EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)

CLAIM No: BVIHC (COM) 2014/0062

BETWEEN:

JSC VTB BANK

Claimant

and

~~(1) ALEXANDER KATUNIN~~
(2) SERGEY TARUTA
(3) ARROWCREST LTD

Defendants

Appearances:
Mr. Taruta was represented by Mr. Adrian Francis, Mr. Scott Tolliss and Mr. Carl Moran of Maples and Calder
Arrowcrest Ltd was represented by Mr. Tom Roscoe, with him were Mr. Richard Brown and Mr. Paul Griffiths of Carey Olsen
Ogier were represented by Mr. David Alexander QC, with him were Mr. Grant Carroll and Mr. Daniel Mitchell of Ogier
Mrs. Fiona Forbes Vanterpool on the instructions of the Attorney-General's Chambers appeared as *amica curiae*
VTB Bank did not appear nor did it make written submissions; Ogier declined to represent it

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2022 March 17
March 22

OPEN JUDGMENT

[1] **JACK, J [Ag]:** On 11th March 2022, I handed down a judgment exhibiting the memorandum prepared by Ms. Forbes Vanterpool on the Attorney-General's behalf giving their comments on the sanctions legislation. This judgment should be read

in conjunction with that judgment and I shall use the same short-form names. As with the previous judgment, I thank Ms. Forbes Vanterpool and Ms. Dawn Smith, the Attorney-General, for their assistance.

[2] There are three separate issues for determination before me. The first is an application by Ogier to come off the record as acting for VTB. The second is the question whether the receivership order and steps taken under it require the Governor's licence under the sanctions legislation and whether it can be discharged without such a licence. The third is whether Arrowcrest is properly subject to the jurisdiction of this Court and whether the receivership order should be discharged on substantive grounds.

Coming off the record

[3] As regards the application to come off the record, the main grounds are set out in the next paragraph. There was also a separate ground for coming off the record, which I have rejected in two confidential judgments, the latter of which I am handing down at that the same time as this judgment. I should record that Ms. Forbes Vanterpool, who appeared on the instructions of the Attorney-General as *amica curiae*, agreed that the ground relied on in the confidential judgments did not justify Ogier coming off the record.

[4] Ogier's grounds for coming off the record, which I deal with in this open judgment, are these:

> "(1) VTB is a majority state owned Russian bank;
> (2) Russia has invaded Ukraine in an entirely unprovoked way in circumstances which most of the world, including Ogier, regard as unjustified and unacceptable;
> (3) It has been reported that in the invasion of Ukraine, hundreds of thousands of Ukrainians, if not millions of Ukrainians, have been displaced from their homes by that Russian invasion;
> (4) It has been reported that in the invasion of Ukraine, many Ukrainian soldiers have been killed or wounded by the Russians;
> (5) It has been reported that in the invasion of Ukraine, many civilians have been killed or wounded by the Russians;
> (6) VTB has been sanctioned by the UK, which sanctions apply in BVI;

(7) Any breach of those sanctions is a criminal offence.
(8) The Chairman of VTB has been sanctioned by the UK, which sanctions apply in BVI;
(9) In any event, it is against Ogier's ethics and code of practice to act for a company so closely associated with the Russian state in the circumstances set out above.
(10) However, Ogier cannot in any meaningful way act or represent VTB without the risk of Ogier and people who work for Ogier being in breach of the sanctions regime. Ogier will not place its employees in that sort of jeopardy.
(11) In any event the litigation cannot be furthered because of the sanctions. Nor could VTB pay for it to be furthered.
(12) It is obviously important that VTB have no assistance from anyone in the BVI, Ogier included, in its efforts to realise and turn into money the judgment which was recognised in BVI before the invasion of Ukraine;
(13) In the above circumstances, the representation of a sanctioned Russian Bank is plainly a reputational concern or issue;
(14) Recent guidance from Jersey (subject to the same sanctions) states that the present circumstances provide 'just cause' for the termination of a retainer with a sanctioned entity. The BVI language contained in the LPA is 'good and compelling reason' which is submitted is a virtually identical formulation."

[5] As to point (2), it is not proper for a domestic Court to express a view on international affairs. That is a matter exclusively for Her Majesty's Government. Subject to this caveat, I accept the points (1) to (9).

[6] I do not accept point (10). It is true that there are a large number of restrictions placed on any form of dealing in money or assets with a sanctioned person. However, it is possible to obtain a licence from His Excellency the Governor. Mr. Carroll, who argued this part of Ogier's case, said that the process was extremely onerous and required the filling out of a long form for each transfer of money and each dealing subject to the sanctions legislation. Ms. Forbes Vanterpool explained that this was not so. It was possible to ask for a licence to cover a whole year. It was only if there were changes in the course of the year that an updated application would need to be lodged. No fee was charged for applying for a licence. If Ogier obtain the appropriate licences, she said, there should be no risk any criminal offences being committed.

