EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/052

BETWEEN:

ALEXANDRA VINOGRADOVA

Appellant

and

[1] ELENA VINOGRADOVA
[2] SERGEY VINOGRADOVA

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Robert Levy QC with Mr. Iain Tucker for the Appellant
Mr. Brian Lacy and Mr. Alexander Muksinov for the 1st and 2nd Respondents

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2019: March 27;
July 30.

Commercial Appeal – Interlocutory Appeal – General Principles for Receivership – Appointment of Receivers – Threshold test for appointment of Receivers – Good arguable case - Whether learned judge erred in exercise of his discretion in appointing Receiver and continuing his appointment– Appropriateness of appointing Receiver by local court where similar relief available in a foreign court closely connected to the disputes between the parties - Appropriateness of appointing Receiver where a freezing injunction could provide adequate protection for the claimant.

REASONS FOR DECISION

[1] **WEBSTER JA [AG.]**: On 27th March 2019 we heard an appeal by the appellant, Ms. Alexandra Vinogradova, against the decision of the learned judge ("the judge") dated 16th November 2018 by which the judge ordered the continuation of the appointment of Mr. John Ayers as the receiver of Grantway International Limited

("the Receiver"). We allowed the appeal, set aside the appointment of the Receiver and the costs order made by the judge, and ordered the respondents to bear the costs of the appellant in the Court of Appeal and in the court below, as well as the costs of the Receiver. We promised to give written reasons for our decision and we now do so.

Background

[2] Mr. Alexander Vinogradova was a successful Russian businessman who was killed in Russia by an unidentified person on 31st July 2011. He is referred to in the judge's Reasons for Judgment and in this decision as "VAV". VAV was survived by his widow, Elena Vinogradova, his son by his widow, Sergey Vinogradova, and his daughter, Alexandra Vinogradova. Alexandra's mother is VAV's first wife, Mrs. Venera. Elena, Sergey and Alexandra comprise the heirs to VAV's estate and are referred to together in this decision as "the Heirs". Alexandra is the appellant and is referred to individually as "Alexandra". Elena and Sergey are the respondents and are referred to together as "the respondents". References to the parties by their first names are for convenience only and no disrespect is meant.

[3] Grantway International Limited ("Grantway"), is a British Virgin Islands ("BVI") company. Grantway was under the control of Alexandra until the appointment of the Receiver in July 2018. Grantway's assets consist of the shares of three Cypriot companies, Bescant Enterprises Ltd. ("Bescant"), Daykel Holdings Ltd. and Estov Enterprises Ltd. (together "the Cypriot Companies"). Bescant was used by VAV to make numerous loans to himself and other persons. The loans to VAV amounted to approximately US$7.75 million ("the VAV loans").

[4] Following the death of VAV, the Heirs entered into various agreements regarding the distribution of the assets and liabilities of VAV's estate. The agreements include:

i. An Agreement on Division of Hereditary Property dated 11th March 2012 dealing with certain Russian real estate properties. The properties were divided equally between the Heirs.

ii. A Sharing Declaration dated 20th March 2012 dealing with VAV's foreign assets which included an agreement to become joint beneficial owners of Grantway. The Sharing Declaration contained provisions for:

(a) the distribution of cash in the estate among the heirs;

(b) the sharing of the proceeds of loans payable to Bescant from various persons including the VAV loans;

(c) the transfer of the loan recovery proceeds from Bescant to Grantway for eventual distribution to the heirs in the agreed proportions; and

(d) the transfer by Skopev Holdings Limited of its share in LLC Visostroy to Alexandra and its share of the Russian entity, Staroalekseevskaya DOM 8 ("DOM 8") to Elena.

iii. An Instruction in March 2015 ("the Instruction") implementing the arrangements under the Sharing Declaration. In exchange for the receipt of certain loan proceeds and DOM 8, Elena agreed to give up her beneficial interests in Skpoev, Bescant and Grantway in favour of Alexandra and Alexandra agreed that she would have no further interest in DOM 8.

[5] Following the signing of the Instruction, Alexandra acquired control of Bescant and the right to collect the loans provided by Bescant to VAV and other persons. Alexandra caused Bescant to issue various powers of attorney to her husband, Boris Koisman ("Boris"), to pursue claims to recover the VAV loans.

