Neutral Citation Number: [2012] EWHC 1609 (Ch)

Case No: 3680 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building London EC4A1NL
Date: 14/06/2012

Before :
THE HON MR JUSTICE FLOYD
Between :

CALDERO TRADING LIMITED	**Petitioner**
- and -	
(1) BEPPLER & JACOBSON LIMITED	
(2) BEPPLER & JACOBSON MONTENEGRO D.O.O.	
(3) LEIBSON CORPORATION LIMITED	
(4) BELINDA CAPITAL LIMITED	
(5) IGOR LAZURENKO	
(6) MARCEL TELSER	**Respondents**
(7) LAWSON TRADING LIMITED	
(8) SERGEY SCHEKLANOV	**Proposed Respondents**

Mr Robin Hollington QC and Mr Adrian Pay (instructed by **Bryan Cave**) for the **Petitioner**
Mr Richard Morgan QC, Mr Andrew Westwood and Ms Narinder Jhittay (instructed by **Rooks Rider**) for the **Third and Sixth Respondents**
Mr Peter Griffiths (instructed by **Edwin Coe**) for the **Fourth Respondent**
Mr Neil Kitchener QC and Mr Alexander Polley (instructed by **Mishcon de Reya**) for **Lawson Trading, the proposed Seventh Respondent**
Mr Cyril Kinsky QC (instructed by **Edwin Coe**) for **Mr Scheklanov, the proposed Eighth Respondent**

Hearing dates: 6th, 7th and 11th June 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON MR JUSTICE FLOYD

Mr Justice Floyd :

1. In this petition Caldero Trading Limited, the petitioner, seeks the winding up on the just and equitable ground of the first respondent Beppler & Jacobson Ltd ("BJUK") alternatively seeks relief under section 994 and 996 of the Companies Act 2006 (unfair prejudice). The petition was presented on May 3rd 2012. On the same day the petitioner applied, without notice to any of the respondents, for the appointment of provisional liquidators. Following a hearing, HHJ Birss QC appointed Mr Shaw and Mr Cohen of BDO as provisional liquidators. He also granted injunctive relief against Mr Marcel Telser, a director of BJUK aimed at preserving the assets of BJUK.

2. The respondents to the petition in addition to BJUK and Mr Telser were Beppler & Jacobson Montenegro DOO (BJM), Leibson Corporation ("Leibson") and Belinda Capital Limited ("Belinda"). BJM is a wholly owned subsidiary of BJUK. It owns two hotels in Montenegro, now called the Avala and the Bianca. Leibson and Belinda are shareholders in BJUK. Mr Lazurenko's role will appear from what follows, but apart from serving a short affirmation, he has not played any real part in the proceedings to date.

3. Although some of the respondents to the order of HHJ Birss QC applied to set aside the appointment, it was ultimately agreed that directions should be given, subject to the approval of the court, for a speedy trial of the petition. On 17th May I gave those directions, and the trial is due to be heard in less than two weeks time. In the meantime, I have before me three interim applications which needed to be decided as a matter of urgency. Hence they came before me sitting in the vacation court.

4. By the first application the petitioner seeks to join two additional respondents to the petition. These are Lawson Trading Limited ("Lawson") and Mr Sergey Scheklanov. Lawson is beneficially owned by Mr Scheklanov, who also beneficially owns Leibson, the third respondent. Again the roles of Lawson and Mr Scheklanov will appear from what follows. They resist joinder principally on the ground that Leibson has offered the petitioner all that it can reasonably expect to gain from the petition: see *O'Neill v Phillips* [1999] 1 WLR 1092 at 1106-7.

5. The second application is an application by Mr Telser to strike out the petition as against him.

6. At the conclusion of the hearings of these two applications I made it clear that I would allow the applications to join Lawson and Mr Scheklanov and I would refuse the application to strike out Mr Telser. I said that I would give my reasons later. They are included in this judgment.

7. The third application is an application by Leibson and Mr Telser to restrain the use of documents which have been disclosed in connection with these proceedings. In particular Leibson and Mr Telser complain that the documents have been shown to TNK-BP and related companies in the TNK-BP group. TNK-BP are funding the petitioner in this litigation and have given a cross-undertaking in damages. It is necessary to set out some background before turning to the applications.

8. The petitioner is owned and controlled by Mr Zoran Becirovic. In the spring of 2002 Mr Lazurenko and Mr Becirovic decided to join efforts in relation to property related

business ventures in Montenegro. According to Mr Becirovic, Mr Lazurenko told him that he represented a Mr Khan, a well known Russian businessman and an owner of TNK-BP, a large Russian oil company, said to be the third largest in Russia. Mr Lazurenko denies that he said he was acting on behalf of Mr Khan, his case is that throughout he said that he was acting on behalf of an undisclosed principal. It was, in any event, agreed that Mr Lazurenko's principal would provide the finance for the venture, and Mr Becirovic would provide other input, such as the location of opportunities and dealing with acquisitions and refurbishment. Mr Becirovic says that in return he was to get a 20% interest in the company, later increased to 25%. His case is that it was agreed between all the shareholders of BJUK that he held this interest without deduction of the capital investment made by Mr Lazurenko's principal.

9. BJUK had by this stage already been incorporated, but in April 2002 its authorised share capital was increased to 350,000 shares of which Leibson was allotted 270,000 and Mr Becirovic was allotted 80,000. In October 2003 BJM was incorporated as a wholly owned subsidiary of BJUK.

10. The business of BJUK operated in Montenegro by BJM was in the acquisition and refurbishment of hotels. In January 2004 BJUK acquired the Avala hotel. Later it acquired the Bianca. In October 2004 Mr Becirovic's shareholding was increased by 5% plus 1 share to bring it to 25% plus one share.

11. The accounts of BJUK for the years ending November 2004 to November 2006 were originally lodged on the dormant company basis. No reference was made to the company operating in any agency capacity for any other company. Over a period from May 2009 to July 2009 amended accounts were provided for the years to November 2004, 2005 and 2006 which showed BJUK as the holder of 100% of the shares in BJM. A note to the amended accounts for 2005 showed that BJUK:

> "has made investments on behalf of the trade creditor, [Lawson], in hotel developments totalling £2,526,671 (2004 £2,498,576). This balance has been included within creditors amounts falling due within one year.

12. A similar note appears in the 2006 amended accounts and is repeated in the subsequently filed accounts for 2007 and 2008.

13. In August 2010 the relationship between Mr Becirovic and Mr Lazurenko started to sour. Mr Becirovic had begun to suspect that the financier behind the joint venture was not in fact Mr Khan of TNK-BP. In October 2010 the existing directors of BJUK were removed and replaced by Mr Telser, a Liechtenstein lawyer. Mr Becirovic says he did not know of this at the time. Moreover when he inspected the register of companies in late 2010 he did not notice the reference to Lawson which I have set out above.

14. In October 2010 Leibson transferred 5% of its interest in BJUK to Belinda. This is said to represent Mr Lazurenko's interest.

15. In March 2011 Mr Telser approved BJUK's accounts for the year to November 2009. This showed a nil balance in fixed assets compared to a balance of £1,732,616 for the

period to November 2008 and previous years. To explain this significant change in the fixed asset position, the note which previously referred to Lawson as a trade creditor, now read

> "BJUK kept the investments as an Agent for Principal based on the agency agreement dd 03 03 2003 with [Lawson]. The investments were transferred to the Principal."

16. In August 2011 Mr Telser caused BJM, the Montenegrin company, to change its articles. By article 9 it is recorded that the total capital provided by its founder, BJUK, was 5,853,508 Euros of which 2,525,747 Euros was provided in cash. The petitioner points out that the cash sum recorded is the approximate equivalent of the book value shown in the accounts of BJUK until 2009. In the same month Mr Lazurenko informed Mr Becirovic that "in accordance with new shareholders decision", he would no longer be involved in operational management of the hotel projects in Montenegro.

17. In April 2012 Mr Becirovic received a phone call from Sergey Scheklanov. Mr Scheklanov introduced himself as Mr Becirovic's Montenegrin partner. He proposed a meeting. This was the first time Mr Becirovic had heard of Mr Scheklanov. Mr Becirovic says that he was prepared to meet only if Mr Khan was there. It is the petitioner's case that Mr Scheklanov has only recently appeared on the scene and the agency agreements are a fraud on the minority shareholder, Caldero.

18. The evidence before HHJ Birss QC on 3rd May included an affidavit of a Mr Egorov which made it clear that the litigation was being funded by TNK-BP. Mr Egorov explained that TNK-BP were investigating the possibility that Mr Lazurenko may have been guilty of fraud against TNK-BP. Fortification of the cross undertaking in damages by TOC Investments Limited, a BVI company in the TNK-BP group, was offered, and included in the order made. Fortification of the cross-undertaking in damages by TNK-BP was also referred to in an affidavit by Mr Dougans, a solicitor acting on behalf of the petitioner.

19. On 11th May 2012 solicitors acting for Leibson and Mr Telser wrote making points about the adequacy of the cross-undertaking in damages. They complained that the undertaking was given by "a foreign company about which no real evidence was provided to the court". In particular there was no evidence about the existence, ownership or financial position of TOC Investments Limited. The letter asked that 25 million Euros should be lodged in court as security. The petitioner's solicitors responded on 14th May 2012 challenging the justification for such a large sum.

20. Pursuant to the order of HHJ Birss QC, Mr Telser made an affirmation on behalf of himself and Leibson exhibiting the agency agreements, and stating his belief as to the ownership of the land, buildings and shares. The affirmation made clear it was made under compulsion of the order of HHJ Birss QC.

21. On 15th May an application was made on behalf of Leibson and Mr Telser seeking fortification of the cross-undertaking in damages and discharge of the Provisional Liquidators. These applications were supported by a witness statement of Mr Golikov on behalf of Leibson and Mr Telser. The evidence included evidence about the loss suffered from the interim relief and raising questions about the identity of the party

giving the cross undertaking. The agency agreements were exhibited to Mr Golikov's witness statement. Reliance was also placed on a witness statement of Mr Scheklanov which asserted that he was the beneficial owner of both Lawson and Leibson. The agency agreements were also exhibited to Mr Scheklanov's witness statement. He claims to have provided the funding for both hotels bought in Montenegro.

22. In response to the application concerning fortification of the cross-undertaking in damages, on 16th May 2012 the petitioner's solicitor wrote to the solicitors for Leibson and Mr Telser offering a cross undertaking from TNK-BP, subject to formal ratification, of $30 million. At the hearing before me on 17th May I made an order which was conditional on the provision of this security, which was subsequently given at a subsequent hearing for that purpose.

23. On 16th May 2012 Leibson made a formal open offer ("the Leibson offer") to buy the petitioner's shares in the following terms:

> "(1) Leibson offers to purchase your client's shares at a fair value being a value representing an equivalent proportion of the total issued share capital without any discount for the shareholding being a minority holding,
>
> (2) the value of your client's shares is to be determined by a competent expert to be agreed by our respective clients or in default nominated by the President of the Institute of Chartered Accountants with the costs of the expert to be shared or as the expert should decide,
>
> (3) the value should be determined by the expert as such rather than as an arbitrator and he need not give reasons,
>
> (4) both of our clients will have the same access to information about BJUK which bears upon the value of the shares and the right to make submissions to the expert but the form of those submissions is to be left to the discretion of the expert, and
>
> (5) the petition be dismissed and the Order [of HHJ Birss QC] be discharged."

24. The offer letter went on to say:

> "In relation to the valuation exercise to be conducted, we are instructed that, without prejudice to the actual position reflected in the accounts, and without prejudice to our client, Leibson's, position that the accounts accurately reflect the true position, in an attempt to cut through the issues Leibson offers as an alternative to (1) that Leibson agrees to purchase your client's shares at a fair value being a value representing an equivalent proportion of the total issued share capital without any discount for the shareholding being a minority holding but on the basis that the shares in BJM and the relevant hotels and land are owned beneficially within BJUK, either directly or through

> BJM, but with such valuation to take into account those sums paid to BJUK and their trading as loans that are repayable."

25. On 21st May 2012 solicitors for Leibson and Mr Telser wrote asking for confirmation that the affirmation and witness statements of Mr Telser and the witness statement of Mr Golikov had not been shown to TNK-BP. The solicitors for the petitioner responded that any documents shown to TNK-BP had been shown only for the purposes of the action and to enable TNK-BP to take an informed decision whether or not to offer the cross undertaking to the court. They pointed out that they had drawn the attention of TNK-BP to the restrictions on collateral use of documents imposed by the rules.

26. On 24th May 2012 solicitors for the petitioner responded to the Leibson offer. They pointed out that the offer contained no guarantee that Leibson would complete the purchase. They added that the principal relief claimed remained a winding up.

27. On 30th May 2012 in a witness statement, Mr Scheklanov's solicitor, Mr Neoclis Neocleous of Edwin Coe said this:

> "I am instructed by Mr Scheklanov to say that he is content to proceed, for the purpose of the offer letter from [Leibson's solicitors] and with a view to resolving this matter, but for no other purpose, on the basis that the Agency Agreements … are ineffective and do not prejudice any relief the Petitioner might be granted or any agreed compromise of the Petition. Furthermore, Mr Scheklanov is content for Leibson to grant a charge in favour of the Petitioner over the shares it holds in BJUK as security for the payment of the price found by the expert agreed between the parties for the shares held by the Petitioner in BJUK. Mr Scheklanov is also content for [Lawson] to grant a charge as security for Leibson's obligation to pay Caldero the value of its shares over the beneficial interest it has in the assets which are held on trust for Lawson pursuant to the terms of the Agency Agreement …"

28. The Respondents' case is that the shares in BJUK were never anything other than tokens. The true beneficial owner of the assets was Lawson. Mr Becirovic's rights in the joint venture were not represented by his shares, but were contractual rights under an agreement with Mr Scheklanov or Lawson which had been negotiated by Mr Lazurenko. That agreement is said to have been governed by Russian law.

The application to join Lawson and Scheklanov

29. There is no dispute that it may be appropriate to strike out an unfair prejudice petition if a respondent has made an offer which gives the petitioner everything to which he might reasonably be entitled. Moreover section 125(2) of the Insolvency Act 1986 prevents the court making a winding up order on the just and equitable ground if the court is "*of the opinion both that there is some other remedy available to the petitioners, and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy*".

30. At the start of the hearing Mr Hollington QC for the petitioner submitted that the offer in the present case does not give the petitioner everything it might reasonably be entitled to for essentially three reasons:

    i) The offer does adequately deal with the issue of fact concerning the basis on which the company was funded. It is made explicit by the respondents that the valuation is to be on the basis that the petitioner's case that the company was funded by way of capital contribution is rejected.

    ii) The offer, even as improved by the subsequent statement in Mr Neocleous's evidence, does not adequately guarantee payment. Leibson is a BVI company and Lawson and Belinda are both Nevis companies. All three are of wholly unknown financial standing. In a situation where the parties are distrustful of one another, the petitioner is acting reasonably by insisting on some better security, for example that the respondent submits to a winding up order if the money is not paid.

    iii) The out of court valuation process proposed cannot adequately determine the true financial position of the companies. The remedy which will get to the bottom of the financial position of the company is a winding up order.

31. In the course of the hearing the Leibson offer was improved yet further by an offer that if Leibson fails to pay the price determined by the valuer within 90 days or such other longer period as may be allowed, the petition shall be allowed and BJUK shall be wound up.

32. Joinder of a party is governed by CPR Part 19.2(2):

> "The court may order a person to be added as a new party if-
>
> (a) it is desirable to add the new party so that the court can resolve all that matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

33. Mr Hollington submits that Lawson and Mr Scheklanov have an obvious and fundamental involvement in two of the most important issues in the petition, namely the efficacy and propriety of the agency agreements and the nature of the agreement between Mr Becirovic and Mr Lazurenko as agent for Mr Scheklanov. These agreements are at the root of the alleged unfairness to Mr Becirovic.

34. Mr Kinsky QC, on behalf of Mr Scheklanov, submitted that there was no point in Mr Scheklanov being joined, given the offer made by Leibson. He submitted that there was nothing left in the proceedings which has any bearing on the relief sought, and it is therefore not desirable that he be joined, and likewise permission to serve out of the jurisdiction should not be granted. Mr Kitchener QC for Lawson made submissions to the same end.

35. The court's powers to join persons to a section 994 petition are wide, as is made clear by the authorities on its predecessor, section 459 of the Companies Act 1985. Thus in *BSB Holdings Limited* [1993] BCLC 246 Vinelott J first referred to an earlier case, *Re a company (No 007281 of 1986)* [1987] BCLC 593, the 3i case, in which he had said:

> "A petition under s 459 is not analogous to litigation in which the issues raised affect only those against whom allegations are made by the plaintiff. A closer analogy is an administration action where all beneficiaries having an interest in the relief sought should be made parties all represented. The practice that has so far been followed in the Companies Court is to require that all members of the company whose interest would have been affected by the misconduct alleged or who would be affected by an order made by the court under the very wide powers conferred by s 461 are made respondents to a petition or served with it."

36. Vinelott J went on to say:

> "It is important to bear in mind that s 459 sets out the grounds on which the court's jurisdiction to make an order under s 461 can be invoked. To answer the question who is a necessary or proper party to a petition under s 459 requires consideration to be given not only to the persons who were responsible for the unfair conduct complained of but those who might be affected by relief under s 461 rectifying that unfair conduct. But, as I pointed out, a member against whom no allegation is made and against whom no relief is sought need not take an active part in the proceedings unless it is sought to amend the petition to raise an allegation against that person or to seek relief which might affect him."

37. In *Re Little Olympian Each-Ways* [1994] 2 BCLC 420 at 429, Lindsay J conducted a review of the authorities including the two cases decided by Vinelott J which I have cited from above. At page 429 at f he said this:

> "From the existing authorities cited it can be seen that in an appropriate case relief can be sought against a non-member other than the company itself, or against a person not involved in the act complained of (at least if that person would be affected by the relief sought) and that a person against whom no relief is in terms sought cannot necessarily escape being a respondent, whilst, on the facts, it can be right to strike out a petition, even as against those whose acts are complained of, so long as no relief is sought against such a person.
>
> This summary suggests to me that in point of jurisdiction the wide language of ss 459 and 461 is not to be cut down. None the less, cases may arise where, notwithstanding that the claim cannot be clearly said to be outside that wide jurisdiction, the likelihood of the court's discretion being exercised so as to lead

> to relief against, or relief having any material effect upon, a given respondent can to be seen to be so remote that the case can fairly be described as "perfectly hopeless", to use Hoffmann J's phrase, and hence that it would be abusive to require that respondent to remain as such or to be added as such."

38. I start with the suggestion that the Leibson offer gives the petitioner everything which it could hope to obtain by the petition. Whilst it is true to say that the offer treats the agency agreements as of no effect, the offer is made on the basis that the injection of funds was by way of loan as Lawson and Mr Scheklanov contend, rather than as capital, as the petitioner contends. Mr Hollington submits that by pursuing the petition Caldero can obtain a finding from the court as to the basis of funding. Moreover, that decision affects the valuation of the shares.

39. Mr Kinsky and Mr Kitchener respond by saying that the dispute about the agreement reached between Mr Lazurenko and Mr Becirovic about the basis of funding is a dispute between those individuals only and does not arise in the context of the present proceedings. Any rights under the alleged oral agreement are Mr Becirovic's and not the petitioner's. The petitioner has no claim under this agreement either against BJUK or Mr Scheklanov or anyone else. It would be up to Mr Becirovic in separate proceedings to make a claim against Mr Lazurenko and his principals, but no issue as to this agreement arises in the present proceedings.

40. I do not accept Mr Kinsky's and Mr Kitchener's submissions. It seems to me to be at least realistically arguable that the agreement alleged was a shareholders agreement binding the company, and that the finance provided was, in fact, capital and not loan. The way the matter is put in the Points of Reply is this:

> "The agreement between Mr Becirovic and Mr Lazurenko (acting on his own behalf and his principal) was that the respective contributions to be made for their interests in the joint venture, as represented by their respective shares in BJUK, of Mr Becirovic on the one hand and Mr Lazurenko's principal on the other, would be (a) in the case of Mr Becirovic, his local knowledge and management, and (b) in the case of Mr Lazurenko's principal the principal's investment of funds. In other words, those were their respective capital contributions to the joint venture, represented by their shares in BJUK, as opposed to contributions by way of loan, thus making Mr Becirovic's interest a clear 20% interest in the joint venture.

41. It seems to me that a finding on this issue is a pre-requisite to any valuation. Moreover as the valuation is expressly offered on the loan basis, depriving the petitioner of the benefit which the finding will have on the value of the shares.

42. Once it is clear that this issue is or may have to be decided in the petition, it seems to me to follow inevitably that Lawson and Mr Scheklanov should be joined as parties under CPR 19.2(2)(b). They have every interest in resisting the finding which is being sought, which will affect them. Moreover it is plainly important that they be bound by the outcome of that issue.

43. Very similar considerations apply to the question of whether there is a good arguable case for service out on the ground that Lawson and Mr Scheklanov are "necessary or proper" parties. Indeed I notice that Vinelott J used just that expression in the first of his cases on joinder cited from above. Whilst recognising, as Mr Kitchener reminded me, that the power to serve out of the jurisdiction is one which must be exercised with care and forbearance, I am satisfied that a sufficient case is made out against Lawson and Mr Scheklanov to make it proper to exercise it here.

The application to strike out Mr Telser

44. When the petition was launched it was intended to make a derivative claim against Mr Telser for breach of his duties. No such claim is now included in the Points of Claim. There is no claim for any monetary relief against Mr Telser. There remains a claim that he be restrained from dissipating the assets of BJUK.

45. Mr Hollington relied upon the fact that HHJ Birss QC had granted interim relief against Mr Telser in his capacity as a director of BJUK to restrain him from dissipating the assets of BJUK pending trial.

46. In *HMRC v Egleton and others* [2006] EWHC 2313 (Ch) Briggs J considered whether the *Mareva* jurisdiction was wide enough to grant relief against third parties, such as directors, in the context of a creditors winding up petition. At [14] - [21], relying on some observations of Pumfrey J in *Premier Electronics GB Limited* [2002] 2 BCLC 634, and of Etherton J in *re Ravenhart Services Holdings Limited* [2004] EWHC 76 (Ch) he rejected a submission by counsel for the third parties that because the petitioner was not pursuing a claim for a money judgment, the court had no jurisdiction to make freezing orders against the third parties. Although his views are expressed in terms of the jurisdiction to grant freezing orders against the company, it would be an odd result if the court could restrain the company disposing of assets through its directors but not the directors disposing of assets of the company.

47. Mr Hollington also relied on the fact that it is through Mr Telser that the alleged wrongdoing of which the petitioner complains took place. He says that he is likely to be in possession of documents which shed light on the wrongdoing, and he is therefore, within the *Norwich Pharmacal* jurisdiction, properly joined for the purposes of disclosure.

48. Mr Morgan QC submits that once the derivative claim goes, there is no basis for Mr Telser to be kept in the action on either of the bases contended for by the petitioner. He points out that on one reading of the prayer for relief Mr Telser is restrained from dealing in his own assets, rather than those of the company. He drew my attention to an unreported decision of the Court of appeal dated 8th October 2001 in *Society of Lloyd's v Air William Jaffray and others* [2001] EWCA Civ 1503 in which Lord Phillips MR said at [24] that it was "misconceived" for a party to be joined in order to be able to make applications for discovery.

49. I am not prepared to strike out Mr Telser from the claim. Firstly, it has been made clear in correspondence that the injunction sought does not affect Mr Telser's personal assets. Secondly, I do not read the passage in the *Lloyds* case as cutting across the *Norwich Pharmacal* jurisdiction to make disclosure orders against those who become involved in the wrongdoing of others.

50. Although it is now tolerably clear that Mr Telser was acting on instructions from his principals, he remains a central actor in the wrongdoing of which the petitioner complains. In my judgment he is properly joined (and properly served outside the jurisdiction) for both of the purposes which Mr Hollington identifies. He, of course, has to do no more than comply with his obligations of disclosure if he so chooses.

The application in respect of documents

51. The application notice in respect of documents seeks injunctions to restrain the petitioner from (a) showing and (b) providing documents disclosed by and affidavits, affirmations and witness statements served by Leibson or Mr Telser to TNK-BP, or TOC or any third party for the purposes of or in connection with the funding of the petition. The application also asks for an order that the petitioner takes all necessary steps to recover those documents from the third parties.

52. The order of HHJ Birss QC contained an express undertaking in the following terms:

> “The Applicant will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim."

53. That undertaking reflects the standard form of order for use in freezing orders annexed to Part 25 PD A.

54. CPR Part 31.22 provides:

> “A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where-
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.”

55. CPR Part 32.12 does the same in respect of witness statements. There is no corresponding provision for affidavits or affirmations.

56. CPR 31.22 replaces the common law rule based on an implied undertaking not to use documents disclosed on “discovery” otherwise than for the purposes for which they were disclosed. As the notes in the White Book indicate, it avoids concepts of implied or express undertakings, by legislating as to the terms on which disclosure documents are held and used. The same is true for witness statements. CPR 31.22 has been held to be a “complete code” for disclosure documents, see *SmithKlineBeecham v Generics* [2004] 1 WLR 1479 at 1490. The code is neutral as to whether the disclosure documents or witness statements are obtained by compulsion, or are produced voluntarily as part of a party’s case.

57. Mr Morgan drew my attention to a transcript of a decision of the Court of Appeal in *Savings & Investment Bank v Gray and another (No 1)* dated 10th August 1990. In that case, one of the defendants, Mr Gray, had sworn affidavits of assets in compliance with a *Mareva* injunction. At first instance, the judge struck out the claim against Mr Gray for want of prosecution, but not that against his co-defendant, Mr Finfer. One of the points on the claimant's appeal was that the only consequence of the judge's order would be that Mr Gray would be brought back in by way of a contribution notice. Mr Finfer's position was that unless he knew what Mr Gray was worth, he could not decide whether to join him. For this purpose the claimant wanted to show Mr Finfer what they had learned from the *Mareva* disclosure. The Court of Appeal thought that the whole dispute "had a pervasive air of unreality". Nevertheless they held that use of the affidavits of Mr Gray for the purposes of illuminating Mr Finfer about Mr Gray's worth was not permissible. In doing so, Lloyd LJ said that the true test was not whether the documents are being used for the purposes of the action, but

> "whether the documents obtained on discovery are being used for the purpose for which the discovery was ordered, or whether they are being used for a collateral purpose. Normally the purpose will not be collateral if the document is to be used in the same action. But I can imagine cases where that would be not so, just as I can imagine the converse case where the purpose would not be collateral even though the documents are to be used in a separate action."

58. So Lloyd LJ went on to say that the question to be decided was whether the plaintiffs were proposing to put the documents to some "*collateral or ulterior purpose to the purpose for which they were obtained on discovery*." The Court answered that question in the affirmative.

59. In *Harman v Home Office* [1983] 1 AC 280 at 302B-C, Lord Diplock explained the notion of "collateral or ulterior purpose" in connection with the implied undertaking:

> "I think the expression "collateral or ulterior purpose" from the judgement of Jenkins J. in *Alterskye v Scott* [1948] 1 All ER 469. I do not use it in a pejorative sense, but merely to indicate some purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, she was accorded at the advantage, which she would not otherwise have had, of having in her possession copies of other people's documents."

60. Mr Morgan submits that in the present case there can be no sense in which the court's order compelling Leibson and Mr Telser to disclose information was to enable the petitioner to provide that information to a third party funder. The information was ordered for a specific and limited purpose, namely as ancillary to and in aid of injunctive relief granted by it. He submits that such use is not "*for the purpose of the proceedings*" as that phrase is properly understood.

61. Mr Hollington submits that showing and supplying the documents to a third party funder for that third party to determine whether to fund the proceedings and whether

to give and whether to continue to give the cross-undertaking in damages is use "for the purpose of the proceedings". That is permitted use whether one looks at the express undertaking in the order or CPR 31.22.

62. I consider first the application in so far as it relates to material other than the affirmation of Mr Telser. All this material seems to me to fall squarely within CPR 31.22 as disclosure or as a witness statement within CPR 32.12. The delineation of the limits of the use to which this material may be put turns on the meaning of "for the purpose of the proceedings in which it is disclosed". I cannot accept Mr Morgan's submission that this phrase carries with it the limitations on use of disclosure which the old implied undertaking would have imposed. I accept that, as *Savings & Investments v Gray* makes clear, it was not enough to ask, prior to the CPR, whether the documents were being used in the same action. It was necessary to examine more closely whether the documents were being used for the purpose for which they were disclosed, or for some ulterior or collateral purpose. However, the draughtsman of the CPR chose not to go down that route in codifying the restrictions on use of disclosure documents. He or she chose to define the permitted scope as being "for the purpose of the proceedings". Had it been the intention to define the permitted scope of use by reference to the precise purpose for which the documents were disclosed it would have been a simple matter to do so.

63. By laying down a test that documents may only be used for the purposes of the proceedings in which they are disclosed, it seems to me that those who framed the CPR were providing a different test. Thus any use within the purpose of the proceedings is permitted use, whilst any use for a purpose outwith the purpose of the proceedings can only be made with the leave of the court. If use for the purpose of the proceedings is to be restricted, it is necessary to apply for a restriction to be imposed.

64. Is showing or supplying the witness statements and attached documents to a third party funder so that the funder can determine whether to continue to fund the proceedings and whether to give and whether to continue to give the cross-undertaking in damages use "for the purpose of the proceedings"? Mr Morgan submitted that such use was to be distinguished from showing or supplying documents to a witness, as such use was within the proceedings. Showing the documents to a third party funder was use outside the proceedings. He said that if I were to hold that it was legitimate to supply documents to a third party funder in these circumstances, funders would be able to buy information to which they would not otherwise have access.

65. In my judgment, at least in the present circumstances, the use to which the petitioner has put the documents other than the affirmation is use for the purpose of the proceedings. I do not think that the distinction which Mr Morgan seeks to draw between witnesses and funders is a workable one. Ultimately the question must be whether what is being done is for the purposes of the proceedings, or some other purpose. Although Mr Morgan did not accept on behalf of his clients that what had been done was necessary for the purposes of making the decisions referred to, there was really no evidence that it was done for any other purpose.

66. I conclude therefore that in relation to the material other than the affirmation of Mr Telser there has been no breach of the conditions on which the materials are held.

Subject to an undertaking proffered by TNK which I mention below, I see no reason for the court to intervene to prevent the documents from continuing to be used for the purpose they were shown and supplied to TNK.

67. I turn therefore to the affirmation of Mr Telser. The regimes of CPR 31.22 and 32.12 apply only to disclosure and to witness statements. A first question is whether either provision applies also to information and documents provided pursuant to a *Mareva* order. In *Marlwood Commercial v Kozeny* [2004] EWHC 189 (Comm) Moore-Bick J thought that it did not. He said at [32] that 31.22 does not "*extend to documents or information provided under any other form of compulsion, for example … an affidavit of assets ordered in support of a freezing injunction.*" I agree.

68. It is true that CPR 31.2 explains that a document is disclosed "by stating that the document exists or has existed". In *SmithKlineBeecham v Generics* [2003] EWCA Civ 1109 at [29] the Court of Appeal held that a party disclosed a document by stating that the document existed in a witness statement. However, information produced pursuant to a freezing order is not in my judgment "disclosed". Thus the contents of the affirmation of Mr Telser are not disclosure within the meaning of Part 31. It would be illogical in my view to apply a different rule to documents exhibited to an affidavit or affirmation of compliance with such an order, but for reasons which will appear it is not necessary for me to decide that question.

69. What rules now govern what may be done with information and documents produced pursuant to the *Mareva* jurisdiction? If the implied undertaking continues to apply in relation to the affirmation ordered to be produced by Leibson and Mr Telser pursuant to the order, it would, as Mr Morgan submits, limit the use to which the documents were to be put to purposes ancillary to the *Mareva* relief. Use for the purposes to which the petitioner has put them would be outside the permitted use. Mr Morgan goes on to submit that the original purpose of including express undertakings in such orders was to add to the protection given by the implied undertaking. Thus documents disclosed for the purposes of tracing assets might legitimately be used to commence new proceedings within or outside the jurisdiction: but the express restriction in the order prohibiting such proceedings without the permission of the court added a requirement of the court's permission. It was never the purpose, he submits, of the express undertaking to grant permission to use information provided pursuant to a *Mareva* order for a wider purpose than that for which it is disclosed.

70. Mr Hollington submits that there is no room for the implication of an implied undertaking in the face of the express undertaking in the order. The express undertaking permits the use to which the petitioner has put the documents.

71. I prefer Mr Morgan's submissions. It seems to me that the purpose of the express undertaking is to restrict the use of information obtained pursuant to the order for the purpose of fresh proceedings within or outside the jurisdiction. The implied undertaking may in some cases be inadequate for that purpose because it does not prevent use of the material obtained for the purpose, for example, of tracing assets into the hands of third parties. I agree with Mr Morgan that in cases not subject to the codification in CPR Part 31 and 32, the implied undertaking continues to apply. In the present case it is possible to read both the express and the implied undertakings together, the former regulating use in relation to fresh proceedings, the latter imposing obligations as to the purpose for which the material may be used. Thus I reject Mr

Hollington's submission that there is no room for the implied undertaking in the face of the express undertaking in the order.

72. Accordingly, in my judgment, the affirmation and its exhibits should not have been shown or supplied to TNK-BP. However the material has been supplied. The question is therefore whether I should grant an injunction prohibiting further use or a mandatory injunction requiring its return.

73. The affirmation of Mr Telser is a very short document. Apart from identifying himself and other formal matters, it only has one paragraph which contains information compelled under the order. It consists of responses to paragraph 17 and 18 of the order. Paragraph 18 required production of the agency agreement. Paragraph 17 required the petitioner to be informed of the legal and beneficial interest in the hotels, land and buildings in Montenegro and any transactions in the interest in the hotels since November 2008; the interests in the shares and any transactions in the shares since the same date; the interest in the debt and any transactions in the interest in the debt; and the explanation for the note in the accounts for the year ending 30th November 2009. Almost all the answers are expressly given on the basis of the exhibited agency agreements.

74. So far as the agency agreements are concerned, they were also exhibited to Mr Golikov's and Mr Scheklanov's witness statements. Those statements and exhibits are subject to the CPR 32.12/31.22 regime. There would therefore be no purpose in granting relief in respect of the agency agreements.

75. Mr Telser has also made a witness statement in addition to his affirmation. Mr Hollington submitted that the contents of Mr Golikov's and Mr Telser's witness statements almost entirely replicated the contents of Mr Telser's affirmation. Mr Morgan did not seek to draw my attention to any particular part of Mr Telser's witness statement which was not already contained in material which is not subject to the CPR regime.

76. In those circumstances it does not seem to me that any purpose would be served by granting the relief claimed solely in relation to the Telser affirmation. It follows that I will dismiss this application.

77. As mentioned above, in the course of argument, Mr Hollington offered an undertaking on the part of TNK-BP both to observe the provisions of CPR 31.22, 32.12 and the express undertaking in the order and to submit to the jurisdiction for the purpose only of enforcing that undertaking. I accept that undertaking as providing an additional safeguard given that TNK-BP is out of the jurisdiction and not a party to the action.