[7] As to point (11), it is true that VTB, with other Russian banks, has been ejected from the SWIFT bank transfer system. Thus any monies being sent by VTB to Ogier would need to be routed by other means through countries, like China or India, which have not imposed sanctions on Russian entities. If that cannot be done, then this issue of payment as a ground for coming off the record would need to be revisited. Ogier are entitled to be paid. This, however, does not raise an issue about possible criminal liability on the part of Ogier and its staff. Insofar as Ogier are concerned about criminal sanctions for extending credit to VTB by doing work without money on account, firstly that can be dealt with by a licence and secondly, given the large amount of work Ogier have done for VTB, a short period where they cannot bill whilst a licence is being obtained is not onerous.

[8] I agree with point (12) on a narrow basis. Whilst sanctions are in place, there can be no question of the payment to VTB of monies recovered in respect of the judgment debt. However, if the receivers succeed in taking control of Enard and realising assets of that company, they will no doubt seek a licence permitting the realisation of the assets, but without the licence permitting the remittance of monies to Russia. Once the monies were recovered, they could be frozen pending the suspension of sanctions. It would be a matter for the Governor to regulate.

[9] The wider point in (12) that VTB should "have no assistance from anyone in the BVI" overlaps with points (13) and (14). They need to be considered together.

[10] So far as payment is concerned, Ogier have significant monies on account in respect of various cases on which they have been working on VTB's behalf. This money is frozen by the sanctions regime. However, a licence can be obtained to offset that sum against billed fees. That would leave some very much smaller sums of billed but unpaid invoices and as yet unbilled work in progress, where no payment on account has been made. The sums are, however, manageable.

[11] Before considering these matters, I should record that Mr. Alexander QC accepted that the terms of Ogier's retainer are not determinative of the Court's approach to an application under CPR 63.6 to come off the record. In other words, the fact that Ogier are entitled under the terms of their retainer by VTB to terminate the retainer does not oblige the Court to allow them to come off the record. Mr. Alexander submitted, however, that the terms and conditions of Ogier's retainer were entered into freely by a major Russian corporation. That is, he submitted, a weighty consideration. If the terms and condition permit the termination of the retainer, the Court should be slow to go behind the arm's length agreement of the parties. I agree that this is a relevant factor. The weight to be attached to it is, however, a matter which I need to determine as part of my overall assessment.

[12] As to the approach which this Court should take to the sanctions legislation, it is important to recognise that the sanctioning of Russia-related entities is a decision taken at the highest level in the British Government and concerns foreign affairs, which are within the exclusive purview of the Government. It is not for this Court to second-guess what the Government has determined is the appropriate policy. In particular, the sanctions regime is exclusively aimed at freezing assets. No provision is made for the confiscation of assets. Save that their assets are frozen, sanctioned entities retain all their civic rights, including full access to the Courts and an entitlement to have their rights and obligations determined by this Court. VTB's right to litigate against Mr. Taruta has not been curtailed.

[13] Mr. Alexander QC accepted that the effect of Ogier ceasing to act for VTB would be potentially disastrous for VTB's conduct of the current proceedings. He accepted that the effect of CPR 69B4(4) coupled with the limited power of the Court to order a new legal practitioner to pick up the case meant that VTB would be unrepresented and unable to appear, even by a director, to fight its claim. Far from being a problem, this, he submitted, was a good thing. Reprehensible entities such as state-owned Russian banks should forfeit their rights by being denied the right to litigate.

[14] That in my judgment would require special legislative provision. As I. Stephanie Boyce, the current president of the Law Society of England and Wales, said in expressing support for law firms representing Russian clients:[1]

> "It's the job of solicitors to represent their clients, whoever they may be, so that the courts act fairly. This is how the public can be confident they live in a country that respects the rule of law — unlike Putin's tyrannical regime…"

[15] There is nothing in the sanctions legislation to support an inference that the denial of a right to participate in litigation was intended. I have already referred to the extremely sensitive context of the United Kingdom's external relations. Confiscation of assets is a traditional marker of a war existing *de facto*. Even if there are no Prize Courts set up to condemn the goods of the enemy, there are acts which can potentially be treated in international law as an implied declaration of a state of belligerency, such as the creation of a blockade.[2] Denial of a right to litigate and to defend oneself in litigation could at least start to raise an argument that there was an expropriation of assets. This Court should in my judgment be extremely wary of interpreting the sanctions legislation as having any intended effects beyond those which appear from the plain wording of the legislation.

