Companies

# [2020]JCA136

**COURT OF APPEAL**

**10 July 2020**

**Before : Mr George Bompas, Q.C., sitting as a single judge.**

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| **Between** | **United Company Rusal Plc** | **Appellant/Defendant** |
| **And** | **(1) MB & Services Ltd** | **Respondents/Plaintiffs** |
| | **(2) Tatiana Golovina** | |

**Advocate D. Evans for the Appellant**

**Advocate W. A. F. Redgrave for the Respondent.**

**JUDGMENT**

**GEORGE BOMPAS JA:**

1. On 24 February 2020 (MB and Services Limited v United Company Rusal Plc [2020] JRC 034) the Royal Court (Sir Michael Birt, Commissioner, and Jurats Olsen and Pitman) dismissed the application of the Appellant/Defendant, United Company Rusal Plc ("Rusal"), seeking a stay of proceedings brought by the Respondents/Plaintiffs, MB & Services Ltd and Tatiana Golovina (together "the Plaintiffs"). Rusal is incorporated in this Island, so that the Plaintiffs' proceedings have been brought as of right against a Jersey defendant. The basis of Rusal's application is that there is clearly and distinctly a more appropriate forum for the Plaintiffs' proceedings, namely the Arbitrazh courts in Russia, and that therefore the Plaintiffs' proceedings should be pursued there and not before the Royal Court in this Island.

2. On 1 June 2020 (MB and Services Limited and Golovina v United Company Rusal Plc [2020] JRC 099) (Sir Michael Birt dismissed Rusal's application for leave to appeal to the Court of Appeal. Rusal has now renewed its application to the Court of Appeal. The application has come before me as a single judge of that Court.

3. At the outset I indicated to the parties that I was minded to deal with the application on the papers, and therefore without oral argument. I have had written submissions from both sides, indeed detailed and helpful written submissions from Advocate Damian Evans on behalf of Rusal. Having carefully considered the grounds of appeal, the written submissions and the materials which the parties have provided in support of their submissions, I refuse the leave sought and dismiss Rusal's application. This judgment sets out my reasons.

**Test for leave to appeal**

4. Advocate Evans has drawn attention to the case of Crociani v Crociani [2014] (1) JLR 426 in which this Court set out the grounds on which leave to appeal is to be granted, namely where (a) the appeal has a real prospect of success, (b) a question of general principle falls to be decided for the first time, or (c) there is an important question of law on which further argument and a decision of the Court of Appeal would be to further public advantage. This test is well-established and uncontroversial.

**The Plaintiffs' proceedings**

5. In the Royal Court's judgment dismissing Rusal's application for a stay there is a detailed narrative setting out the factual background and explaining the Plaintiffs' claims as articulated in the Plaintiffs' Order of Justice. For present purposes, however, it is sufficient to borrow from Advocate Evans' written submissions in support of Rusal's application:

> ***"18. The claims in these proceedings relate to designs for gondola wagon liners ("GWLs") which are used in the Rusal Group's business for the efficient transport of alumina. From about 2010 to 2013, [the Second Plaintiff] through EKP supplied these to third-party Russian transport companies ... who performed transport services for the Rusal Group.***
>
> ***19. In early 2014 [the Second Plaintiff] raised the possibility of selling her business for US$15m. At that stage she had registered no IP rights in relation to GWLs. The Rusal Group eventually declined to pursue her proposal and ceased to purchase GWLs manufactured by the plaintiffs.***

***20. Subsequently, Rusal Group entities have used GWLs produced by other suppliers in China and the Ukraine. The plaintiffs moved to patent certain designs, starting in 2014.***

***21. The essential facts on which the Plaintiffs rely in support of their claims are summarised in paragraphs 23 to 31 of the Judgment. Having previously been put in different ways in correspondence, the claims are advanced on two bases:***

***a. That Rusal was party to a conspiracy to injure the plaintiffs by infringing their IP rights (in the form of "utility model patents").***

***b. That Rusal has breached the confidence of the plaintiffs by passing on confidential design information."***

6. Rusal denies the Plaintiffs' claim. However, the question before the Royal Court was not whether the Plaintiffs' claims have any merit, but whether the Plaintiffs should not be allowed to pursue them at all before the Royal Court on the ground that they should be pursued in Russia as the more appropriate forum for disposing of them. For present purposes the merits or otherwise of the Plaintiffs' claims and Rusal's defences are not material.

**The Royal Court's decision**

7. The Royal Court directed itself, at paragraph 11 of its judgment, as to the issues to be decided if the Royal Court was to accede to Rusal's application for a stay of the Plaintiffs' proceedings. Advocate Evans has not criticised this direction, which reads as follows:

***"… two issues fall for decision in the present case:***

***(a) Has [Rusal] discharged the burden of establishing that Russia is another forum which is clearly or distinctly more appropriate than Jersey?***

***(b) If so, have the Plaintiffs discharged the burden of showing by cogent evidence that there is a real risk that they will not obtain justice in Russia if the case proceeds there?"***

8. In the event, the Royal Court answered in the affirmative both questions posed in paragraph 11 of its judgment. The answer to the second question resulted in the rejection of Rusal's application.

9. Rusal's proposed appeal is directed at the second of the two issues, Rusal having succeeded on the first. Rusal has stated that it is in the process of becoming redomiciled from Jersey to Russia. While that might be relevant to the first of the two issues, it does not impact on the second: it has no impact of the issue arising on Rusal's proposed appeal, namely the Royal Court's assessment of the risk of the Plaintiffs not obtaining justice in Russia if the case proceeds there.

**Rusal's proposed appeal - approach**

10. Rusal wishes to contend on appeal that the Royal Court's decision should be set aside and the Plaintiffs' proceedings should be stayed. Leave to appeal is sought not only on the ground that the appeal has a real prospect of success, but also on the second and third grounds described in paragraph 4 above. In other words, assuming that the appeal is not considered to have a real prospect of success, is there nevertheless some other good reason for giving leave?

11. In my judgment the present is a case in which leave should not be granted without there being a real prospect of success. The two other bases for giving leave contemplated in the Crociani case and referred to above have no relevance in the present case. The application did not raise any point of general principle or important question of law, and neither will any appeal, where the test for staying such proceedings as the present on the ground of *forum non conveniens* is perfectly clear and where there is no complaint as to the direction which the Royal Court made to itself, as set out in paragraph 11 of its judgment (quoted above). The present is a case where the Royal Court found that a stay of the Plaintiffs' present proceedings was unjustified on the basis presented by Rusal. The decision does not have any further implications for future applications by different parties in different circumstances and with different evidence.

12. The substantial issue on this present application is whether or not Rusal's proposed appeal has a real prospect of success, for example because the Royal Court failed to apply correctly the test by reference to which it had directed itself.

13. This gives rise to a threshold question. What is the approach which the Court of Appeal will take when considering the appeal, if leave is given? The answer to this question I describe below. It is, or certainly ought to be, familiar.

14. On behalf of Rusal Advocate Evans submits that *"The nature of the [Royal] Court's task in such a challenge [as made by Rusal] is not a discretionary one"* For this proposition Advocate Evans draws attention to passages in two of the judgments given in the Supreme Court in the case of VTB Capital plc v Nutritek International Corporation [2013] UKSC 5, [2013] 2 AC 337, adding that this was *"recognised by Commissioner Birt in his judgment refusing leave to appeal (rejecting a submission by the Plaintiffs that this is a wholly discretionary question)"*. Advocate Evans then submits that the Royal Court's task *"is an evaluation of primary and secondary facts against relevant legal principles"*. Having drawn attention to the fact that at the hearing before the Royal Court there was no live evidence and much of the background was common ground, he submits as follows as to the approach on appeal: *"The question is whether the Royal Court's ultimate conclusions, reached through inference and reasoning from the primary facts, are consistent with the applicable principles. That is … classically a matter which is properly to be reviewed by an appellate court".*

15. Before discussing in a little more detail the authorities referred to, I should say at once that Advocate Evans is correct in saying that an appeal in the present case would be by way of a review, not a rehearing. This case is not one of those which can be adjourned from one tribunal to another for a rehearing afresh. What is more, the application before the Royal Court was one invoking the Court's case management powers. It was a procedural application: the Royal Court has a discretionary power to stay proceedings in the interests of justice. But in deciding whether or not to exercise the power, the Court is guided by established principles. Evaluation is required when the Court is determining how, having regard to the facts found (primary and by inference), the principles are to be applied: where does the case stand as regards those principles? More particularly in the present case, bearing in mind that at present the focus is on the second of the two issues set out in paragraph 7 above, having regard to the materials before the Court and the conclusions drawn, what answer is to be given to the second of the two questions.

16. The upshot is that the Court of Appeal's approach on an appeal from the Royal Court's decision will be little different from an appeal against any exercise of a discretionary power. This appears from the passage in the judgment of Beloff JA cited by Sir Michael Birt, Commissioner, when refusing Rusal's application for leave to appeal. Sir Michael Birt cited this passage when, as Advocate Evans submits, recognising that the Royal Court's task had involved evaluation. What Beloff JA said, giving the judgment of the Court of Appeal in Jaiswal v Jaiswal [2007] JLR 305 (a case in which a stay had been sought on the basis that a foreign court was the more appropriate forum), at [76] was:

> ***"What makes (or does not make) one forum more appropriate than another depends upon a comparison of various factors said to favour the one or the other. The exercise is one of evaluation rather than of***

***discretion. However, from the perspective of an appellate court, such exercises have this measure of affinity: it will not interfere with the decision of the court at first instance unless that court has taken into account irrelevant factors, has failed to take account of relevant factors, or has reached a conclusion outside the spectrum of reasonableness. It is not for the former simply to substitute its view for that of the latter…"***

17. The passages in VTB Capital plc v Nutritek International Corporation (above) cited by Advocate Evans were from judgments given by Lords Neuberger and Wilson. These are set out below. But describing the task which faced the Royal Court as being one of evaluation rather than of discretion does not materially affect the position. This indeed appears from the two judgments themselves when examined carefully:

(i) In the first passage relied on by Rusal from the VTB Capital case, the passage from the judgment of Lord Neuberger at [97], the following was said:

***"97. It is worth emphasising that, as Lord Wilson JSC says, the exercise carried out by the judge and by the Court of Appeal on the first question was not the exercise of a discretion but an evaluative, or a balancing, exercise, with which, as Lord Goff said in The Spiliada at p 465, an 'appellate court should be slow to interfere' (also reflected in Lord Bingham's observation in Lubbe quoted in para 92 above)."***

It seems that in this quoted passage the reference to Lord Goff may have been a mistaken reference to Lord Templeman, whose speech expressed agreement with that of Lord Goff while also, at page 465G-H, making the quoted observation. But nothing of consequence turns on this, as appears from paragraph 18 below.

(ii) The reference made by Lord Neuberger, in the passage quoted above, to paragraph 92 of his judgment and to a quotation there was to the following:

***"92. The third point was expressed by Lord Bingham of Cornhill in Lubbe v Cape plc [2000] 1 WLR 1545, 1556. He said, in the context of an application for a stay of proceedings on grounds of forum non conveniens, that***

***'This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal***

***challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum.'"***

(iii) The second passage relied on by Rusal, that from the judgment of Lord Wilson in the VTB Capital case at [156], was:

***"156. The forum issue required [the trial judge] not (in my view) to exercise a discretion but, rather, to reach an evaluative judgment upon whether, in the light of these and the many other points pressed upon him by each side, England was clearly the more appropriate forum. 'The appellate court should be slow to interfere' (Lord Goff in The Spiliada… 465); and I agree … that the errors which the Court of Appeal identified in the judgment of [the Judge] (in particular his adoption of the two-part test apt to an application for a stay) were on analysis of materiality insufficient to justify re-evaluation of its own."***

Again, the reference to Lord Goff should have been to Lord Templeman.

18. The feature which is significant about the relevant passages in the speeches of Lords Templeman and Goff in Spiliada Maritime Corporation v Cansulex [1987] AC 460 is that they both spoke in terms of the exercise of discretion as being the nature of the court's task, not evaluation. To them the precise terminology was not critical.

(i) What was said by Lord Templeman was so far as relevant:

***"In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the***

***appellate court should be slow to interfere. I agree with my noble and learned friend Lord Goff of Chieveley that there were no grounds for interference in the present case and that the appeal should be allowed."***

(ii) What was said, in the same theme, by Lord Goff, in the speech with which Lord Templeman agreed, was that the Court of Appeal was mistaken in reversing the decision of the trial judge, and that:

***"…this is a classic example of a case where the appellate court has simply formed a different view of the weight to be given to the various factors, and that this was not therefore an appropriate case for interfering with the exercise of the judge's discretion."***

19. It should be kept in mind that the Royal Court's aim on Rusal's application was to decide whether it would be unjust for the Plaintiffs to be confined to remedies outside this Island, where the Plaintiffs were entitled to commence their action. As Lord Templeman said also in the Spiliada case at 465, ***"… But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere"***. The Royal Court's assessment in the present case was that staying the Plaintiffs' proceedings would be unjust to the Plaintiffs, the Royal Court having concluded that there was shown, by cogent evidence, to be a real risk in this case of the Plaintiffs not being able to obtain justice in Russia. Judicial comity is an important consideration, as the Royal Court noted. Hence the evidence of the real risk of justice not being obtained needs to be cogent, again as the Royal Court noted.

20. Accordingly, for Rusal's appeal to have a real prospect of success, Rusal must be able to put forward plausible grounds for arguing that the Royal Court misdirected itself or took into account irrelevant (or failed to take into account relevant) factors or reached a conclusion outside the spectrum of reasonableness. The Royal Court had rightly directed itself that the burden lay on the Plaintiffs to show why justice requires that a stay should not be granted, once Rusal had discharged the burden of showing that Russia was an available forum which is clearly or distinctly more appropriate than Jersey (cf. the Spiliada case at 478 per Lord Goff). But was the Royal Court wrong in its evaluation? More specifically, is there a real prospect of the Royal Court's conclusion being shown on an appeal by Rusal to be one that was not reasonably open to it?

21. Having regard to the very detailed notice of appeal and submissions put forward on Rusal's behalf on this appeal, I explain at perhaps greater length than ordinarily necessary my answer to the question posed at the end of the previous paragraph. That question is not, of course, whether

the Court of Appeal, if hearing afresh Rusal's application, would have come to the same conclusion as the Royal Court.

**Real prospect of success?**

22. The Royal Court's judgment addressed, at paragraphs [96] to [138], the question it had asked itself, namely whether there is a real risk that the Plaintiffs will not obtain justice in Russia. On this the Royal Court's conclusion was explained at some length in paragraph [139], and then summarised at paragraph [140(ii)] where the Royal Court said:

> ***"... we do not stay the current proceedings because the Plaintiffs have satisfied us by cogent evidence that there is a real risk that they will not obtain justice in Russia."***

23. Before describing Rusal's attack on the Royal Court's conclusion and decision I should summarise the sections of the Royal Court's judgment dealing with the question of risk of the Plaintiffs' not obtaining justice in Russia and leading up to the analysis in paragraph [139]. This question was, I stress, one of evaluation – that is judgment - for the panel (Sir Michael Birt and Jurats Olsen and Pitman) who heard Rusal's application.

(i) At paragraphs [97] and [98] the parties' rival positions were explained as follows:

> ***97. In briefest outline, the Plaintiffs submit there is a real risk they will not obtain justice in Russia. They say that there is a risk of outside interference with the Arbitrazh courts where a case is of political sensitivity or touches upon the interests of the state or those close to it. They submit that, because of the important position of the Rusal Group and the involvement of Mr Deripaska as someone who is very close to President Putin, this is such a case and there is therefore a risk of interference. Furthermore, they point to the allegations of intimidation set out in the Order of Justice and the Second Plaintiff's affidavit as confirming the likelihood of interference.***
>
> ***98. On the other hand, the Defendant, whilst accepting that there may be interference in cases involving serious political sensitivity, submit that this is not such a case. It is simply a claim for damages against the Defendant which, even if successful, will have no impact on the interests of the state. Furthermore, if, which is denied, the***

***Defendant might otherwise have been inclined to seek to interfere, its position with regard to OFAC (described below) means that any interference could well have catastrophic consequences for its business such that there is no possibility that it would in fact seek to interfere. The Defendant also denies the allegations of intimidation."***

(ii) At paragraphs [99] to [115] the judgment described the Arbitrazh courts and the evidence before the Royal Court concerning those courts. This evidence was given by experts, Professor Bowring and Mr Kulkov, called respectively by the Plaintiffs and Rusal. Paragraph [114] recorded a matter agreed by the two experts, namely ***"that it could not be said that Russian courts are immune from external or political influence, but this is rare and limited to cases involving serious political sensitivity".*** This followed a discussion of what had been said by each in their separate reports, including a reference at paragraph [112] to Mr Kulkov's reference to cases with a ***"significant political, economic or social element"*** as being those where there could be some risk of denial of a fair trial. Then, at paragraph [115] the Royal Court recorded Mr Kulkov's opinion as to the application of the description to the present case, namely that this is a simple commercial dispute without risks of external interference, and on the other hand Professor Bowring's assessment that ***"it is highly likely that Mr Deripaska's character, wealth, importance to Russia, and influence will enable him to influence the outcome of any litigation in Russia".*** This assessment is important, as the Royal Court found at paragraph [139(xiii)] that it was to be preferred to that of Mr Kulkov.

(iii) At paragraphs [116] to [126] the judgment described three cases in the English High Court and Court of Appeal (Cherney v Deripaska [2008] EWHC 1530 (Comm); Deripaska v Cherney [2009] EWCA Civ 849; Erste Group Bank AG London Branch v JSC 'VMZ Red October [2013] EWHC 2926 (Comm); Bazhanov v Fosman [2017] EWHC 3404 (Comm)) in which there had been consideration of the question whether a party in the particular case could expect to receive a fair trial in Russia. In one of the cases Mr Deripaska was a party. In a later passage in the judgment of the Royal Court there was reference to another English case in which there was criticism of Mr Deripaska not only as a witness whose uncorroborated evidence would not be safe to rely upon but also as having probably prevailed upon a different witness to give false evidence.

(iv) At paragraph [127] of its judgment the Royal Court recorded the following: ***"It was not disputed before us that Mr Deripaska is a very powerful and wealthy individual whose interests are closely allied to those of the Russian State. There is also evidence that he is a person who would not hesitate to seek to influence a Russian court if he thought it was in his interests to do so."***

(v) In the following paragraphs of its judgment down to paragraph [135] the Royal Court gave attention to a contention that, as a result of the intervention of the US Treasury Office of Foreign Affairs Control ("OFAC"), since 2018 Mr Deripaska's connection with Rusal had been significantly diminished, leading to Rusal's submission that, in the light of the constitution of Rusal's board of directors and the potentially disastrous consequences for Rusal, there is no likelihood of Rusal seeking (even if it could) to influence any Russian court or contacting Mr Deripaska with a view to his doing so.

(vi) At paragraphs [136] to [137] of its judgment the Royal Court examined the parties' rival contentions concerning an allegation that the Second Plaintiff has been subject to actions by or on behalf of Rusal designed to intimidate her into dropping any claim against Rusal.

(vii) Paragraph [138] of the judgment drew together the submissions on behalf of Rusal in support of the case that there was no real risk in this case of an unfair trial in Russia.

24. Paragraph [139] needs to be set out in full, as it is here that Rusal's criticism of the Royal Court's judgment is focussed:

> ***"139. We have carefully considered the above submissions and Advocate Mackereth's other oral and written submissions. However, we have concluded that there is cogent evidence that there is a real risk that the Plaintiffs would not obtain justice if this case were tried in Russia. We would summarise our reasons as follows:***
>
> > ***(i) We bear firmly in mind the cautionary words of Lord Collins in [AK Investments CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7] at [97] where he said:***
> >
> > > ***"Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."***
> >
> > ***(ii) We also bear in mind that, as the Court of Appeal made clear in Cherney in the passage quoted … above, the Court must focus on the facts of the particular case and whether in the particular case, there is a real risk of a party not obtaining a fair trial.***

***(iii) The experts Professor Bowring and Mr Kulkov are agreed that it cannot be said that the Arbitrazh courts are immune from external or political influence, but that this is rare and limited to cases involving serious political sensitivity. Mr Kulkov also referred in his report to there being very little risk of denial of a fair trial in cases where there is no significant political, economic or social element. But where these factors are present, the experts are agreed that there is a risk of outside interference. Once one acknowledges that such interference can take place, the difficulty then is, as Christopher Clarke J indicated at [241] in Cherney to ascertain the limit of cases in which such interference may occur.***

***(iv) Acknowledgment that interference may take place in some cases immediately leads to the conclusion that the reforms introduced under Mr Ivanov (such as random allocation of judges, reasoned judgments, publication of judgments etc) cannot be a complete answer because the experts are agreed that external influences can still occur in some cases despite these protections. Whether this is because, in a particular case, the judge will not in fact be randomly allocated or is subject to a telephone call or simply knows which way he must decide for his own self-interest, is beside the point. The agreed evidence before us is that in cases of political sensitivity, justice may not be done because the Arbitrazh court may be subject to improper external influence. The question therefore is whether this is one of those cases.***

***(v) We accept that the Second Plaintiff is not a high-profile figure who has had any involvement in Russian politics. We also accept that the case does not involve a strategic interest of the State such as a substantial shareholding in the Defendant as was the case in Cherney. We further accept that the current board of directors of the Defendant would not authorise or approve of any improper action in relation to the Russian courts.***

***(vi) But Mr Deripaska still has a substantial interest in the Defendant through his 44.95% shareholding in EN+. Furthermore he was involved to some extent in the events of 2014 and is likely to be a witness in any proceedings. We find that he is someone who, because of his closeness to the Russian State and his wealth and power, would have the ability***

***to exert influence on a Russian court and he is someone who would be willing to do so if he thought it was in his interests. The Plaintiffs suggest - and we accept for the purposes of this hearing - that his ability to exert influence in Russia (albeit not on a court) is shown by the fact that, although the employees of the Defendant had tried to sort out the railway spur problem at Vanino for some time without success, the matter was resolved satisfactorily within a very short time of the Second Plaintiff contacting Mr Deripaska to alert him to the issue and to the fact that it was costing Rusal money.***

***(vii) Importantly, for the purposes of our present decision, we accept that members of the Defendant have taken actions in this particular case designed to intimidate the Second Plaintiff or to make it more difficult for her to pursue her action. Whilst the incidents described at (i) – (iv) of para 136 above would not, if they stood on their own, be sufficient to lead to that conclusion, they have to be read in conjunction with those summarised at (v) and (vi). As to (v), there is no effective challenge to the evidence of Mr Nesterenko as to the content of the meeting in October 2014 and in particular that he was told not to leave the country as he might be required for another meeting, which gave the impression to him of someone speaking from a position of authority in the State. The Second Plaintiff's email dated 27th October to Mr Soloviev recording that this had occurred is contemporaneous support for Mr Nesterenko's evidence.***

***(viii) Even more significantly, as set out at paragraph 136(v) above, we have the evidence of the patent attorney – which has not been satisfactorily addressed by any evidence on behalf of the Defendant – that Mr Nikolaev tried repeatedly to persuade the attorney to drop the Plaintiffs as clients and attempted to bribe him by reference to everything having its price. We regard an attempt to interfere with the relationship between an opposite party and his or her advisers as particularly serious.***

***(ix) The reputation of Mr Deripaska and the perception that he would be willing to use unlawful means is shown by the fact that the attorney was not willing to give an affidavit because of the possible ramifications for him and his wife and young family in Russia if he were to do so.***

***(x) In our judgment, the overwhelming likelihood is that these actions were taken on the authority or with the implicit approval of Mr Deripaska. This is therefore compelling evidence that, in this particular case, Mr Deripaska has been willing to use unlawful means to try and dissuade the Second Plaintiff from pursuing the claim. We accept that in many cases involving the Rusal Group, Rusal has been unsuccessful as described earlier in this judgment. However, these appear to be cases involving comparatively small sums and there is no suggestion that Mr Deripaska was personally involved in any of them. The present case is very different given the direct involvement of Mr Deripaska.***

***(xi) We accept that the situation has changed since 2014 in that Mr Deripaska has been designated by OFAC and the Defendant must comply with the agreement with OFAC if it is to avoid sanctions. However, the fact remains that Mr Deripaska has sought in this very case to exert improper influence on the Plaintiffs and we have little doubt that, if he was confident he could do so without being found out, he would attempt to do so again either by exerting further influence on the Second Plaintiff or her attorney or by exerting influence on the court. As Professor Bowring has stated, a telephone call would be very difficult ever to prove. Furthermore, there must always be the real possibility that, knowing that Mr Deripaska is interested in the outcome and is a witness, a judge will simply be aware of the best way to decide the case in his own self-interest.***

***(xii) We consider that in this particular case, the fact that the Second Plaintiff says that she will not return to Russia for any court case out of fear, is also a relevant factor. We accept that it is not necessary under the Russian system for a party to be present and that a case can be presented by way of statements and information from a party together with submissions. But an important aspect is whether the Plaintiffs can have confidence in their lawyer. Given our finding that the Defendant has made attempts to persuade the Second Plaintiff's patent attorney to stop representing her and implicitly to offer a bribe to that effect, if she does not attend, she will not be in a position to be confident that her lawyer has fought the case as hard as possible and has not been bribed or intimidated into simply going through the motions.***

> ***(xiii) In summary, whilst we accept that any interference with the Arbitrazh court which was discovered would have very serious adverse consequences for the Defendant and Mr Deripaska, we prefer the evidence of Professor Bowring about the risk in this particular case and we find that there is a real risk that, given what has already occurred in this case, coupled with the involvement and character of Mr Deripaska, there is a real risk that the Plaintiffs will not receive justice if this case is heard in Russia."***

25. In his written contentions in support of Rusal's application for leave to appeal Advocate Evans has drawn attention to three principal considerations taken into account by the Royal Court. First, the Court looked at the question whether, as regards the Plaintiffs' proceedings, there was a real risk that the Arbitrazh courts could be improperly influenced in favour of Rusal. Second, the Royal Court looked at question whether, there was a real risk that the courts might be so influenced. Third, the Royal Court looked at a question whether for some other improper reason, notably intimidation, the Plaintiffs might be at a real risk of being hampered from obtaining justice in Russia. Mr Deripaska, by reason of his connection with the Russian state, his importance in Russia, and his connection with Rusal, was found to be central to each of the three principal considerations. Inevitably, this meant that the considerations were on occasion addressed together.

26. It is worth noting that

    (i) he first two considerations mentioned in the previous paragraph were concerned with, in effect, the integrity of the internal process of courts in Russia as an engine for delivering justice for the Plaintiffs in the present case; and

    (ii) the third of the considerations was directed at improper impediments in the present case for the Plaintiffs' litigation of their present claims in Russia.

27. As to the first of the matters mentioned in the previous paragraph, Rusal wishes to challenge the Royal Court's judgment as having failed to pay sufficient regard to the need for judicial comity, despite the direction given at paragraph [139(i)] of the judgment. It is said that the Royal Court's conclusion, and in particular its conclusion concerning the possibility of improper influence as set out in paragraph [139(x)] of the judgment was inconsistent with *"both the relevant authorities and the evidence and factual findings in this case"* (para 4(a) of the grounds of appeal). The authorities referred to were cases where decisions were reached on the particular facts before the

court. They did not expound any different legal principles than applied by the Royal Court in the present case. They were, at the highest, illustrations of the way in which the court in different cases applied the test in paragraph [11(2)] of the Royal Court's judgment. They did not preclude the conclusion reached by the Royal court on the evidence in this case. The evidence before the Royal Court, on the other hand, was described in detail by the Royal Court and reasoned conclusions reached, as explained in paragraph [139] of the judgment, which were open on the evidence.

28. I comment later in this judgment on the second of the two matters mentioned in paragraph 26 above

29. In a little more detail, Rusal's argument is that the Royal Court's conclusions were flawed, and not based on cogent evidence, because:

(i) A finding of a risk of justice being denied to the Plaintiffs through improper influence in the process of the Arbitrazh court was inconsistent with accepted evidence that there was no risk of improper influence in the absence of serious political sensitivity for a case (the present not being such a case).

(ii) There was insufficient evidence to support the personal involvement of Mr Deripaska in the events of 2014, the evidence being exiguous and confined to a one-line email promising to look into a tangential matter involving a Russian railways spur line.

(iii) The finding of a real risk of possible interference with the Second Plaintiff and her witnesses or representatives in Russia was not supportable on the evidence.

(iv) There was no basis for considering Mr Deripaska to have been involved in the past, or to be likely to be involved in the future, in any improper attempt to interfere with the Plaintiffs or their claims.

(v) Further, and in any case, the intervention of OFAC should have been found to remove any risk of future impropriety on the part of Rusal or Mr Deripaska, even if there might at one time have been such a risk.

30. In my judgment Rusal has not put forward an attack on the Royal Court's conclusions which has a real prospect of succeeding on appeal. The conclusions were well within the range of what was

reasonably open to the Royal Court on the evidence before it, and there is no basis for saying that the Royal Court misunderstood the evidence.

31. The first of the points summarised in paragraph 29 above has been described by Advocate Evans as Rusal's *"overarching point".* In supporting the submission that the present case was found not to be within the description of one of *"serious political sensitivity"* (the description used by the two experts in their joint statement), the written submissions on behalf of Rusal drew attention to the first two sentences of paragraph [139(v)] of the Royal Court's judgment. The submission was that those sentences involved the finding contended for, and that once that finding was made there was no further need for the Royal Court to explore the possibility of external influence in a non-political case.

32. This submission mistakes what the Royal Court found concerning the characterisation of the present case. Quite simply, the Royal Court's conclusion was that the present was within the category (a case of *"serious political sensitivity"*) where external influence might be possible. This appears from (a) the question which the Royal Court had posed in the last sentence of paragraph [139(v)], (b) the opening word *"But"* at the start of paragraph [139(vi)], and (c) the summary in paragraph [139(xiii)]. The point is that the features of the case noted in paragraph [139], in particular at paragraph [139(vi)] were found to qualify the case as coming within the range of the relevant description of being of serious political sensitivity.

33. Taking this in a little more detail, the Royal Court pointed out that, once it is accepted that the Arbitrazh courts are not wholly immune from external or political influence, the difficulty is to ascertain the limit of the range of cases in which the courts might not be immune to interference. The Royal Court asked itself whether this is one of those cases. It noted the expert evidence, and then noted features pointing against the case being within the limit as described by the experts (para [139(v)]); but the Royal Court then drew attention to the involvement and importance of Mr Deripaska, including his closeness to the Russian State (para [139(vi)]). It was open to the Royal Court to conclude, as it did at para [139(vi)] and again in para [139(xiii)] (where it accepted Professor Bowring's evidence), that Mr Deripaska had the ability to exert influence on a Russian court. The Royal Court considered that he had reason to wish to do so in the present case; and it considered also that he was someone who would be willing to do so if he thought it in his interests. This conclusion was based on evidence before the Court and was sufficient as a conclusion that the present case is within the range of cases in which there might not be immunity to interference. There is no real prospect of the Royal Court's conclusion on the point being found to be beyond what was reasonably open to the Royal Court on the evidence before it.

34. In deference to a further submission made on Rusal's behalf by Advocate Evans, the Royal Court's decision does not amount to a determination as to the correct characterisation of each and every case with which Mr Deripaska might have some connection. It was a decision on the evidence before it concerning the present case.

35. As to the second of the points noted in paragraph 29 above, namely the involvement of Mr Deripaska, I have read carefully the affidavits and affirmations before the Royal Court, including those of the Second Plaintiff and of Messrs Strunnikov and Soloviev on behalf of Rusal together with the relevant emails referred to by the deponents, in particular having regard to the passages referred to in Advocate Evans' written submissions. Again, there was evidence before the Royal Court sufficient to support a finding that Mr Deripaska was directly involved in the present case going beyond sending a simple six-word acknowledgment email *("I'll sort it out this week")* concerning the Russian railways spur line; that is to say, that he was involved in dealings of early 2014 relied upon by the Plaintiffs as the foundation of their claims.

36. As to the third of the points noted in paragraph 29 above, there was evidence of past intimidation sufficient to support the findings at paragraphs [139(vii)] and [139(viii)] of the Royal Court's judgment. In particular, the explanation given in paragraph [139(vii)] concerning the Royal Court's assessment of the evidence as to intimidation described in paragraph [136] was sufficient and reasonable, as was the explanation given in paragraph [139(viii)].

37. An argument on behalf of Rusal which has featured prominently on this application is that the courts in the appropriate forum for a trial, in this case Russia, would be better placed to deal with interference in their process through intimidation of parties and their witnesses that the court in Jersey. The difficulty with this argument is that it is undermined where the particular case is found to be one where there is a risk of the court in the foreign forum being open to improper influence.

38. As to the fourth of the points noted in paragraph 29 above, there was material on which the Court could conclude that Mr Deripaska's connection with the case could rationally be seen as an impediment to a fair trial: at para [139(ix)] the Court referred in this regard to evidence concerning the Plaintiffs' Russian patent lawyer.

39. Paragraph [139(x)] of the judgment addressed the question whether matters relied upon by the Plaintiffs as evidencing intimidation could properly be connected with Mr Deripaska. The Royal Court found that *"the overwhelming likelihood is that these actions were taken on the authority or with the implicit approval of Mr Deripaska"*. A striking feature of the case, in this regard, is that (a) no explanation was given by Rusal as regards the evidence of Mr Nesterenko, referred to in

paragraph [139(vii)], while (b) there was evidence of Mr Deripaska having been connected with the matters giving rise to the dispute between the Plaintiffs and Rusal.

40. Finally, as to the fifth point in paragraph 29 above, the intervention of the OFAC and the resulting changes in relation to the Rusal shareholding arrangements could reasonably have been regarded as providing no guarantee of the Plaintiffs having a fair trial for their case in Russia. This point was addressed in paragraph [139(xi)]. The point only is that the OFAC intervention might be thought to make it likely to be more painful and embarrassing for Rusal or Mr Deripaska if improper influence in a trial before the Arbitrazh Court came to light. But if there were to be any improper influence it would likely be covert and intended to be kept secret. It was therefore open to the Royal Court to conclude that the OFAC intervention was not a cure.

41. In the result, I do not consider Rusal's proposed appeal to have a real prospect of success; and therefore leave to appeal is to be refused.

**Authorities**

MB and Services Limited v United Company Rusal Plc [2020] JRC 034

MB and Services Limited and Golovina v United Company Rusal Plc [2020] JRC 099

Crociani v Crociani [2014] (1) JLR 426

Jaiswal v Jaiswal [2007] JLR 305

VTB Capital Plc v Nutritek International Corporation [2013] UKSC 5, [2013] 2 AC 337

Cherney v Deripaska [2008] EWHC 1530 (Comm)

Erste Group Bank AG London Branch v JSC 'VMZ Red October [2013] EWHC 2926 (Comm)

Spiliada Maritime Corporation v Cansulex [1987] AC 460

Bazhanov v Fosman [2017] EWHC 3404 (Comm)