Neutral Citation Number: [2020] EWHC 975 (Comm)

Case No: CL-2020-000144

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/04/2020

**Before** :

**THE HONOURABLE MRS JUSTICE MOULDER**

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**Between :**

**(1) PETROCHEMICAL LOGISTICS LIMITED** **Claimants**
**(2) MR AXEL KRUEGER**

**- and -**

**Defendants**

**(1) PSB ALPHA AG**
**(2) MR KONSTANTINOS GHERTSOS**

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**Guy Blackwood QC** and **Turlough Stone** (instructed by **Vitaliy Kozachenko**) for the **Claimants**
**Christopher Lloyd** (instructed by **Keystone Law**) for the **Defendants**

Hearing dates: 8 April 2020

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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.

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THE HONOURABLE MRS JUSTICE MOULDER

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 27th April 2020.**

**Mrs Justice Moulder :**

1. This is the reserved judgment on the claimants' application of 16 March 2020 to continue a freezing injunction (the "Injunction") which was made on an *ex parte* basis on 13 March 2020 by order of Henshaw J (the "March Order") and continued pending the handing down of this judgment by order of this court on 8 April 2020. (The original return date of 27 March 2020 was adjourned by consent.)

2. The defendants apply to set aside the Injunction and/or to set aside the permission for service by email.

3. Due to the coronavirus the hearing was held remotely but both parties were represented by counsel. As the application for an injunction was made in connection with an underlying arbitration and pursuant to Section 44 of the Arbitration Act 1996 (the "Act") the hearing was held in private.

Evidence

4. The claimants have filed evidence in the form of three affidavits of Mr Kozachenko, an English solicitor with the firm of Fortior Law acting for the claimants, dated 12 March, 13 March and 3 April 2020 and a witness statement of Mr Axel Krueger ("Mr Krueger") dated 8 March 2020.

5. The defendants have filed a witness statement of Mr Konstantinos Ghertsos ("Mr Ghertsos"), the second defendant, dated 31 March 2020 and a witness statement of Mr Alessandro Laurenti, a Swiss lawyer acting for the defendants, dated 31 March 2020.

Background

6. The claimants are Petrochemical Logistics Ltd ("Petrochemical") and Mr Krueger. Petrochemical is a company registered in Gibraltar.

7. PSB Alpha AG ("PSB Alpha") is a company registered in Switzerland with shares in bearer form.

8. Alpha Terminals BV ("Alpha Terminals") is a company registered in The Netherlands which was owned by PSB Alpha. Alpha Terminals owns land on which a storage terminal for oil and petroleum products is to be built (the "Vlissigen Project"). Petrochemical has made three loans in connection with the Vlissigen Project: two to Mr van Croonenburg and an associated company and one for CHF 50,000 to PSB Alpha. The agreement for the latter provided for LCIA arbitration in London.

9. It is the claimants' case that:

    i) pursuant to a share purchase agreement dated 25 November 2019 (the "November SPA") Mr Ghertsos sold his 100% shareholding in PSB Alpha to Mr Krueger; and

    ii) pursuant to a share purchase agreement dated 16 January 2020 (the "January SPA") PSB Alpha sold its shares in Alpha Terminals to Petrochemical.

10. However Mr Ghertsos has not delivered the bearer share certificates in PSB Alpha to Mr Krueger. Notwithstanding that Mr Krueger had not received the bearer share certificates, in reliance on the November SPA he purported to pass a shareholder resolution removing Mr Ghertsos as director of PSB Alpha and appointing himself as director.

11. It is the defendants' case that at the time of the purported sale of the shares by PSB Alpha, Mr Krueger did not own the shares in PSB Alpha as they are bearer shares and were not in his possession. Thus it is said that Mr Krueger could not validly appoint himself as the director of PSB Alpha and was not the owner of PSB Alpha. Accordingly it is the defendants' case that Mr Krueger could not validly enter into an agreement to sell the shares in Alpha Terminals to Petrochemical and the shares have been sold to AT Holdings Ltd.

12. It is the claimants' case that when Mr Ghertsos failed to deliver the shares in PSB Alpha, a deposit agreement was created such that the shares were held to the order of Mr Krueger. The claimants assert that Mr Krueger was therefore entitled to remove Mr Ghertsos as a director and appoint himself (Kozachenko 3 para 36) and to execute the January SPA whereby the shares in Alpha Terminals were sold to Petrochemical.

13. According to the defendants' evidence the shares in PSB Alpha remain (as to Mr Ghertsos' holding) at the offices of his lawyer in Switzerland. The balance of the shares is said by the defendants to be held by Century Capital pursuant to a pledge by Mr van Croonenburg (paragraph 36 of Laurenti). Mr Kozachenko questions whether this is correct and whether they are in fact in the offices of PSB Alpha and not in the possession of Mr Ghertsos (Kozachenko 3 paragraph 36). Mr van Croonenburg was previously a director of PSB Alpha and a current director of Alpha Terminals. He is also said by the defendants to have owned 36% of the shares in PSB Alpha at the time of the November SPA. The claimants dispute this and maintain that Mr Ghertsos owned 100% of the shares at the relevant time.

14. AT Holdings is a company registered in the Netherlands with its registered office in Canada. It is a subsidiary of Century Capital Management Ltd ("Century"). The claimants originally sought an injunction against AT Holdings but did not pursue that application before Henshaw J. It is now the subject of a separate application by the claimants.

15. The November SPA is governed by Swiss law and disputes are to be referred to a Swiss arbitration. The January SPA is governed by English law and disputes are to be referred to an English arbitration. No arbitrator has yet been appointed in either arbitration.

Chronology

16. On 19 December 2019, Mr Ghertsos wrote to Mr Hromyk, the Managing Director of Century Capital and AT Holdings, as follows:

> "I cc Axel Krueger – purchaser / restructured company package (including PSB) for sake of ease…"

17. On 9 January Mr Krueger sent an email to Century (copied to Mr Ghertsos) as follows:

> "Dear All,
>
> I understand that you have been informed that I have taken over K Ghertsos companies including PSBA. Therefore K Ghertsos has no more corporate authority to finalise this transaction hence this email to notify you accordingly.
>
> In relation to this transaction and the execution of the legal documents I had a preliminary review. The current status and conditions are not in line with my expectation consequently not in the position to execute the deal that i (sic) can be executed as certain parameters needs reviewing mainly:
>
> 1) SPA wording: certain clauses are not acceptable so please send Word version for marking up comments to rebalance the legal position,
>
> 2) 10% K Ghertsos shares should be directed to PSBA,
>
> 3) I Fux liabilities not 100% covered as per initial understanding.
>
> There are minor other issues which can be addressed later.
>
> I appreciate that this may be some deviation to what may have been discussed before but surely a deal must be fairly balanced between the parties which is not the case for now and therefore need to be addressed accordingly." [emphasis added]

18. Century responded by email on 10 January 2020:

> "We are taken aback by your message, which we receive as an attempt by PSBA Alpha BV to re-negotiate the agreed transaction between us, in bad faith. We request that you provide us with your legal authority to represent PSBA, and your date of appointment…"
>
> …As recently as December 12, 2019 Kostas stated in writing "We're agreed thank you" in response to my direct question "I would like to know we have agreement on the form of documents before we engage with the notary to get this formalized. Are we agreed or is there another process now?" You were cc'd on this correspondence…
>
> I propose two options for you to consider:
>
> - you can confirm your authority with PSBA, affirm the existing agreement, make any minor drafting suggestions to the formal documents (which we will consider but will not agree to accept without first seeing them) and move to close this transaction; or

> - you can immediately refund to us all monies we have advanced to PSBA & its subsidiary ATBV as well as all other out-of-pocket costs we have incurred in pursuing this transaction, plus a fee for our time which we will offer to settle at 25% of the monies we have expended. This figure will be approximately USD $600,000.
>
> Should PSBA be unwilling to choose either of these options, we will have no choice but to immediately commence formal legal action against both PSBA and Kostas personally." [emphasis added]

19. The email exchanges continued. It is the claimants' case that Mr Krueger concluded that he did not want to enter into a sale on the terms offered by Century (paragraph 29 of Kozachenko 1) and that PSB Alpha was free to dispose of the shares "as it considered appropriate". Accordingly it is the claimants' case that on 16 January 2020 Petrochemical purchased the shares of Alpha Terminals from PSB Alpha.

20. On 16 January 2020 Century wrote to Mr Krueger asserting that they had an agreement for the purchase of the shares in Alpha Terminals and "again pressing Mr Krueger for proof of his authority to act for PSB Alpha as well as proof of his acquisition of the shares in that company" (Kozachenko 1 paragraph 40).

21. The relevant email read (so far as material):

> "I note that you have ignored my request that you provide us with your legal authority to represent PSB Alpha AG, and your date of appointment.
>
> According to information provided by Kostas in July 2019 you ceased to be a shareholder of PSBA in 2018 (see attached email). You will also have read Mr. van Croonenburg's email to you of January 13, 2020, and will understand why we need to confirm your authority. I therefore once again request that you provide us with your legal authority to represent PSBA, and your date of appointment. If you do not have legal authority to represent PSBA, please advise of your relationship to the transaction.
>
> …
>
> At this juncture, we must clearly understand whether your legal authority to represent PSBA, or we need to understand what relationship you have to the transaction (ie are you a creditor of PSBA, are you a third party purchaser, etc.) If you do not have legal authority to represent PSBA and are not a bone fide purchaser of our interest in ATBV, we demand that you immediately cease interfering in our transaction. From where we sit your previous statement that you "have taken over K Ghertsos companies including PSBA" has not been substantiated…" [emphasis added]

22. On 31 January 2020 Century told Mr Krueger that PSB Alpha had sold the shares in Alpha Terminals to AT Holdings. In an email Century wrote:

> "I am writing to confirm that PSB Alpha AG has executed a binding Share Purchase Agreement with our subsidiary AT Holdings BV and that the transfer of 100% of the shares of Alpha Terminals BV from PSB Alpha AG to AT Holdings BV has been completed under the attached Deed of Transfer, with the Dutch Trade Register being updated accordingly.
>
> Mr. Krueger, we note that despite repeated requests you have never provided to us any proof that you have legal authority to represent PSB Alpha AG. We also understand that you have recently been misrepresenting to third parties that you have such authority, and/or that you have authority over Alpha Terminals BV.
>
> You are hereby notified to CEASE AND DESIST interfering with our affairs, including but not limited to the affairs of our subsidiaries AT Holdings BV and Alpha Terminals BV…" [emphasis added]

23. Mr Krueger then obtained an attachment in the Dutch courts to prevent the disposition of the shares in Alpha Terminals. However that expired automatically on 13 March 2020 as PSB Alpha was unable to commence substantive proceedings, the Dutch lawyers having declined to take instructions from Mr Krueger on behalf of PSB Alpha in light of the dispute (Kozachenko 1 paragraph 48).

24. On 13 March 2020 the March Order together with the supporting documents were served by email on the Defendants. The claimants were arranging for the service of the documents in accordance with the Hague Convention ie via the Foreign Process Section but that section is currently closed due to the Coronavirus until further notice.

25. On 18 March 2020 after the March Order had been sent by email to the defendants, the defendants obtained an injunction (the "Swiss Injunction") from the Swiss courts (the District court in Kussnacht) against Mr Krueger which prevents him from "interjecting himself" in the business affairs of PSB Alpha. The Swiss Injunction was obtained ex parte. No reference was made to the March Order when the Swiss Injunction was obtained although it is said for the defendants that there was no obligation to do so. The Swiss Injunction is currently being challenged by Mr Krueger in the Swiss courts.

The Injunction

26. The March Order (and as continued) provides (at paragraphs 1 and 2) that:

> "1…the Defendants shall not in any way:
>
> a) dispose of, transfer or deal in the shares of Alpha Terminals BV;
>
> b) dispose of, deal with or diminish the assets of Alpha Terminals BV;

> 2 …Mr Konstantinos Ghertsos shall not in any way dispose of, transfer or deal in the bearer share certificate or certificates of [PSB Alpha]."

in each case until further order of the court or a competent arbitral tribunal.

27. The Injunction thus deals with three classes of assets:

    i) The shares in Alpha Terminals;

    ii) The assets of Alpha Terminals;

    iii) The bearer share certificates of PSB Alpha.

28. The Injunction in relation to the shares and assets of Alpha Terminals is directed to both defendants.

29. The Injunction in relation to the bearer shares is directed only to Mr Ghertsos.

30. The question as to whether the Injunction should be maintained or set aside must therefore be considered separately in relation to the two limbs, the shares and assets of Alpha Terminals BV and the share certificates of PSB Alpha.

Relevant legal principles

31. The injunctive relief is sought pursuant to section 44(2)(e) of the Act and/or section 37 of the Senior Courts Act 1981.

32. Section 44 provides (so far as material):

> "(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are—
>
> (a) the taking of the evidence of witnesses;
>
> (b) the preservation of evidence;
>
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
>
> (i) for the inspection, photographing, preservation, custody or detention of the property, or
>
> (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
>
> and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

> (d) the sale of any goods the subject of the proceedings;
>
> (e) the granting of an interim injunction or the appointment of a receiver.
>
> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
>
> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
>
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively." [emphasis added]

33. Section 2(3) of the Act states:

> "(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—
>
> (a) section 43 (securing the attendance of witnesses), and
>
> (b) section 44 (court powers exercisable in support of arbitral proceedings);
>
> but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so."

Should the Injunction be continued?

34. By virtue of section 44(1) the court has the same power of making orders for an interim injunction as it has for the purposes of and in relation to legal proceedings. Pursuant to section 37 of the Senior Courts Act 1981:

> "The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so."

35. There are then the additional hurdles under section 44(3) and section 44(5). I accept that this case in the circumstances where the arbitral tribunals have not been constituted falls within section 44(5) of the Act. However under section 44 (3) the claimants must also show that the case is one of urgency in which case section 44(3) gives the court a discretion to make an order where it is "necessary for the purpose of preserving assets".

36. It was accepted for the defendants for the purposes of these applications that the claimants had a good arguable case. (No issue was taken either as to whether there was an adequate remedy in damages or as to the cross undertaking in damages which has been provided by Integral Petroleum SA. I note for completeness however that the land in the Vlissigen Project is said to be unique and thus damages would not be an adequate remedy because it is land for which permission to develop the terminal has already been given (Kozachenko 1 para 70)).

37. The next question is whether the claimants have shown a real risk of dissipation of assets.

Risk of dissipation in relation to the shares in PSB Alpha

38. It was accepted for the defendants that the shares in PSB Alpha were assets which could be the subject of a freezing order.

39. It was submitted for the claimants that there is a real risk that Mr Ghertsos will transfer the bearer shares in PSB Alpha to a third party which would make it impossible for Mr Krueger to ratify the January SPA and render nugatory an order in favour of Petrochemical obtained from the English arbitrator.

40. On the evidence in my view the court can conclude that there is sufficient in the conduct of Mr Ghertsos in entering into a sale of 100% of the PSB Alpha shares to Mr Krueger but failing to deliver the bearer shares to Mr Krueger to establish a risk of dissipation in the shares in PSB Alpha. The evidence is in summary that Mr Ghertsos executed a resolution of the directors dated 25 November 2019 to transfer the shares to Mr Krueger pursuant to the November SPA, to notify the Swiss registry of companies and to endorse and deliver the shares but Mr Ghertsos has failed to deliver the shares and Mr Krueger has been unable to update the Register.

Risk of dissipation in the shares in Alpha Terminals

41. In relation to the shares in Alpha Terminals, according to the Dutch companies' register, the shares are now registered in the name of AT Holdings (paragraph 35 of Laurenti). It was submitted for the claimants in the written submissions that PSB Alpha had a "possessory interest" in the shares and that the transaction by which AT Holdings purported to acquire the shares was invalid. It was submitted orally for the claimants that the shares in Alpha Terminals are property in issue in the forthcoming arbitration and thus within the scope of section 44(2).

42. It seems to me that whilst the reference to "assets" in section 44(2) is broad the issue at this stage is whether the claimants have shown a real risk of dissipation by the defendants in the assets, that is the shares in Alpha Terminals and its assets.

43. The claimants relied on the evidence of Mr Kozachenko (Kozachenko 1 paragraph 59) which referred to the impugned sale by PSB Alpha to AT Holdings and the actions of AT Holdings. The claimants submitted that the restrictive measures in The Netherlands to hold the ring had lapsed and there was a concern that Century would dispose of the land. The claimants relied on the evidence in the Third Affidavit of Mr Kozachenko at paragraphs 26-54. It was submitted that AT Holdings had entered into an agreement with a person who arguably did not have authority to sell and had not acted with

candour. It was submitted that the risk of dissipation was therefore a reasonable inference from their "questionable conduct": *Lakatamia Shipping Company Limited v Toshiko Morimoto* [2019] EWCA Civ 2203 at [32]-[38].

44. In *Lakatamia Shipping* Haddon Cave LJ noted at [36] that:

> "An applicant for a freezing order does not need to establish the existence of a risk of dissipation on the balance of probabilities. It is sufficient for the applicant to prove a danger of dissipation to the 'good arguable case' standard."

45. It was submitted for the defendants that a freezing order will only be granted if there are some assets "on which the injunction will bite. Otherwise the court will run the risk of acting in vain." *Revenue & Customs v Cozens* [2012] STC 420 at [40]-[41] per Floyd J, quoted in *Ras Al Kaimah v Bestfort* [2018] 1 WLR 1099 at [38]. There must be grounds for believing that the respondent to a freezing order has assets otherwise no injunction will be granted: *Ras Al Khaimah* at [39].

46. The relevant paragraphs in *Ras Al Khaimah* (so far as material) are as follows:

> "38. This requirement was regarded as axiomatic by Floyd J in HMRC v Cozens [2011] EWHC 2782 (Ch) in which the Revenue sought a freezing order against an alleged "inward diversion" fraudster. He said:-
>
> > "40. One aspect of the basis for the grant of a freezing order which needs to be scrutinised with care is the question of whether the defendant in fact has assets on which the order will bite. That this is a principle which underlies the freezing order jurisdiction is reflected in a number of the cases, and was not the subject of challenge. Indeed, as Mr Moser submitted, it is inherent in the requirement to show that there is a risk of dissipation of assets that the cases in which freezing injunctions are granted are cases in which there is evidence that the defendant has some assets to dissipate. Thus in the Mareva case itself, Mareva Compania Naviera v International Bulk Carriers [1980] 1 All ER 213, Lord Denning MR said at 215:-
> >
> > If it appears that the debt is due and owing, and there is a danger that the debtor will dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. There is money in a bank in London which stands in the name of these charterers. The charterers have control of it. They may at any time dispose of it or move it out of the country." (emphasis added)
> >
> > 41. The evidence of the existence of assets need not be specific: indeed it may in some cases be unreasonable to expect a party seeking such an injunction to have evidence of precisely what assets his adversary in litigation has. But there

> must be some material from which it is reasonable to infer or deduce that there are assets on which the injunction will bite. Otherwise the court will run the risk of acting in vain."
>
> 39. In the light of these authorities, I would therefore hold that it is not enough for a claimant to assert that a defendant is an apparently wealthy person who must have assets somewhere. Although Parker LJ said that a claimant must "satisfy" the court of the existence of assets he was not purporting to set out what the standard of proof should be. A test of "likelihood" on its own is inappropriate; the right test must be either a "good arguable case" or "grounds for belief". There is, no doubt, not much difference between the two but I prefer "grounds for belief" which is how Robert Goff J expressed it in A v C. Since a claimant cannot invariably be expected to know of the existence of assets of a defendant, it should be sufficient that he can satisfy a court that there are grounds for so believing. That is not an excessive burden but if an order is sought against numerous companies or LLPs and those companies and LLPs can show that there is no money in their accounts and the claimant cannot show that the account has been recently active, it may well be right to refuse relief." [emphasis added]

47. The order which is sought to be continued seeks to prohibit the defendants from disposing of, transferring or dealing in the shares of Alpha Terminals. Whilst assets which can form the basis of an injunction need not be a legal interest, the order is sought in relation to the shares in Alpha Terminals and not any interest therein or contractual claim. In my view it cannot be said that there are grounds for believing that the shares of Alpha Terminals which are registered in the name of AT Holdings are assets of the defendants and accordingly the injunction sought cannot bite.

48. Even if I were wrong as to the existence of assets upon which the injunction could bite, in my view the evidence does not establish a good arguable case that there is a risk that PSB Alpha or Mr Ghertsos will dissipate the shares or assets in Alpha Terminals.

49. The email correspondence in January (referred to above) shows that Century asked repeatedly for evidence of the authority of Mr Krueger in relation to the sale by PSB Alpha and Mr Krueger apparently failed to provide this. In my view the evidence does not establish a good arguable case that the conduct of AT Holdings (or Century) was "questionable" and thus a risk of dissipation by AT Holdings. Even if I were wrong on that, AT Holdings (and Century) is an independent third party and is not alleged to be linked in terms of ownership with PSB Alpha and Mr Ghertsos or to have anything other than a commercial relationship with PSB Alpha and Mr Ghertsos. Mr Ghertsos is not a director of Alpha Terminals. No specific risk has been identified in the circumstances that Mr Ghertsos or PSB Alpha may now seek to dissipate these shares (even less the underlying assets of Alpha Terminals) which have already been transferred to AT Holdings. Accordingly I find that the claimants have not shown a good arguable case of a risk of dissipation on the part of Mr Ghertsos and PSB Alpha in relation to the shares in Alpha Terminals and/or its assets.

Connection with England and Wales: the shares in PSB Alpha

50. Although the court has found that the claimants have shown a good arguable case of a risk of dissipation in the shares in PSB Alpha, in deciding whether to exercise its discretion and grant the injunction, the court has to take into account the fact that the seat of the arbitration for the dispute in relation to the shares in PSB Alpha is outside England and Wales.

51. In *Mobil Cerro Negro v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684 Walker J said at [119]:

> "119. In my view it is apparent from the cases cited earlier, and is sufficient for present purposes, that this court will only be prepared to exercise discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here if the respondent or the dispute has a sufficiently strong link here or, in cases where the European jurisprudence referred to by Potter LJ at paragraph 114 of Motorola (No. 2) does not apply, there is some other factor of sufficient strength to justify proceeding in the absence of such a link. This way of putting the matter does not assume that presence of the respondent here will necessarily be sufficient to warrant the exercise of discretion in favour of an applicant — although as was observed by Lord Bingham in Credit Suisse Fides Trust it may weigh in favour of granting relief. Nor does it assume that any other particular factor will be sufficient. There will always need to be a careful examination of the justification for any part of the proposed order which would tend to run counter to principles of comity with courts in other jurisdictions." [emphasis added]

52. It was submitted for the claimants that although there needs to be a connection with England, the threshold is not high: *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64 at [54].

53. In this case it was submitted for the claimants that there was sufficient jurisdictional connection because:

    i) Mr Ghertsos is a British national;

    ii) the application under section 44 is based on a contract which is governed by English law (the January SPA) and

    iii) there is a close connection between the two contracts – one (the November SPA) was intended to facilitate the sale of the shares in Alpha Terminals to Petrochemical.

54. The defendants relied on *ICICI Bank UK plc v Diminco NV* [2014] EWHC 3124 (Comm) at [27] for the proposition that where the respondent is resident and domiciled outside England and Wales; is not subject to the *in personam* jurisdiction of the English court; and has no assets in England, the English court should only grant injunctive relief in exceptional circumstances:

"27. Drawing the strands together, I derive the following principles as applicable when the court is asked to grant a freezing order in support of foreign proceedings under section 25.

(1) It will rarely be appropriate to exercise jurisdiction to grant a freezing order where a defendant has no assets here and owes no allegiance to the English court by the existence of in personam jurisdiction over him, whether by way of domicile or residence or for some other reason. Protective measures should normally be left to the courts where the assets are to be found or where the defendant resides or is for some other reason subject to in personam jurisdiction.

(2) Where there is reason to believe that the defendant has assets within the jurisdiction, the English court will often be the appropriate court to grant protective measures by way of a domestic freezing order over such assets, and that is so whether or not the defendant is resident within the jurisdiction or for some other reason is someone over whom the English court would assume in personam jurisdiction.

(3) Where the defendant is resident within the jurisdiction, or is someone over whom the court has in personam jurisdiction for some other reason, a worldwide freezing order may be granted applying the discretionary considerations which were explained in the Cuoghi, Motorola and Banque Nationale cases.

(4) Where the defendant is neither resident within the jurisdiction nor someone over whom the court has or would assume in personam jurisdiction for some other reason, the court will only grant a freezing order extending to foreign assets in exceptional circumstances. It is likely to be necessary for the applicant to establish at least three things:

(a) that there is a real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the English court in the sense referred to in Van Uden ;

(b) that the case is one where it is appropriate within the limits of comity for the English court to act as an international policeman in relation to assets abroad; and that will not be appropriate unless it is practical for an order to be made and unless the order can be enforced in practice if it is disobeyed; the court will not make an order even within the limits of comity if there is no effective sanction which it could apply if the order were disobeyed, as will often be the case if the defendant has no presence within the jurisdiction and is not subject to the in personam of the English court;

> (c) it is just and expedient to grant worldwide releif, taking into account the discretionary factors identified at paragraph 115 of the Motorola case. They are (i) whether the making of the order will interfere with the management of the case in the primary court, e.g. where the order is inconsistent with an order in the primary court or overlaps with it; (ii) whether it is the policy in the primary jurisdiction not itself to make to make worldwide freezing/disclosure orders; (iii) whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located; (iv) whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order; and (v) whether in a case where jurisdiction is resisted and disobedience may be expected the court will be making an order which it cannot enforce." [emphasis added] [1]

55. It was further submitted for the claimants having regard to the above principles that:

i) the injunction in relation to the bearer shares in PSB Alpha had a sufficient link to England because the sale of the shares in PSB Alpha was merely an intermediate step and counsel referred to the loans made by Petrochemical to PSB Alpha and the fact that the subsequent sale of shares in PSB Alpha was in consideration (in part) for the forgiveness of the loan.

ii) The Swiss Injunction was not relevant as it was not the appropriate court in respect of the shares in PSB Alpha and these proceedings were not in breach of the Swiss Injunction as Mr Krueger has taken no steps on behalf of PSB Alpha in these proceedings;

iii) The making of the order will not interfere with the management of the case in the Swiss arbitration;

iv) The Swiss Court in Zug which could grant an attachment over the bearer shares would have limited powers in the circumstances to impose a meaningful fine (Kozachenko 1 paragraph 65);

v) There is no reason to believe that Mr Ghertsos as a British national would disobey an order of the English court.

56. It was submitted for the defendants that:

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[1] Citation is version of judgment in [2014] 2 C.L.C. 647 as cited with approval by Popplewell J in *Banca Turco Romana v Kamuran Cortuk* [2018] EWHC 662 (Comm) at [20].

i) The decision in *Taurus* does not establish a "low bar"; *Mobil Cerro Negro v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684 established that there must be a sufficient connection;

ii) Mr Ghertsos is a British citizen but (since 2012) neither domiciled nor resident here;

iii) the November SPA is governed by Swiss law

iv) there is no evidence in the documents that the two contracts were linked; that may have been the intention of Mr Krueger but there is nothing to indicate in the November SPA that it was a back to back contract; this is an attempt to get in effect a third-party injunction against Mr Ghertsos through reliance on the London arbitration;

v) Mr Krueger could have applied to the district court of Zug to restrain Mr Ghertsos from dealing with the bearer shares pending the outcome of the Swiss arbitration and that there is no reason to believe that the Swiss court would not have acted with appropriate expediency (evidence of Laurenti paragraph 21); even though the penalties for breach of an order are greater in England the English court is not the international policeman and the scale of the penalty is not enough to justify the order being granted.

vi) That the continuation of the injunction contradicts the order made by the Swiss courts (Laurenti at 38)

57. The claimants relied on the authority of the Supreme Court in *Taurus Petroleum* at [54]:

> "54. International trade, and particularly the international oil trade, is conducted predominantly by means of letters of credit. London is one of the two major financial centres of the world and enormous numbers of letters of credit are issued by international banks from their London branches. It would have been entirely foreseeable by SOMO that a majority of the letters of credit against which they sold oil would be issued out of London and subject to English law. SOMO's trade therefore involved a long term connection with the jurisdiction. Successful international commerce depends upon the enforcement of contracts, the enforcement of arbitration awards and the enforcement of judgments. Both the international plane, through the 1958 New York Convention and the UNCITRAL Model Law and Rules, and the domestic plane, through the Arbitration Act 1996, evince a clear policy to ensure the efficient recognition and enforcement of arbitration awards."

58. The authority of *Taurus* referred to above does not in my view assist the claimants materially. The connection in that case to the jurisdiction was very different from the current circumstances: as quoted above, SOMO's trade involved a "long term connection with the jurisdiction". In this case there is no such long-term connection and in the circumstances where Mr Ghertsos is neither domiciled nor resident in England, the nationality of Mr Ghertsos is not in my view a sufficient connection.

59. In relation to the linked nature of the SPAs, in my view this submission is not supported by the evidence before the court. Mr Kozachenko's evidence in relation to the correspondence with Century prior to the January SPA (Kozachenko 1 at paragraph 29) was:

> "I am informed by Mr Krueger that, after initial review of the documents available to him, he concluded that whilst there had been some discussions between Century and Mr Ghertsos, there was no binding agreement between PSB Alpha and Century. Mr Krueger was unwilling to enter into a share purchase agreement on the terms of the draft document that had been forwarded to him, and indicated that certain issues needed to be resolved. This was made clear in his email of 9 January 2020." [emphasis added]

This evidence does not support the submission on behalf of the claimants that it was always intended that the transfer of the shares between Mr Ghertsos and Mr Krueger was merely an intermediary step between the making of the loan and the transfer of Alpha Terminals. Rather it suggests that Mr Krueger was willing to contemplate a sale to Century if suitable terms could be agreed. Whilst the sale to Petrochemical involved the repayment of loans as consideration, the court was not taken to any evidence which establishes the proposition that the loan and subsequent sales were all part of a single transaction whereby the sale of the shares in PSB Alpha were merely an intermediate step.

60. Further it is acknowledged in the claimants' own evidence that it would be open to Mr Krueger to apply to the courts of Zug (where the bearer shares are believed to be located) for an attachment (Kozachenko 1 paragraph 49d). In my view given that there are sanctions attached to any such order by the Swiss courts (including imprisonment in default of payment of fines) I do not accept that the English court should make an order by reason only of the alleged inadequacy of the penalty under Swiss law. Whilst an order of the English court may not interfere with the management of the Swiss arbitration, there must be a risk of overlapping orders being sought in the Swiss courts and there is no countervailing factor or sufficient connection which in my view tips the balance in favour of an order of the English court.

61. For all these reasons in my view there is insufficient connection with the English court in the circumstances and thus the court declines to exercise its discretion to order the Injunction against Mr Ghertsos in respect of the shares in PSB Alpha to continue.

Section 44(3)

62. The original application was said by the claimants to be urgent because the LCIA tribunal which will deal with the dispute over the shares in Alpha Terminals pursuant to the arbitration provisions in the January SPA had yet to be put in place and could not act prior to the date on which the Dutch attachment lapsed. (Kozachenko 1 paragraph 56). Similarly the Swiss tribunal has not yet been constituted.

63. Had it been necessary to decide this, I would have held on the evidence that the requirements of section 44(3) in relation to the shares and assets of Alpha Terminals had not been made out: the shares have already been transferred to AT Holdings and

the evidence does not support an inference that an injunction is "necessary for the purpose of preserving these shares or assets". There is no evidence which shows that either the shares or the underlying assets need to be preserved through a freezing injunction.

Injunction against third parties

64. It was submitted for the claimants that the court should maintain the Injunction against the defendants to "hold the ring" until the application for an order extending the Injunction to the third parties is heard.

65. However in my view for the reasons discussed above the evidence before the court does not justify the making of an order against the defendants under section 44 and it is not appropriate to continue the Injunction.

Conclusion

66. For the (separate) reasons set out above in relation to the two limbs of the Injunction, the application to continue the Injunction is refused both in respect of the shares in PSB Alpha and the shares and assets in Alpha Terminals.

Alternative service

67. The claimants obtained permission to serve the claim form by alternative means pursuant to CPR 6.15. It was submitted for the claimants that service by email would be the quickest way to bring the proceedings to the attention of the defendants.

68. The evidence of Mr Laurenti is that service by email as a matter of Swiss law is prohibited and service by a private party may result in criminal sanctions (paragraph 28 of Laurenti witness statement). Accordingly his evidence is that the Injunction cannot be validly served by email.

69. The evidence of Mr Kozachenko is that according to a Swiss lawyer at his firm, the position as to whether service of proceedings equates to acting on behalf of the state is not settled as a matter of Swiss law. He also states in his third affidavit that he did not believe Mr Ghertsos was in Switzerland when service was effected by email as he had been informed that he was then in Russia.

70. In the light of my conclusion it is not necessary to deal with the objection in relation to service.