[16] I come back to Ogier's application to come off the record. There is in this Territory no, or at least no express, cab rank principle, thus Ogier would not be under a professional obligation to take on VTB as a new client. However, once Ogier do take on VTB as client in litigation, the position changes. They are (unless disinstructed by VTB) obliged to continue to represent VTB to the best of their skill and ability unless and until the Court permits them to come off the record. The duty to continue to act is self-evident when a firm of legal practitioners is representing a defendant in criminal proceedings. Many criminal clients manifest varying degrees

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[1] Law Society Gazette, "Ukraine backlash — profession hits back over 'amoral' allegations", accessed 17th March 2022, www.lawgazette.co.uk/news/news-focus-ukraine-backlash-profession-hits-back-over-amoral-allegations/5111839.article

[2] See the discussion in Andrew Clapham, "Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law" (2021) 97 International Legal Studies 1201.

of unsavoriness. That has never been a ground for withdrawing from a retainer. The situation with civil clients is the same. VTB may be a pariah, as Mr. Alexander QC submitted. That does not afford a ground for its legal representatives to withdraw from representing them. Quite the contrary. It is precisely when VTB are stigmatised as a pariah that VTB need the best endeavours of their legal representatives to advise them and to advocate in Court on their behalf. However uncomfortable it may be for Ogier, this is, as Ms. Boyce asserted in respect of England and Wales, a vital safeguard for ensuring the rule of law in this Territory. Even pariahs have rights.

[17] The Code of Ethics in the **Legal Practitioners Act 2015** is to the same effect. It provides:[3]

> "A legal practitioner shall defend the interests of his or her clients without fear or judicial disfavour or public unpopularity and without regard to any unpleasant consequences to himself or herself or to any other person.

[18] So far as the guidance given by the Law Society of Jersey is concerned, this addresses the contractual right to terminate a retainer. It says:

> "In light of the current situation in Ukraine, it is appropriate to consider the position with regard to the potential termination of relationships with Russian or Belarusian clients.
>
> At present, the Code of Conduct provides for members only to terminate a retainer for 'just cause'. Rule R.1.8 states that 'Members may only terminate a retainer for just cause and, other than in exceptional circumstances, upon reasonable notice, unless the retainer is terminated automatically by law. A client is free to terminate a retainer at any time.'
>
> While it is clear that any established links or relationships with Vladimir Putin, his associates or those members of the current regime who have been identified and named (or have had sanctions applied against them) represents 'just cause' to terminate a retainer, it is perceived that firms may be reluctant to exercise termination for any other reason.

[3] No 15 of 2015, Laws of the Virgin Islands, Schedule 4 Part A para 5.

> While firms may, subject to enhanced due diligence and ongoing monitoring, maintain relationships with Russian or Belarusian clients who are not subject to sanctions, **the Law Society considers that, in the current circumstances and specifically in relation to Russian or Belarusian clients, reputational concerns or issues may, additionally, be considered to represent 'just cause' to justify termination of a relationship.**
>
> Where termination is considered the appropriate course of action, it is still expected that reasonable notice will be given to the client to make alternative arrangements, unless circumstances dictate that termination should, exceptionally, be effected immediately." (Emphasis in the original.)

[19] The guidance does not say that it applies to a lawyer's right to withdraw from representing a client in existing proceedings, where, as I have outlined, different considerations apply. In my judgment it does not assist in deciding whether Ogier should be permitted to withdraw from the current proceedings. The Jersey guidance does not address coming off the record.

[20] I turn then to my decision in relation to Ogier's application. So far as outstanding fees are concerned, this is a matter which needs to be kept under review. If Ogier cannot obtain licences so as to legitimise payment to them by VTB, then there may be a need to release Ogier on that ground. However, it is in my judgment too early in the sanctions regime to know what the practicalities of payment are.

[21] So far as reputational damage is concerned, there is on the one hand Ogier's commercial interest in keeping its name unsullied by association with Russian state entities. Their contractual terms entitle them to terminate the retainer. On the other hand, their duties as officers of the Court require them to maintain the rule of law by ensuring access to the Courts for the proper and fair determination of parties' rights and obligations.

[22] Standing back and weighing on the one side the issues of fee payment and damage to Ogier's reputation in conjunction with their standard terms and condition and on the other side their duties as officers of the Court, in the exercise of my discretion I

find that their duties as officers of the Court outweigh the other considerations. I accordingly refuse the application for Ogier to come off the record.

[23] I should add that one of the reasons I am giving this as an open judgment without anonymisation is so that it will be known that Ogier are continuing to act for VTB not out of personal choice, but because this Court has refused to allow them to stop acting for VTB.

Sanctions and the receivership order

[24] I turn then to the issue of sanctions and the receivership order. At present, the receivers have notified Enard and Arrowcrest of their appointment over the shares of Enard. They have not yet changed the directors of Enard, because of the possible commercial effect on the underlying businesses. With the current hostilities, the value of the Ukrainian assets would in any event be almost impossible to realise. There are two issues. Firstly, if the receivers take steps to change the directors and realise the assets of Enard, do they require a licence and what are they to do with the money recovered? Secondly, can the receivership order be discharged without a licence from the Governor to do so?