[6] In July 2016, Bescant started proceedings in the Solntseva District Court of Moscow against the Heirs for the recovery of loans made by Bescant to VAV amounting to a principal sum of approximately US$7.75 million, plus interest. On 6th February 2017, Bescant obtained a pre-judgment freezing order from the District Court which prohibited the Heirs from dealing with their assets up to a value of approximately US$17.447 million. It appears that this freezing order is still in place because on 7th September 2018, the respondents gave the BVI Commercial Court (the "BVI court") an undertaking not to apply to the District Court in Moscow to vary, set aside or discharge the said order.[1]

[7] On 14th June 2017, the Solntseva District Court entered judgment in favour of Bescant against the Heirs for approximately US$11.3 million (the "Russian judgment"). The respondents appealed the Russian judgment to the Moscow City Court. The City Court dismissed the appeal on 2nd August 2018.

[8] Prior to the delivery of the judgment by the City Court dismissing the appeal the respondents filed a claim in Geneva, Switzerland on 8th June 2018 against Alexandra seeking declarations from the Swiss Court that certain clauses in the Sharing Declaration and the Instruction were null and void by reason of "defect of consent"[2] (the "Swiss proceedings"). The respondents contend that if they are successful in the Swiss proceedings, they will recover their beneficial ownership of Grantway which they had acquired by inheritance and which they say they lost as a result of Alexandra's fraudulent conduct.

[9] On 13th July 2018, prior to the decision of the City Court, the respondents applied ex parte to the BVI court for the appointment of a receiver over the assets of Grantway. The application was made in support of the Swiss proceedings under the court's **Black Swan** jurisdiction.[3] The application was supported by the [First]

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[1] Record of Appeal Vol. 2, Tab 27, pp. 790 to 792.
[2] Record of Appeal Vol. 1, Tab 21, pp. 346 to 368.
[3] Black Swan Investment I.S.A. v Harvest View Limited and others BVIHCV2009/0399 (delivered 23rd March 2010, unreported).

Affidavit of Ivan Evstifeev, the respondents' Russian legal advisor, sworn on 13th July 2018,[4] and a certificate of urgency. The primary ground of the application was that the respondents were concerned that if the appeal against the Russian judgment was decided against them, Alexandra would cause steps to be taken to enforce the judgment against the Heirs. She would then cause the recovered funds, which belong to Grantway ultimately, to be dissipated by transferring them out of Bescant for her own benefit instead of being paid up the corporate chain to Becscant's parent, Grantway, as contemplated by the Declaration. This concern is based on Alexandra's previous dishonest and fraudulent conduct which was being addressed in the Swiss proceedings. In the meantime, the respondents sought the assistance of the BVI courts to protect their interests by appointing a receiver of Grantway. The receiver, as the person in control of the shares in Bescant, would be able to control the activities of Bescant including taking charge of the execution of the Russian judgment to ensure that it was carried out in such a way as to protect and preserve the assets of Grantway and Bescant. Further details of the application are dealt with below under the heading 'Evidence of risk of dissipation at the ex parte hearing'.

[10] The judge heard the ex parte application on 17th July 2018 and appointed the Receiver. The order appointing the Receiver was set aside by the judge of his own motion the following day for material non-disclosure. The respondents filed a second application on 20th July 2018 which the judge granted and re-appointed the Receiver on 23rd July 2018.

[11] The receivership was continued on 16th August 2018 subject to joining Alexandra as a defendant and with full directions for the inter partes hearing scheduled for October 2018.

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[4] Record of Appeal Vol. 1, Tab 13. Pp. 41 to 47.

The Inter Partes Hearing

[12] The inter partes hearing for the continuation of the receivership took place before the judge on 15th and 16th October 2018. The respondents' position at the hearing was substantially the same as at the ex parte hearing, subject to two new points that we deal with below under the heading 'Evidence of dissipation at the inter partes hearing'.

[13] Alexandra denied the allegations of dishonest and fraudulent conduct and dissipation. She submitted that the appointment of a receiver over Grantway was an entirely improper use of the court's process and that the receivership should be set aside.

[14] On 16th November 2018, the judge delivered an oral judgment by which he ordered that the receivership should continue with the limitation that the Receiver could not, without the prior sanction of the appropriate Russian court, take any step that would have the effect of staying or attempting to stay the execution of the Russian judgment.[5] On 19th December 2018 he delivered his written reasons for the oral judgment delivered on 16th November 2018 ("the Written Reasons").

