16/1/12

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 141 of 2011 (PCJ)

GRAND COURT CAYMAN ISLANDS

The Hon Sir Peter Cresswell
In Chambers on 13 December 2011 and 10 January 2012

BETWEEN: **VTB CAPITAL PLC** **Plaintiff**

AND:
(1) **KONSTANTIN MALOFEEV**
(2) **UNIVERSAL TELECOM MANAGEMENT**
(3) **UNIVERSAL TELECOME INVESTMENT STRATEGIES FUND SPC** **Defendants**

APPEARANCES: Mr. Clive Freedman, QC instructed by and with Mr. Nigel Meeson QC of Conyers Dill & Pearman for the Plaintiff

Mr. Joe Smouha, QC instructed by and with Mr. James Eldridge and Mr Jan Golaszewski of Maples and Calder for the Second and Third Defendants

JUDGMENT

Revised from transcript and approved.

On 18 August last year, I refused to grant leave to serve out against the First named Defendant, Mr. Malofeev. That decision was upheld by the Court of Appeal on 30 November 2011. I refer to the judgment of the Court of Appeal for its full terms and effect.

On the same date (18 August), I granted holding relief against the Second Defendant ("D2") and the Third Defendant ("D3") stating:

> *"I am persuaded, not without considerable hesitation, that I should grant holding relief against D2 and D3 for a limited period of time so that the question whether "the free-standing Black Swan jurisdiction" should be held to exist in the Cayman Islands, can be fully argued.*
>
> *For present purposes, I am persuaded that the Plaintiff has a good arguable case against D2 and D3, in the light of the decisions of Bannister J (if correct), and that it is expedient to grant the relief sought so that the Grand Court can consider whether the "free-standing Black Swan jurisdiction"' should be held to exist in the Cayman Islands…………"*

I propose, therefore, to grant limited relief against D2 and D3 until the hearing of an application by D2 and D3 to set aside this order, or until the hearing of an application by the Plaintiff to continue this order, whichever is the earlier.

An application by the Plaintiff to continue the order must be heard before the end of November."

On 7 November 2011, I varied the order against D2 and D3 to insert a new paragraph 9A in the following terms:

"This Order does not prohibit the Third Defendant or its wholly owned subsidiaries from entering into either (a) a new 'repo' finance arrangement with Gazprombank OJSC..... substantially in the terms exhibited to Milukov 3......... or (b) any further similar 'repo' arrangements with GPB............."

The summons by the Plaintiff for a continuation of the order dated 18 August was issued on 28 September 2011. By agreement between the parties, the injunction granted on 18 August 2011 was continued until 13 December 2011. On 13 December 2011, there was new material before the court in the shape of Mr. Riem's fourth affidavit.

The background to this matter is set out in my first judgment and in the judgment of the Court of Appeal dated 30 November 2011.

The Parties

The Plaintiff ("VTB") is a bank with its registered office in London. It is a company registered in England and Wales and a member of the London Stock Exchange, authorised and regulated by the Financial Services Authority. The majority of its shares are owned by JSC VTB Bank, a state owned Russian bank.

The First named Defendant in these proceedings, Mr. Konstantin Malofeev, is a Russian citizen with controlling interests in what VTB alleges is "a complex web" of companies located in numerous offshore jurisdictions. Mr. Malofeev is the founder of the Marshall Capital Group of companies ("Marcap"). Marcap is a group of companies incorporated in a number of jurisdictions, including Russia, Cyprus, the BVI, Panama and the Cayman Islands.

The Second Defendant (D2) is an exempted company incorporated in the Cayman Islands. The Third Defendant (D3) is a segregated portfolio company incorporated in the Cayman Islands. The Third Defendant is administered by an entity based in Cyprus. Mr. Malofeev has the sole ultimate beneficial interest in the participating shares of D3.

The English Proceedings

VTB commenced the English proceedings on 23 December 2010. In the English proceedings, VTB, as Plaintiff, claims, among other things, that it was induced by fraudulent misrepresentations to enter into a Facility Agreement dated 23 November 2007 ("the Facility Agreement"). The other parties to the Facility Agreement were:

(a) a Russian company called Russagroprom LLC ("RAP");
(b) Nutritek International Corp ("Nutritek"), a company incorporated in the BVI; and
(c) a BVI registered company called Newblade Limited ("Newblade"), which was a special purpose vehicle which had been incorporated to hold nine Russian dairy plants.

At the time the Plaintiff VTB entered into the Facility Agreement, it was known as "VTB Europe PLC". The Plaintiff changed its name to VTB Capital PLC in January 2009.

Pursuant to the Facility Agreement, the Plaintiff loaned to RAP a total of US$225,050,000 principally for the purpose of enabling RAP to acquire Nutritek's shareholding in Newblade.

At the time the Facility Agreement was signed, the Plaintiff's case is that it believed that it was a genuine commercial transaction between two independent companies for the sale of shares at market value. The Plaintiff says it has subsequently discovered that:

(a) Nutritek and RAP were in fact controlled by the same beneficial owners, Marcap, whose ultimate controlling mind was the First Defendant.

(b) In order to induce the Plaintiff to enter into the Facility Agreement, Nutritek provided false information regarding the value and revenues of the dairy plants held by Newblade.

(c) The figures provided to the Plaintiff at the time at which the Facility Agreement was agreed were very significantly overstated.

(d) The report of Ernst & Young provided to the Plaintiff was based on historical figures and forecast trading figures both provided by Nutritek. Based upon those figures, Ernst & Young provided a valuation of US$366 million. In fact, both the historical figures and the trading forecast were overstated and in addition one of the dairy plants was not in fact operating. This is explained further at paragraphs 38 to 57 of the Particulars of Claim in the English proceedings.

The progress in the English proceedings is as follows.

The Plaintiff filed its claim form on 23 December 2010 claiming damages for deceit and/or conspiracy to defraud against all the Defendants to those proceedings (Nutritek, Marshall Capital Holdings Ltd ("MarCap BVI"), Marshall Capital LLC ("MarCap Moscow") and M. Malofeev).

On 11 May 2011, the Plaintiff was granted permission by Chief Master Winegarten to serve the claim form out of the jurisdiction. Nutritek and Marcap BVI have been served. Marcap Moscow has not yet been served. Because of the difficulties regarding service of foreign proceedings in Russia, service could take between 12 and 18 months.

By application notices dated 25 July 2011, Nutritek and Marcap BVI applied to set aside the order permitting service out of the jurisdiction.

On 5 August 2011, the Plaintiff issued its application for a Worldwide Freezing Order without notice to any of the Defendants to the English proceedings. A Worldwide Freezing Order was granted by the English Court together with an order for alternative service on Mr. Malofeev. Permission was granted to enforce the order against Mr. Malofeev's assets in Cyprus, the BVI and the Cayman Islands.

I have referred to the orders I made on 18 August.

The Plaintiff also applied to the courts of the BVI and Cyprus for ex parte freezing orders, which were granted on 24 and 23 August respectively.

By application notice dated 28 September, Mr. Malofeev applied in England to set aside the order against him permitting service out of the jurisdiction. Mr. Malofeev also applied to discharge the Worldwide Freezing Order on the basis that he had offered undertakings in respect of certain of his assets which he contended were adequate to replace it. This application came before Vos J on 12 and 14 September 2011 and was dismissed.

A discharge application, (supported by additional evidence and with slightly varied undertakings) by Mr. Malofeev, coupled with an application to suspend his assets disclosure obligations pending determination of the same, was made to Norris J on 26 September. Norris J adjourned the discharge application to be heard as an application by order, but refused to suspend Mr. Malofeev's disclosure obligations pending determination of that application. On the latter point, Mr. Malofeev appealed to the Court of Appeal, but Carnwath and Jackson LJJ dismissed that appeal on 4 October.

From 2 November, there was a hearing lasting six days before Arnold J in which Mr. Malofeev, as well as Nutritek and Marcap BVI, applied for the discharge of Master Winegarten's order of 11 May and Mr. Malofeev applied for the discharge of the

Worldwide Freezing Order. The Plaintiff sought permission to amend the claim form to include a further claim arising out of or involving the lifting of the corporate veil.

Arnold J handed down judgment on 29 November. In that judgment, Arnold J held that:

(a) there was a good arguable claim of deceit and conspiracy against Mr. Malofeev;
(b) the loss claimed was suffered by the Plaintiff VTB and such loss was suffered in England;
(c) the application to amend the Particulars of Claim to add a claim in contract based on lifting the corporate veil was refused;
(d) applying the Private International Law Act 1995, the proper law of the tort was Russian law and not English law. Further, England was not clearly the appropriate forum to try this matter. The natural forum was Russia. Accordingly, the order of Chief Master Winegarten permitting service out of the jurisdiction was set aside and permission to serve out of the jurisdiction on Mr. Malofeev, Nutritek and Marcap BVI was refused;
(e) in any event the judge would not have continued or regranted the injunction on the ground that in his judgment there was no real risk of dissipation of assets on the part of Mr. Malofeev and/or in one respect relating to a company called Dalford, there was a material non-disclosure "deliberately concealed from the court." (See the judgment at paragraphs 249 to 252.)

At the conclusion of his judgment (paragraph 255) Arnold J said:

> *"For the reasons given above,*
>
> *(i) I shall refuse VTB permission to amend the Particulars of Claim;*
> *(ii) I shall set aside the order of Chief Master Winegarten and refuse VTB permission to serve the proceedings outside the jurisdiction;*
> *(iii) even if I were willing to give VTB permission to serve the proceedings outside the jurisdiction, I would not continue the WFO until trial;*
> *(iv) even if I were otherwise prepared to continue the WFO, I would discharge the WFO for material non-disclosure by VTB."*

The matter is now proceeding to the Court of Appeal in England. Arnold J gave permission to appeal in respect of the application for leave to amend to plead the contractual claim.

Although Arnold J refused permission in respect of other grounds of appeal, on an application for permission to appeal heard by the Court of Appeal on 5 December, Tomlinson LJ and Sir Richard Buxton gave permission to appeal in respect of his findings relating to the injunction, both as regards real risk of dissipation and material non-disclosure.

I am told that later this month Tomlinson LJ is due to hear an application for permission in respect of the remaining parts of Arnold J's judgment, where permission has to date not been granted and in particular against the findings that the proper law of the tort was Russian law (the Plaintiff says that it was English law) and against the finding that Russia was the natural forum (the Plaintiff says that it was England and Wales).

Arnold J continued the injunction for a further seven days pending the hearing before the Court of Appeal. In addition to granting permission on 5 December, the Court of Appeal continued the injunction against Mr. Malofeev until after the disposal of the appeal. Thus, the Worldwide Freezing Order of the English court continues to have effect.

I should record that when granting permission to appeal Tomlinson LJ said:

> *"For all these reasons, whilst I consider that Mr. Freedman faces very considerable difficulties on his appeal, I have nonetheless concluded that it is appropriate to grant permission to appeal, having regard to the test which has to be satisfied that there is a real prospect of success of an appeal, that is a relatively modest hurdle and Mr. Freedman has, in my judgment, if only just, surmounted [it]."*

<u>The hearing in Grand Cayman on 13 December</u>

The FSD practice in relation to heavy applications is set out in the FSD Guide.

Prior to the date fixed for the hearing of this matter on 13 December, Conyers Dill & Pearman, on behalf of the Plaintiff, sent an email to Maples and Calder on behalf of D2 and D3.

> *"One concern we have is what you intend to argue and whether the hearing can be completed in one day. The Court of Appeal* [in England] *has given leave to appeal, and in our view it would not be productive to argue the same matters before Cresswell J that are subject to appeal in London. If, on the other hand, the hearing will be limited to those matters which are Cayman specific, then, although tight, we could do it in one day. Please let us have your views on this."*

Maples and Calder emailed back the same day.

> *"One point to note is that our leading counsel is not available on 14 December and therefore if we agree that we need more time, then we will have to see if Cresswell J has time available on 12 December.."*

There was then a further email from Maples and Calder.

> *"I have now spoken to our leading counsel. Although he considers that we should be able to get through everything in one day, he thought it might be prudent to request that the judge starts the hearing on 13 December at 9:00 am. If the hearing is not progressing....... according to plan, we could always request one hour for lunch and then possibly sit until 5:00 pm. Please let me know your thoughts on this suggestion."*

Conyers Dill & Pearman emailed back.

> *"Fine as we would not be available on 12th or 14th."*

The reason why that message said, "...we would not be available on 12th..." was because Mr. Freedman, QC had recently been instructed, and was unable to travel to the Cayman Islands for a hearing starting before the 13th.

In the event, this matter came before me on the 13th. The skeleton arguments on behalf of VTB extended to about 63 pages.

I sat until late in the day but Mr. Smouha, QC, who appeared for the Second and Third Defendants, had to leave to catch an aeroplane before his submissions were finished. In the circumstances, I was anxious to ensure that the parties had a full and fair opportunity to complete their submissions, at least as to jurisdiction, so I gave directions to enable further skeleton arguments to be served.

In the result, there are six skeleton arguments before the Court dated as follow. For the Plaintiff, 9 December. For D2 and D3, 9 December. For the Plaintiff, 12 December. The skeletons that followed the hearing on 13 December are as follows. Reply submissions on behalf of the Plaintiff, 14 December. Supplemental submissions of the Second and Third Defendants, 19 December. Final reply submissions on behalf of the Plaintiff, 22 December.

<u>The Plaintiff's Submissions</u>

Mr. Freedman, QC, for the Plaintiff, submitted as follows.

<u>The need for an injunction</u>

The Second Defendant and the Third Defendant are not parties to the English proceedings. Mr. Malofeev has assets in the Cayman Islands, namely his interests (through Tarsara Portfolio Corporation ("Tarsara") a company incorporated in the BVI) in the Third Defendant, which are being used to hold shares in a Russian telecommunications company known as Rostelecom. If he were to take steps to dispose

of or diminish his interest in D3 or if D3 were to take steps to dispose of or diminish the Rostelecom shares, this would have the effect of preventing or impairing VTB's ability to recover the losses it claims in the English proceedings.

Rostelecom shares are traded on the London and Frankfurt stock exchanges and on some Russian exchanges, including OTCQS. The manner in which the shares are held is complex and is subject to various repurchase agreements involving Gazprombank, such that in fact they may not be owned at all, but be the subject of a right vested in D3 to repurchase them at a price currently below market value.

Whilst the Plaintiff had the benefit of the orders made by the Court of Appeal in England in the nature of a Worldwide Freezing Order and of the courts of the BVI against the First Defendant, the Plaintiff sought and obtained an order against D2 and D3 in Cayman in order to domesticate the Worldwide Freezing Order from the English Court. The purpose of so doing is that it will operate in personam against D2 and D3.

If no order is made, the evidence is to the effect that Mr. Malofeev will be able to serve redemption notices on D3 and/or take other steps which would have the effect of immediately enabling Mr. Malofeev, directly or indirectly, to take control of D3 and then to deal with the assets of the Fund so as to diminish or dissipate the value of the participating shares.

In the event that the Plaintiff obtains judgment in England, an injunction is required to ensure that it is not rendered nugatory when it comes to be enforced in Cayman. The route by which the English judgment will reach the Cayman assets is as follows. The English judgment against Mr. Malofeev will be registered in the BVI. The BVI court will appoint a receiver by way of equitable execution over Mr. Malofeev's 100% shareholding in Tarsara. Tarsara's right to redeem the 100% holding of the participating shares in D3 is a contractual right which is enforceable against D2 and D3 in Cayman. The Cayman injunction is required so as not to render that right of enforcement nugatory.

The Chabra jurisdiction

Mr. Freedman's central submission is as follows. Where a non-cause of action defendant ("NCAD") is amenable to the jurisdiction of the Grand Court because he/she/it resides here, the Grand Court has power to grant Chabra type relief in aid of proceedings in a foreign court against a cause of action defendant ("CAD") in the foreign court, notwithstanding that the NCAD is not before the foreign court and the CAD is not amenable to the jurisdiction of the Grand Court.

Thus, the Grand Court has jurisdiction to grant an injunction against D2 and D3 (the Cayman entities) notwithstanding that there is no cause of action asserted against D2 or D3 in the Cayman Islands or in any other jurisdiction. The Grand Court has personal jurisdiction over the Cayman entities D2 and D3 and has the power to grant freezing order relief in respect of the Cayman entities despite the fact that they are non-cause-of-

action defendants. The fact that Mr. Malofeev may be considered to be out of the territorial jurisdiction of this Court is entirely irrelevant to the question whether or not the Plaintiff is entitled to injunctive relief against D2 and D3, the Cayman entities.

The Cayman cases dealing with the Chabra jurisdiction do not involve fact scenarios in which the following factors arise:

(a) the defendants before the Court are Chabra Defendants;
(b) the plaintiff has not commenced substantive proceedings against the Chabra defendants; and
(c) there is no cause-of-action defendant amenable to the jurisdiction of the Grand Court.

However, these facts did arise in the BVI case of Black Swan Investment I.S.A. v Harvest View Limited and Sablewood Real Estate Limited (23 March 2010, Bannister J). Following on from the decision in Black Swan, Bannister J delivered judgment in Yukos CIS Investment Limited & Anor v Yukos Hydrocarbons Investments Limited and Others, BVIHC (COM) 85 of 2010. (See the quotation from the judgment of Bannister J at page 23 of my first judgment.)

The Eastern Caribbean Court of Appeal in Yukos 26 September 2011 approved Bannister J's reasoning. Kawaley JA said at paragraph 147:

> *"I find that the substance of the judge's legal findings about the inapplicability of the Black Swan principle to the present case was sound. This in no way undermined the legal analysis in the Black Swan case itself, with which I concur, on the proper approach to the jurisdiction to grant interim relief in support of foreign proceedings. The proper question is not whether a freezing injunction is sought in support of either a local cause of action or a foreign cause of action which has a local equivalent in any strict sense. Rather, the relevant enquiry is whether or not the claimant may obtain a foreign judgment which may be enforceable by whatever means against local assets owned or controlled by the defendant."*

This Court, submitted Mr. Freedman, has jurisdiction to grant Mareva relief to VTB on the basis that the assets vested in the Cayman entities may in fact be owned beneficially by Mr. Malofeev, against whom a cause of action is asserted in England. Further, any money judgment which the Plaintiff may obtain against Mr. Malofeev in England could be enforced against him in the Cayman Islands, jurisdiction being established under GCR Order 11 rule 1(1)(m) which enables the Court to grant leave to serve out in order to enforce a judgment or award. Alternatively, the value of the assets held by D3 may be realised through enforcement in BVI against Mr. Malofeev's interest in Tarsara, which in turn can redeem the participating shares in the Fund. Service of a Notice of Redemption by Tarsara would lead to the realisation of the value of the participating shares covered by such a notice and enable those assets to be applied towards satisfaction of the judgment. This is a contractual right capable of enforcement by this Court.

Mr. Freeman submitted that in two recent cases of the Cayman Islands Court of Appeal, Sir John Chadwick, President has affirmed the jurisdiction of the Cayman Court to grant relief in support of foreign proceedings without any requirement about having a cause-of-action defendant before the Cayman Court.

In his judgment in this case (30 November 2011), Sir John Chadwick, President said at paragraph 16 that:

> *"decisions in this Court have established that courts in this jurisdiction will follow Lord Nicholls' lead in relation to the Siskina question."*

He later said at paragraph 25 that this issue had been settled at least at the level of the Court of Appeal.

The Court of Appeal authority mentioned by the President in this connection was Deloitte & Touche Inc. v Felderhof, unreported 12 July 2011. At paragraph 44 in Felderhof, the President said:

> *"as it seems to me the real question is not whether the cause of action pleaded in the Ontario proceedings would be justiciable here: the real question is whether a judgment against Mr. Felderhof in the Ontario proceedings could be enforced against him in the Cayman Islands."*

The other justices of appeal agreed with the President, and Conteh J A said:

> *"I agree especially with his conclusion that the purpose of a Mareva freezing order and its extended Chabra jurisdiction is to ensure that the enforcement of a future judgment of a court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of a non-cause-of-action defendant) which would or might otherwise be or become available to satisfy that judgment."*

What matters is whether a freezing injunction stands to assist in the enforcement of a prospective judgment, wherever that judgment may be obtained. The question where causes of action may be enforced is irrelevant. (See *Mercedes Benz AG v Leiduck* pages 306B - 307F, 310A, 311F to H.)

The Law in Other Jurisdictions

In some countries there is legislation. In England and Wales there is section 25 of the Civil Jurisdiction and Judgments Act 1982. In Hong Kong Article 21M to the High Court Ordinance was introduced by the Civil Justice (Miscellaneous Amendments) Ordinance 2008.

In other countries, the courts have been able to achieve the same result through careful analysis of the court's inherent jurisdiction and existing legislation - in particular local equivalents to section 37 of the English Senior Courts Act 1981.

So far as Jersey is concerned, see the decision of the Court of Appeal in Solvalub Limited v Match Investments Ltd [1998] 1 LPr 419.

In the British Virgin Islands, in *Black Swan [supra]* Bannister J concluded that he should follow Lord Nicholls' lead in a case where the defendant against whom an injunction was sought was resident in the BVI. His analysis was entirely correct. In Yukos, the Eastern Caribbean Court of Appeal disagreed about whether Bannister J had been correct to refuse relief with the majority upholding his decision. But all three justices endorsed the analysis and approach in Black Swan.

Meespierson (Bahamas) Ltd v Grupo Torras SA (1999-2000) 2 I.T.E.L.R. 29, a decision of the Court of Appeal of the Bahamas, is not good law and should not be followed. Meespierson was cited to and mentioned by the ECCA in Yukos, but they preferred the approach in Black Swan.

The Plaintiff's Position in Summary

In reliance on the Chabra jurisdiction, the Plaintiff is entitled to obtain injunctive relief in respect of D2 and D3. The Plaintiff has demonstrated a good arguable case before the English High Court. The Plaintiff has also demonstrated a significant claim to the funds which it believes are held in D2 and/or D3. The Court of Appeal in England has continued the Worldwide Freezing Order pending the outcome of the appeal. In order not to render the appeal nugatory and to support that order, this Court is asked to support the English order by granting an order against D2 and D3 in the nature of Chabra relief and thereby to preserve those funds pending final judgment in the English proceedings. Without domestication, there will be no prospect of being able to have any practical sanction in the event that Mr. Malofeev was to deal with the shares or their value. The interim relief is needed to render more efficacious the English proceedings. There is a real risk of dissipation of significant assets, and if the injunction sought by the Plaintiff is not granted, it would cause significant prejudice to the Plaintiff and thereby injustice. The balance of convenience plainly favours the granting of relief on the Plaintiff's application.

The Submissions on behalf of D2 and D3

Mr. Smouha, QC, on behalf of D2 and D3 submitted as follows:

Free-standing Chabra relief

In this application, the Plaintiff seeks relief which is doubly novel. Not only does it seek free-standing Mareva relief, it then goes on to do so on the Chabra basis against NCADs

only, in the complete absence of a CAD. That has never happened before in the Cayman Islands. Indeed so far as D2 and D3, (and indeed the Plaintiff), have been able to ascertain, this has not even happened in England and Wales where free-standing Mareva relief generally is not controversial in the light of section 25 of the CJJA 1982.

The Plaintiff's attempt to combine into these proceedings a free-standing injunction with the exercise of the Chabra jurisdiction raises novel issues and complex problems. The Plaintiff has not cited any authority in any jurisdiction which has combined these two jurisdictions. The problems of doing so are self-evident - each by itself lacks any substantive cause of action. At least in relation to the free-standing injunction jurisdiction, there is a cause of action being pursued somewhere against the defendant. But here there is no cause of action being pursued against D2 and D3 anywhere, neither in England nor in the Cayman proceedings, which claim only an interlocutory injunction.

A plaintiff joining a Chabra defendant must assert and establish that the Chabra defendant holds assets which are in fact assets of the primary defendant. But if there is no primary defendant, as in the present case, where and how is that issue to be resolved? There is a misconception at the heart of the Plaintiff's application and a misapplication of the Chabra jurisdiction. The Chabra jurisdiction is a jurisdiction that can only be exercised ancillary to the exercise of jurisdiction over and against a cause-of-action defendant who is the beneficial owner of assets in the possession of a non-cause-of-action defendant. If there is no cause-of-action defendant, there is nothing to be ancillary to. The Cayman Defendants D2 and D3 are not defendants in the English proceedings - it is not conceptually possible for a Cayman Defendant to be an ancillary defendant to English proceedings.

Where the Court is unable or refuses to grant Mareva relief against the principal defendant (cause-of-action party) the foundation for Mareva relief against the co-defendants (non-cause-of-action parties) falls away. The latter is parasitic upon the former.

In this case, this Court (affirmed on appeal) has refused permission to serve the Plaintiff's Mareva application against Mr. Malofeev out of the jurisdiction. There is no possible Mareva relief against Mr. Malofeev. Given this, it is not possible as a matter of law and principle to extend any Mareva relief to the Cayman Defendants, D2 and D3. There are important practical reasons why this must be so.

The question to be determined as between a plaintiff and a Chabra defendant requires investigation of the relationship between the Chabra defendant and the primary defendant. But that issue cannot properly be determined if the primary defendant is not a party.

The Plaintiff's allegations in respect of the Fund are based on allegations against Mr. Malofeev. The allegations of risk of dissipation are allegations against Mr. Malofeev. But without Mr. Malofeev, it would be unfair and inappropriate to require the Cayman Defendants to defend those claims, which would at some point have to be tried.

Even at the interlocutory stage, there are questions which cannot be properly determined. For example, the Cayman Defendants cannot say whether Mr. Malofeev's other assets are sufficient to meet the Mareva relief sought, such that no relief would be appropriate against them.

The position in this case is no different from where a plaintiff seeks Mareva relief against a sole defendant against whom no cause of action lies. It is well established that a court has no power to grant an injunction in such a case. *(See TSB Private Bank International v Chabra [1992] 1 WLR 232).*

As to the Yukos decision, Yukos was not a Chabra case where NCADs hold assets to which the CAD may have an entitlement, against which the plaintiff may in due course be able to enforce. In Yukos the three BVI respondent companies were themselves the subject matter of the main proceedings (which were in the Netherlands). That case was principally about who ultimately owned those BVI companies. The claimants were seeking to maintain the status quo (both through a freezing order and a receivership) pending determination of that question. The BVI respondents, whilst not parties to the Dutch proceedings, were very much bound up in those proceedings, as they were ultimately the subject matter of them. This seemed particularly important to the reasoning of the leading judgment of Kawaley JA.

In the present case, D2 and D3, their shares and their assets, have nothing whatsoever to do with the English proceedings and the dispute between VTB, Mr. Malofeev and the other defendants in England. The only connection, tenuous as it is, is that Mr. Malofeev indirectly holds the participating shares in D2.

Yukos is not principally concerned with the correctness of Black Swan. In the leading judgment of Kawaley JA, there is no detailed consideration of the correctness of Bannister J's judgment in Black Swan at all, but rather a conclusory statement that Kawaley JA concurs with it. To the extent that there is any analysis of Black Swan, it is not as to whether Black Swan is correct but rather, as to whether it could be applied on the facts then before the Court in Yukos. In the absence of any detailed analysis, it appears that the Court of Appeal was led into error by the original error of Bannister J in Black Swan, which in turn rests on a misreading of Channel Tunnel.

Public policy played a very significant role in the Court's conclusion in Yukos. This important question of public policy is a matter for the legislature, after consideration by the Cayman Islands Law Reform Commission which would typically consult with stake holders, including the local legal community. Even if it were right to say, as Black Swan suggests and Yukos appears to prove, that there is a "lacuna in the authorities", that does not mean the Court has a free hand to legislate the position. It is not the Court's role to fill the gap, contrary to the view of Bannister J in the BVI. This submission has additional force here in the Cayman Islands where the issue is, in fact, under active consideration by the Law Reform Commission. The Law Reform Commission do not consider the outcome of the policy review to be a foregone conclusion, with its counsel stating that the

Commission *"will be examining the Grand Court Law and Rules against the background of the UK Civil Jurisdiction and Judgments Act 1982 to determine whether any principles can be usefully adopted for Cayman purposes."*

To the extent that it is contended that Black Swan and Yukos should be followed in the Cayman Islands so as to ensure a uniform approach throughout the common law Caribbean jurisdictions, Mr. Smouha submitted that there is already a division in approaches throughout the common law Caribbean jurisdictions and indeed the broader common law world, (including at appellate court level).

In *Meespierson (Bahamas) Limited v Grupo Torras SA (1999) I.T.E.L.R. 29*, the Bahamas Court of Appeal held, in carefully reasoned decisions, that the question of whether free-standing Mareva relief ought to be permitted is one for the legislature. It is particularly striking that the Court reached that conclusion when expressly articulating the policy considerations in play.

The Court of Appeal of Singapore followed the same approach in *Swift-Fortune Limited v Magnifica Marine SA [2007] 1 SLR(R) 629*. This is the approach which the Defendants submit the Court should take here.

Even if the Court has power to grant the relief sought, such power should not be exercised in the present case.

Mr. Smouha submitted that even if the Grand Court has power to grant a freezing injunction in the present circumstances and has Chabra jurisdiction over the Cayman Defendants, the Plaintiff cannot establish the elements necessary for the exercise of such power/jurisdiction.

The Plaintiff now faces insuperable difficulty in establishing that it has a good arguable case on the substantive cause of action. Arnold J held that the natural forum for the dispute is Russia and refused the Plaintiff permission to serve out on, among others, Mr. Malofeev. As matters stand, there is no substantive claim even in England.

Whatever the Court's view of The Siskina, not even Lord Nicholls' dissent in Mercedes Benz or Black Swan go as far as sanctioning the granting of a freezing order in circumstances where no substantive proceedings are alive anywhere at all. The threshold the Plaintiff must cross is a demonstration of a good arguable case. The fact of the existence of an appeal cannot establish satisfaction of that test given that Arnold J has, in a detailed and comprehensive judgment, after a six-day inter partes hearing, found that the English Courts do not even have jurisdiction over the claim against Mr. Malofeev. The grounds on which the Plaintiff relies to prove that there was a real risk of dissipation of assets are the same as those raised before Arnold J in the Chancery Division. They have all been comprehensively rejected and dismissed at paragraphs 231 to 236 of Arnold J's judgment. Arnold J in fact considered further points raised by the Plaintiff's counsel but rejected each one of them at paragraphs 237 to 243 of his judgment. Further, the Plaintiff was found by Arnold J not to have made full and frank disclosure in the ex parte

application before Roth J, and deliberately so. In particular, Arnold J found that the failure to disclose VTB Moscow's involvement in a sham contract in order to avoid tax undermined the Plaintiff's case on the risk of dissipation. (See paragraph 252 of the judgment.)

Here the Plaintiff failed to disclose that it had taken an inconsistent position before the English Court in relation to Mr. Malofeev's control over the Fund. Such information is within the Plaintiff's knowledge and ought to have been brought to the attention of the Court on the ex parte application. Both points are critical to the Court's assessment as to whether to grant a freezing order against the Cayman Defendants, relating, as they do, to the Court's Chabra jurisdiction and the necessity for a further freezing injunction in addition to the English Worldwide Freezing Order.

The fact that the Plaintiff chose to omit from the evidence deployed for its application before this Court substantial evidence from the hearing before Arnold J, while seeking to try to persuade this Court to come to a conclusion different from Arnold J is illustrative of the difficulties - in effect seeking to take advantage of the absence of a CAD. D2 and D3 have been unable to make submissions based on that evidence, which presumably included evidence relied on by Mr. Malofeev, in successfully persuading Arnold J to set aside the Worldwide Freezing Order.

During the course of the 13 December hearing, it emerged that a very considerable amount of material which was before Arnold J had not been placed before the Grand Court or served on D2 and D3. It appears that of 34 affidavits and witness statements, which were in the "F Bundle" in the English proceedings, only seven have been served on D2 and D3 and were before the Grand Court at the hearing on 13 December. Of the 27 missing affidavits, some date back to August 2011 and none are more recent than 8 November 2011. The "F7 Bundle" also appears to contain certain contemporaneous documents which were before Arnold J. D2 and D3 and this Court have not seen these.

The Plaintiff's assertion that the omitted material is not relevant seems doubtful bearing in mind that Arnold J's adverse decision goes to all the main issues, including risk of dissipation and deliberate non-disclosure. Neither D2 and D3 nor this Court is in a position to test that assertion.

It is difficult to see how these 27 missing affidavits and witness statements could be sufficiently relevant to be put before Arnold J, but not sufficiently relevant to be put before the Grand Court. This is doubly so considering the way in which the Plaintiff chose to present its case on the summons. It seeks to argue, in effect, that the Cayman Islands Court should accept the parts of Arnold J's judgment which are helpful to it, but then second guess and depart from the parts which do not assist the Plaintiff, especially with regards to material non-disclosure and risk of dissipation. However, it then asks the Grand Court to do that with only a part of the evidence which was before Arnold J. This approach is wholly misconceived. It is clear that at least some of this material must be relevant to the Plaintiff's summons.

As regards to the length of the hearing on 13 December, the Plaintiff's time estimate in their summons was one day. As the onus is on the Plaintiff and the great bulk of the submissions to be made are theirs, it was at all times best placed to estimate the time. The week before the hearing (on 6 December) attorneys for the Plaintiff flagged a concern as to whether one day would be enough. That was the first time any such concern had been raised, notwithstanding Arnold J's judgment was handed down on 29 of November. The Plaintiff's concern was apparently based on "what you (i.e. D2 and D3) intend to argue". D2 and D3 attorneys' initial response to that was to say that they would check with leading counsel but that "if we agree that we need more time then we will have to see if Justice Cresswell has time available on 12 of December 2011". That date was convenient both for D2/D3 and for the Court. However, it was not convenient for the Plaintiff. After speaking with their leading counsel, D2 and D3 confirmed their view that "we should be able to get through everything in one day", albeit it would be prudent to request a longer sitting day. That estimate was correct from D2 and D3's perspective. The Plaintiff's attorneys' response was: "fine as we would not be available on 12th or 14th December". In the light of how it intended to present its case on the summons, the Plaintiff must have realised that one day would not be enough. At that point, the Plaintiff ought to have engaged with D2 and D3 and the Court as to how best to deal with the timing difficulty. In the event, leading counsel for the Plaintiff took some 4.5 hours to deal with jurisdictional issues only, having served about 70 pages of written submissions. No criticism can be made of the Defendants for that wholly unfair use of the time available which effectively precluded any possibility of disposition of any issue within the day, let alone all the issues. The result was that the injunction had to be continued so as to allow further submissions.

<u>Analysis and Conclusions</u>

It is convenient to summarise the current state of the law before turning to consider the application for Chabra type relief.

It is important to distinguish between two separate issues or questions.

First: Service. The Grand Court Rules Order 11, rule 1(1) set out the principal cases in which service of a writ out of the jurisdiction is permissible with leave.

Second: Power. The extent of the Grand Court's power to grant Mareva or freezing orders and the Chabra Jurisdiction.

GENERAL POWER TO GRANT MAREVA INJUNCTIONS

A. DEFENDANT SERVED WITHIN THE CAYMAN ISLANDS WITH PROCEEDINGS CLAIMING SUBSTANTIVE RELIEF. Where a defendant is served within the Cayman Islands with proceedings claiming substantive relief, there is jurisdiction to grant a domestic or exceptionally a worldwide Mareva injunction.

B. DEFENDANT SERVED OUT OF THE JURISDICTION OF THE CAYMAN ISLANDS WITH PROCEEDINGS CLAIMING SUBSTANTIVE RELIEF IN ONE OR MORE OF THE CASES PERMITTED BY GCR ORDER 11.When a defendant is served out of the jurisdiction of the Cayman Islands with leave of the Grand Court with proceedings claiming substantive relief in one or more of the cases permitted by GCR Order 11, there is jurisdiction to grant a domestic or exceptionally a worldwide Mareva injunction. But on the present state of the law, a claim for a free standing Mareva injunction is not a case where there is jurisdiction to grant leave to serve out (GCR Order 11 Rule 1(b) and the decision of the Court of Appeal in *VTB Capital v Malofeev and Others 30 November 2011).*

POWER TO GRANT MAREVA INJUNCTIONS IN AID OF FOREIGN PROCEEDINGS

C. THERE IS NO EQUIVALENT OF SECTION 25 OF THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982 IN THE CAYMAN ISLANDS. In England and Wales, section 25 of the Civil Jurisdiction and Judgments Act 1982 confers a jurisdiction on the Court to grant interim relief in English proceedings brought solely for that purpose, the interim relief being granted in support of foreign proceedings either commenced or to be commenced. *Mareva* relief can be granted in those English proceedings for the purpose of preserving assets, so that assets will be available to satisfy a judgment obtained in the foreign proceedings, which will be enforceable in England.

There is a similar jurisdiction under section 44 of the Arbitration Act 1996 for relief to be granted in support of arbitral proceedings, including arbitral proceedings abroad. Both section 25 proceedings and section 44 proceedings are the subject of rules enabling service of the proceedings to be made with permission outside of the jurisdiction of the Courts of England and Wales.

There is no equivalent of section 25 of the Civil Jurisdiction and Judgments Act 1982 or of section 44 of the Arbitration Act 1996 in the Cayman Islands legislation. Nor are there any related rules.

The position in England and Wales until section 25(1) of the Civil Jurisdiction and Judgments Act 1982 came fully into force in 1997 is conveniently described in Dicey, Morris & Collins The Conflict of Laws 14th edition, volume 1, at paragraph 8-021 and following (as quoted in my first judgment herein).

D. DEFENDANT SERVED WITHIN THE CAYMAN ISLANDS WITH PROCEEDINGS CLAIMING SUBSTANTIVE RELIEF, WHEN SUCH PROCEEDINGS ARE STAYED. Where a defendant is served within the Cayman Islands with proceedings claiming substantive relief, there is jurisdiction

to grant a freezing order in aid of foreign proceedings when the proceedings (for substantive relief in the Grand Court) against the defendant (served in the Cayman Islands) are stayed. (See the decision of the Court of Appeal in *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity Partners, L.P. & Ors. 1 August 2002*).

In *Telesystem International Wireless Inc. and TIW Do Brasil Ltd v CVC/Opportunity Equity Partners, L.P. & Ors. [supra]*, the Court of Appeal said:

"The respondents submitted that on the basis that Brazil is clearly and distinctly the appropriate forum for the determination of the action the Mareva injunction should fall away and no new Mareva injunction should be granted. There was no dispute that in principle the court has jurisdiction to grant a Mareva injunction in aid of foreign proceedings notwithstanding that proceedings for substantive relief in the Cayman courts have been stayed in favour of proceedings in Brazil. In Channel Tunnel Group Ltd V. Balfour Beatty Ltd. [1993] AC 344, Lord Mustill laid down three conditions on which such relief may be granted: (a) the interim relief must be needed to render more efficacious the procedures and any decision favourable to the appellants that emerge therefrom; (b) the court should approach such an order with utmost caution: and (c) the court should be prepared to act only when the balance of advantage plainly favours the grant of relief....

.... Walsh & Ors. v. Deloitte & Touche, Inc., judgment by the Privy Council dated 17 December 2001. ... was a case from The Bahamas and was directly concerned with the grant of a worldwide Mareva injunction. The Privy Council expressly applied the Channel Tunnel decision to the Mareva injunction situation where it is intended that such an injunction should be issued in aid of a foreign jurisdiction after the stay of proceedings in the domestic court. The Privy Council held that as the proceedings for a Mareva injunction of a foreign court are interlocutory, it is not necessary for the applicant to show that he is likely to succeed in establishing such a cause of action. For the purposes of the threshold requirement it is sufficient, if upon the material before the court, the appellant appears to have a good arguable case."

E. DEFENDANT SERVED WITHIN THE CAYMAN ISLANDS WITH PROCEEDINGS CLAIMING SUBSTANTIVE RELIEF, WHEN THE PARTIES HAVE NO INTENT TO LITIGATE THE SUBSTANCE OF THEIR DISPUTE IN THE CAYMAN ISLANDS. Where a defendant is served within the Cayman Islands with proceedings claiming substantive relief there is again jurisdiction to grant a freezing order in aid of foreign proceedings, even though the parties have no intent to litigate the substance of their dispute in the Cayman Islands (see the decision of the Court of Appeal in *Deloitte & Touche, Inc. v John B Felderhof & Ors 12 July 2011*).

THE CHABRA JURISDICTION

F. JURISDICTION TO GRANT A MAREVA INJUNCTION AGAINST A NCAD IN A CASE WHERE SUCH AN INJUNCTION WOULD BE ANCILLARY AND INCIDENTAL TO THE EFFECTIVE ENFORCEMENT OF A PROSPECTIVE JUDGMENT AGAINST A CAD. The principles governing the grant of Chabra type relief in the Cayman Islands have been considered in the decisions of the Court of Appeal in *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Ltd and others 15 February 2011* and *Deloitte & Touche, Inc. v John B Felderhof & Ors* [supra].

The Grand Court has jurisdiction to grant a Mareva injunction against a NCAD (a non-cause of action defendant) in a case where such an injunction would be ancillary and incidental to the effective enforcement of a prospective judgment against a defendant against whom there is a pleaded cause of action (a "cause of action defendant" or "CAD") because assets to which the NCAD is itself entitled beneficially (as well as assets in which the CAD has a beneficial interest) may become available to satisfy a judgment against the cause of action defendant (Saad para 22 and Felderhof para 41).

The purpose of the Chabra jurisdiction is to ensure that enforcement of a future judgment of the Court against a cause-of-action defendant is not frustrated by the dissipation of assets (in the hands of the non-cause of action defendant) which would or might otherwise be or become available to satisfy that judgment (Felderhof para 46).The principle was explained by the High Court of Australia in Cardile v Led Builders Pty Ltd [1999] HCA 18; 198 CLR 380;162 ALR 294;73 ALJR 657 at para 57 quoted at para 46 of the decision in Felderhof.

LEAVE TO SERVE OUT

G. NO JURISDICTION TO GRANT LEAVE TO SERVE OUT TO ENABLE AN INJUNCTION IN AID OF FOREIGN PROCEEDINGS TO BE GRANTED. Although the Grand Court has jurisdiction to grant a Mareva injunction in aid of foreign proceedings (in the circumstances set out in D and E above), on the present state of the law the Grand Court does not have jurisdiction to grant leave to serve out against a person who owes no allegiance to this jurisdiction, and is not present in this jurisdiction, simply in order to enable an injunction in aid of foreign proceedings to be granted. Although such a jurisdiction may well be desirable, it is a step which should be taken by the rule-making body, or perhaps the legislature, in this jurisdiction. (*VTB Capital v Malofeev and Others 30*

November 2011,Chadwick P applying the decision of the Privy Council in *Mercedes Benz v Leiduck*).

I repeat what I said in my first judgment at page 24.

> *"The separation of powers is essential to democracy in the Cayman Islands. Without intending in any way to trespass on the role of the legislature, I respectfully suggest that urgent consideration should be given by the Law Reform Commission to whether legislation equivalent to section 25 of the Civil Jurisdiction and Judgments Act 1982 and section 44 of the Arbitration Act 1996 should be introduced in the Cayman Islands. Further, the issues raised herein call for urgent consideration (to the extent appropriate) by the Rules Committee."*

I also refer to the observations by the President at paragraphs 26 and 27 in the judgment herein of 30 November quoted below.

I have to apply the law as it is in the Cayman Islands today.

The application before the Court is for Chabra type relief.

Mr. Freedman's central submission is as follows. Where a non-cause of action defendant ("NCAD") is amenable to the jurisdiction of the Grand Court because he/she/it resides here, the Grand Court has power to grant Chabra type relief in aid of proceedings in a foreign court against a cause of action defendant ("CAD") in the foreign court, notwithstanding that the NCAD is not before the foreign court and the CAD is not amenable to the jurisdiction of the Grand Court.

The principal question raised by this submission is thus:-

Is Chabra relief available in the Cayman Islands where there is no CAD in the proceedings in the Cayman Islands?

In my opinion the answer is in the negative.

I do not consider that I have jurisdiction to grant the order sought for, among others, the following reasons:

(1) The current state of the law as to Mareva injunctions and the Chabra jurisdiction is as set out above.

It is important to note that the present case does not involve any proprietary claims (for example, proprietary claims arising from a breach of trust, see Snell's Equity 31st Ed. paragraph 28-32 and following).

(2) There is no equivalent of section 25 of the Civil Jurisdiction and Judgments Act 1982 or of section 44 of the Arbitration Act 1996 in the Cayman Islands legislation. Nor, importantly, are there any related rules enabling service of such proceedings to be made with permission outside the jurisdiction of the Grand Court. I emphasise the absence of both the statutory provisions <u>and</u> the related rules in the Cayman Islands.

(3) If the circumstances of the present case were the other way around, i.e. if the principal litigation was in the Cayman Islands and there were assets in England and Wales and Mareva relief was sought in London in support of orders made by the Grand Court, the judge's power to grant relief in aid of the proceedings here would be by reference to section 25 of the 1982 Act (interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings) <u>and</u> the related rules.

(4) The Court of Appeal has upheld the order I made refusing leave to serve out against Mr. Malofeev. The Court of Appeal said:

"26.Given the developments in the law since the Mercedes case – including, in particular, the recognition in this jurisdiction that, notwithstanding the decision in The Siskina, a Mareva injunction can be granted in aid of foreign proceedings, it is tempting to take that step. But, to my mind, that temptation must be resisted. The step is a step too far for the Court to take. This Court must, in my view, follow the guidance given by the majority in Mercedes Benz in the final paragraph of Lord Mustill's opinion. Addressing this very question, he said that, if the position were reached - as it has been now been reached in this jurisdiction - that Mareva relief can be granted in support of a claim pursued in a foreign court, then the question of whether or not the rules should be extended to enable service out of the jurisdiction on a defendant to such a claim should merit close attention of the rule-making body.

27.For all the reasons which have been explained in other courts, that may well be a desirable step to take; but it is a step which should be taken by the rule-making body, or perhaps the legislature, in this jurisdiction. It is not a step which, in my view, is open to this Court to take. This Court

must apply the law as it presently is in the light of the decision of the Privy Council in Mercedes Benz v Leiduck."

(5) The present application against D2 and D3 is for Chabra type relief. The state of the law in the Cayman Islands is as set out at F above. The relevant principles require a CAD as well as a NCAD. There is no CAD in the present case following the decision of the Court of Appeal.

(6) It is elementary that I am bound by decisions of the Court of Appeal. Sir John Chadwick, President, in two full and carefully reasoned decisions, (Saad and Felderhof), has set out the nature, extent and principles that govern the Chabra jurisdiction in the Cayman Islands. I respectfully refer to his analysis.

Mr. Freedman's central submission finds no support in the two judgments. In particular, but without limitation, I refer to the following statements in Saad and Felderhof which show that a CAD is central to the Chabra jurisdiction.

First, the statements of principle identifying the nature and extent of the jurisdiction set out under F above, drawn from Saad at para 22 and Felderhof at paragraphs 41 and 46.

Second at paragraph 33 of his judgment in Saad, the President said:

"The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD) .... is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant... It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either

(i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or

(ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD."

Third at paragraph 80, the President said:

"I am satisfied that Justice Anderson erred in principle in continuing the Mareva relief against the defendants in respect of whom it could not be said

(A) that either (i) the claimant had a good cause of action against them; or (ii) that following a judgment against another defendant (against whom the claimant did have a cause of action) there was reason to suppose that the claimant would be able to invoke some process of enforcement which will lead to the assets (if any), of the non-cause of action defendant NCAD, becoming available to satisfy that judgment; and

(B) that either (i) there was reason to suppose that the defendant had some assets which (absent Mareva relief) were at risk of dissipation; or (ii)that there was a real prospect that assets would be transferred to, or otherwise acquired by, that defendant in the future which would (a) then become available to satisfy a judgment (whether against that, or some other defendant); and (b) would (absent Mareva relief) be at risk of dissipation while held by that defendant."

If the Plaintiffs contentions were correct, the President would not have set out the relevant principles as above. It is clear that there has to be CAD in the proceedings in the Cayman Islands.

(7) The President's reference at paragraph 16 of his judgment in this matter to decisions was, in my view, a reference to the decisions referred to above.

Further, when the President said at paragraph 25,

"25.As I have said, that question whether a Mareva injunction can be granted in aid of foreign proceedings is settled, at least at the level of this Court, by the recent decision of this Court in Deloitte & Touche v Felderhof. It is recognised that such an injunction can be granted. But should this Court take the next step of declaring that proceedings can be served on a person who owes no allegiance to this jurisdiction, and is not present in this jurisdiction, simply in order to enable such an injunction to be granted?"

I understand the President to be saying that a Mareva injunction can be granted in aid of foreign proceedings in the circumstances which obtained in Felderhof (see E above) i.e. where a defendant is served within the Cayman Islands with proceedings claiming substantive relief.

(8) No pre-section 25 of the Civil Jurisdiction and Judgments Act 1982 case in England and Wales has been drawn to my attention where the court granted relief similar to the relief sought on the present application.

(9) The analysis set out above is, in my view, consistent with the section in Gee on "Commercial Injunctions" 5th Ed. at 1.025-1.029 on "Free-standing Mareva relief, The Siskina, section 25 CJJA 1925, and later developments".

(10) The decisions of the Court of Appeal referred to above provide no support or room for a Black Swan type jurisdiction in the Cayman Islands. I refer to the decision of Bannister J in Black Swan as explained by Bannister J in Yukos (see the quotation in my first judgment at pages 23 and 24) and to the decision in Yukos of the Eastern Caribbean Court of Appeal. The latter decision did not involve the Chabra jurisdiction. I have the greatest respect for the BVI decisions and the underlying policy considerations, but in my opinion they are not in accord with the current state of the law in the Cayman Islands as determined by the decisions of the Court of Appeal referred to above.

(11) According to a summary of the current position placed before the Court:

"The Law Reform Commission is currently examining two interrelated issues. The first deals with the enforcement of foreign judgments generally and in particular judgments emerging from UK courts. In this regard, we are seeking to identify the deficiencies in our Foreign Judgments Reciprocal Enforcement Law (1996 Revision) against the background of the UK Administration of Justice Act 1920 and the UK Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Amendment) Order 1985. The 1985 Order was extended to the Cayman Islands in order to facilitate enforcement of Cayman judgments in UK. However, there appears to be no reciprocating measure in place. We also intend to seek advice from the Foreign Commonwealth Office to further clarify our statutory obligations as they relate to the enforcement of UK judgments.

The second issue is being examined against the background of Quin J's decision in the Gillies-Smith case and Cresswell J's decision in the VTB Capital PLC case. The primary issue for consideration is what legislative action should be taken in Cayman to facilitate interim relief in cases where proceedings have been or are to be commenced in foreign jurisdictions. In this regard, we will be examining the Grand Court Law and Rules against the background of the UK Civil Jurisdiction and Judgments Act 1982 to determine whether any principles can be usefully adopted for Cayman purposes.

We intend to further discuss our findings at the next scheduled meeting of the Commission. At that time we will confirm the way forward."

In circumstances where a number of the issues raised in this matter are the subject of active consideration by the Law Reform Commission it is, in my opinion, inappropriate for a first instance judge to consider extending the current state of the law, the more so when the same is clearly set out by the Court of Appeal.

For the reasons set out above, I consider that I have no jurisdiction to make the orders sought.

Even if there was jurisdiction to grant the orders sought (although this aspect of the case has not been the subject of full oral argument), I have grave doubts as to whether it would be appropriate to exercise that jurisdiction on the material before the Court.

The decisions of Arnold J may be reversed by the English Court of Appeal, but the fact remains that as of today the first instance judge in the Chancery Division has found against VTB on the issues of risk of dissipation and deliberate material non-disclosure.

In my opinion, there is considerable force in the submissions of D2 and D3 as to the absence of material before this Court, which was placed before Arnold J. If there was jurisdiction, it would be necessary to consider, among other matters, whether there has been material non-disclosure in this Court (and whether it would be appropriate as of today to take a different view to that of Arnold J on other issues (for example, the risk of dissipation)). It is difficult to see how this could be done where a great deal of the material before Arnold J is not before this Court.

Further, I draw attention to the fact that the assets sought to be restrained are traded on international stock exchanges.

Further, there is the complication of the repo transactions.

In addition some protection is provided by the existing order in the BVI.

But for the avoidance of doubt, my decision is based on the lack of jurisdiction. For this reason I am unable to make the order sought.

DATED this 16 day of January 2012

Cresswell J

The Hon. Sir Peter Cresswell
Judge of the Grand Court