BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NOS. 20 OF 2003 & 1 OF 2004

BETWEEN:

IPOC INTERNATIONAL GROWTH FUND LIMITED

Claimant/Applicant

and

[1] LV FINANCE GROUP LIMITED
[2] TRANSCONTINENTAL MOBILE INVESTMENT LIMITED
[3] OOO CT-MOBILE
[4] SANTEL LIMITED
[5] AVENUE LIMITED
[6] JANOW PROPERTIES LIMITED
[7] BARROWS ALLIANCE LIMITED
[8] CORMACK SELECT LTD
[9] STEGMAN UNIVERSAL LTD
[10] SMART FINANCE LIMITED
[11] CARBERT INTERNATION LIMITED
[12] CARBONELL TRADING LTD
[13] RAMPTON ENTERPRISES LIMITED
[14] ALAMOSA HOLDINGS LIMITED
[15] NORMANTON LIMITED
[16] OOO ALFA-ECO

Defendants/Respondents

Before:

The Hon. Mr. Brian Alleyne S.C. — Chief Justice [Ag]
The Hon. Mr. Michael Gordon Q.C. — Justice of Appeal
The Hon. Mr. Denys Barrow S.C. — Justice of Appeal [Ag]

Appearances:

Martin Mann QC, with him Adrian Francis and Colin McKie, Solicitor Advocate, instructed by Maples & Calder of The British Virgin Islands and Winston & Straun of London for the Appellant

Mark Cran QC with Andrew Thomas, Jeffrey Elkinson and Dawn Smith instructed by Conyers Dill & Pearman of the British Virgin Islands and Neil Gotshal & Manges of London for the 1st Respondent

Clyde Williams with Kissock Laing instructed by Dancia Penn & Co of the British Virgin Islands and McKenna of London for the 2nd Respondent
Stephen Smith QC with Robert Levy and Samuel Jack Husbands instructed by Walkers of the British Virgin Islands and Lovells of London for the 4th – 6th and 16th Respondents

John Carrington for the 3rd and 7th – 15th Respondents instructed by McW Todman of the British Virgin Islands and Freshfield of London

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2005: July 11,12,13,14,15,18;
September 19.

JUDGMENT

[1] GORDON J.A.: OOO CT Mobile, the third Respondent, (hereafter CTM) is a company incorporated in Russia whose principal asset is a 25 .1 % shareholding in a limited liability company incorporated in Russia called OAO Megafon (hereafter Megafon) a large mobile phone operator in Russia. CTM was a wholly owned subsidiary of the second named Respondent, a Bahamian incorporated company called Transcontinental Mobile Investment Limited (hereafter TMI). TMI was itself a wholly owned subsidiary of the first named Respondent, a British Virgin Island (BVI) company, LV Finance Group Limited (hereafter LVF).

[2] The Appellant, a company incorporated in Bermuda, entered into two option agreements with LVF to purchase LVF's shareholding in TMI. The first such option agreement was executed on 10th April 2001 and was in respect of 77.7 percent of the issued share capital of TMI and the second option agreement was entered into on 14th December 2001 in respect of the remaining share capital of TMI, namely 22.3%. Both option agreements contained clauses for binding arbitration in the event of dispute, the first in Zurich and the latter in Geneva. In both cases the law of the contract was stated to be English law and the proceedings were to be carried on in English.

[3] It is the Appellant's case that it duly exercised the option rights conferred by the option agreements and that it is legally and beneficially entitled to the whole of the issued share capital of TMI, by virtue of which it is entitled to absolute control of CTM and through CTM

of the latter's holding in Megafon. It is the Appellant's further case that LVF, through a series of transactions, which allegations will be expanded later, sought to block the Appellant's acquisition of the TMI shares. The dispute between the Appellant and LVF has been submitted to arbitration in Geneva and in Zurich. The Geneva arbitration has resulted in an award in favour of the Appellant in respect of the December option agreement and the Zurich award which is on-going has resulted so far in a partial award that the April option has not been properly exercised.

The Proceedings to date

[4] On September 2, 2003 the Appellant filed an application in the High Court of the BVI seeking the appointment of Receivers of all of the issued shares in, or property in or ownership rights relating to the 2nd and 3rd named Respondents (CTM and TMI) and all property and assets of the 2nd and 3rd named Respondents. In addition, the application sought, inter alia, that the receivership should attach to all shares issued in Megafon that were currently or formerly held by or on behalf of the 3rd named Respondent, and any and all assets in the hands of any of the Respondents which represent the traceable proceeds of any of the aforesaid shares, ownership rights, property or assets. The application was heard 'ex parte' and the Court granted the order as prayed on September 4, 2003. Between September 18, and 19, 2003 by three separate applications all of the Respondents filed applications to revoke the order of September 4.

[5] An inter partes hearing of the applications to set aside took place between September 26 and October 1, 2003. That hearing resulted in two orders of the Court, one delivered at the close of the hearing of the applications on October 1, 2003 and the other delivered as a reserved judgment on January 21, 2004. The initial order of the Court granted ex parte will hereafter be referred to as the September Order, the second order delivered immediately after the inter partes hearing will hereafter be referred to as the October Order and the decision delivered in January 2004 will be referred to hereafter as the January Decision. The October Order, inter alia, discharged the September Order as against the 3rd and 16th Respondents, CTM and OOO Alfa-Eco, and ordered the Appellant to deposit the sum of

$30,000,000.00 as security for its undertakings contained in the September Order and for any potential liability for costs awarded against it (which sum was deposited in Court within the applicable time limit). It would appear that no order was written up deriving from the January Decision. However, the concluding words of the January Decision were:

> "In my judgment the 4th September order should be discharged in its entirety against all the remaining fourteen named Applicants and I so order".

The Appellant is dissatisfied with the October Order and the January Decision and has appealed to this Court. There have been a number of other applications but save for the application by the Respondents for further security for costs, to which passing reference will be made later, they do not impact on this appeal.

[6] The Appellant alleges that the Respondents are all involved in a scheme to wrongfully deprive it of the benefits of the option agreements. The allegations are that in December 2002, in other words some 12 months after the execution of the second option agreement, TMI sold 49.9% of the CTM shares to three companies, LV Investments Partner 1-3, (incorporated in Panama) which three LV companies on 21st July 2003 simultaneously sold to three buyers, namely, Alamosa Holdings Limited (Respondent No. 14), Carbert International Limited (Respondent No.11) and Rampton Enterprises Limited (Respondent No. 13). Also on July 21, 2003 TMI sold its remaining 51.1% shareholding in CTM to three other companies, namely Normanton Limited (Respondent No. 15), Carbonell Trading Limited (Respondent No. 12) and Smart Finance Limited (Respondent No. 10). On that same date LVF sold all of its shares in TMI to three other companies, not parties to these proceedings for $27,000.00. Some 7 days later CTM issued new shares which were allotted to Barrows Alliance Limited (Respondent No.7), Cormack Select Limited (Respondent No.8) and Stegman Universal Limited (Respondent No. 9). Respondents Nos 7 – 15 inclusive (which shall hereafter be referred to as the Intermediary Companies) each sold their shares in CTM in varying proportions to three companies, namely, Santel Limited (Respondent No. 4), Avenue Limited (Respondent No. 5) and Janow Properties Limited (Respondent No 6) which latter three companies are said to be subsidiaries of the 16th Respondent or at any rate part of the Alfa Eco Group. Respondents 4 – 6 inclusive and 16 will hereafter be referred to collectively as the Alfa Companies.

[7] It is the Appellant's case that the commercial purpose of the two option agreements was to enable it to ultimately hold and/or control the CTM 25.1% stake in Megafon. It was common ground between the parties that Megafon is a very large company and the 25.1% stake was therefore itself a very valuable asset. Various figures were bandied about as to the worth of the 25.1 % stake. Suffice it to say that there seemed little argument that the worth could be measured in the mid range of nine figures.

[8] The Appellant appealed against both the October Order and the January Decision. The two appeals were consolidated and argued together. All of the respondent save Respondent No. 2 filed counter-notices of appeal which will be dealt with subsequently. As expressed in the Appellant's skeleton arguments, the main issues of the appeal, from the Appellant's point of view, was:

- whether there are grounds for interfering with the exercise of the trial Judge's discretion as expressed in the October Order and the January Decision;
- if so, whether this Court is satisfied that the BVI is forum non conveniens;
- if not, whether this Court considers that the Appellant should have interim relief pending trial and, if so, the nature and extent of such relief and the terms on which it should be given.

For the most part each of the Counsel for the Respondents adopted such parts of other Counsel's arguments that were applicable. In the circumstances, intending absolutely no disrespect to any such Counsel, arguments on behalf of the Respondents will be referred to generically, save where arguments specific to a particular Respondent are referred to. I should also like, at this stage, to pay tribute to all Counsel who appeared before us for their thoroughness of preparation and presentation. This hearing stretched over a period of six days, which might well have been shortened, but it was the view of the Court that as a large number of issues were being canvassed, it was an appropriate use of court resources to permit full development of argument by Counsel.

Are there grounds for the interference by this Court with the Judge's October Order and/or January Decision

[9] The essence of the argument of learned Queens Counsel for the Appellant on this issue was that the trial Judge failed to exercise properly or at all her discretion on certain fundamental issues before her, and hence this Court should substitute its own discretion. In Hadmor Productions Limited et al v Hamiliton and Anor[1] the House of Lords reminded appeal courts of their function and jurisdiction with regard to the substituting of the appeal court's discretion for that of a trial judge. It is well to repeat that admonition:

> "Upon an appeal from a judge's grant or refusal of an interlocutory injunction the function of an appellate court… is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. … It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

[10] It is the Appellant's case that the trial Judge failed properly or at all to assimilate the factual matrix of the Appellant's case and failed to analyse the legal consequences of the parties' assertions. The Appellant further argues that the trial Judge failed in her duty to give reasons for the October Decision, and that that in itself is sufficient grounds for the launching of this appeal – Flannery v Halifax Estate Agencies Limited[2]. In that latter case there was a difference between the experts of the plaintiff and those of the

[1] [1983]1 A.C. 191
[2] [2000] 1 WLR 377

defendants regarding the cause of cracks in a first floor flat. The trial judge accurately set out the crucial issue and what he had to decide. He then, in his judgment, stated that having had the advantage of hearing the expert testimony on behalf of both parties, he preferred that of the defendant. Before the Court of Appeal in England, both parties accepted that there was adequate evidence for the trial judge to have come to a conclusion in favour of either party, but, as the Court of Appeal commented, the judgment was "entirely opaque. It gives the judge's conclusions but not his reasons for reaching that conclusion." The Court of Appeal went on to make a number of general comments on a judge's duty to give reasons which are summarized below:

(i) The first reason for a judge to give reasons for a decision is that the duty is part of due process, and therefore of justice. The rationale of that statement has two principal aspects. Firstly, the parties should be left in no doubt as to why they have lost or won, especially the losing party. Without reasons given, the losing party is in no position to know whether the court has misdirected itself, and thus whether he may have an available appeal. The second is that the giving or reasons concentrates the mind of the judge.

(ii) The first principal aspect recited above, that the parties be left in no doubt as to why they have lost or won, "implies that want of reasons may be a good self standing ground of appeal." If it is impossible to tell whether the trial judge has gone wrong on the facts or the law, the losing party would be deprived of his chance of appeal unless the appellate court entertains an appeal based on the lack of reasons itself.

(iii) The extent of the duty to give reasons will depend on the complexity of the matter to be resolved. It may be enough where there is a straightforward dispute as to simple fact after summarising the evidence for the judge to simply state that one version of the facts is preferred to another. However, where the dispute is more complex, and both sides have canvassed differing analyses of the circumstances, the judge must explain why one side is preferred to the other.

[11] The learning expressed in Flannery is gratefully adopted in this jurisdiction.

[12] It is the argument of the Appellant that it is sufficient to ground an allowance of the appeal against the October Order on the single ground that no reasons were given in its justification. As remarked above, the appeals against the October Order and the January Decision were consolidated by consent. This, in my view, allows this Court to review the January Decision as it impacted, explained or was confirmatory of the October Order.

[13] Learned Queen's Counsel for the Appellant contended that a reading of the January Decision demonstrates that the learned Judge wholly misconceived the evidence and submissions of the Appellant. He pointed to paragraph 5 of the January Decision wherein the trial Judge stated that "Alfa Eco bought all the shares in CTM". This is factually incorrect, as conceded by all parties. However, the trial Judge, later in her decision, on at least two separate occasions, correctly recorded the arguments of counsel for the Respondents which clearly indicated that the owners of the CTM shares were the 4th – 6th Respondents. It is not contested that the 4th – 6th Respondents belong to the Alfa-Eco group of companies. I am of the view that whilst the learned Judge might have misspoken herself, there can be little doubt that she was seised of the relationships between Respondents 4 – 6 and 2 and 3.

[14] Learned Queen's Counsel for the Appellant complained that when the trial Judge stated at paragraph 12 of the January Decision "It is the Respondent's (Appellant herein) contention that the ownership of the Megafon shareholding provided the commercial rationale for the Option Agreements. A perusal of the two Option Agreements will show that there is no mention of Megafon", she clearly demonstrated a lack of understanding of what the Appellant's case was before her. Given the evidence before the trial Judge and the submissions made to her, I agree that the above quoted statement by the trial Judge fell short of demonstrating a complete grasp of the inter relationships of the parties and the evolution of the original CTM shareholding into a shareholding in Megafon. Having so said, however, in the context of the remainder of the January Decision, I am of the view that such a misunderstanding did not impact the final conclusion of the learned Judge.

[15] Many other instances of what were described as deficiencies of the trial Judge's expressed reasoning and conclusions were submitted on behalf of the Appellant. I am of the view that whilst the learned Judge without question erred on the side of extreme brevity (and I do not hold prolixity to be a virtue) it cannot be said that a reading of her judgment would leave a party or an appellate court bereft of understanding of the cognitive process employed by the Judge in arriving at her conclusions. I do not find apposite in this case the criticism by Jonathan Parker LJ in UCB Group Ltd v Hedworth[3] wherein he stated:

> "Whilst I have considerable sympathy for the judge, whose expertise does not lie in this area and who is faced with potentially difficult and complex issues involving the application of equitable principles with which he is not especially familiar, nevertheless I cannot avoid the conclusion that his judgment is so superficial and perfunctory that his conclusion cannot stand."

Judges in this jurisdiction work under the combined pressure of a heavy civil list and commercial urgency and are required to establish a fine balance between the efficient dispatch of business and the avoidance of the appearance of summary justice. The learned trial judge in this case did not over-balance. I am therefore of the view that there is no valid basis for substituting our discretion for that of the learned Judge.

[16] That, however, is not the end of the matter. A considerable body of new evidence that was not before the trial Judge has been admitted in the hearing of this appeal for the specific purpose of the argument on the issue of *Forum non conveniens.* It therefore behoves this Court to examine de novo the whole issue of forum.

Forum non conveniens/ Submission to the Jurisdiction

[17] At paragraph 53 of the January Decision the trial Judge said the following:

> "I agree with the submission of the Applicants (Respondents) that the BVI is not the appropriate forum for the trial of this case since the issue in the case is the enforcement of a contract between a Bermudan company whose business interests are in Russia and a BVI company that is controlled in Russia. Therefore applying the principles in the Spiliada case, followed in Mohammed v Bank of Kuwait and the Middle East KSC [1996] 1 WLR 1483 I find that Russia is the more appropriate forum."

[3] [2003] EWCA Civ 1717

The Appellant has appealed against this conclusion. In the context of paragraph 16 above that conclusion will be reexamined. It becomes necessary to examine in some further detail the Appellant's allegations of the scheme by the Respondents to deprive it of the benefit of the two option agreements to put in context the various arguments on this issue..

[18] However, before I examine the Appellant's allegations I should remark that in this action some of the Respondents (Defendants) have been served within the jurisdiction and some without. Issue has been taken by those Respondents who were served without the jurisdiction that permission to serve out was improperly given in the September Order, which permission, it will be recalled was given after an ex parte hearing. The conjoint effect of the October Order and the January Decision was that permission to serve out was withdrawn. The Appellant's grounds of appeal complains of this also. In E. I. Du Pont de Nemours & Co et al v I. C. Agnew et al[4] a similar confluence of the issues of service out and forum had to be dealt with by the Court of Appeal of England. Bingham LJ said the following:

> "I now turn to consider the comparison[5] which the authorities indicate must be carried out. In doing so I make three points at the outset. First, in a case such as this where some defendants have been served within and some without the jurisdiction, the Court must in my judgment view the case in the round. It would not be correct to review the position of the English defendants independently and treat that decision as concluding the position of the foreign defendants. Or vice versa. Relative appropriateness and the requirements of justice should be assessed taking the case as a whole and not giving preponderant weight to the position of either group of defendants..."

Although the heading above this section of the judgment is "Forum non conveniens" the facts and considerations that follow are relevant to the issue of service out, though that latter subject is not identified specifically.

[19] According to the Appellant, this was a high value transaction, with the Appellant undertaking, pursuant to the two option agreements, to invest many millions of dollars into a company called Sonic Duo, which it duly did. To protect the Appellant's investment, the

[4] [1987] 2 Lloyd's Rep 585
[5] Of jurisdictions

option agreements required the existing group structure (TMI – CTM – Sonic Duo/later the Megafon stake) to be maintained and conferred on the Appellant a certain measure of control of TMI's affairs.

[20] At a meeting just before Christmas 2002, Leonid Rozhetskin, the C.E.O. of LVF, informed Geoffrey Galmond representing the Appellant that he and LVF wanted to renegotiate the option agreements and to receive $60-70 million more than the Appellant was contractually obliged to pay. Galmond refused.

[21] The Appellant alleges that unknown to it, by the date of this meeting Rozhetskin had taken steps, in breach of the option agreements, to transfer 49.9% of TMI's shares in CTM to three Panamanian companies, the 3 LV Partner companies referred to at paragraph 6 above. The audited accounts of LVF do not explain the purpose of the transaction but state that these companies were controlled by LVF's management. The Appellant believes these were amongst the first steps taken to deprive it of the benefit of the option agreements and that the "partners" referred to in the Panamanian companies' names are the active partners in LVF

[22] The Appellant's case is that in the ensuing months Rozhetskin sought out a purchaser for LVF, improperly offering to sell the Megafon stake as part of the package and that in the Spring of 2003 he met with the Alfa Group. An agreement was reached and work began immediately on valuation and due diligence.

[23] Learned Queens Counsel for the Appellant argued that these direct dealings between LVF and Alfa are central to the Appellant's case because, if they are established, it follows that the complex series of transactions that followed ending up with Alfa acquiring, through CTM, the Megafon stake, can be shown to be a contrivance to conceal the direct deal done between LVF and Alfa.

[24] The trial Judge had before her an affidavit of Vadim Kucharin, Vice President for Economics and Finance of the 16th Respondent in which it is denied that the 16th

Respondent had any direct dealings with LVF for the purchase of the CTM shareholding. Rather, he states, the negotiations were with the then shareholders of CTM. The trial Judge also had before her an affidavit of Kenneth Rawding, a partner of Freshfields Bruckhouse Derringer acting on behalf of the 3rd and 7 – 15th Respondents in which he stated, inter alia, that the directors of all of those latter companies were Russian citizens resident in Russia and many of whom spoke only Russian.

[25] By Order of this Court dated May 11, 2005, permission was granted to both the Appellant and the Alfa Respondents to rely on a large number of affidavits with copious exhibits for the purpose only of supporting the relevant party's arguments on the issue of *forum non conveniens.* In large measure, these affidavits dealt with what I shall refer to as the money laundering charge leveled by the Alfa Respondents against the Appellant, a charge which arose in the context of the use of the $40,000,000.00 now being held in the court as security for the undertakings of the Appellant and for costs. As I remarked in my judgment on the application for further security for costs, the evidence both for and against the charge of money laundering comprised some 17 or 18 large ring binders. The allegation, which I record with neutrality, is that the Appellant is a corporate vehicle for the laundering of funds derived from the illegal dealings by a minister of the Russian government and that the scheme has been on-going for some ten years. A great deal of the evidence, both documentary and oral, derives from Russia and other places. None derives from the BVI.

[26] Counsel for the Respondents urged that if the Court were minded to remove the stay and allow the action to proceed, the money laundering allegations would form an integral part of the defence of the Respondents. Counsel relied on this aspect as a major connecting factor with Russia.

[27] This jurisdiction has frequently had to deal with the principles that a trial judge should apply in exercising a discretion whether to stay proceedings on the grounds of *forum non conveniens*. As always the starting point is Spiliada Maritime Corporation v Cansulex Limited[6], a decision of the House of Lords, the learning within which has on more than

[6] [1987] 1 A.C. 460

one occasion been accepted by this Court. In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that "where there can be pointers to a number of different jurisdictions" there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the "natural forum" as was described by Lord Keith of Kinkel in The Abidin Daver[7], "that with which the action has the most real and substantial connection". In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions

[7] [1984] A.C. 398

might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

(iv) If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the Abidin Daver made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.

[28] The Respondents urge that Russia is clearly the most appropriate forum for the following reasons:

- this whole action revolves around the 25.1% stake in Megafon, a Russian corporation providing mobile telephone services in Russia and subject to Russian regulatory provisions;
- the owner of the 25.1% stake in Megafon, CTM, is also a Russian corporation and so is the 16th Respondent;
- according to the affidavit of Nicolas Ulmer on behalf of the Appellant (Ulmer 1 at paragraph 67) both the Russian Ministry of Antimonopoly Policy and the Ministry of Communications and Information have been put on notice by the Appellant of what the Appellant refers to as LVF's and/or the Alfa Group's illegal acts. Those same Ministries were also informed of the Order of the Court of the Commonwealth of the Bahamas in respect of a not dissimilar action commenced by the Appellant in that Court;
- the Appellant operates from Russia and has a particular focus on investment in Russia;

- the beneficial owner of the Appellant is either Jeffrey Galmond or Leonid Rieman, the latter being Russian and the former doing business in Russia;
- All the owners of the shares in the Alfa companies are Russian citizens or Russian corporations;
- The April option agreement was negotiated in Russia;
- The principal persons mentioned in the evidence, particularly in respect of the money laundering allegation, are Russian or based in Russia;
- The Appellant's claim as against the 2nd to 16th Respondents can only be grounded in tort, a tort which, if committed, would have had to be committed in Russia making Russian law the proper law;
- It is unlikely that any order of the BVI Court would be enforceable in Russia and hence even if such an order were obtained, the matter would have to be re-litigated to obtain enforcement in Russia.

[29] Learned Queen's Counsel for the Appellant, on the other hand points to what he describes as non-Russian connecting factors. He points to the fact that only two of the Respondents are incorporated in Russia, the others being incorporated in the BVI, Panama, the Seychelles, Belize and the Turks and Caicos Islands. He further points to the fact that the principal law firms and counsel that have had conduct of the substance of the disputes between the parties are all based in England. Both of the option agreements are in English and contain clauses making English Law the proper law of the contracts and provide for arbitration in Switzerland. The sales agreements between the 9 selling companies and the Alfa companies are also in English and contain English choice of law. Learned Queen's Counsel relied on a passage in Goff L.J.'s speech in Spiliada to the following effect:

> "Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions…I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly appropriate forum…In my opinion the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate that the English forum."

Learned Counsel argued that on the basis that there were pointers to more than one jurisdiction in this case the BVI should be retained as forum conveniens recognizing that jurisdiction had been founded as of right, at least against some of the Respondents. Perhaps the most telling point made on behalf of the Appellant was that if the Appellant LVF was successful in the arbitrations, the award in its favour would have to be enforced in the BVI, LVF's place of incorporation. Indeed, we were informed that enforcement proceedings based on the Geneva award had already been commenced in the BVI, though these had been stayed pending the final outcome of the Zurich arbitration. In my view, the logical counter to that argument is simply that none of the other 15 Respondents could ever be parties to any such enforcement proceedings purely based on the fact that they were neither parties to the option agreements nor to the arbitration proceedings.

[30] Learned Queen's Counsel for the Appellant further argued that at no point did the Respondents acquit the burden of proof on them in their application for a stay, namely to satisfy the Court that Russia, or any where else, for that matter, was an available forum. The Respondents counter by admitting that there was no direct evidence on the issue but advance firstly that there is no requirement for specific expert evidence on the subject of availability of a specific jurisdiction and secondly that the very affidavits of the Appellant show that proceedings have already been commenced in Russia by the Appellant, albeit not proceedings replicatory of the proceedings in the BVI but nevertheless deriving from the same set of transactions. They point to the 6th affidavit of Nicolas Ulmer wherein he exhibits a copy of proceedings in the City of Moscow Arbitrazh Court wherein Respondents 3, 4 and 5 have sued the Appellant, among others, seeking a declaration that the Megafon shareholders agreement is invalid on the ground that it offends imperative provisions of Russian company law. They also point to the third affidavit of Jeffrey Galmond on behalf of the Appellant wherein he gives evidence of proceedings brought by CTM challenging Megafon's decision to enter, at the Receivers' request, and maintain a blocking entry against CTM's stake in Megafon's share register. These proceedings were also brought in the City of Moscow Arbitrazh Court. In the same affidavit Galmond also refers to proceedings initiated by the Appellant in the St. Petersburg Arbitrazh Court against parties to the Megafon shareholders agreement. Based on the

above, I am satisfied that this Court can infer that Russia is an available jurisdiction and that this aspect of the Spiliada first test has been met by the Respondents.

[31] It was the Respondents' contention that the only connection that this case had with the BVI was that some of the Respondent companies had been incorporated there. It was argued on behalf of the Respondents that in this jurisdiction this Court was recently faced with a not dissimilar situation in the case of Astian Group Limited et al v TNK Industrial Holdings Limited et al[8] in which the 2 Appellants were respectively a BVI company and a Seychelles company and the three Respondents were all BVI companies. This Court upheld a decision of the trial Judge to grant a stay on the grounds of forum non conveniens. The trial Judge had found that incorporation in a tax efficient jurisdiction is merely one of the factors to be taken into account by the court in the exercise of its discretion on this issue. The fact that nine of the Respondents were incorporated in the BVI is merely one of the factors to be considered, and is not necessarily a dominant factor when placed in the context of the non-BVI connecting factors listed in paragraph 28 above. A further consideration is that the Appellant has applied to join a further 12 defendants to the main action, of which only one is a BVI incorporated company. Three of the proposed additional defendants are Russian individuals, one is a person of French nationality and the remainder are corporations incorporated in various off-shore jurisdictions.

[32] I am satisfied on a review of the authorities and the circumstances in this case that BVI is not the forum conveniens. I am of the view that Russia is not only an available forum but is the forum "with which the action has the most real and substantial connection". There have been no circumstances adverted to by the Appellant by reason of which justice requires that a stay should nevertheless not be granted. In the circumstances I confirm the learned trial Judge's finding that Russia is the more appropriate forum. Because of the view that I have taken in regard to the forum issue it becomes unnecessary for me to regard specifically the points raised by the non-BVI Respondents on the appropriateness of the September Order in regard to service out of the jurisdiction under Part 7 of the Civil Procedure Rules 2000.

[8] 2005 BVI Civil Appeals Nos 11 and 17 of 2004 (unreported)

Submission to Jurisdiction

[33] There is one further jurisdictional matter to be dealt with. As remarked earlier on in this judgment, the Respondents had all applied to this Court for security for costs for the consolidated appeals. It will be recalled that the October Order ordered the Appellant to provide security for its undertakings and for costs in the sum of $30,000,000.00 (which sum was later increased to $40,000,000.00 by a single Judge of this Court as a condition for granting a stay of the January Decision). The basis of the applications for security for costs was that the Respondents alleged that the $40,000,000.00 presently being held by the Court were tainted funds, being the proceeds of money laundering and they apprehended that that sum might not be available to them in the event of their success in this appeal. The allegation of money laundering first arose (in so far as these proceedings are concerned) in a witness statement by one V. Sharma given in the Geneva arbitration proceedings. In support of their applications voluminous affidavits with exhibits attached were filed setting forth the allegations of money laundering and the Appellant replied in similar measure.

[34] It is the contention of the Appellant that the conduct of the parties, in particular their pursuit of the money laundering allegations, has been such that they have forfeited the right to argue that this Court should not exercise jurisdiction in this case. Learned Queen's Counsel for the Appellant framed his argument in this way: a party submits to the jurisdiction if he takes a voluntary step in proceedings that clearly and unequivocally acknowledges the existence of them. With the greatest of respect to learned Queen's Counsel, I am of the view that he has misstated the principle. In the old case of Rein v Stein[9] the principle was stated thus by Cave J. in the Divisional Court:

> "It seems to me that, in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or useful if the objection has been actually waived, or if the objection has never been entertained at all."

[9] (1892) 66 L.T. 469

The above statement was quoted with approval in the House of Lords decision of Williams & Glyn's Bank v Astro Dinamico[10]. The Appellant prayed in aid of their argument that an application for security for costs could be a waiver of objection to the jurisdiction of the court the case of Hewden Stuart Heavy Cranes Ltd v Leo Gottwald Kommanditgesellschaft et al, (1992) a decision of the English Court of Appeal of which we were provided a transcript. I am unaware of this case having been reported. The principal opinion was delivered by Lloyd L.J. in the course of which he said the following:

> "The plaintiffs say that the defendants submitted to the jurisdiction on three separate occasions – first when they applied for and obtained an extension of time for service of their defence, secondly when they applied for an order for security for costs and thirdly in the course of the hearing of the application under Order 12, rule 8…
>
> As for security for costs, the application covered the period up to and including the hearing of the application under Order 12, rule 8. The application was on the ground that the plaintiffs are a dormant company, without apparent assets. The defendants made clear from the outset, and in particular in an affidavit in support of the application for security for costs, that it was without prejudice to the defendants' forthcoming application under Order 12, rule 8. The point was repeated not once but twice in a letter of 11th April shortly before the hearing.
>
> It is difficult to know what more the defendants could have done to preserve their challenge to the jurisdiction. It is said that the application was inconsistent with an application under Order 12, rule 8, since the schedule of anticipated costs included costs related to the substantive issues in the action. But a closer look at the schedule reveals that this is not so. The substantive issues were those relevant to the application for security for costs itself and not beyond. I can find nothing in the application for security for costs itself, nor in the manner in which it was put forward, which could amount to a submission or a waiver. I reject the submission, if indeed it was advanced, that an application for security for costs up to and including the hearing of an application under Order 12, rule 8 and for the purposes of that application is of itself inconsistent with a challenge to the jurisdiction."

[35] The applications for security for costs are specific. The application of the 4th – 6th and 16th Respondents for example, sought an order of the Court that the Claimant (Appellant) do "Provide security for the Applicants' costs of IPOC's appeals nos. 20/2003 and 1/2004" by paying a sum into court or explaining in writing to the reasonable satisfaction of the Applicants the source of funds which were then in court. In the affidavit of Samuel Husbands dated 28th April 2004 in support of the application for security, at paragraph 35 it is stated:

[10] [1984] 1 WLR 438

> "By way of conclusion, in view of the very grave allegations made at the ICC Arbitration, and the impact upon the Fourth to Sixth and Sixteenth Defendants' ability to have recourse to the funds in Court, I respectfully request that IPOC be required to make available security in the sum of US$240,000.00 within 14 days as a condition of being permitted to continue with its appeals."

It is clear that the Respondents are going no further in their applications than to secure for themselves, in the event that they are successful in this appeal, their costs. I am of the clear view that the Respondents did not, by their application for security for costs, waive their objection to the jurisdiction.

[36] There were many other issues canvassed at the hearing before us by both sides. In view of my findings above I do not find it necessary to deal with them, save one, as they all fall away once the Appellant fails on the jurisdictional/forum issue. The additional issue that I will deal with concerns the protocols for an ex parte application for interim remedies such as injunctive relief or appointment of receivers.

Material misrepresentation and non-disclosure by Appellant

[37] It has long been settled law that an applicant for ex parte relief must act in the utmost good faith and disclose to the court all matters relevant to the exercise of the court's discretion. In Brinks Mat Ltd v Elcombe et al[11] Ralph Gibson LJ of the Court of Appeal in England giving the lead judgment opined that a court in considering whether there had been relevant non-disclosure and/or misrepresentation and what consequence to attach to it should have in mind the following circumstances:

- the duty of the applicant is to make "full and fair disclosure of all the material facts";
- the material facts are those which it is material for the court to know in dealing with the application as made; materiality is to be decided by the court and not the applicant;
- there is a duty on the applicant to make proper enquiries before making the application. Thus a state of correctable ignorance is no excuse;
- the extent of the enquiries to be made by the applicant must depend on the nature of the order that he is seeking and the circumstances in which the order is being sought.

[11] [1988] 1 WLR 1350

In other words, the more intrusive the effect of the order to the respondents' business the more searching must be the enquiries. A further factor is the degree of legitimate urgency;

- if material non-disclosure is shown a court should be "astute to ensure that a plaintiff who obtains [an ex parte order] without full disclosure is deprived of any advantage he may have derived by that breach of duty" , per Donaldson LJ in Bank Mellat v Nikapour[12]);
- a court must, nevertheless determine whether the facts(s) not disclosed are of sufficient materiality to justify immediate discharge of the order without examination of the merits. The innocence or deliberateness of the non-disclosure is relevant, though not necessarily decisive;
- it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded", per Denning MR in Bank Mellat[13]. In other words, the court has a continuing discretion.

To the list adumbrated by Ralph Gibson LJ I would add that there is also a duty on the plaintiff to advance, albeit in summary form, arguments that might reasonably be anticipated would be advanced against the grant of the ex parte order so that the judge might advert his mind to such argument in exercising his discretion

[38] The Respondents argued that the Appellant fell well short of fulfilling the duty of disclosure and non-misrepresentation. The Respondents posited that the Appellant misled the court in stating, through the first affidavit of Nicolas Ulmer at paragraph 40, that the Appellant had made or tendered all payments and notifications necessary for the exercise of its option rights under the two option agreements. There was no mention, the Respondents complain, of the requirement on the Appellant to pay a further $18 million, nor of the private agreement between Leonid Rozhetskin acting for LVF and Jeffrey Galmond acting for the Appellant. The ex parte application that resulted in the September Order was supported by an affidavit by Mr. Nicolas Ulmer, a lawyer acting on behalf of the Appellant. That affidavit was dated September 1, 2003. Prior to the swearing of that affidavit, Mr.

[12] [1985] F.S.R. 87
[13] supra

Ulmer had sworn another affidavit for use in proceedings in the Supreme Court of the Commonwealth of the Bahamas on August 21, 2003. The two affidavits were substantially similar, though there were significant variations. In the affidavit used for the ex parte application in this jurisdiction Mr. Ulmer says the following at paragraph 40:

> "Specifically, the April 14, 2001 Call Option Agreement (this is clearly a misprint as the date should have read April 10, 2001) provides for IPOC to pay an Option Price made up of a "Funding Price" of at least $15,150,000 together with a minor "Required Expenditure amount". As to the December 14, 2001 Call Option Agreement IPOC has paid LV Finance the $10 million portion of the "Option Price" set forth at 2.2.1 and, as further, explained below, has twice sent the $16 million final payment foreseen under 2.2.2 of the Agreement. To the best of my knowledge LV Finance's only statement that it had not received full payment under the Option Agreements is a March 31, 2003 letter to the Escrow Agent… Stating that the 'full Option Price' had not been paid under the agreements… At the time of that letter, March – May 2003, only the $16 million final payment of the Option Price under the December 14, 2001 Call Option Agreement remained to be paid; that amount has been repeatedly tendered through the Escrow Agent as explained below."

Paragraph 17 of Mr. Ulmer's affidavit submitted to the Bahamian Court is in exactly similar terms (including the misprint of the date) save that after the phrase "together with a minor 'Required Expenditure Amount'" there is the following language, which is absent from the BVI affidavit:

> "The 'Total Purchase Price' set forth in 2.4 of that first Agreement was a stratagem initially insisted upon by Mr. Rozhetskin and has not, and was not intended to be, paid because it was waived and varied by the parties, notably by operation of the December 14, 2001 Call Option Agreement which provided for a total 'Purchase Price' of one dollar. Any payment of the 'Total Purchase Price' under the April 10, Call Option Agreement was, furthermore, subject to an undertaking by Mr. Rozhetskin to cause it to be returned."

It was argued on behalf of the Respondents that in his submission before the trial Judge on the ex parte application, learned Queen's Counsel for the Appellant placed a convoluted construction on the language of the two option agreements, and in particular the second option agreement with the result that the trial Judge was misled into believing that the option price of $18 million was not payable. This, the Respondents argued, was a grave misrepresentation. Without going into detail, I would agree that the presentation by learned Counsel for the Appellant in the ex parte hearing was less than felicitous.

[39] When one looks at the Claim form before the trial Judge who heard the ex parte application for the interlocutory orders, it is clear that fundamental to the Appellant's case was the proper exercise of the two options in accordance with the option agreements. I am of the view that the failure to disclose the circumstances of non-payment of the $18 million purchase price for the 77.3% of the shareholding of TMI pursuant to the April Option Agreement was non-disclosure of a material fact. In the circumstances of the earlier part of this judgment, I am not required to decide whether it was of sufficient materiality as to justify this Court acting upon it.

[40] In the premises, I would dismiss the Appellant's appeal.

[41] In the January Decision, the learned trial Judge said the following: "The Respondent is to pay the costs of this application which I fix at $10,000.00 in favour of each group of Applicants represented at the hearing." Each of the Respondents save the 2nd, 3rd and 16th Respondents filed counter-notices challenging the trial Judge's determination of quantum of costs. We have intimated to Counsel for the 2nd, 3rd and 16th Respondents that we would hear argument on whether in the absence of an appeal by those Respondents against the costs order in the January Decision this Court has jurisdiction to vary that order in so far as it affects them. Upon hearing argument by Counsel for the Appellant and the named Respondents a comprehensive costs order will be made.

Michael Gordon,Q.C.
Justice of Appeal

I concur.

Brian Alleyne, S.C
Chief Justice [Ag.]

I concur.

Denys Barrow, S.C.
Justice of Appeal