The Appeal

[15] Alexandra was dissatisfied with the judge's decision and appealed to this Court. The original notice of appeal which was filed before the Written Reasons was delivered lists a single ground of appeal, that is, that the judge was wrong to order the continuation of the receivership for the reasons set out in the notice of appeal.[6] On 29th January 2019, Alexandra filed an amended notice of appeal[7] following receipt of the Written Reasons. The grounds of appeal in the amended notice are:

i. The respondents did not have a good cause of action in relation to either the jurisdiction or merits of the Swiss proceedings;

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[5] The effect of this order is dealt with below at para. 48.
[6] Record of Appeal Vol. 1, Tab 1, pp. 1 to 5.
[7] Supplemental Bundle, Tab 1, pp. 1 to 4.

ii. There was no real risk of dissipation;

iii. The judge's order staying the execution of the Russian judgment was entirely inappropriate; and

iv. The judge erred in having recourse to the balance of harm and status quo tests.

Before discussing the issues that arise from the grounds of appeal we will make general comments on the law and practice relating to the appointment of receivers in the BVI.

General principles - Receiverships

[16] The jurisdiction to appoint receivers is found in section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**[8] which reads:

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

[17] The procedural rules for appointing receivers are contained in Part 51 of the **Civil Procedure Rules 2000** (the "CPR") which provides that a receiver can be appointed or an injunction granted to restrain a judgment debtor from dealing with any property identified in the application. Part 51 also provides that the court can appoint a receiver or grant an interim injunction without notice to the defendant. An application for interim relief is made under Part 17 of the CPR as was done in this case.

[18] The usual situation for the appointment of a receiver is to help to enforce the payment of a judgment debt. However, the court's jurisdiction to appoint a receiver is much wider and goes beyond just aiding in the enforcement of payment of a judgment debt. Receivers are frequently appointed before judgment. In

[8] Cap. 80 of the Revised Laws of the British Virgin Islands 1991.

Finecroft Limited v Lamane Trading Corporation[9] Hariprashad-Charles J cited, with approval, the statement of principle for the justification for appointing a receiver in **Snell's Equity** (31st edition 2005) Chapter 17 ("Receivers") as follows:

> "17-03 The court appoints receivers for two quite different purposes. First, the court may appoint a receiver as an interim means of preserving property until the rights of those interested in it can be determined... Secondly, where a litigant has obtained judgment, the Court will sometimes appoint a receiver as a form of execution."[10]

This case falls under the first limb of the general principle in **Snell** and the respondents were required to satisfy the judge that the appointment of the Receiver was necessary to preserve the assets of Grantway pending the resolution of their claims in the Swiss proceedings. In order to satisfy this requirement, the respondents needed to satisfy the three elements that apply in all applications for appointing receivers, namely:

i. That he has a good arguable case for the appointment of a receiver;

ii. There is a real risk of dissipation; and

iii. It is just or convenient to appoint a receiver.

Ground 1 - No good arguable case - The ex parte application

[19] As stated above, the respondents sought protection from the BVI court by the appointment of the Receiver to take control of Grantway, and by extension Bescant, with the aim of preserving the value of Grantway in the event that they are successful in the Swiss proceedings. To succeed they were required to satisfy the judge that they have a good arguable case for succeeding in the Swiss proceedings. This is the test that was applied by Rawlins JA in **Norgulf Holdings Limited and another v Michael Wilson and Partners Ltd**[11] and is generally accepted as the correct test for determining whether the applicant has a good arguable case.

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[9] BVIHCV2005/0264 (delivered 27th April 2006, unreported).
[10] Ibid at para. 58.
[11] BVIHCVAP2007/0008 (delivered 29th October 2007, unreported).

[20] The good arguable case test was described by Mustill J in **Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen**[12] as entailing consideration whether the case advanced by the claimant seeking freezing order relief 'is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'.[13] On appeal, the English Court of Appeal agreed with this refinement of the test and added:

> "A 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction. But at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction."[14]

[21] It is common ground that the good arguable case test, with the Mustill J refinement, applies to the appointment of a receiver and Mr. Levy, QC submitted that the test has a higher threshold in applications for the appointment of a receiver (as opposed to the grant of an injunction). We agree. In the **Norgulf** case, Rawlins JA accepted counsel's submission that '...the threshold test to justify the appointment of a receiver should at least be equal to that which is required for obtaining a freezing injunction, or even a higher threshold'.[15] Having accepted this submission, Rawlins JA continued:

> "This was with particular reference to the statement in *Gee on Commercial Injunctions* that the appointment of a receiver is more intrusive, more expensive, and less reversible than the grant of an injunction. I accept that the appointment of a receiver is usually more draconian than issuing a freezing order because of the expenses and inconvenience which often arise with the appointment. When a receiver is appointed a defendant no longer has control of the assets of the company to continue its operation as a commercial concern. The business could sustain irreparable damage by the publicity that the receivership may bring. The minimum threshold test for appointing a receiver would require an applicant to have a good arguable case."[16]

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[12] [1984] 1 All ER 398.
[13] Ibid at p. 404.
[14] [1984] 1 All ER 398 at 415.
[15] Supra n.11 at para. 26.
[16] BVIHCVAP2007/0008 (delivered 29th October 2007, unreported) at para. 27.

[22] The test for the appointment of a receiver continues to be that, as a minimum threshold, the applicant has a good arguable case against the respondent which is not necessarily a case with more than 50% chance of success, but within that test, the applicant must satisfy a higher evidential threshold than if he was applying for a freezing injunction.

[23] The test for whether the respondents have a good arguable case revolves around the jurisdiction of the Swiss courts to entertain their claim and the merits of the claim. Both parties relied on reports from expert witnesses to support their respective positions. The judge analysed the evidence and concluded at paragraph 43 of the Written Reasons that:

> "The evidence of the experts as to whether there is a good arguable case that the Swiss courts will accept jurisdiction or that the action in Switzerland will succeed is conflicting. The court was unable to choose one over the other at this stage, but on one view there is a good arguable case on each of those heads."

This finding by the judge is in accordance with the test for a good arguable case. As stated above, the test is satisfied even if the respondents' case does not have more than a 50% chance of success. Put another way, the judge did not have to be satisfied that the respondents had a better case than Alexandra in respect of the Swiss proceedings, but he had to be satisfied that the evidence taken as a whole showed that the respondents had a good arguable case.

[24] In reviewing the judge's exercise of his discretion, we reminded ourselves that as the judge hearing the application, he was not required to resolve serious questions of fact or law, nor to conduct a mini-trial of the contested issues in the case. Mr. Lacy relied on the following statement of Parker LJ in **Derby & Co Ltd & others v Weldon & others**[17] in support of this basic proposition:

> "...What however should not be allowed is (1) any attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a *Mareva* is sought or relating to the elements of the *Mareva* jurisdiction such as that of dissipation or (2)

[17] [1990] Ch. 48.

> detailed argument on difficult points of law on which the claim of either party may ultimately depend. If such attempts are made they can and should be discouraged by appropriate orders as to costs."[18]

This is not to say that the Court cannot take a view of the evidence on an ex parte application. Mr. Lacy reminded the Court of the following passage from **Gee on Commercial Injunctions**[19] (12 – 026):

> "Nevertheless, the court will take into account the apparent strength or weakness of the respective cases in order to decide whether the claimant's case, on the merits, is sufficiently strong to reach the threshold, and this will include assessing the apparent plausibility of statements in affidavits. The test is not a particularly onerous one, however. The court should not conduct a mini-trial on this and the Court of Appeal will normally respect the "instincts" of an experienced judge on whether there is a good arguable case, and not interfere with it unless it is plainly wrong."

[25] The passage from **Gee** is a reminder that although the Court of Appeal should not resolve difficult issues of fact and law, it must nevertheless assess the untested affidavit evidence to determine whether the applicant made out a good arguable case to the required threshold for the appointment of a receiver, and then decide whether the hearing judge erred in his treatment of the evidence.

[26] We have reviewed the expert reports and factual evidence and the extensive written and oral submissions by learned counsel. Though we entertain some doubt about the strength of the respondents' case in the Swiss proceedings we do not think we should disturb the judge's assessment that the evidence which, on one view, he found shows a good arguable case as to the strength of the respondents' case in the Swiss proceedings.

Ground 2 - Risk of Dissipation

[27] This case involves an application for the appointment of a pre-judgment receiver over the shares of Grantway. There is no pleaded cause of action against Grantway and the stated purpose of the receivership was to protect the underlying

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[18] Ibid at p.58.

[19] Steven Gee, *Commerical Injunctions*, (6th edn, Sweet & Maxwell UK 2016).

assets of Grantway (the "Bescant recoveries") so as to preserve the value of the shares in Grantway. This objective is consistent with the decided cases including the **Norgulf** case where Rawlins JA said that '...the main object for the appointment of a receiver is to safeguard or preserve property for the benefit of those who are entitled to it'.[20]

[28] Applied to this case, the respondents were concerned that Alexandra would dissipate the recoveries from the Russian judgment and thereby diminish the value of the Grantway shares in which they claim an interest. In order to get protection, the respondents must satisfy the Court that the person in control of Grantway and Bescant (Alexandra) is likely to dispose of the Bescant recoveries other than in the normal course of the company's business. To do this, the applicant must provide 'solid evidence of that risk'[21] and a 'real risk that the assets may be dissipated'.[22] Kawaley JA in the same case said:

> "For dissipation to justify the grant of an interim freezing injunction (or indeed the appointment of a receiver) according to established principles, there must be a real risk that either (1) the respondents will not retain sufficient funds to meet a money judgment which the appellants hope to obtain, or (2) the respondents will dispose of property which belongs to the appellants..."[23]

The respondents' case falls into the second category as they claim an ownership interest in the shares of Grantway and Grantway indirectly owns the assets of Bescant.

[29] What then was evidence of dissipation? The answer to this question can be approached in two stages: (1) up to and including the ex parte application and (2) later at the inter partes hearing.

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[20] Supra n. 16 at para. 22.
[21] Yukos CIS investments Ltd and another v Yukos Hydrocarbons Investments Ltd and others HCVAP 2010/0028 (delivered 26th September 2011, unreported) at para. 36 per Redhead JA.
[22] Ibid at para. 44 per Redhead JA.
[23] Supra n. 21 at para. 156.

Evidence of Dissipation at the Ex Parte Hearing

[30] The material before the judge on the ex parte application contained little, if any, evidence of dissipation. The stated ground of the application was to protect the respondents against the execution of the Russian judgment by Alexandra and her husband, Boris, before the assets of Bescant are dissipated. The basic ground of the application is set out at paragraph 13 of the application filed on 13th July 2018:

> "The appointment of a receiver pending the resolution of the Swiss proceedings is needed in order to prevent the infliction of harm to the lawful interests of Elena and Sergey which may occur if a decision in favour of Bescant (with respect to its claim under the VAV loans) is given by the Moscow City Court on 18 July 2018. In such circumstances, if a receiver is not appointed, Bescant is highly likely to proceed with the enforcement of the judgment against Elena and Sergey. However, if a receiver over Grantway is appointed by the BVI court, the receiver will be able to exercise control over Bescant (which is wholly owned by Grantway) and, among other things, take control of the Russian proceedings and revoke the power of attorney granted by Bescant in favour of Alexandra's husband Boris with respect to the said proceedings."

[31] The reason for the appointment of a receiver is also apparent in the respondents' certificate of urgency dated 13th July 2018 which states in paragraph 11:

> "The appointment of a receiver pending the resolution of the Swiss proceedings is needed in order to prevent the infliction of harm to the lawful interests of Elena and Sergey which may occur if a decision in favour of Bescant is given by the Moscow City Court on 24 July 2018. In such circumstances, if a receiver is not appointed, Bescant is highly likely to proceed with enforcement of the judgment against Elena and Sergey."

[32] The respondents' skeleton arguments and the second certificate of urgency dated 19th July 2018 are to the same effect, and the evidence of the respondents' fact witness, Russian attorney, Mr. Ivan Evstifeev, also addresses the point. In paragraph 37 of his first affidavit, filed on 13th July 2018, in support of the first application he stated that Bescant, acting through Boris, '...is highly likely to proceed with immediate enforcement of the judgment against Elena and Sergei...' and at paragraph 27 he said that 'the applicants believe that any amounts which may be recovered by Bescant are highly likely to be dissipated by Alexandra'.

[33] By the time Mr. Evstifeev filed his second affidavit on 20th July 2018[23] in support of the second application he repeated, with very little added detail, the risk of dissipation. After repeating the facts about the need to prevent the execution of the Russian judgment he concluded the affidavit in paragraph 33 with the bald statement that, '...Any amounts that may be recovered by Bescant would likely then be dissipated by Boris and Alexandra via Grantway and the appointment of a receiver is needed to prevent this'.

[34] In summary, that was the state of the evidence at the hearing of the ex parte application. The respondents' fear that the assets would be dissipated was based on the allegations of fraud against Alexandra. However, these fraudulent acts are said to have occurred in September 2011, December 2011 and February 2015. They have been denied and explained by Alexandra and are now the subject of the Swiss proceedings. While we have decided that we should not resolve factual issues at this stage and defer to the judge's findings that they constitute a good arguable case in respect of the Swiss proceedings, we do not think that the evidence of dissipation reached the required threshold of 'solid evidence' or 'a real risk' that the Bescant recoveries will be dissipated.

Evidence of Dissipation at the Inter Partes Hearing

[35] The respondents used the occasion of the inter partes hearing to bolster their evidence of the need to continue the appointment of the Receiver. The two new grounds that they added to justify the continuation of the appointment of the Receiver, and by extension strengthening the allegation of dissipation, are:

i. the need for the Receiver to take control of other money claims in Russia by Bescant; and

ii. the need to take control of the actions of Boris who, in breach of an agreement with the receiver, has proceeded with steps to execute the Russian judgment.

[23] Record of Appeal, Vol.1, Tab 14, pp. 49 to 54.

[36] In relation to the need to take charge of the other Bescant claims in Russia, the respondents relied on the fifth affidavit of Mr. Evstifeev sworn on 8th October 2018[24] where he referred to the affidavit of Mr. Dmitri Bogatov, who, in his affidavit, listed details of the other Bescant claims in Russia. Relying on this evidence, Mr. Evstifeev stated that 'these proceedings have not been pursued with reasonable diligence', referring to the Bescant claims in Mr. Bogatov's affidavit. However, Mr. Evstifeev's criticism of the pursuit of these claims should be viewed with caution. He relied on Mr. Bogatov's affidavit which was produced at Boris' request for the purpose of showing the effects and potential damage that would be caused by revoking the Bescant powers of attorney that Boris held and used to pursue the Bescant claims. Mr. Bogatov's evidence did not deal with the diligence with which the claims were being pursued, only the effect of revoking the powers of attorney. There is no evidence in Mr. Bogatov's affidavit, or elsewhere, that the claims were not being pursued with reasonable diligence. Mr. Levy's response to this new allegation was that Alexandra has been pursuing the claims for six years and it is only now that the respondents want to appoint a receiver that there is a fear that Alexandra will not pursue the claims with reasonable diligence. Even if there was a genuine concern about Alexandra's diligence in pursuing the other Russian claims, this does not go to discharging the burden of showing that there was solid evidence of a real risk of dissipation. Lack of diligence is not the same as dissipation. We do not think that Mr. Evstifeez's assertion about lack of diligence in pursuing the other Russian claims assists the respondents in showing that there was a real risk of dissipation and that there was a need for appointing a receiver.

[37] The other new ground for seeking the continuation of the receivership is the allegation that Boris had secured three writs of execution for the enforcement of the Russian judgment without the knowledge or consent of the Receiver. This suggestion was rejected by the judge. At paragraph 46 of the Written Reasons he

[24] Record of Appeal, Vol. 1, Tab 20, pp. 104 to 115.

found that: '...the attempts by Alexandra's husband, Boris, to use the Power of Attorney to enforce on behalf of Bescant the Russian Judgment cannot ipso facto be seen as an attempt or risk of dissipation'. There was no challenge to this finding in the respondents' counter notice of appeal and there is no basis for this Court to interfere with the judge's finding. Nothing further needs to be said about this new ground.

Summary of Dissipation

[38] We have reviewed the evidence supporting the respondents' fear that Alexandra is likely to dissipate the Bescant recoveries and not pay them up the corporate chain to Bescant's parent, Grantway. The only evidence that could support a finding of dissipation are the allegations of fraud against Alexandra that are being litigated in the Swiss proceedings. While we are not resolving serious factual issues at this stage we are also mindful that the Court must assess the evidence even at this preliminary stage, as the judge did, to determine if it discloses a good arguable case for saying that there was a serious risk of dissipation. We do not think that the evidence, even when combined with the new allegations of dissipation raised for the first time at the inter partes stage, has reached the required threshold of solid evidence showing a real risk of dissipation.

[39] We note that the judge did not make a clear finding on dissipation. He referred to the respondents' case on dissipation and the need for a receiver, but he did not make a specific finding that there was a real risk of dissipation. We had to infer that this was his finding based on the fact that he continued the appointment of the Receiver. If there was a finding that there was a real risk of dissipation, we disagree with it based on the state of the evidence both on the ex parte application and later at the inter partes hearing. With respect, we set aside any such finding as being one that was not open to him on the state of the evidence and was outwith the generous ambit of reasonable disagreement.

Grounds 3 and 4 - Just and Convenient

[40] The third element for the appointment of a receiver is that the appointment must be just and convenient. In dealing with this element, we will deal with the following issues:

a. The appropriateness of appointing a receiver;

b. The judge's order staying the execution of the Russian judgment (Ground of Appeal 3); and

c. The judge's recourse to the "balance of harm" and the "status quo" tests (Ground of Appeal 4)

Appropriateness of Appointing a Receiver

[41] In paragraph 18 above, we alluded to the fact that if a claimant claims an interest in property held by a third party or seeks to freeze the assets of a third party to give the claimant protection in the event that he is successful in his claim, the court will appoint a receiver if the claimant meets the stated criteria. We also pointed out the court's reluctance to appoint a receiver when the grant of a freezing injunction would give the claimant sufficient protection. We referred to the judgment of Rawlins JA in the **Norgulf** case which sets out the court's position on this issue. We would add that this principle applies with full force when the respondent is a trading company, and to a lesser extent when the respondent is a holding company. However, the basic principle is and continues to be that an order for the appointment of a receiver is a draconian measure that should not be granted when a freezing injunction would provide the claimant with adequate protection.

[42] Grantway is a holding company and therefore the appointment of a receiver would not be as disruptive as if it was a trading company. Its only asset is its shares in Bescant and two other subsidiaries which do not feature in this matter. The shares in Bescant give Grantway an indirect interest in the potential loan recoveries by Bescant. It is commonplace for the Commercial Court to grant injunctions to freeze monies held by a defendant. In this case the judge could

have considered granting a freezing injunction against Grantway and Alexandra restraining them from taking any action to cause the Bescant recoveries to be transferred out of the company other than in the normal course of business, or as dividends to Grantway. What would have been even more effective was for the respondents to apply in the Russian proceedings for interim relief where the parties reside and where the recoveries are or will be located. This is what Bescant did before judgment in the Russian proceedings.[25] The argument of the respondents that the procedure for applying in Russia would be inconvenient and expensive pales in comparison to appointing the Receiver in the first place and then continuing his appointment.

[43] In the absence of evidence that the relief sought by the respondents is not available in Russia, and in light of the evidence that the Russian court had granted a pre-judgment freezing order, we are satisfied that the respondents should have approached the Russian courts for the relief that they are seeking in the BVI.

[44] In this case, we also had to grapple with the reality that the appointment of the Receiver had the effect of handing over control of the execution of a judgment of a foreign court to an officeholder appointed by the BVI court. The judge was alive to this reality because he noted at paragraph 47 of the Written Reasons that:

> "This is prima facie inconsistent with comity, as it deprived Bescant of the fruits of its judgment which the Russian Court of Appeal has determined it should have, and had granted a pre-judgment injunction to protect."

He addressed the apparent inconsistency by staying the execution of the Russian judgment.[26] However, the judge proceeded to continue the appointment of the Receiver at the inter partes hearing relying on the new point raised by the respondents that a receiver was necessary to take charge of the other claims by Bescant 'in numerous jurisdictions' that required the active involvement and monitoring of a receiver.[27] The judge did not make a specific finding that these

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[25] See para. 6 above.
[26] See para. 48 below.
[27] See para. 33 of the Written Reasons.

other claims were not being pursued with reasonable diligence, a finding which, in any event, we have found would not comport with the evidence.[28]

[45] Finally, on the issue of the appropriateness of approaching the BVI court for interim relief, we note that in 2010 Bannister J, who presided over the Commercial Court for many years, issued a timely warning about using the BVI courts to get interim relief when a foreign court is more appropriate for granting such relief. In **Yukos CIS Investments Limited and another v Yukos Hydrocarbons Investments Limited and others**, he posited:

> "...If for whatever reason the claimants do not wish to approach the Dutch court for such relief, then it seems to me illegitimate for them to obtain it by the back door by coming here and asking this Court to enjoin the BVI subsidiaries. For me to attempt to grant relief in respect of a matter which is pre-eminently within the province of the Dutch court would, in my judgment, give rise to the risk of inconsistent orders being made in different jurisdictions and, if only for that reason, would be inimical to the comity which I must and am anxious to show towards the courts of a friendly jurisdiction."[29]

The claimants in the **Yukos** case sought relief that included the appointment of an interim receiver over the BVI companies in the case. Bannister J refused the application and his decision was affirmed by the Court of Appeal. Kawaley JA, who delivered the majority judgment, cited with approval the passage by Bannister J.[30]

[46] In all the circumstances, we do not find that there was sufficient evidence for the judge to have appointed the Receiver at the ex parte hearing, nor to continue his appointment at the inter partes hearing.

The Judge's Order Staying the Execution of the Russian Judgment

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[28] See para. 37 above.
[29] BVIHC(COM)2010/0085 at para. 27.
[30] Supra n.21 at para. 161.

[47] The judge having found that 'one of the unintended consequences of continuing the appointment...was to stay the judgment of the Russian Court of Appeal'[31] varied the appointment at the inter partes hearing by ordering the Receiver not to take any step to execute the Russian judgment without the prior sanction of the appropriate Russian court. This variation took away the very purpose for the appointment of the Receiver, namely, preventing the execution of the Russian judgment. We agree with Mr. Levy's submission that at that stage the judge should have set aside the appointment, the purpose for which having fallen away. Instead, he continued the appointment, presumably to allow the Receiver to take control of the other Bescant claims, a purpose which we have found was not open to him on the evidence. This is an additional reason that we took into consideration in setting aside the Receiver's appointment.

The Judge's use of the Balance of Harm and the Status Quo Principles

[48] Mr. Levy, QC, submitted that the judge's resort to the balance of harm and status quo principles were erroneous in the context of this case which involved the appointment of a receiver. The judge having reviewed the evidence and being concerned about issues such as comity and the conflicting expert evidence said '...the balance of harm was evenly balanced. On that basis the court decided to maintain the status quo, namely to maintain the receiver'.[32] While we do not think that a judge is wrong as a matter of law to refer to these principles on an application to appoint a receiver, we think they should be applied cautiously. As stated above the appointment of a receiver is a draconian remedy that can have far reaching consequences for a company, and if the harm is evenly balanced a court should be very reluctant to appoint a receiver.

[49] A court can also consider the status quo but this should be the status quo before the receiver was appointed. The status quo is not the situation that is created as a result of the ex parte appointment of a receiver. Rather, it is the situation that

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[31] See para. 47 of the Written Reasons – see preceding paragraph.
[32] See para. 44 of the Written Reasons.

prevailed before the appointment. On the facts of this case, the judge should not have found that the status quo was 'to maintain the receiver'.

Conclusion

[50] On our review of the facts and the law in this case, this Court did not interfere with the judge's finding that there is a good arguable case regarding the Swiss proceedings. However, there is no solid evidence showing a real risk of dissipation and the evidence did not reach the required threshold for the appointment of a receiver. Even if there was a risk of dissipation, this was not a case where it was just and convenient to appoint a receiver having regard to the fact that the respondents chose not to apply in Russia which would have been the more appropriate court to approach, or apply in the BVI for a freezing injunction which would have been a more appropriate remedy.

[51] For all of the foregoing reasons, we found that this was a proper case to set aside the exercise of discretion in appointing the Receiver and continuing his appointment. We allowed the appeal, set aside the appointment of the Receiver and the costs order made by the judge, and ordered the respondents to bear the costs of the appellant in the Court of Appeal and in the court below, as well as the costs of the Receiver.

Comment

[52] By way of general comment, this Court has noted with some concern that there has been an increasing number of applications to appoint receivers when the grant of less intrusive relief such as a freezing injunction would provide the defendant with sufficient protection. The judge himself said at the conclusion of the inter partes hearing that he has seen 'a lot of them' (applications for receiverships) recently.[33] The dictum of Bannister J in the **Yukos** case cited at paragraph 45 above is apposite. Trial judges should be vigilant to ensure that the court's

[33]Supplemental Bundle, Tab 5, p. 49, lines 10-14.

jurisdiction to appoint interim receivers is exercised only when it is truly just and convenient to do so.

[53] The assistance of counsel in this matter is gratefully acknowledged.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar