders and said:

"My Lord, the *Chabra* order, which is at tab 4, I believe is the final one which I believe Your Lordship has. I think it's directed at specific things that are held by the relevant *Chabra* parties who are addressed at Paragraph 1 of that order."

The Court then said: "Liwet, Berdwick and Tiwel."

Mr. Marshal said: "Yes. And those particular things that are frozen are specified assets as set out in Paragraph 8."

He then deals with that. At that point he does not refer to ABC at all or point out to any differences with TLB. At page 183, he then moves on to the question of amendments to pleadings. He says that ABC and Berdwick are located in Cyprus and that provision is to be made for proceedings to be issued there and adds that "it may be necessary to seek a freezing order literally there to make Your Lordship's order, any order Your Lordship made, effective locally, and for that reason we make provision for Paragraphs 6 to 7 of the undertaking in Schedule B."

[43] Then he returns to amendments and says: "So, My Lord, there's got obviously got to be, I think, a claim form amendment to allow us to proceed against the *Chabra* Parties and we seek permission to do that. That's simply for the purpose of establishing that they are holding assets as a nominee for either Mr. Vekselberg or Renova Holdings. And we then propose to serve out of the jurisdiction on the basis they would be necessary and proper parties to that proceeding that makes for that issue."

[44] Now what Mr. Marshall says there about the nature of the amendment is completely accurate in terms of the Re-Re-Amended Counterclaim which I have already summarised. The Court then deals with some other matters about the order. Again, it is not pointed out that ABC are a business who have other clients than the Vekselberg entities. But at page 192, Justice Wallbank gives a very short judgment saying that it is appropriate to grant freezing orders.

[45] He then raises a question with counsel about service outside the jurisdiction. Mr. Marshall's primary case is that TLB are necessary parties so they get in under gateway (a). The judge though does not appear to have been entirely happy about that. He read out the whole of CPR 7.3. That is, I think, because there were some difficulties with Mr. Marshall having actual sight of the gateways before him.

[46] Then at page 202, Mr. Marshall says:

> "Well, My Lord, we brought claims, I think, against Mr. Vekselberg and indeed other defendants on the footing that they have engaged [in] transaction[s] designed to defeat our claims which are themselves part of a conspiracy to defraud us and involve fraudulent dealings. And we would say this Liwet transaction is an extension of that. The claims that were there originally were concerning Starlex and Sunglet and then one further transaction that took place after the transfers to them. We would respectfully submit that these recent transactions involving Liwet shareholdings fall into a similar category. So it would be part of that, as I understand any way, are tortious claims which are designed to attack conspiracies of fraud and other fraudulent actions."

[47] The Court: "Okay. So why is the claim in tort brought in the BVI?" Mr. Marshall then explains how it was the Vekselberg Parties who started the matter and deals with various claims unrelated to ABC which were also said to be tortious and fraudulent conduct. The Court then wants to slow down a little bit, and says at 204: "So this is one you need to squeeze into if you are going under that head..." They are talking about the tort head here. “A claim form, this is the Claim Form that you would imagine that you would be filing and serving presumably quite soon. It may be served out of the jurisdiction. "If a claim in tort as made, the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction."

[48] Mr. Marshall says: "Yes, My Lord, I think in this case, obviously we would have to come into the second category of the damage being sustained within the jurisdiction. Then the question would be whether the damage was being sustained by, I suppose, one of the Emmerson parties which was based in this jurisdiction would, be one way of looking at that."

[49] The Court said: "Remind me, is Emmerson a BVI company?" and was told it was.

[50] Mr. Ratan, who is a BVI attorney, interjects from Tortola to say: "Yes, Emmerson is incorporated in the British Virgin Islands, but as I say, Section K in our skeleton argument is where we set it out about the gateways." The gateways relied on, as I have said, were "necessary party" and "some enactment giving jurisdiction".

[51] The Court then summarized his case to Mr. Marshall:

> "So you say that because Emmerson is, it turns out, in the jurisdiction and it might be the victim of this tortious act, if you can establish it, then the damage would be established within the jurisdiction, is that right?"
>
> Mr. Marshall: "That's one way we put it, yes, My Lord."
>
> "Well," the judge continued, "what about the necessary and proper party basis?" And Mr. Marshall then addresses that.

Non-disclosure and misrepresentation

[52] Before drawing my conclusions about how that affects the application to amend the pleadings, I should deal with the issues of nondisclosure. The injunction granted against ABC effectively shuts ABC's business. The injunction freezes assets beneficially owned by clients of ABC. There is provision for ABC to dispose of assets on giving three working days' notice to Emmerson's lawyers, but that is wholly unworkable for a firm in ABC's line of business. It would involve a wholesale breach of other clients' confidentiality. Moreover, other clients may need access to their assets much more quickly than three working days. In my judgment, there is extremely serious nondisclosure in that hearing in relation to ABC.

[53] Firstly, there is barely any mention of ABC. I have pointed out the references to ABC. There is no explanation that ABC has a business managing non-Vekselberg-related assets, although, as appears from the Third Ancillary Claim, Emmerson knew that very well.

[54] Secondly, there is no attempt to put any points which differentiate ABC from TLB. The fact that the form of the injunction shuts down ABC's business was not brought to the Court's attention.

[55] Thirdly, the form of injunction granted was simply not a *Chabra* relief order. It covered all assets of ABC, including those beneficially owned by ABC and those beneficially owned by other clients of ABC. There are other more minor nondisclosures, but I do not need to set these out. I have no doubt at all that had these matters been drawn to Justice Wallbank's attention he would have refused to make the injunction in the form granted. He would have been careful to ensure that only *Chabra* relief was granted.

[56] Mr. Weekes in his skeleton at paragraph 94(a) says the slip was innocent. There is, however, no evidence of that. Indeed when I asked him who had made the mistake, he was unable to tell me. When errors as serious as this have occurred, the Court cannot assume that this was merely one of those accidents which happen in the best-run litigation.

[57] Moreover, I have failed to see any expression of remorse. When the matter was raised with Walkers immediately after the injunction was served on Campbells, Walkers replied in a letter of the 6th of January 2019 at Bundle 1, tab 40, page 404. They agreed to vary the injunction as against ABC, but do not include even the most perfunctory apology for the terms in which the order was obtained in the first place. Where mistakes of this gravity are made, it would be normal to see some display of contrition. I regret that I do not see any in this case.

[58] It is agreed by the parties that the law on discharging injunctions for nondisclosure and then re-imposing injunctions is accurately set out in Mr. Weekes' skeleton. The seriousness of the nondisclosure and indeed the positive misrepresentations that the order against ABC was a *Chabra* order are such that, in my judgment, a discharge of the injunction would be inevitable. This is not a *locus poenitentiae* case. I would then need to consider whether to grant a fresh injunction limited to the relief to which Emmerson were properly entitled. I am, however, relieved from having to carry out this exercise of discharging and then re-imposing the injunction because Mr. Doctor effectively concedes that that is what should happen.

[59] The parties agreed a consent order which appears at Bundle 1, tab 4U, page 424 which has that effect.

[60] Mr. Weekes submits that I do not need to consider the question of discharge: the consent order simply makes that a non-issue. I agree with Mr. Doctor's submission that this elevates form over substance. When I come to consider costs, I shall bear in mind what I found to be very serious nondisclosures by the Applicants for the *Chabra* order.

Amendment of pleadings

[61] I turn then to the amendments of the pleadings. The order granted on the 31st of December 2018 (although only filed later) contained these terms as to amendments: Paragraph 1 : "The Applicant shall have permission to amend the counterclaim and ancillary claims herein as appropriate to add the remaining respondents as parties." And then it dealt with service of the documents outside the jurisdiction.

[62] I have already read from what was proposed at the hearing on the 1st of December as to the Re-Re-Amended Counterclaim. The amended pleadings purportedly served were quite different. Instead of amending the counterclaim, the Claim Form for the First Ancillary Claim was amended in two ways. First of all, Emmerson were added as Sixth Claimant by way of First Ancillary Claim. Then

Liwet, Berdwick and Tiwel and ABC were added as Nineteenth to Twenty-second Defendants by way of ancillary claim. Further, instead of the declarations which had been the subject of the proposed amended counterclaim which was before the Court on the 31st of December, they added an annex to the First Ancillary Claim. This includes a lot more detail, but, in particular, it says:

> "The senior managers who purported to benefit from the Liwet transfers acting at the instruction of Mr. Vekselberg and/or with his authorization, have been pursing concerted action deliberately and specifically intended to prejudice legal action by Emmerson, amongst others. Since at least 2011, the Liwet transfers are the latest step in furtherance of this purpose. The Schedule 6 defendants, save for Tiwel, have thereby entered into a conspiracy to injure Emmerson by unlawful means. Those unlawful means, include, among the Liwet transfers themselves which are actions defrauding creditors..."

Pausing there, the Schedule 6 defendants include ABC.

[63] The prayer, then seeks declarations. And then there is a prayer 7:

> "Emmerson claims damages against the Schedule 6 defendants for conspiracy and causing harm unlawful means."

[64] That obviously is a personal claim against ABC.

[65] The statement of case as opposed to the Statement of Claim is in the form of a re-re-re-re-re-amended defence and counterclaim which also covers the First Ancillary Claim. As I have mentioned, it is an extremely long document. The way in which the pleader, who is unnamed, deals with claims against the Schedule 6 defendants, including ABC, is by adding a Schedule 6 to the document. This sets out in a bit more detail the way in which the Liwet shares came to be transferred to the Cypriot trusts and their allegations as to what subsequently happened. Then they plead that these were transactions defrauding creditors and a claim in conspiracy. It has to be said the claim in conspiracy is very baldly pleaded with very little detail.

[66] There is then a claim for causing loss by unlawful means. And again, those are extremely short. They simply say,

> "Particulars of unlawful means:
>
> The Schedule 6 defendants (other than Tiwel) must have intended and it is to be inferred did intend to cause damage to Emmerson by this use of unlawful means, such damage being a necessary and obvious consequence of putting assets beyond the reach of Emmerson and thus frustrating its ability to enforce a monetary award in these proceedings. Emmerson thereby suffered loss and is entitled to and claims damages. Paragraph 23 is repeated."

[67] No figure is put on damages, but looking at the action as a whole, it will be the 890 million-dollar figure plus interest, so about $1 billion.

[68] Now there are special rules applying to ancillary claims. CPR rule 18.4(1) deals with cases where ancillary claims can be made without permission of the Court, but that does not apply here. Rule 18.4 continues:

> "(2) Where paragraph (1) does not apply, an ancillary claim may be made only if the Court gives permission.
>
> (3) An application for permission under paragraph (2) may be made without notice unless the Court directs otherwise.
>
> (4) The applicant must attach to the application a draft of the proposed ancillary claim form and ancillary statement of claim.
>
> (5) The Court may give permission at the case management conference.
>
> (6) The Court may not give permission after the first case management conference to any person who was a party at the time of that conference unless it is satisfied that there has been a significant change in circumstances which became known after the case management conference.
>
> (7) the ancillary claim is made in:
>
> (a) the case of a counterclaim, when it is filed; and

(b) any other case, when the court issues the ancillary claim form."

[69] Now, as I have already said, there is no correspondence between the draft filed with the application and the documents actually served. The filed amendments were what the Court was considering on the 31st of December. Admittedly, Justice Wallbank could not see the document, but it was as described in the application notice and as described in Mr. Marshall's oral submissions. So the fact that Justice Wallbank did not actually see the document, in my judgment is neither here nor there. The order of the 31st of December does not permit the amending of the statement of case. There is no permission to add the personal claims against LBT or ABC. It just refers to the amendments to the counterclaim.

[70] A Court order has to be construed as any other document having legal effect. In particular, an order has to be construed against the factual matrix known to the Court and to the parties. In this case, the factual matrix is that Emmerson was seeking *Chabra* relief against ABC. That comes from the application at page 92 which I have already read and that is what the Amended Claim Form which was submitted to the Court sought.

[71] Now the hearing on the 31st of December 2018 was *ex parte* and that the Emmerson team drew up the order which was then approved by the Court. I find it a spectacularly unattractive argument that Emmerson can take advantage of drafting infelicities of their own team to bring a claim which was never in contemplation of the Court when the order was made.

[72] I should add that if I am wrong about this, there is a different procedural route by which ABC can seek to have the grant of permission to serve the amended pleading sets aside. Because this was an order obtained *ex parte*, it should have contained a warning that the absent party against whom the order was made could apply within 14 days of service of the order on him to vary or discharge it: see CPR rule 11.16(3). The original freezing order does not contain such a warning.

Instead, it contains a general right to apply on 48 hours' notice. The consent order at 4/4U/424 continues paragraph 17 of the original freezing order so that that provision for variation or discharge continues to apply.

[73] Paragraphs 4 and 6 of ABC's application of the 6th of February 2019 cover the setting aside of the amendments, thus ABC are perfectly entitled (as I find they do) to apply to set aside the amendments purportedly made by Emmerson.

[74] Mr. Weekes submitted that the liberty to apply only applied to the *Mareva* part of the order. There is nothing in the order to support that. Given that the rule 11.16(3) warning was not given, it is more likely the liberty to apply was a general permission to apply to vary or discharge. In effect the liberty to apply on 48 hours' notice was a substitute for rule 11.16(3).

[75] Mr. Weekes sought to argue that the passage of the transcript at page 202 , which I have cited, shows that a personal claim against LTB and ABC was in contemplation. I agree the passage is a little strange in that counsel appear to be suggesting that Mr Vekselberg's alleged fraud and conspiracy could give a gateway against LTB. In effect, he was offered a free gateway by the judge and did his best to take advantage of that gift. I cannot, however, see how that could be turned into the Court granting permission to bring a personal claim for fraud and conspiracy against ABC.

[76] It has to be remembered that ABC were not even under consideration in this part of this hearing, because they had already submitted the jurisdiction and were not going to be served outside the jurisdiction. As Mr. Doctor pertinently argued: "You don't have a billion dollar claim for conspiracy and fraud added to a *Chabra* application made over a telephone call without giving any notice of it."

[77] There was no evidence put before the Court by Emmerson to support a personal claim. On the contrary, the evidence was all directed at *Chabra* relief, which is relief against a *non*-cause of action defendant. I do not accept that Justice

Wallbank was intending to allow a personal claim to be brought against ABC. Such an application was never before him, and he never applied his mind to it. If he had, he would no doubt have given a judgment explaining his reasoning.

Conclusion

[78] The order I make, therefore, is that the purported amendments to the First Ancillary Claim and to the statement of case applicable to that are all disallowed. Emmerson has permission to amend in the form at Bundle 1, tab 4B page 123, a copy of which should be attached to the order. This is without prejudice to Emmerson's right to apply to amend to plead a personal claim against ABC, if so advised, but that should be done by *inter partes* application in the usual way. The Court will have particular regard to the rather bald and un-particularized way in which the allegations of conspiracy and fraud are pleaded. It will also have regard to how the issues between the ostensible beneficiaries of the three Cypriot trusts can be balanced against Emmerson's claim that the true beneficial owner of the assets is Mr. Vekselberg. ABC can, in principle, be neutral on that question. They will no doubt say that they will abide by whatever the Court decides. Whether it is necessary to add the ostensible beneficiaries as parties or name a representative beneficiary, will need to be determined at a case management conference.

[79] The result is that Emmerson's application under rule 18.12 falls away and is dismissed.

[80] I shall hear the parties on costs.

COSTS JUDGMENT

[81] I am asked to deal with the question of costs. CPR rule 64.6 says:

”(1) Where the Court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the cost of the successful party.

(2) The Court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs."

I do not need to read (3) or (4).

"(5) In deciding who should be liable to pay costs, the Court must have regard to all the circumstances.

(6) In particular, it must have regard to –

(a) the conduct of the parties both before and during the proceedings;

(b) the manner in which the party has pursued –

(i) a particular allegation.

(ii) a particular issue; or,

(iii) the case;

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to –

(i) pursue a particular allegation, and/or,

(ii) raise a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim."

[82] In the current case, Mr. Weekes says that ABC has not had complete success. What he proposes is that for the initial period of the 31st of December to the 6th of January, which was the date on which the form of a consent order was, in broad terms, agreed, he accepts that ABC should have a 100 percent of its costs. In the period from then to date, he says that looking at the matter overall and taking a holistic view, there should be payment of 50 percent of the costs.

[83] The matters on which he particularly relies are effectively issue-based, and I am entitled to take those into account. He points out that the order which was originally sought included a determination that the claim had not properly been served because it had to be served outside the jurisdiction. ABC lost on that. He points out that the application to discharge the order completely was never formally abandoned until we came to the hearing to date, although I think it is fair to say that it must have been apparent that the *Chabra* order was one which was not going to be pursued with enormous vigour. And then he says that looking at the matter holistically, although overall Emmerson are the losers, nonetheless they had some success on some items and the only real advantage to ABC has been they are not facing the personal claim.

[84] In my judgment, that approach overlooks the fact that this is a case where there was extremely serious nondisclosure and misrepresentation in the hearing before Justice Wallbank on the 31st of December. Moreover, although he is right that the issue of service was one on which ABC lost, it was not a matter which took up an enormous amount of time. It certainly would not have reduced the hearing time from one and a half days to just one day. This was a matter where it is difficult to say there have been any particular costs which have been caused by ABC pursuing particular arguments on which they lost.

[85] I agree with him that one needs to take a holistic point of view, but when one stands back from this, ABC, in my judgment, have been the very substantial winners. They no longer face a claim for approximately a billion US dollars for conspiracy and fraud. Instead they are in the happy position of being able to take a neutral approach as mere *Chabra* defendants against whom no cause of action lies. Further I cannot overlook the fact of the material nondisclosures and misrepresentations.

[86] So standing back and taking a holistic view, in my judgment, Emmerson ought to pay all the costs of ABC from the 31st of December to date of and in the applications, namely: the applications for the continuation of the freezing order, including the initial consideration of the freezing order; the subsequent applications

made by ABC on the 6th of February 2019; and the cross application made by Emmerson for rule 18.12 relief. These costs, in view of what I found to be serious misrepresentations and nondisclosure, should be assessed and paid immediately rather than at the end of the case.

Adrian Jack
Commercial Court Judge (Ag)

By the Court

Registrar