Neutral Citation Number: [2020] EWCA Civ 1337

Case No: A4/2019/1709

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
PATRICIA ROBERTSON QC (Sitting as a Deputy Judge of the High Court)
CLAIM NO. CL-2012-000478

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2020

Before:

LORD JUSTICE LEWISON
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE PHILLIPS

- -

Between:

JSC VTB BANK
(a company incorporated in Russia) **Claimant**

- and -

(1) PAVEL VALERJEVICH SKURIKHIN
(2) PIKEVILLE INVESTMENTS LLP
(3) PERCHWELL HOLDINGS LLP **Defendants**

- and -

(1) ZENO ALOIS MEIER
(2) BEAT LERCH
(3) CROWN CAPITAL HOLDINGS LIMITED
(a company incorporated in Hong Kong)
(4) THE BERENGER FOUNDATION
(a foundation incorporated in Liechtenstein)
(5) ACCREDA TRUSTEES LIMITED
(a company incorporated in Nevis) **Respondents**

- -
- -

David Lord QC and **Sebastian Kokelaar** (instructed by **Withers LLP**) for the **Appellant**
Tim Penny QC and **Tim Matthewson** (instructed by **PCB Litigation**) for the **Respondent**

Hearing date: 14 May 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 21 October 2020.

Lord Justice Phillips:

Introduction

1. The central issue in this appeal is whether, and subject to what qualifications, it is an abuse of process for a party to apply to set aside an interlocutory order on the grounds that there has been a material change of circumstances when the party brought about the change itself.

2. By orders of Simon J dated 7 March 2014 and Blair J dated 14 November 2014, the claimant ("VTB") was granted separate summary judgments against the first defendant ("Mr Skurikhin") for sums in Russian roubles equivalent, in total, to about £13.4m. On 12 June 2014 Eder J granted a worldwide freezing injunction against Mr Skurikhin ("the WFO"), freezing his assets up to £25m.

3. VTB thereafter sought to enforce the judgments by obtaining possession of and selling three properties in Italy used by Mr Skurikhin and his family, worth about €17m ("the Properties"), the registered owner of the Properties being the second defendant ("Pikeville"), an English limited liability partnership. Pikeville's membership shares are registered to the first to third respondents, who originally held them on trust for Mr Skurikhin, but since 2010 have held them for the fourth respondent ("Berenger"), a foundation incorporated in Liechtenstein. VTB contends that Mr Skurikhin either has a right to call for the assets of Berenger to be transferred to him or has de facto control of those assets.

4. VTB therefore applied, by notice dated 16 December 2014, for the appointment of receivers over the membership interests in Pikeville by way of equitable execution. Berenger was joined in and served with the application but did not appear at the hearing on 13 July 2015. On 21 July 2015 Christopher Butcher QC (sitting as a deputy judge of the Commercial Court) granted the application ("the Receivership Order"), finding that it was more likely than not that Mr Skurikhin either had a right to call for the assets of Berenger to be transferred to him, or had *de facto* control of those assets.

5. Following their appointment, the receivers used their powers to cause Pikeville to apply for an administration order in respect of itself. The receivers were appointed administrators of Pikeville on 6 August 2015. In that capacity the receivers brought proceedings in Italy to obtain possession of the Properties and are currently in the process of selling them.

6. In August 2017 the board of Berenger passed a resolution (backdated to 14 June 2017) irrevocably excluding Mr Skurikhin from the class of beneficiaries of the foundation and introduced new regulations providing that that class shall consist of the fifth respondent ("Accreda") as trustee of the Olympic Settlement ("Olympic"). At about the same time Accreda passed a resolution (backdated to 18 June 2017) confirming Mr Skurikhin's exclusion as a beneficiary of Olympic.

7. On 12 July 2018 Berenger applied to discharge the Receivership Order on the grounds that (a) it should not have been made in the first place; alternatively (b) Mr Skurikhin's exclusion as a beneficiary of both Berenger and Olympic was a material change of circumstance which meant that the Receivership Order should not continue.

8. In a reserved judgment dated 12 June 2019, Patricia Robertson QC, sitting as a deputy judge of the Commercial Court ("the Judge"), dismissed the application. In relation to the alleged change of circumstances, the Judge held that the contention was an abuse of process, having been brought about by Berenger itself, probably at Mr Skurikhin's instigation, for the purpose of throwing obstacles in the way of enforcement. Further, the Judge held that, even if Berenger had been entitled to rely on Mr Skurikhin's exclusion as a beneficiary, that change was not material as it did not undermine the basis on which the Receivership Order was made.

9. Berenger now appeals the Judge's decision in relation to the alleged material change of circumstances, being the only ground in respect of which permission was granted. VTB resists the appeal and, in doing so, also seeks permission to amend its Respondent's Notice to allege that the exclusion of Mr Skurikhin was a breach of both the WFO and the Receivership Order and that Berenger is in contempt of court in both respects.

The facts

10. The background facts were set out by the Judge in paragraphs 4 to 59 of her careful and detailed judgment, from which the summary below is largely derived. The Judge also made several findings of fact, having heard oral evidence from the first respondent ("Mr Meier") and Dr Schurti, a member of Berenger's board. Those findings are not challenged and, so far as material, are also summarised below.

The proceedings against Mr Skurikhin

11. Between 2005 and 2009 VTB, a Russian bank, made loans to the SAHO group of companies of which Mr Skurikhin, a resident of Russia, was the chairman. When the SAHO group defaulted on the loans, VTB made demand on personal guarantees which Mr Skurikhin had provided. When he too failed to pay, VTB commenced proceedings in Russia, obtaining several judgments against him.

12. On 16 August 2012 VTB commenced these proceedings against Mr Skurikhin, suing on the Russian judgments. On the same date Hamblen J made a domestic freezing order against Mr Skurikhin and a worldwide freezing order against Pikeville (on the basis that Mr Skurikhin was alleged to be the owner in equity of its membership interests). The freezing orders were continued by Burton J on 4 December 2012 following a hearing at which both Mr Skurikhin and Pikeville were represented.

13. As referred to above, VTB obtained summary judgment on its claims against Mr Skurikhin in March and November 2014 and the WFO was made on 12 June 2014. The WFO contained, at paragraph 9, the standard Commercial Court wording that:

> "[The injunction] applies to all of the Defendant's assets … whether or not they are in his own name and whether they are solely or jointly owned and whether the Defendant is interested in them legally,

> beneficially or otherwise or if they are controlled by him directly or indirectly. For the purposes of this Order, the Defendant's assets include any asset which he has the power, directly or indirectly, to dispose of or to deal with or control as if it were his own. The Defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instruction".

Among the assets specifically identified in paragraph 10 of the WFO as being subject to the prohibition on dealing were Mr Skurikhin's beneficial interest in and/or right of control over (i) the membership interests in Pikeville or Pikeville itself; (ii) Berenger; and (iii) the Properties.

14. Paragraph 25 of the WFO contained the standard provision that the terms of the order do not affect or concern anyone outside the jurisdiction of the court, but expressly extended to (i) persons and companies referred to in paragraph 10 of the order, including Berenger, and (ii) persons able to prevent acts or omissions outside the jurisdiction which constitute or assist in a breach of the terms of the order.

15. On 31 October 2014 Flaux J sentenced Mr Skurikhin to a term of 16 months imprisonment (four months of which was suspended) for contempt of court in failing to comply with the disclosure obligations in the WFO, describing it as "a particularly serious case of a contemnor in effect cocking a snook at this court". Since that date Mr Skurikhin has not returned to this jurisdiction, so has avoided arrest and imprisonment.

Berenger, Olympic and Pikeville

16. Although Mr Skurikhin was not frank about it before Burton J in 2012, it subsequently emerged that he was indeed the economic settlor of Berenger when it was established on 12 January 2005 by Walpart Trust, on Mr Meier's instructions. Mr Meier was in turn acting for Mr Skurikhin. Mr Meier and the second respondent ("Mr Lerch"), together with Dr Schurti (a Liechtenstein attorney), were members of Berenger's board.

17. Article 5 of Berenger's statutes provided that beneficiaries "may not be deprived of their beneficial interest under the foundation by their creditors by means of proceedings for protective relief, execution or bankruptcy", a provision which replicated the effect of Liechtenstein law.

18. In regulations issued by Walpart Trust on 12 January 2005, the beneficiaries of Berenger were Mr Skurikhin, his descendants and trusts, foundations and the like whose beneficiaries included beneficiaries of Berenger. Those regulations also provided that distributions would normally be made only to Mr Skurikhin during his lifetime.

19. On 16 February 2005 the original regulations were replaced, the new regulations naming Mr Skurikhin (and his family members after his demise) as discretionary beneficiaries as to 20% of the assets and Accreda (as trustee of Olympic) as to 80%, although that apportionment was described as "a long-term guideline only".

20. Olympic had been established in Nevis on 2 February 2005 by Mr Meier on the instructions of Mr Skurikhin. Accreda, the trustee of Olympic and a company controlled by Mr Meier and Mr Lerch, had nominated thirteen individuals as discretionary beneficiaries as to defined percentages, including Mr Skurikhin (although the percentage allocated to him has not been disclosed). The other 12 beneficiaries have not been identified, but it is accepted that they are family or friends of Mr Skurikhin. Accreda further resolved that a beneficiary cannot be designated as such "[in] the event of a bankruptcy or lawsuit in the amount of more than USD 100,000".

21. Pikeville had been established as an English LLP in 2002, owned and controlled by Mr Meier and Mr Lerch (or companies controlled by them), but (as was common ground) held on trust for Mr Skurikhin. On 10 June 2005, following the founding of Berenger, Mr Skurikhin orally instructed Mr Meier that the membership interests in Pikeville were to be held on trust for Berenger. The companies through which Mr Meier and Mr Lerch held those interests made declarations of trust in favour of Berenger on that date. Further declarations to the same effect were made by Mr Meier and Mr Lerch in 2008 (when they had become members in their own names) and again in 2010 by Mr Meier, Mr Lerch and the third respondent ("Crown"), when Crown had also become a member. The Judge found that the 10 June 2005 declaration was not, in the event, effective to transfer Mr Skurikhin's beneficial interest to Berenger, but that the 2008 and 2010 declarations were valid and effective.

22. Pikeville purchased the Properties for about €18m, using monies borrowed from Miccros Group Ltd ("Miccros"), a BVI company owned by Berenger and a settlement again controlled by Mr Meier and Mr Lerch. VTB contends (but the Judge considered it unnecessary to decide) that the loan was a sham, Miccros being owned and controlled by Mr Skurikhin. The three Properties were (i) a holiday home for Mr Skurikhin and his family, rent free; (ii) a property used for Mr Skurikhin's business; and (iii) an empty plot intended to be developed for Mr Skurikhin's family.

23. On 13 March 2012, Mr Meier and Mr Lerch resigned from the board of Berenger, although Dr Schurti remained in place. However, Mr Lerch retained authority to access Berenger's account with UBS (UBS having been informed that Mr Skurikhin was the beneficiary of the account). When that account was closed in September 2014, the balance was transferred to Accreda, therefore remaining under the control of Mr Meier and Mr Lerch.

The Receivership Order

24. As stated above, VTB issued an application for the appointment of receivers by way of equitable execution over the membership interests in Pikeville on 16 December 2014. On 6 February 2015 Leggatt J gave VTB permission to join Mr Meier, Mr Lerch, Crown and Berenger to the application. Berenger was served with the application and the evidence in support on 10 April 2015 through the foreign process section, some 3 months before the hearing of the application. Berenger did not, however, serve evidence in response. Nor did it appear at the hearing.

25. In his judgment dated 21 July 2015, Christopher Butcher QC accepted VTB's contention (set out at [39]) that property subject to a trust or analogous foreign arrangements would be regarded in equity as assets of the judgment debtor (and

therefore might be subject to the appointment of a receiver by way of equitable execution) if the debtor has the legal right to call for those assets to be transferred to him or his order, or if he has de facto control of the trust assets in circumstances where no genuine discretion is exercised by the trustees over those assets [45]. The deputy judge proceeded to find at [50] that the membership interests in Pikeville should be considered in equity to be Mr Skurikhin's assets on the basis of a number of matters, set out at [49], including:

i) that there was evidence that assets, including those in Berenger's structure, were the product of Mr Skurikhin transferring his assets out of Russia in an attempt to make them difficult to trace and/or judgment proof;

ii) that Mr Skurikhin was closely associated with assets held by Berenger/Pikeville, including the Properties, which were apparently leased rent free to Mr Skurikhin and his wife;

iii) the extreme coyness of the members of Pikeville in revealing the ultimate controlling party of Berenger, coupled with Pikeville's involvement with other companies associated with Mr Skurikhin;

iv) that Berenger produced no evidence to show that assets held directly or indirectly were not under Mr Skurikhin's control;

v) that Mr Skurikhin had failed to provide proper disclosure of his assets, or produce documents he was ordered to produce, including those which would have demonstrated that he was not in control of Berenger's assets. Given that Burton J had drawn the inference that Mr Skurikhin did control those assets, it was clearly for Mr Skurikhin, if the inference was not to continue to be drawn, to produce evidence to those that it was incorrect;

vi) the evidence of an experienced Liechtenstein lawyer, drawing the conclusions (a) that Mr Skurikhin (or his agent) is the mandatory to a mandate agreement with the board of directors/foundation council of Berenger; (b) that Mr Skurikhin was likely to be able to instruct the board to transfer at least significant parts of Berenger's assets in Pikeville into his own name; and (c) that the reason Mr Skurikhin and his family benefit from Berenger is because he is in de facto control as a mandatory and its economic founder.

26. The Receivership Order was therefore made on 21 July 2015. The Order (at paragraph 1.1) appointed receivers over the membership shares and interests in Pikeville registered in the names of Mr Meier, Mr Lerch and Crown. Paragraph 3 enjoined those respondents, together with Berenger, from further dealing with the membership interests in Pikeville or associated rights or entitlements, including, at paragraph 3.5, a provision that they shall not "Transfer, charge, encumber or otherwise deal with the membership interests of the First, Second and Third Respondents in the Second Defendant".

Events subsequent to the Receivership Order

27. As set out above, the receivers (as administrators of Pikeville) have succeeded in obtaining possession of the Properties and are in the process of selling them. As of

May 2018, £516,000 had been incurred in the administration of Pikeville, the receivers having incurred further costs of £15,713.

28. On or about 16 March 2016 Mr Skurikhin was declared bankrupt by the Arbitrazh Court of the Novosibirsk Oblast in Russia. On 7 June 2017 the same court concluded the bankruptcy proceedings and Mr Skurikhin was discharged from his liabilities to his creditors. VTB appealed that decision to the Arbitrazh Court of the West Siberia region and was partially successful as, on 18 December 2017, the appeal court confirmed that the bankruptcy proceedings had concluded, but set aside Mr Skurikhin's discharge. Mr Skurikhin's appeal against that decision was dismissed by the Supreme Court of the Russian Federation on 20 April 2018.

29. As set out in paragraph 6 above, by resolutions dated 14 and 18 June 2017 respectively, Mr Skurikhin was excluded from the class of discretionary beneficiaries of both Berenger and Olympic. The resolution of the board of Berenger stated that it was made "Due to [Mr Skurikhin's] bankruptcy and its related harm to [Berenger]". Accreda's resolution stated that "One of the beneficiaries has lost his entitlement as a beneficiary. In accordance with the court's decision of 7 June 2017, [Mr Skurikhin] was declared bankrupt.... [Mr Skurikhin] thus loses his ability to benefit of this trust". Accreda passed a further resolution on 16 January 2019, irrevocably declaring that Mr Skurikhin was an excluded person, and would be treated as excluded since 18 June 2017.

30. The Judge found that the irrevocable exclusions were valid and effective as a matter of the law of Liechtenstein and Nevis respectively.

The application to discharge

31. An application to discharge the Receivership Order was threatened by Withers LLP ("Withers") on behalf of Mr Skurikhin on 12 January 2018. That application was not pursued after VTB's solicitors pointed out that Mr Skurikhin was subject to a committal order and remained in contempt of court. However, on 1 June 2018 Withers indicated that they had been instructed by Berenger to make such an application, the same individual solicitor having conduct of the matter.

32. Berenger's explanation for the timing of its belated resistance to the receivership was that it had been unable to resist the Receivership Order in 2015 due to lack of funds, but that an unidentified beneficiary had now come forward to fund an application (and a parallel application by Berenger in the BVI to discharge a receivership order in respect of Miccros). It was first suggested by Mr Meier that the beneficiary concerned did not know of the application for a Receivership Order in 2015 because Berenger did not have contact details for all beneficiaries (an assertion he later contradicted). Mr Meier later suggested that there was a sensitivity about contacting beneficiaries because not all of them knew that they were beneficiaries.

The Judge's findings of fact

33. The Judge rejected Berenger's explanations for its approach to the receivership, finding that a deliberate decision was taken in 2015 not to engage with the evidence and not to attend or be represented at the hearing [88]. This was pursuant to Mr Skurikhin's strategy at the time, implemented via instructions to Mr Meier and

through him to Dr Schurti, to ignore the orders of the English court and rely on the difficulties VTB would have in enforcement against assets held in a Liechtenstein foundation [98].

34. After extensive consideration of the evidence, including the oral testimony of Mr Meier and Dr Schurti (both of whom she found to be untruthful in numerous respects), the Judge further found the following facts:

    i) that Mr Meier was and continued to be Mr Skurikhin's right hand man in respect of the latter's financial affairs [140]. He controlled Berenger's actions in the interests of and at the behest of Mr Skurikhin [141];

    ii) that resolutions excluding Mr Skurikhin as a beneficiary of Berenger and of Olympic were both in fact made in August 2017 and were backdated in order to "bolster the false claim that the motivation [was] to protect other beneficiaries". She further held that "the initiative to exclude Mr Skurikhin [came] from Mr Meier in August 2017, and [related] directly to a bid to get the Receivership order and [WFO] lifted" [141(ff)];

    iii) that Mr Skurikhin throughout had control of Berenger as a mandatory and never relinquished that control [142];

    iv) that the exclusion of Mr Skurikhin was undertaken to further his interests in defending the assets within Berenger and Olympic from VTB's attempts to recover its judgment. It was most probably taken at his instigation (acting through Mr Meier) or at least with his knowledge and approval. Far from being a hostile move towards Mr Skurikhin, its purpose was to serve his interests by throwing obstacles in the way of enforcement and, ultimately, to pave the way not only for discharging the Receivership Order but also from removing Pikeville from the scope of the WFO [177].

35. As already indicated, none of the above findings is subject to challenge on this appeal.

Abuse of process

The arguments before the Judge

36. VTB objected to Berenger's application, in so far as it was based on the exclusions, on the ground that, as matter of principle, a material change of circumstance[1] can only arise in respect of matters over which the applicant has no control. VTB submitted in paragraph 29d of its skeleton argument for the hearing below that "to allow a party to have control of creating its own material change of circumstances would be pernicious".

37. Berenger maintained that there was no such principle. Although the change was brought about by Berenger itself, it was (as the Judge held) lawful action which Berenger was entitled to take to protect itself and its beneficiaries. If, as Berenger

[1] It was common ground that an interlocutory order can only be reopened for good reasons such as a material or "significant" change of circumstances or because the party has subsequently become aware of facts which he could not reasonably have known about: *Chanel Ltd. v Woolworth & Co* [1981] 1 WLR 485 at 492D and 492H-493A.

contended (and must be assumed for the purpose of this argument) that lawful action meant that the Receivership Order was no longer appropriate or effective, it should be discharged: it would be wrong to ignore the reality of the changed situation, and there was no principle or authority requiring the court to do so.

38. Indeed, Berenger contended that the Supreme Court, in *Thevarajah v Riordan* [2015] UKSC 78, [2016] 1 WLR 76, recognised that a party could rely on a change brought about itself. In that case a party belatedly complied with an unless order that they give disclosure of assets, and sought relief from the sanction of being debarred from defending the claim on the basis that circumstances had changed since a previous application for relief had been refused. The Supreme Court upheld the dismissal of that application, holding that belated compliance was not a material change of circumstance as the court had already determined, by previously refusing relief, that it was too late to comply. However, Lord Neuberger (with whom all other Justices agreed) stated at [22]:

> "… If, say, the "unless" order required a person or company to pay a sum of money, and the court subsequently refused relief from sanctions when the money remained unpaid, the payment of money thereafter might be capable of constituting a material change of circumstances, provided that it was accompanied by other facts. For instance, if the late payment was explained by the individual having inherited a sum of money subsequent to the hearing of the first application which enabled him to pay; or if the company had gone into liquidation since the hearing of the first application and, unlike the directors, the liquidator was now able to raise the money. These are merely possible examples, and I am far from saying that such events would always constitute a material change of circumstances, or, even if they did, that they would justify a second application for relief from sanctions..."

The Judge's reasons

39. The Judge, however, considered that it was significant that Lord Neuberger's examples involved elements that were not within the control of the party relying on them as a change of circumstance. She further considered that the case, and the examples, could be analysed in terms of abuse of process: where a subsequent event makes belated compliance possible, there may be no abuse in making a second application. But where a party simply chooses not to comply and later on chooses to comply, it is likely to be an abuse of process to rely on a belated decision as a material change justifying reopening their unsuccessful application for relief from sanctions.

40. The Judge then stated:

> "161. Authority aside, it seems to me that it may, in principle, amount to an abuse of process for a party to seek to reopen an interlocutory order on the basis of treating as a material change of circumstances a development that is wholly within that party's own control. *Ex hypothesi*, if the matter is within that party's control, it is a change they could have chosen to effect before the order was first made. Otherwise a party could test its position on one set of facts, and then, if

> unsuccessful, subject the other party to a series of further interlocutory hearings to see whether it can arrive at a more favourable result on variants of those facts, all of which were within its own power to bring about at the outset, had it so chosen. It cannot be right that a party can freely move the goalposts around in that way, to award itself the opportunity for a rematch. Rather, to mix metaphors, having, as it were, made its bed, by choosing on which set of facts to have the first battle, the party must usually then lie in it."

41. The Judge then applied that principle on the basis that (contrary to her findings of fact) the exclusions were effected on the initiative of Dr Schurti and Mr Meier, not acting in collusion with Mr Skurikhin, to protect other beneficiaries. The Judge found that, in those circumstances:

> "176 …the position is that Berenger (and Mr Meier in respect of Olympic) chose not to exclude Mr Skurikhin or otherwise to contest the making of the Receivership Order at the time, but stood by whilst it was made, looked on for three years whilst the receivers incurred expenses in seeking to realise the assets, and then when they got close to success, excluded Mr Skurikhin and sought to rely on that exclusion to lift the Receivership Order. That in itself, it seems to me, has something of the quality of an abuse of process."

42. The Judge then added that, on the facts as she found them, the position was even worse:

> "177. ….The starting point here is that prior to the exclusions Mr Skurikhin had control in such a way that the assets of Berenger and Olympic were exposed to enforcement…The exclusion of Mr Skurikhin was, as I find, undertaken to further Mr Skurikhin's interests in defending the assets within Berenger and Olympic from VTB's attempts to recover its judgment debts through the bankruptcy proceedings in Russia and through these proceedings, to remove the assets within the trusts from the scope of the bankruptcy and to protect [the Properties] from the receivers' efforts to realise those assets. It was most probably a step taken at his instigation (acting through Mr Meier) or at least with his knowledge and approval. Far from being a hostile move towards Mr Skurikhin, its purpose was to serve his interests by throwing obstacles in the way of enforcement and, ultimately, to pave the way not only for discharging the Receivership Order but also for removing Pikeville and other assets held within Berenger and Olympic from the scope of the [WFO]…"

43. The Judge concluded that, in those circumstances, it was a clear abuse of process for Berenger to rely upon the exclusions as a material change of circumstances.

Berenger's arguments on appeal

44. Berenger emphasised that there was no authority for the principle applied by the Judge, arguing that it was not well founded. Berenger contended that an application could not be treated as an abuse where nothing that had been done was unlawful (it

always being open to Berenger and Olympic, notwithstanding the Receivership Order, to vary their respective lists of their beneficiaries) and there had been no misuse of procedure, such as an attempt to re-litigate an issue which had already been determined. Berenger further argued that:

i) motive and intention were irrelevant in considering whether proceeding were an abuse (referring to *Broxton v McClelland* [1995] EMLR 485), such that consideration of the reasons for the exclusions (including that they were at Mr Skurikhin's behest and for his benefit) were inappropriate;

ii) mere delay, even a long delay, could not in itself amount to abuse of process, a principle referred to by Barling J in *Wearn v HNH International Holdings Ltd* [2014] EWHC 3542 (Ch) at [66].

45. Berenger accepted that it would have been an abuse to rely on the exclusions if they amounted to a breach of the WFO or the Receivership Order by Berenger (it being accepted that Berenger was on notice of the WFO), but objected strongly to that point being taken by VTB at the appeal stage for the following reasons:

i) VTB argued below that Berenger was party to a conspiracy to assist Mr Skurikhin in breaching the WFO, but the Judge did not decide that point;

ii) VTB did not contend below that Berenger itself had breached the WFO (or the Receivership Order) and did not put that allegation to the witnesses, in particular to Dr Schurti, a member of Berenger's board. Berenger submitted that a new point should not be permitted on appeal where, had it been taken below, it might have changed the course of the evidence given or which might require further factual enquiry: see *Notting Hill Finance v Sheikh* [2019] 4 WLR 146 CA at [27].

46. As to the substance of the allegation, Berenger denied that the exclusion of Mr Skurikhin breached the terms of the WFO as (i) the exclusion did not dispose of any underlying assets, nor Mr Skurikhin's control of them pursuant to the mandate and (ii) although he ceased to be a discretionary beneficiary, the Judge rightly recognised that such interest does not of itself give rise to a right of control or a proprietary interest, referring to *JSC Mezhdunarodniy Promyshilenniy Bank v Pugachev* [2015] EWCA Civ 139 at [13] in support of the latter aspect. Berenger therefore submitted that all that had "gone" was an interest which was not an asset.

The law relating to abuse of process

47. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 HL at 536C, Lord Diplock referred to:

> ".. the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…It would, in my view, be most

> unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

48. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, the House of Lords considered the particular form of potential abuse (referred to as *Henderson v Henderson* abuse of process), where a party seeks to raise a matter in proceedings which should have been raised in previous proceedings between the same parties. Lord Bingham of Cornhill stated at 31B:

> "The underlying public interest is…that there should be finality in litigation and that a party should not be twice vexed in the same matter. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse maybe found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the latter proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

49. The fact-sensitive nature of the enquiry was further emphasised in *Laing v Taylor Walton* [2007] EWCA Civ 1146, where Buxton LJ at [12], after setting out the passage above from Lord Diplock's speech in *Hunter,* stated:

> "The court therefore has to consider, by intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute."

50. Buxton LJ also emphasised that, although determining whether proceedings were an abuse of process was not an exercise of discretion, it was an exercise of judgment, in respect of which the Court of Appeal would always give considerable weight to the opinion of the judge. That approach was affirmed by the Court of Appeal in *Michael Wilson & Partners v Sinclair* [2017] 1WLR 2646 at [48(6)].

51. It is clear from the above authorities that, contrary to Berenger's contention, proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct. Indeed, the power exists precisely to prevent the court's process being abused through the lawful and literal application of the rules, and most likely would not be needed or engaged where a party was acting unlawfully or in breach of procedural rules, where established rules of law or procedural sanctions would usually suffice to protect the court process. In my view *Thevarajah* is an example of such protection via the rules, alternatively the recognition of an issue estoppel, rather than a finding that the application in that case was an abuse of process. Recognised aspects of abuse of process include *Henderson v Henderson* abuse, bringing the administration of justice into disrepute and proceedings which are manifestly unfair to the other party (aspects which may well overlap), but the crucial question is whether, taking a broad merits-based approach, a party is misusing or abusing the process of the court.

52. In my judgment the Judge was right to say that it may, in principle, be an abuse of process for a party to seek to reopen an interlocutory order on the basis of treating as a material change of circumstances a development that is wholly within that party's control. If a party effected such a change immediately after losing the first hearing and issued a second application the very next day, that would self-evidently be an abuse, as Mr Lord QC, for Berenger, accepted in the course of argument. Equally, if a party waited several years before effecting such a change, then made a second application just as the other party, after incurring significant expense, was about to reap the benefit of the first order, that would also seem to be a clear abuse.

53. However, I do not consider that the Judge's broad proposition at [161] of her judgment amounts to a new or freestanding aspect of abuse, but rather a recognition that such conduct might well fall within one or more of the "broad rubrics" referred to above. Both of the (relatively extreme) examples above of second applications, based on changed circumstances brought about by the losing party, reveal aspects of *Henderson v Henderson* abuse and, if permitted, would plainly bring the administration of justice into disrepute and would be manifestly unfair to the other party. Less extreme examples might or might not fall foul of one or more of those aspects. I certainly would not suggest that a losing party can never make a second application based on a material change of circumstances within its control without that second application constituting an abuse. That would be to adopt the sort of dogmatic approach deprecated by Lord Bingham in *Johnson.*

54. As for the relevance of motive, Berenger is right to say that a party's motives for asserting a legal right are, in themselves, irrelevant (save where "malice" is a relevant factor) and cannot, without more, turn a legitimate action into an abuse. However, it is far from the case that a party's purpose in taking action cannot render that action an abuse, as is apparent from *Broxton v McClelland* itself. Simon Brown LJ, at 497, stated:

> "… the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted

> proceedings. The cases appear to suggest two distinct categories of such misuse of process:
>
> (i) The achievement of a collateral advantage beyond the proper scope of the action…
>
> (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a matter designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation."

55. Consideration of what proceedings are being used to achieve, or what they are designed to cause, necessarily involves examination of the motivation and intention of the party in question. The question is whether the particular use of proceedings for the intended purpose is an abuse of the court's process, adopting the multi-factorial approach set out by Lord Bingham in *Johnson*.

56. In the same way, delay in taking or pursuing proceedings is not in itself an abuse of process (although it may give rise to defences as a matter of law or sanctions under the procedural rules). However, it is clear that "abuse may arise when delay is combined with some other relevant factor (such as absence of intention to take a case to trial)": *Wearn* per Barling J at [67].

Application to the present case

(i) On the basis the case was argued before the Judge

57. If Mr Skurikhin's bankruptcy had genuinely required (or even caused) Berenger to exclude Mr Skurikhin, an application to set aside the Receivership Order on the basis of such a change of circumstance might well have been an unobjectionable use of the court's processes (the merits of the application, including the issue of whether such change was material, being a different question).

58. However, by August 2017 Mr Skurikhin had been subject to very substantial judgments for several years, in both Russia and England, and had been made bankrupt over a year before: such matters had not required or caused Berenger or Accreda to exclude Mr Skurikhin. Whilst the resolutions effecting the exclusions were backdated to June 2017 in order to give the impression that they were consequent on the order of June 2017, it is plain (as the Judge found) that that was not truly the case. Indeed, that order discharged Mr Skurikhin from liability to his creditors (although that aspect was subsequently overturned on appeal).

59. It follows that, even if the exclusions were effected for the purpose of protecting other beneficiaries, that could have been arranged (and the point taken) prior to the hearing of VTB's application for the appointment of receivers. The fact that the exclusions (and the argument based upon them) only arose years later, after the receivers had incurred significant expenses in realising Pikeville's assets, was simply because Berenger and Accreda decided to adopt that stance in 2017 when they had not done so in 2015. I accept VTB's submission that such conduct, seeking to re-argue an issue on a basis that could have been advanced on the first occasion, engages the principles underlying *Henderson v Henderson* abuse, tends to bring the administration of justice

into disrepute and is manifestly unfair to VTB. For those reasons I agree with the Judge that, on any basis, the application "has something of the quality of an abuse".

60. The Judge was also plainly right to hold that the true position (as she had found it to be) put the matter beyond doubt. The exclusion was not a genuine attempt to divest Mr Skurikhin of his beneficial interest in Berenger's assets, but was a device, instigated by him, to further disguise his ownership and control and to frustrate the enforcement of the judgments against him as they neared fruition. The application was not a genuine attempt by Berenger to discharge the receivers because Mr Skurikhin no longer had any interest in its assets, but was made at Mr Skurikhin's behest and for his benefit because he, being in contempt of court, was not permitted to advance the argument himself. The whole process was redolent with illegitimate collateral purposes, subterfuge and manifest unfairness. The intense focus on the facts, which the Judge brought to bear, revealed that the application was wholly abusive. I see no merit whatsoever in Berenger's challenge to her conclusion in that regard.

(ii) Taking into account VTB's new argument that Berenger was in breach of the WFO

61. For my part, I would give VTB permission to advance the additional argument that, by excluding Mr Skurikhin as a beneficiary, Berenger and Accreda were each in breach of the WFO and Berenger was in breach of the Receivership Order.

62. The argument involves consideration of (i) the effect of the exclusion of Mr Skurikhin, the facts of which are not in dispute, and (ii) whether that exclusion is technically a breach of the WFO or the Receivership Order. There is no dispute that Berenger and Accreda had notice of the WFO by the date of the exclusion, and there is no application for committal for contempt, so I do not accept that the oral evidence of Mr Meier or Dr Schurti would have been relevant in any respect to the argument, nor that the failure to put the allegation to them debars VTB from taking the point now. Further, I am satisfied that the three criteria identified by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [18] for allowing a new 'pure point of law' to be raised are satisfied as Berenger (a) had ample time to deal with the points, having addressed it in detail in written and oral submission; (b) has not acted to its detriment on the faith of the earlier omission to raise the point; and (c) can be adequately protected in costs.

63. I turn first to the substance of the argument in relation to Berenger and the WFO. VTB's case was that, in excluding Mr Skurikhin as a discretionary beneficiary, Berenger "disposed of, dealt with or diminished the value of" assets in which Mr Skurikhin was interested, "beneficially or otherwise" or "controlled by him directly or indirectly", and in particular his beneficial interest in assets held by the respondents and in the Properties. VTB asserted that Berenger, as a party named in WFO and bound by its terms, thereby directly breached the restriction which arose from the combined effects of paragraphs 8, 9 and 10 of that order.

64. Berenger's answer, referred to above, was that Mr Skurikhin's status as a discretionary beneficiary did not give rise to any proprietary interest and was therefore not an asset, so that its termination did not constitute disposing of or dealing with an asset. Mr Skurikhin's beneficial interest arose from his right of control under

the mandate agreement: neither that interest nor the underlying assets were affected by the exclusion.

65. However, that technical argument ignores the interrelationship between the mandate and the status as a discretionary beneficiary. It was Mr Skurikhin's ability to procure the distribution of assets to himself that give rise to the equitable interest in those assets. The removal of his right to receive such distributions (at least directly) undoubtedly diminished the value of the right of control for Mr Skurikhin, in breach of the WFO, even if it did not extinguish it.

66. Indeed, Berenger can hardly resist that analysis. The basis of the application to discharge the Receivership Order was that there was a change in circumstances, namely, that as a result of his exclusion as a discretionary beneficiary, Mr Skurikhin no longer had an equitable interest in Berenger's assets, rendering the receivership inappropriate. In so contending, Berenger implicitly averred that, by its actions, it had dealt with and diminished the value of Mr Skurikhin's equitable interest.

67. It follows that Berenger was in breach of the WFO in excluding Mr Skurikhin as a beneficiary and so, as it accepts, for that reason Berenger cannot rely upon that exclusion as a basis for applying to discharge the Receivership Order and the application was accordingly an abuse. It is therefore unnecessary to determine the interesting but difficult question of whether, taken in isolation, excluding a discretionary beneficiary is a breach of a freezing order on the standard Commercial Court form, now contained in Appendix 11 of the Admiralty and Commercial Courts Guide 10th ed (2017). It is also unnecessary to decide whether Accreda was also in breach of the WFO, or whether Berenger was also in breach of the Receivership Order.

Summary on abuse of process

68. At a time when Mr Skurikhin was subject to the WFO and in contempt of court, Berenger accepted his instructions to exclude him formally as a named beneficiary so that he might contend (through Berenger) that he no longer had an interest in the assets VTB was seeking to enforce against, a stance that could have been, but was not, taken three years earlier when the enforcement process in question had been ordered by the court. There could not be a clearer example of a wrongful and abusive process, one which the Judge was right to refuse to entertain.

Whether the change of circumstances was material

69. If, contrary to the above conclusion, Berenger's application was not an abuse of the process, the further question arises as to whether the change of circumstances brought about by the revocations was material to the appointment of receivers.

70. Berenger's contention was, and remains, that the valid irrevocable exclusion of Mr Skurikhin meant that he could not, thereafter, receive its assets, even by exercise of his mandate and de facto control. Mr Skurikhin therefore no longer had any enforceable right to call for the assets of Berenger to be transferred to him, and so cannot be regarded as the owner in equity of those assets. Berenger contended that the Receivership Order should therefore be discharged, both because it had no proper foundation as a matter of law, and because it had no utility as VTB, as a judgment

creditor of Mr Skurikhin, would not be able to enforce against any assets realised and held by the receivers.

71. The Judge rejected that contention in the following terms:

> "179…The issue is whether, although he is still a mandatory, the fact that he is now no longer himself named as a beneficiary removes the basis for the order. I accept that the trustee could not properly make a distribution directly to Mr Skurikhin himself, on his direction, in circumstances where he is no longer a beneficiary. However, his ability to direct that assets be distributed to any other beneficiary that he may choose (and, conversely, to prohibit any distribution to any other beneficiary that does not accord with his wishes) is undiminished.
>
> 180. The effect of Mr Skurikhin's exclusion from Berenger is that all of the assets are currently held by Berenger on trust for Olympic, which in practice puts them under the control of Mr Meier (who, as I have found, is his trusted adviser and acts on his instructions), through Accreda Trustees. There is no bar to a distribution being made, via Olympic, to a new corporate entity established for that purpose, which the trustees have power to include amongst the class of beneficiaries of Olympic. Equally, Berenger can be instructed under the mandate to add a new "juristic person or institution" as a beneficiary. Mr Skurikhin has shown himself adept at using complex structures which have the effect of obscuring the beneficial ownership of assets and would have no difficulty at all in ensuring that he could still access the assets if he chose to do so. More straightforwardly, distributions can be made to another family member who is named as a beneficiary, Mr Skurikhin having agreed with that other beneficiary that they will take the assets as his nominee and pass them on as and when instructed and distributions can be withheld from any beneficiary who is not willing to accept a transfer on those terms. In those circumstances, I am not prepared to find that the basis for the Receivership Order has been destroyed by the exclusions …"

72. On this appeal, Berenger argued that the Judge's reasoning amounted to no more than speculation on the basis of hypothetical situations, wrongly taking into account how assets might be transferred to Mr Skurikhin by those entitled to receive them, rather than addressing his right to and interest in those assets. Berenger further contended that the Judge failed to take into account that the assets would not belong to Mr Skurikhin, even if transferred to a company wholly owned by him, referring to *Lakatamia Shipping Co Ltd. v Su* [2015] 1 WLR 291.

73. In my judgment the Judge was right to reject Berenger's contentions for the reasons she gave. The decision of Christopher Butcher QC to appoint receivers was based on Mr Skurikhin's control of Berenger, in particular by exercising his powers under a mandate agreement (the existence of which the deputy judge inferred, but which the Judge found as a fact). Indeed, the fact that Mr Skurikhin was a discretionary beneficiary of Berenger did not feature in the deputy judge's reasoning. That control was in no way diminished by Mr Skurikhin's exclusion as a beneficiary: it merely entails that he would have to route the assets through a nominee (which he would

probably have done in any event) in order to receive them. As VTB put it in argument, nothing has changed at all.

74. There is no merit in Berenger's technical objections. Whilst it is of course correct that a shareholder of a company does not, in that capacity, have a beneficial interest in its assets, even if the shareholding is 100%, that does not address the situation where the company receives assets for no consideration and, on proper analysis, as nominee for or on trust for the shareholder. As Lord Sumption recognised in *Prest v Prest* [2013] 2 AC 415 at [52]:

> "Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts."

75. I have no doubt that, if assets of Berenger or Olympic were distributed to a member of Mr Skurikhin's family or a company under his control, it would be more than arguable that they were held as nominee, or on trust, for Mr Skurikhin.

76. Further, and in any event, the appointment of receivers by way of equitable execution is not limited to circumstances where assets are available for execution. Indeed, the very difficulty in executing a judgment against assets abroad may be the justification for appointing receivers. The flexibility of the jurisdiction was explained by the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721 at [56]:

> "*Masri (No 2)* confirms or established the following principles: (1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1) [of the Senior Court Act 1981]; (2) the court has the power to grant injunctions and to appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1973; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amendable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations."

77. In *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2015] 1 BCLC 377, Males J set out the relevant principles at [47], including the following:

> "(c) The jurisdiction [to appoint receivers] will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case…
>
> …….
>
> (e) A receiver will not be appointed if the court is satisfied that the appointment will be fruitless, for example because there is no property

> which can be reached in law or equity. That is an aspect of the maxim that equity does not act in vain. However, a receiver may be appointed if there is a reasonable prospect that the appointment will assist in the enforcement of a judgment or award. It is unnecessary, and will generally be pointless, for the court to attempt to decide hypothetical questions as to the likely effectiveness of any order. That applies with even greater force where such questions involve disputed issues of foreign law. It will be sufficient that there is a real prospect that the appointment of receivers will serve a useful purpose."

78. In my judgment, applying those principles, the appointment of receivers in 2015 was entirely justified. The subsequent exclusions of Mr Skurikhin as a discretionary beneficiary, despite his continued control, only served to increase the potential obstacles in VTB's path to the execution of its judgments and added to rather than detracted from the need and justification for receivers to be appointed to obtain control of identifiable tangible assets by way of equitable execution. I am in no doubt that their appointment will continue to serve a useful purpose.

Conclusion

79. For the reasons set out above, I would dismiss the appeal.

Senior President of Tribunals:

80. I agree.

Lord Justice Lewison:

81. I also agree.