[25] Section 60 of the United Kingdom **Sanctions and Anti-Money Laundering Act 2018** ('SAMLA')[4] provides:

> "(1) In this Act 'funds' means financial assets and benefits of every kind, including (but not limited to)—
>
> (a) cash, cheques, claims on money, drafts, money orders and other payment instruments;
>
> (b) deposits, balances on accounts, debts and debt obligations;
>
> (c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative products;
>
> (d) interest, dividends and other income on or value accruing from or generated by assets;
>
> (e) credit, rights of set-off, guarantees, performance bonds and other financial commitments;
>
> (f) letters of credit, bills of lading and bills of sale;

[4] 2018 c. 13.

(g) documents providing evidence of an interest in funds or financial resources;
(h) any other instrument of export financing.

(2) In this Act 'economic resources' means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services.

(3) In this Act references to 'freezing' funds are to preventing funds from being dealt with; and for the purposes of this subsection funds are 'dealt with' if—
(a) they are used, altered, moved, or transferred or access is allowed to them,
(b) they are dealt with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or
(c) any other change is made that would enable their use, including portfolio management.

(4) In this Act references to 'freezing' economic resources are to preventing economic resources from being dealt with; and for the purposes of this subsection economic resources are 'dealt with' if—
(a) they are exchanged for funds, goods or services, or
(b) they are used in exchange for funds, goods or services (whether by being pledged as security or otherwise)."

[26] It can be seen that any asset which is not a "fund" under section 60(1) is an "economic resource" under section 60(2). All the advocates were happy to accept that the BVI judgment debt and the Meshchansky judgment constitute a "fund" falling within section 60(1), so it is not necessary to consider section 60(2) separately. What might amount to "dealing" was, however, in dispute.

[27] Also in dispute is the question whether the receivership order itself amounts to a "benefit" or a "financial… benefit" within the meaning of section 60(1). (Whether the adjective "financial" applies to both assets and benefits or only to the former is in my judgment immaterial on the facts of the current case.)

[28] Mr. Alexander QC and Ogier, in their capacity as officers of the Court, submitted:

"1 The Attorney General's Note dated 8 March 2022 is correct.

2 That being the case, as the Attorney-General says, the assets of VTB (including the judgment debt owed to it) are frozen.

3 The Receivers may not, therefore, take steps to deal with the judgment debt owed to VTB without obtaining a licence to do so.

4 But the Receivers can deal with the judgment debt if they obtain a licence to do so.

5 The Court should accordingly leave the Receivers to do their job within the parameters of the sanction arrangements (and their ability to come back to court to seek directions).

6 There is no need for the Court to do anything now.

7 Furthermore, discharging the receivers may involve dealing with funds owned by VTB.

> (a) Regulation 11(1) of **The Russia (Sanctions) (EU Exit) Regulations 2019** says that a person must not deal with funds or economic resources owned, held or controlled by a designated person if they know or have reasonable cause to suspect that they are dealing with funds or economic resources;
> (b) Funds means 'financial assets and benefits of every kind': section 60(1) of [SAMLA]. The judgment debt seems to fall within that. It is both a financial asset and a benefit.
> (c) Funds also means 'debts and debt obligations': section 60(1)(b). The judgment debt seems to fall within that. It is a debt.
> (d) Funds are 'dealt with' if they are 'used, altered, moved, or transferred or access is allowed to them': section 60(3)(h) or 'if they are dealt with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination' (emphasis added).
>
> > (i) The judgment debt is altered or moved if it is changed from a judgment debt that had the benefit of a receivership over assets to one that does not have the benefit of receivership over assets; and
> > (ii) The character of the judgment debt is changed if it is changed from being a judgment debt with the benefit of a receivership over assets to just an unsecured judgment debt.

8 Accordingly the effect of the sanctions is that everything must stay exactly as it is when the sanctions were imposed unless a licence is obtained."

[29] Mr. Francis, on Mr. Taruta's behalf, argued the case against continuance in respect of sanctions with Mr. Roscoe on Arrowcrest's part supporting his submissions. Mr. Roscoe argued the third application on Arrowcrest's behalf and made some observations about the purpose of the receivership.

[30] Mr. Francis submitted that the receivership should be discharged. "Its purpose is, and its effect will be, to realise, or make available, assets, funds and/or economic resources for the benefit of VTB, contrary to the sanctions regulations." He emphasises that the making of a receivership order does not give the judgment creditor (or the receivers) any property interest in the assets over which receivers have been appointed: **Kerr & Hunter on Receivers and Administrators**.[5] Discharging the receivership order would not therefore amount to a "dealing", because there would be no passing of property. He accepted that the receivership order was "a court-imposed benefit" for the judgment creditor, but the order merely allowed the receivers to deal with Arrowcrest's assets, not with the judgment debt itself.

[31] He goes on to make various public policy arguments about why it would be desirable to discharge the receivership order. In relation to this, as I observed above, the whole area of sanctions is a highly sensitive matter which concerns the United Kingdom's international relations with Russia and other countries. The issues of public policy which Mr. Francis raises are matters for the Governor acting in conjunction with the Foreign, Commonwealth and Development Office. Public policy will be expressed in the granting or refusal of licences. It would be wrong for me to anticipate what the relevant Government decision-makers may decide. In my judgment, the sole matter I should determine is what might constitute a prohibited dealing.

[32] At present, the receivers are not taking active steps to get in assets from Enard. So long as they do nothing, in my judgment, there is nothing for which a licence would

[5] 21st Ed (2020) Chapter 8.

be required. It is different once the receivers decide to take steps to realise Enard's assets. I agree, for the reasons which the Attorney-General gives in her note of 8th March 2022 that:

> "4. The Receivers are required to apply for a financial sanctions licence before taking any steps to deal with the assets of the BVI Company for the benefit of the designated person or to access any money derived from the sale of the Company's assets for the purpose of paying their fees."

[33] If such a licence is not granted, then the purpose of the receivership would come to an end. Subject to the next point, the Court would discharge the receivership on that ground. It is a matter for Her Majesty's Government whether it is desirable to allow a judgment debt owed to a sanctioned entity to be got in (even if the monies raised were then frozen).

[34] This leads to the question whether the receivership order can be discharged without a licence having been obtained. In my judgment there are three reasons why not. First, a judgment debt which has the advantage of partial execution in the form of a receivership is "altered", if the receivership is discharged: Mr. Alexander QC's para 7(d)(i). Second, for the same reason a judgment debt's "character" changes. A partially executed judgment is very different to unexecuted judgment: Mr. Alexander QC's para 7(d)(ii). In both these cases, the value of the judgment debt drops — potentially dramatically — if the receivership order is discharged. That amounts in my judgment to an alteration to, or change in the character of, the judgment debt. Thirdly, the receivership order itself is a "benefit" or "financial benefit" within the meaning of section 60(1) of SAMLA. The receivership order in itself has a substantial value to the judgment creditor. I reject Mr. Francis' submission that receivership has no effect on the nature of the judgment debt, so that discharge of the receivership changes nothing. That is a wholly uncommercial approach, whereas the sanctions legislation looks to the substance of dealings.

[35] At present, it is not in my judgment possible lawfully to discharge the receivership order, nor to allow the receivers to take steps to get in the assets of Enard. Both steps would require a licence from the Governor. What order I should make, I shall consider after discussing the third application.

Arrowcrest's submissions

[36] Mr. Roscoe's points on behalf of Arrowcrest were directed at four issues. The first was the effect of sanctions, where he echoed Mr. Francis' submissions, which I have already set out. The second was the question of a gateway for service on Arrowcrest, which it will be recalled is a Cypriot company. The third is whether a receiver can be appointed over a **Duomatic** power,[6] even assuming **Duomatic** creates a power. The fourth is whether Cypriot law would apply the **Duomatic** principles on the facts of this case (a) where this is a one-man company with special provisions in its memorandum and articles for formalities in respect of acts of a sole shareholder and (b) where there are issues as to Arrowcrest's solvency.

Gateway and submission to the jurisdiction

[37] As to gateway, Mr. Roscoe drew my attention to what I said at para [10] of my judgment of 29th November 2021, where I said that "as a technical matter it is *necessary* to add Arrowcrest as a party so that it is bound by the judgment." (The emphasis was not in the original.) In saying that, I probably went further than was needed. It would have sufficed to add a provision to the order under CPR 42.12 making the order appointing receivers binding on Arrowcrest upon the service of the order on it, but the traditional approach is to add the interested person as a defendant. If Mr. Roscoe is right in his submissions on gateways, that then would have been the appropriate course, relying on CPR 42.12(4) to dispense with service.

[38] Adding Arrowcrest as a party required there to be a gateway for service in Cyprus, even if, as occurred, service was dispensed with. Mr. Roscoe submitted that the

[6] See Re Duomatic Ltd [1969] 2 Ch 365 and Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] Ch 258 at p 280 ("a company is bound, in a matter which is *intra vires* and not fraudulent, by the unanimous agreement of its members"), approved by the Privy Council in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 at p 506.

gateway for service on Arrowcrest under CPR 7.3(5) did not apply. CPR 7.3(5) provides:

> "A claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made by a foreign court or tribunal and is amenable to be enforced at common law."

[39] The receivership order is being made to enforce the Meshchansky judgment, which was being given effect in this jurisdiction by the BVI judgment. Mr. Roscoe submitted, however, that this gateway only applied if service outside the jurisdiction was to be affected on the judgment debtor. The fact that Arrowcrest was a necessary party, he said, did not mean that the CPR 7.3(5) gateway was open to the judgment creditor seeking to enforce against an asset situate in the BVI.

[40] In support of that proposition he relied on the judgments of the Court of Appeal and Flaux J (as he then was) in **Linsen International Ltd v Humpuss Transportasi Kimia**.[7] In that case the first and second defendants were the subject of arbitration awards given in favour of the claimant. The first and second defendants had moved assets to the third defendant, an Indonesian company. None of the assets remained within the jurisdiction. Lord Neuberger of Abbotsbury MR held:[8]

> "The third defendant has no assets in this country and what is sought to be done is to enforce the judgment against the first defendant, i.e. to follow assets which the first defendant has transferred to the third defendant. That enforcement cannot be in this country and must be abroad. Therefore, I accept the submission that [the equivalent of CPR 7.3(5)] cannot be relied on."

[41] The key feature of **Linsen** was that the assets against which execution was to be affected were outside the jurisdiction. In the current case, the **Duomatic** power over which the receivership order has been made is situate in this jurisdiction. There is

[7] [2011] EWCA Civ 1042; and [2011] EWHC 2339 (Comm), [2012] Bus LR 1649 (Flaux J).
[8] At [24]. See also Flaux J at first instance at [168].

nothing in **Linsen** which says that only the judgment debtor can be served under the English equivalent of CPR 7.3(5). There is nothing in the wording of the rule which requires such a construction. It would in my judgment be impermissible to read such additional words into the rule.

[42] Accordingly, there was in my judgment a gateway under which Arrowcrest could be served. The Court could thus assume personal jurisdiction over Arrowcrest. No separate challenge is brought to the order dispensing with service.

[43] There was a fall-back issue as to whether Arrowcrest submitted to the jurisdiction by making the substantive application to set aside the order appointing receivers. "[I]n determining whether a party has submitted to jurisdiction, the court must look at all of the circumstances of the case." So held the Court of Appeal back in 2016 when hearing an appeal in this current action by Mr. Katunin, the original first defendant.[9] In that case, Mr. Katunin was subject to enforcement proceedings here in respect of the same Russian judgment to which Mr. Taruta has been held liable. This Court granted a freezing order against him. Mr. Katunin challenged service of the underlying claim to enforcement and also sought — but purportedly without prejudice to his contentions that he had not submitted to the jurisdiction — to set aside the freezing order. He also filed an affidavit in answer to VTB's application for summary judgment against him, again without prejudice to his contentions as to service. The Court of Appeal, following the English High Court decision in **SMAY Investments v Sachdev (Practice Note)**,[10] held that these steps did not amount to "a wholly unequivocal submission to the jurisdiction".

[44] The key difference between the situation of Mr. Katunin and that of Arrowcrest is that the substantive relief which Arrowcrest seeks in its current application, if its jurisdiction challenge fails, is final relief. Whether the receivership order is upheld or discharged, that is the end of the case. There will be no trial. Apart from

[9] BVIHCMAP2015/0004 and BVIHCVAP2015/0007 (determined 20th June 2016) *sub. nom.* Katunin and another v JSC VTB Bank at [26].
[10] [2003] EWHC 747 (Ch), [2003] 1 WLR 1973 (Patten J).

administrative matters like giving directions to the receivers and eventually discharging them, there will be no further steps in the matter. The substantive issue as to whether execution by the appointment of receivers is appropriate will have been determined. In my judgment seeking final relief is an unequivocal submission to the jurisdiction which cannot be saved by purporting to make the application without prejudice to the jurisdiction of the Court.[11] The position would have been similar if Mr. Katunin had issued an application for reverse summary judgment against VTB. That would have been asking the Court to give final relief, thus entailing a submission to the jurisdiction.

[45] Accordingly I hold that, if I am wrong in my decision on gateway, I find as a matter of fact that Arrowcrest has submitted to the jurisdiction.

Duomatic: is there a power?

[46] I turn then to the question as to whether a receiver can be appointed over a **Duomatic** power. This question has, as I noted in my judgment of 29th November 2021, been revolutionised by the decisions of the Privy Council in **Ciban Management Corp v Citco (BVI) Ltd**[12] and **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd**.[13] As Lord Neuberger noted in **Linsen**:

> "17. In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted."

[47] Mr. Roscoe's first point was that "the **Duomatic** principle, properly analysed, is no a 'power' at all. It is not, for example, something akin to the absolute [?power of][14]

[11] Cf Marc Rich & Co AG v Società Italiana Impianti pA (The Atlantic Emperor) (No 2) [1992] 1 Lloyd's Rep 624, [1992] I L Pr 544 (English CA) at [40].
[12] [2020] UKPC 21, [2021] AC 122 at [47] (Lord Burrows).
[13] [2011] UKPC 17, [2012] 1 WLR 1721.
[14] My conjecture.

beneficial owners under a bare trust to direct how the assets should be dealt with following **Saunders v Vautier**.[15]" He submits that:

> "**Duomatic** is only of any application where a company purports to take some action other than in accordance with the formalities required by its constitutional documents, but where the action is nevertheless assented to by all shareholders. Where there has not been a purported action by the company, there is no scope for the **Duomatic** principle to operate."

[48] Now I agree that there are limitations on the application of **Duomatic**. Indeed, the limitations arising from the terms of the memorandum and articles and from possible insolvency are discussed below, as are Mr. Roscoe's arguments in respect of them. However, I do not follow why (apart from these limitations) a sole shareholder's ability to direct a company to do something without formalities is not a power. After all, it is not uncommon for an injunction to be granted against a sole director or a 100 per cent shareholder to procure that a non-party corporation controlled by that director or shareholder does something. The whole basis for such orders is that the director or shareholder has the power to make the company do something. To say that **Duomatic** only applies when a company itself does something is to turn the principle on its head. The fact that **Duomatic** is subject to slightly more restrictions that the power in **Saunders v Vautier** does not mean it cannot create a power.

[49] In **Tasarruf** itself the power of revocation of a trust held by the bankrupt was a "mere" power, albeit a power which gave him rights akin to those of an owner. Likewise here, Mr. Taruta can *de facto* under **Duomatic** principles exercise the ownership rights of Arrowcrest over the shares in Enard. That in my judgment is the exercise of a power.

[50] Mr. Roscoe correctly points out that in my November judgment I got the date of **Dalemont Ltd v Senatorov**[16] wrong. It is in fact post-dates **Tasarruf**, so there can have been no implied overruling of it by the Privy Council. However, the passage

[15] (1841) Cr & Ph 240.
[16] [2013] ECSCJ No 190 at [6].

at para [6] in the judgment of Bannister J is dealing with a submission of counsel that an equitable receiver could not be appointed over a right to forfeit a lease, because it was a mere power. That was a hypothetical example, which had nothing to do with the case. The judge's comments on "mere powers" are plainly *obiter*.

[51] Mr. Roscoe argued that the Court of Appeal in **John Paul de Joria and another v Gigi Osco-Bingeman and others**[17] rejected my approach to **Duomatic**. The first point is that this case does predate **Tasarruf**. The main point, however, is that the case was concerned with who the parties to a contract were. Two men, Crowley and De Joria, made an agreement between themselves to govern a joint venture concerning the sale of spirits, including the famous *El Padrón* brand of tequila. The joint venture was to be carried out through various wholly-owned direct and indirect subsidiary companies. The central question before the Court of Appeal was:

> "As a matter of Anguillan law, could Crowley and de Joria specifically contracting with each other as individuals bind companies and impose contractual obligations on companies which were not parties to the agreement and in which Crowley and De Joria held no direct interest?"

[52] The Court of Appeal held that the companies were not parties to the joint venture agreement and that **Duomatic** could not be applied to render them parties, where the principals, Crowley and de Joria, did not make them parties to their agreement: see Gordon JA at [19] and [20] and Barrow JA at [60], Rawlins JA agreeing with both judgments. The argument was rejected that a term should be implied that the companies would be bound. No issue of enforcement arose (and the *dictum* of Gordon JA at [17] needs to be read in that context). In my judgment the case is too far removed from the issues in the current case to assist.

[53] I should add that Mr. Roscoe raised in his skeleton the point that the order appointing receivers refers to them being receivers of the Enard shares themselves rather than the **Duomatic** control of the shares. The form of the order was that

[17] [2006] ESCSJ No 45.

agreed by Mr. Carroll and Mr. Francis following the November hearing. Mr. Roscoe did not pursue the point in oral argument.

Duomatic in Cyprus

[54] I turn then to the applicability of **Duomatic** as a matter of Cypriot law. Arrowcrest relies on an expert report of Marina Hadjisoteriou, who appears to be a well-qualified Cypriot lawyer. She was called to the English bar by Middle Temple in 2009 and then to the Cyprus bar in 2010. She is a partner in the firm of Michael Kypriaonou & Co LLC specialising in commercial dispute resolution.

[55] She confirms that Cyprus follows English common law principles and that Cypriot company law is based on English company law. Although there are of course legislative and judicial differences, the Cypriot courts will generally apply English authorities in the absence of Cypriot court decisions. She says:

> "15. …As the Supreme Court of Cyprus has not yet implemented the **Duomatic** principle, the principle is to be applied in the same manner as it has been applied by the English Courts. There are no Cyprus-specific principles relevant to the operation of the principle or the limits of its operation."

[56] She then considers the application of **Duomatic** in the current case. She cites Article 3(e) of Arrowcrest's Articles of Association, which provides:

> "At all times where the Company shall have only one Member the following provisions shall apply:
>
> (i) The sole Member exercises all the powers of the General Meeting provided, always, that any decisions taken by the said Member in General Meeting are minuted or taken in writing.
>
> (ii) Agreements concluded between the sole Member and the Company are minuted or reduced in writing, unless they relate to day to day transactions of the Company concluded in the ordinary course of business."

[57] She refers to the English case of **Toone v Robbins**,[18] which held that a failure by a sole shareholder to observe a similar, but not identical, provision as to minuting of resolutions in the Articles of an English company, did not invalidate the decision of the sole shareholder for **Duomatic** purposes. Her conclusion at para 22 of her report is that the "argument that the **Duomatic** principle may apply to bypass the procedural requirement of a decision being minuted and taken in writing might not be successful in Cyprus" and she gives reasons.

[58] In my judgment, an expert view that an argument "might not be successful in Cyprus" is insufficient to show that the Cypriot courts would make that decision: see the similar situation in **VTB Bank v Miccros Group Ltd**,[19] where I held that an expert's view that a proposition of the law of St Kitts & Nevis was "strongly arguable" was an insufficient basis on which to hold that that proposition was the law of that jurisdiction. It is for an expert to give a concrete opinion. Ms. Hadjisoteriou does not.

[59] Accordingly, in the absence of an expert view to the contrary, I find that the Cypriot law in relation to **Duomatic** is for all relevant purposes in this case the same as English and BVI law. The appointment of a receiver over a **Duomatic** power is therefore possible in Cypriot law, just as I have held it to be in English and BVI law.

Duomatic: insolvency

[60] **Duomatic** will not apply if the effect of the exercise of the **Duomatic** power will be to render the company, in respect of which the **Duomatic** power is sought to be exercised, insolvent. Here the evidence of alleged insolvency is given by Phivos Pelides, a director of the corporate director of Arrowcrest.

[61] He produces Arrowcrest's last financial statements which concern the year ended 31st December 2017. No explanation is given for the absence of any more up-to-date financial information. The balance sheet shows total liabilities of

[18] [2018] EWHC 569 (Ch).
[19] BVIHC (COM) 2018/0067 (determined 23rd January 2020) at [112].

US$120,268,811 as against total assets of US$120,075,319, a shortfall of just under US$200,000. However, this is misleading. Note 9 to the accounts discloses "investments in subsidiaries". These include Enard. Enard's value is shown as nil, because "investments in subsidiaries are stated at cost". The narrative to Note 9 includes the following:

> "Enard…, the Company's whole owned subsidiary from the year 2009, has an investments [*sic*] in underlying operating companies including but not limited to locations like Ukraine, Poland and other countries of EU which are diversified in various business activities in particular agriculture, construction, metallurgical industry, real estate and other."

[62] In other words, the value of Enard is recorded in Arrowcrest's accounts at nil, despite what appear to be very substantial assets. The ostensible balance sheet insolvency of Arrowcrest as at 31st December 2017 cannot be relied upon. Further Deloitte, the auditor, gave a qualified opinion on the accounts because they could not satisfy themselves "as to the carrying value of certain investments and receivables."

[63] Very importantly, in my judgment, Mr. Pelides does not state that in his view the appointment of receivers over the shares in Enard renders Arrowcrest insolvent.

[64] Given the manifest deficiencies in the financial information presented and the silence of Mr. Pelides on the key issue, I find as a fact that the receivership does not render Arrowcrest insolvent. Accordingly, the existence of the **Duomatic** power is not negated in respect of the shares in Enard by reason of any insolvency of Arrowcrest.

Conclusion

[65] Accordingly:

(a) I refuse Ogier's application to come off the record. They must continue to represent VTB including advising them and advocating on their behalf in Court to the best of their skill and ability. This is subject to a liberty to apply if adequate and lawful measures cannot be put in place for VTB to pay for

Ogier's services. Ogier are obliged to apply for whatever licences may be required to permit their continuing to act.

(b) As discussed in the section dealing with sanctions, the receivers can neither get assets in nor distribute them without a licence from the Governor.

(c) Arrowcrest's challenge to the jurisdiction is dismissed, as is their application on substantive grounds to discharge the receivership order.

[66] This leaves the question as to what the practical way forward is. It is unclear how long the hostilities in Ukraine will last and when sanctions may be lifted. Whether the receivership order will eventually have a practical purpose is again unclear. The best course in my judgment is make no order, save to permit the receivers to take no steps in the receivership if in their commercial judgment that is appropriate. There must of course be a liberty to apply.

[67] Lastly, I turn to the question of an appeal. In my judgment, the issues I have determined are all matters of public importance which deserve consideration by the Court of Appeal. They afford "some other substantial reason" for granting leave to appeal. I grant leave to appeal all the orders made consequential on this judgment insofar as leave is required.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar