Neutral Citation Number: [2021] EWHC 1758 (Comm)

Case No: CL-2019-000281

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 July 2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

VTB COMMODITIES TRADING DAC	**Claimant**
- and -	
JSC ANTIPINSKY REFINERY	**Defendant***
- and -	
PETRACO OIL COMPANY SA	**Intervenor***
- and -	
SBERBANK OF RUSSIA	**Third Party**
- and -	
JSC VO MACHINOIMPORT	**Fourth Party**

- -

- -

Jonathan Gaisman QC, Alan Gourgey QC and Michael Ryan (instructed by **PCB Byrne LLP**) for the **Claimant**
Lord Goldsmith QC, James Willan QC and Georgina Petrova (instructed by **Debevoise & Plimpton LLP**) for the **Third Party**
Michael Holmes QC and Henry Moore (instructed by **Stewarts Law LLP**) **for the Fourth Party**
* Party not active in these applications

Hearing dates: 04-06 May 2021

- -

Approved Judgment

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

.....

MRS JUSTICE COCKERILL

Mrs Justice Cockerill :

Introduction

1. These proceedings started as an Arbitration Claim under CPR Part 62 relating to six LCIA arbitrations commenced by the Claimant ("VTB"), which is the commodities division of a large Russian bank, against the Defendant JSC Antipinsky Refinery ("Antipinsky"), which operated an oil refinery in Tyumen, Russia.

2. Relying on s. 44 of the Arbitration Act 1996, VTB obtained both a Worldwide Freezing Order ("WFO") and a mandatory injunction requiring Antipinsky to deliver a particular cargo of VGO (the "Polar Rock Cargo") to VTB (the "Cargo Injunction"). Such relief was claimed on an interim basis pending determination of VTB's claim for a final injunction in the arbitrations.

3. The Intervenor ("Petraco"), an oil trader, applied to vary the WFO and Cargo Injunction on the basis that it was entitled to receive the Polar Rock Cargo. It also applied for an inquiry as to damages under VTB's cross-undertakings in damages.

4. Subsequently, Phillips LJ (in one of his last appearances as a judge of the Commercial Court) set aside the Cargo Injunction and varied the WFO so as to remove a parallel prohibition on Antipinsky delivering VGO to third parties. He concluded that such orders were contrary to the established principle that the court will not decree specific performance of a contract for the sale of commodity where, as VTB accepted, title had not passed.

5. Meanwhile, before the Cargo Injunction was set aside, Sir William Blair made an order under s. 44 of the 1996 Act for the sale of the Polar Rock Cargo to VTB's sub-buyers, in exchange for VTB paying US$30 million into court by way of fortification (the "Blair Order"). The Judge then directed:

> "… the expedited trial of the rights and obligations of the Claimant, the Defendant and the Intervener in respect of the Polar Rock Cargo and/or the Secured Sums [being the US$30m to be paid into court by VTB], including any losses that Petraco may have sustained under the cross-undertaking in damages, and (for the avoidance of doubt) the Claimant's right to seek repayment of the monies paid into Court… ."

6. The Blair Order contained directions for this expedited trial (the "Cargo Trial"), including for pleadings, disclosure, witness statements, expert evidence and a 3-day trial on the first available date after 22 July 2019.

7. That expedited trial has still not taken place.

8. These applications are all about the form which the trial will have. In these applications, the applicants ("Sberbank" and "MachinoImport") challenge the jurisdiction of this court to hear the proposed additional claims which VTB is seeking to pursue against them at the Cargo Trial under CPR Part 20.

9. In essence Sberbank and MachinoImport say that VTB has, "*through a series of audacious procedural steps*", sought to convert an Arbitration Claim against Antipinsky, into substantive proceedings through which it can pursue claims in tort and contract in England against them arising from an alleged fraudulent conspiracy. They say that this approach is illegitimate and flawed.

10. Specifically they say that:

    i) VTB cannot bring Part 20 proceedings against them because VTB is Claimant not Defendant;

    ii) Even if VTB could use Part 20, the Court should not exercise its discretion to do so because VTB is using the Cargo Trial as a basis to drag freestanding damages claims against third parties into the English court;

    iii) There is no applicable gateway to permit service out;

    iv) England is not the *forum conveniens*.

    At this hearing the third argument (gateway) has not been pursued, it being realistically acknowledged that the cross-over between that issue and the second issue (discretion) means that the answers to both questions must be the same.

11. VTB's response is to say that the situation is an organic development in the litigation, and perfectly permissible. It says that:

    i) VTB is a defendant to Petraco's claim and has, as Defendant, made a counterclaim against Petraco. As a defendant, VTB is entitled to bring Part 20 claims against MachinoImport and Sberbank, subject to the relevant requirements of Part 20 being satisfied, and that there is no bar to the Part 20 proceedings.

    ii) Given the degree of overlap between the Cargo Trial and the claims it seeks to bring it is right that those claims be determined in this action. Its case is that the same double-selling is in issue in both VTB's counterclaim against Petraco and in the additional claims against MachinoImport and Sberbank.

    iii) England is the *forum conveniens*.

        a) It is only in England that all the claims relating to the dishonest double-selling scheme may be litigated so that the Court may fully investigate all the relevant facts and issues by reference to all the evidence and thus avoid the risk of irreconcilable judgments.

        b) The present case is similar to the situations in previous cases where, the fact that a conspiracy or dishonest scheme was alleged meant that the need for a single investigation in one forum outweighed the other substantial factors pointing to another forum. There is no distinction in substance with the present case where two interlinked conspiracies are alleged arising out of the same factual narrative.

Factual Background

12. Because this is a jurisdiction hearing the following factual background combines both uncontentious facts, and facts which are asserted to be true by VTB.

13. VTB is an Irish commodity trader. It is a subsidiary of VTB Bank PJSC, a Russian majority state-owned bank (which is the second largest bank in Russia). The activities relevant to this claim were undertaken principally through its branch in Zug, Switzerland, as well as through staff based in Moscow.

14. Antipinsky is a Russian company, which owned and operated the largest independent oil refinery in Russia. It is now in insolvency proceedings before the Russian courts.

15. Petraco is a Swiss company, engaged in oil trading.

16. MachinoImport is a Russian company, engaged in oil-related projects and trading of petrochemicals, which has its headquarters in Russia. It had been a substantial purchaser of products from Antipinsky (and associated companies) since at least 2016.

17. Sberbank is a Russian majority state-owned bank (and the largest bank in Russia). It is common ground that Sberbank provided finance to Antipinsky and was its largest creditor. VTB goes somewhat further and says that by autumn 2018 Sberbank had taken over control of Antipinsky which control was exercised through Sberbank's shareholding and via Antipinsky's board of directors. That control however is in issue.

The original dispute

18. VTB's case is that Antipinsky's maximum monthly refinery output of VGO was c.180,000 tonnes per month and this was known both to MachinoImport and Sberbank.

19. Before September 2018 VTB purchased Antipinsky's VGO indirectly via an entity called Edima Trading & Business Services AG. In October 2018, VTB's purchases became direct. In 2018-2019, VTB entered into six paired Offtake Contracts and Prepayment Agreements (the "VTB-Antipinsky Contracts"). These contracts were subject to English law and LCIA arbitration clauses. Under the Prepayment Agreements, Antipinsky was entitled to make utilisation requests for sums to be paid by VTB prior to VTB receiving delivery of VGO under the offtake contracts. In this way, the contractual scheme was that Antipinsky was prepaid for deliveries of VGO.

20. By the end of November 2018, VTB had advanced €121.6 million to Antipinsky which was to be repaid by delivering 14 shipments of 33,000 MT, with two shipments in January 2019, six in February 2019 and six in March 2019. On this basis Antipinsky's entire production for February and March was to go to VTB. VTB alleges that MachinoImport was to act as forwarding agent in respect of these sales. As such it arranged the physical transportation of the oil and it co-ordinated vessel nominations and loadport operations; and of course it knew of Antipinsky's commitment to VTB.

21. VTB says that in December 2018, meetings took place between Sberbank and VTB to discuss Antipinsky's situation; Sberbank explained that it had taken control of Antipinsky and sought to persuade VTB to commit to maintain existing levels of pre-payments; VTB made clear that it had prepaid for shipments of VGO and would not accept any imposition of conditions upon delivery for pre-paid shipments.

22. The essence of the case which VTB wishes to bring in these proceedings is that in early 2019 a "double selling scheme" was put in place by Sberbank and MachinoImport. As further detailed below:

    i) Antipinsky entered into a (Russian law) contract to sell 2,160,000 MT of VGO to MachinoImport on terms to be agreed in subsequent specifications (the "Antipinsky-MachinoImport Contract"). VTB says that this contract covered the entire annual production of Antipinsky for 2019 and that Sberbank, as the major creditor and controller of Antipinsky, procured Antipinsky to enter into the contract with MachinoImport when it knew the refinery did not have capacity to do so, by reason of its prior commitments to VTB. VTB contends that this contract was a sham. This contract included provision for delivery in February 2019, though the February production was "booked" to VTB.

    ii) MachinoImport in turn entered into a contract to sell lots of 30,000 MT of VGO to Petraco on terms to be agreed in separate addenda (the "Petraco-MachinoImport Contract"). Specifically three such addenda were agreed, providing for delivery to Petraco of two cargoes in March 2019 and the Polar Rock Cargo (which was later the subject of the Cargo Injunction) in April 2019. On 14 January 2019, MachinoImport contracted with Petraco Oil Company LLP ("Petraco London" – a company in the same group as Petraco) to supply Petraco London with 33,000 tonnes of VGO in the delivery window 4-9 February 2019.

23. The timeline which led to this contractual arrangement runs as follows. On 15 January 2019, a meeting was held in Moscow between VTB, Sberbank, MachinoImport and Antipinsky to discuss the parties' future relationship (the "Moscow Meeting").

24. VTB's case is that:

    i) It was made clear that Antipinsky had committed its entire VGO output from February to March 2019 to VTB and that Antipinsky's refinery was running significantly behind its obligations.

    ii) The role of MachinoImport was also discussed and in particular whether MachinoImport could participate in the sales of VGO as principal.

    iii) VTB made plain that the VTB-Antipinsky Contracts were direct contracts between VTB and Antipinsky with no scope for participation by an intermediate buyer/seller.

    iv) At this meeting, Sberbank, MachinoImport and Antipinsky concealed from VTB the fact that February 2019 production of VGO had (inconsistently) already been committed to MachinoImport and sold to Petraco London.

    v) Subsequent to the Moscow Meeting, MachinoImport confirmed to VTB that its role was as forwarding agent and only as forwarding agent.

25. On 21 January 2019, VTB and Sberbank agreed a revised delivery schedule covering January to May 2019 with (VTB says) Sberbank reiterating that it had operational control of Antipinsky.

26. On 25 January 2019, Petraco and MachinoImport entered into the Petraco-MachinoImport Contract for the sale of VGO from the refinery. This contract was executed by MachinoImport subsequent to its meeting with Antipinsky and Sberbank in early January 2019 and in anticipation of the execution by MachinoImport of an agreement for the purchase of VGO with Antipinsky.

27. On 27 January 2019, Antipinsky and MachinoImport entered into the Antipinsky-MachinoImport Contract for the sale/purchase of the entirety of the refinery's production capacity for 2019.

28. The essence of the complaint is that this arrangement was clearly inconsistent with VTB's entitlement. Moreover, it is said that the terms of the Antipinsky-MachinoImport Contract as to the passing of title necessarily pre-empted title passing to VTB (as Antipinsky and MachinoImport knew) and enabled Antipinsky/MachinoImport retrospectively to claim, if challenged, that title had passed to a third party. Yet further, the fact that MachinoImport was purchasing as principal was contrary to the terms of the discussion at the Moscow Meeting.

29. On 29 January 2019, unaware of these agreements, VTB agreed to advance further sums to Antipinsky against increased and rescheduled deliveries of VGO via various further agreements, including further Offtake Agreements and Prepayment Agreements, with the result (it is said) that the outstanding value of prepayments made by VTB to Antipinsky was €194.8 million, which sum was to be repaid by 22 shipments of 33,000 MT between April 2019 and July 2019.

30. In essence Antipinsky had thus contracted to sell to VTB its entire output of VGO for the period until July 2019 and VTB had pre-paid for it; but at the same time Antipinsky had agreed to sell considerable volumes of product to MachinoImport, which it had on-sold to Petraco.

31. During February 2019, the balloon went up. VGO intended for VTB was instead shipped to MachinoImport and on-sold to Petraco. VTB heard from market sources of the involvement of Petraco in taking delivery of VGO (but not at that stage of MachinoImport) and objected to Antipinsky and MachinoImport.

32. VTB claims that:

    i) On 1 February 2019, Sberbank dishonestly represented to VTB that all the refinery's March 2019 production was destined for VTB. In fact, a shipment to Petraco in March had been agreed pursuant to Addendum no.1 to the Petraco-MachinoImport Contract.

    ii) On 18 February 2019, MachinoImport misleadingly claimed that a sixth shipment of VGO in March 2019 "*is not confirmed by the terminal*". This representation was untrue, as MachinoImport knew, because in fact deliveries were due to be made to Petraco, a fact which was concealed from VTB. This dishonest statement was made at Sberbank's direction and with Sberbank's approval.

33. On 26 February 2019, representatives of VTB met representatives of Petraco at the Langham Hotel, London. During this meeting, Petraco was told of the arrangements between VTB and Antipinsky including the fact that VTB had purchased all or

substantially all of Antipinsky's production of VGO, and that any deliveries made to Petraco would put Antipinsky in breach of its obligations to VTB. Petraco refused to say who its February 2019 contractual counterparty was.

34. On 5 March 2019, MachinoImport and Petraco agreed to sell/buy a further parcel of VGO for March 2019 shipment.

35. On 6 March 2019 in response to inquiries from VTB, MachinoImport referred to the dates of two shipments and revealed that "*another buyer's vessel*" had been installed. It claimed that setting up VTB tankers was "*decided between Sberbank and VTB*". VTB says that this email dishonestly created the impression that MachinoImport was acting merely as forwarding agent, whereas it had itself agreed to sell the two March 2019 shipments referred to in the email to Petraco. Sberbank was copied to the email.

36. On 6 and 7 March 2019, VTB protested to Antipinsky, Sberbank and Petraco, telling Petraco that it was "*totally unacceptable that the refinery has sold the same cargo to two people*".

37. During a telephone call on 12 March 2019, VTB asked Sberbank whether there was a long-term facility agreement in place with Petraco, to which Sberbank responded "*no*".

38. Moving on in the timeline, March deliveries scheduled for VTB were instead sold to Petraco.

39. On 15 March 2019, VTB and Antipinsky entered a further offtake contract and prepayment contract. Sberbank was closely involved in the negotiation and conclusion of these contracts. VTB says that had it known of the Petraco arrangement and MachinoImport's true role in it, it never would have entered this and the later April VTB-Antipinsky Contracts or made pre-payments of c.€176 million under those contracts.

40. On 19 March 2019, having noted that only five deliveries to VTB had been scheduled for April 2019, VTB requested MachinoImport to confirm whether "*another cargo has been sold to a third party*" and requested an "*open dialogue*". In its email response (copied to Sberbank), MachinoImport denied any sale to a "*third party*". In fact, MachinoImport itself took delivery of product in April 2019 as a third party.

41. VTB claims that separately on 2 April 2019, Sberbank likewise dishonestly represented to VTB that the entirety of the refinery's production of VGO was being delivered to VTB.

42. On 8 April 2019, VTB and Antipinsky entered into further offtake and prepayment contracts: by now the refinery had committed its entire production to VTB up to July 2019, and MachinoImport knew this. Again VTB says it would not have entered into these contracts if it had known the true state of affairs, and had MachinoImport/Sberbank not falsely reassured it.

43. Following market rumours that Antipinsky was to be placed into bankruptcy, VTB requested that Sberbank execute a "Letter of Assurance" in favour of VTB, which Sberbank did on 11 April 2019. VTB says that it relied on this letter which *inter alia* confirmed (i) Sberbank's intention to put its best efforts into supporting performance by Antipinsky of the March VTB-Antipinsky Contracts with VTB, (ii) that Antipinsky had sufficient working capital, (iii) that Sberbank had no intention of taking action against

Antipinsky that could damage its financial position and (iv) that Sberbank was not aware of any action by other creditors.

44. On 12 April 2019, MachinoImport and Petraco contracted for the sale/purchase of two more parcels, to be delivered May-June 2019, and for which Petraco prepaid. VTB contends that this was directed by Sberbank.

45. The inevitable result of the sales to Petraco was that Antipinsky fell further behind in its deliveries to VTB under the VTB-Antipinsky Contracts.

46. On 16 April 2019, MachinoImport advised VTB that cargoes scheduled for VTB were to be postponed; MachinoImport claimed that this was due to "*shortage of cargo at the terminal*"; VTB contends that this was a lie and that the shortage was because VGO had been sold by MachinoImport to Petraco.

47. On 18 April 2019 it is said that:

    i) In a telephone call between representatives of Sberbank and VTB, Sberbank again dishonestly denied that Petraco had paid for any of VTB's forthcoming shipments of VGO.

    ii) Antipinsky and MachinoImport abruptly cut off contact with VTB.

    iii) Two previously accepted VTB-nominated vessels at Murmansk were thereafter held at anchor, and not called to berth.

48. The net result was that as at the end of April 2019, Antipinsky had 22 outstanding shipments to VTB, for which VTB had prepaid c. €195 million. On 29 April 2019, VTB served on Antipinsky notices of default under the Prepayment Agreements and accelerated Antipinsky's obligations to repay the c. €195 million.

49. Due to its financial difficulties, Antipinsky ceased to trade. On 29 April 2019, Antipinsky announced that it intended to apply for its own bankruptcy. As a result, on the same day, VTB exercised its rights following a default under the VTB-Antipinsky Contracts.

50. On 29 April 2019, VTB commenced LCIA arbitrations under the VTB-Antipinsky Contracts claiming breach of contract based on Antipinsky's failure to deliver product or to reimburse VTB's prepayments.

51. On the same day, VTB commenced these proceedings seeking interim relief under s. 44 of the 1996 Act pending final orders in the arbitrations. The Cargo Injunction and WFO were granted *ex parte* on 29/30 April 2019. Each of the orders contained a cross-undertaking in damages, including in favour of "*other person(s*)". The Cargo Injunction and the WFO also contained non-standard provisions effectively preventing the delivery of the Polar Rock Cargo to Petraco.

The intervention of Petraco

52. On 1 May 2019 Petraco applied for an order requiring VTB to disclose evidence, submissions, and any other documentation shown to Waksman J or Teare J on 29 and 30 April 2019 and a note of the judgment and transcript of the hearings in each case. That application was granted.

53. On 8 May 2019, Petraco issued an application seeking to vary both the Cargo Injunction and the WFO and seeking the release to it of the Polar Rock Cargo (with a value of around US$25 million) or, in the alternative, for fortification of the cross-undertaking in the sum of US$30 million. It sought an order that:

> "(1) Paragraph 5 of the Order of Mr Justice Waksman [dated 29 April 2019] and paragraphs 4(2), 6(c) and 14 of the Order of Mr Justice Teare [dated 30 April 2019] be varied so as to entitle Petraco to take delivery of the quantity of 60,608.905 mts presently on board the "POLAR ROCK" in the port of Murmansk and to load this cargo onto their chartered vessels. M.t. "Esther" and m.t. "Louie" as soon as reasonably practicable."

54. Its written submissions referred specifically to paragraphs 6(c) and 14 of the WFO as being objectionable. The application was made on the basis that, *inter alia*, the Polar Rock Cargo was not owned by Antipinsky but by MachinoImport and was therefore not caught by or subject to the Orders of Waksman J and Teare J. Petraco referred to the Antipinsky-MachinoImport Contract and the Petraco-MachinoImport Contract. In its evidence it asked the Court to resolve "*Petraco's entitlement to load these cargo [sic] at Murmansk on board the MT ESTHER and MT LOUIE [Petraco's nominated vessels] … as quickly as possible*".

55. On 13 May 2019, VTB issued a cross-application for an order for sale of that cargo to its sub-buyers with the proceeds of sale to be paid into court as fortification.

56. Those applications, together with the return date of the original *ex parte* applications, were heard by Sir William Blair on 15 May 2019.

57. VTB contended that:

    i) Petraco's application required "*an adjudication of the substantive question of whether MachinoImport has acquired good legal title to the Parcel*".

    ii) VTB submitted that, as a result of Petraco's disclosure, there was compelling evidence that MachinoImport had conspired with Antipinsky to deprive VTB of its contractual rights (noting that such issues were potentially governed by Russian law).

    iii) The result of such dishonest conduct was that any title which MachinoImport might have to the VGO was vitiated. Further or alternatively, MachinoImport was in any event estopped from asserting title against VTB and Petraco was bound by such estoppel.

    iv) VTB summarised what is broadly referred to as "the double-selling scheme" and its relevance to the dispute with Petraco over the Polar Rock Cargo; it suggested that the evidence indicated that MachinoImport was part of the scheme.

    v) The question of the invalidity of the Antipinsky-MachinoImport Contract under Russian law was identified.

58. VTB also (in very broad terms) flagged the potential for tortious claims against Petraco arising from the same facts; it said in terms that Petraco was on notice as to the fraud and

that there were facts which gave rise to tortious claims against Petraco. It did not indicate any present intention to bring such claims.

59. In the end, VTB and Petraco reached a practical solution, by which (a) VTB agreed to fortify the cross-undertaking in the sum of US$30 million, and (b) Petraco agreed not to oppose VTB's application for an order for sale of the relevant cargo under s. 44 of the 1996 Act and agreed that it would write to MachinoImport releasing it from the obligation to deliver the relevant cargo to Petraco. As the Judge explained, Petraco effectively agreed "*... with the suggestion by VTB that the oil should be shipped under its contracts, and the parties' respective positions should be argued over in respect of the proceeds*". VTB and Petraco jointly requested a three-day expedited hearing in July 2019 to resolve the competing claims to the Polar Rock Cargo and the US$30 million which had replaced it.

60. The hearing on 15 May 2019 thus resulted in the Blair Order, which provided at paragraph 6 as follows:

> "The following directions are given for the expedited trial of the rights and obligations of the Claimant, the Defendant and the Intervener in respect of the Polar Rock Cargo and/or the Secured Sums, including any losses that Petraco may have sustained under the cross-undertaking in damages, and (for the avoidance of doubt) the Claimant's right to seek repayment of the monies paid into Court".

61. A procedural timetable was then set down providing for service of pleadings, disclosure, witness evidence and evidence of Russian law. Paragraph 6 of the Blair Order also stipulated that Petraco should serve Points of Claim, VTB should serve Points of Defence and (if so advised) Counterclaim.

62. The discussion at the hearing before Sir William Blair identified the following issues: (a) who had title to the Polar Rock Cargo, (b) claims under the cross-undertakings in damages, (c) the return of VTB's fortification, and (d) possibly, claims for losses arising out of Petraco's intervention in the Arbitration Claim. The Cargo Trial was listed for a three-day hearing to commence just two months later.

63. Petraco filed Points of Claim on 21 May 2019. By this statement of case, Petraco relied on both the Antipinsky-MachinoImport Contract and the Petraco-MachinoImport Contract to allege that title in the Polar Rock Cargo was transferred from Antipinsky to MachinoImport. Petraco claimed that it had suffered loss and damage for which VTB is liable to compensate it under the cross-undertaking in damages because MachinoImport had been prevented from delivering the Polar Rock Cargo to Petraco by the grant of the WFO and Cargo Injunction. It also sought payment out of the Secured Sums.

64. VTB filed its Points of Defence and Counterclaim on 7 June 2019. VTB argued that MachinoImport never obtained title to the Polar Rock Cargo because the Antipinsky-MachinoImport Contract was void. In support of this allegation, VTB alleged that Antipinsky had breached a duty of good faith under Russian law, essentially because Antipinsky's agreement to sell VGO to MachinoImport prevented Antipinsky from performing its existing obligations to VTB. VTB relied in its pleading upon the dishonest

double-selling scheme in order to assert that MachinoImport had no rights to the Polar Rock Cargo which would entitle Petraco to take delivery.

65. VTB contended in the alternative that title to the relevant cargo did not pass because of matters relating to shipping documents; because Antipinsky retained an interest in the VGO; or because Petraco was estopped from asserting title by virtue of representations which had allegedly been made by MachinoImport. Third, and in any event, VTB argued that no damages should be awarded under the cross-undertakings in damages.

66. As it had foreshadowed, VTB also "counterclaimed" for a declaration that Petraco had no interest in the Polar Rock Cargo on the basis of the same arguments.

67. VTB also included in its pleading a counterclaim in tort against Petraco under Article 1064 of the Russian Civil Code (the "RCC"). VTB essentially alleged that Petraco had procured or induced Antipinsky to breach its contractual obligation to deliver four cargoes to VTB under the VTB-Antipinsky Contracts. This plea was not limited to the Polar Rock Cargo which had been the subject of the Cargo Injunction. VTB contended that Petraco acted unlawfully because it contracted with MachinoImport knowing that VTB had already paid for and was entitled to those cargoes. The value of the claim appears to be around US$27 million, principally representing the value of two March 2019 cargoes, which (VTB alleges) would have been delivered to VTB but for the alleged wrongful acts.

68. On 28 June 2019, Petraco applied to strike out the Points of Defence and Counterclaim on the basis, in summary, that they went beyond the scope of the Blair Order. On 5 July 2019, the Cargo Trial date was vacated and the directions relating to the Cargo Trial were suspended pending the strike out application.

69. On 1 August 2019, VTB issued its application to commence a Part 20 claim against Sberbank and MachinoImport within the Cargo Trial, and for permission to serve out of the jurisdiction (the "Part 20 Application"). However, Bryan J directed that the Part 20 Application should only be heard after determination of Petraco's strike out application.

70. On 10 October 2019, which was about a week before the strike out application was due to be heard, VTB and Petraco agreed a Consent Order (the "Petraco Consent Order") by which Petraco effectively abandoned its strike out application and the Cargo Trial was stayed pending determination of the Part 20 Application. Teare J, who made the Petraco Consent Order, was told that the strike out application "*has now been withdrawn and the relevant Consent Order has been lodged with the Court*".

71. After Petraco's strike out application had been resolved by the Petraco Consent Order, the Part 20 Application was heard and granted by Teare J on 5 May 2020. Teare J gave a short judgment in which he essentially found that (a) the connection between the existing and proposed claims justified permission being granted under CPR rr. 19.2, 20.5 and/or 20.7, (b) Sberbank and MachinoImport were proper parties to the "counterclaim" made by VTB, and (c) although a great many of the facts and matters relied upon had no connection with this jurisdiction, England was nevertheless the *forum conveniens* because it was desirable to have all claims in a single set of proceedings because "*the same double-selling scheme is involved*".

72. It is this order which Sberbank and MachinoImport now seek to set aside by this challenge to jurisdiction.

73. As for the arbitrations, following a hearing that Antipinsky did not attend, the LCIA tribunal issued a Partial Final Award on VTB's debt claims against Antipinsky, awarding VTB a total of €208,102,208 across the six arbitrations in respect of sums repayable to VTB under the Prepayment Agreements, together with contractual interest.

74. No payment has been made pursuant to that Partial Final Award due to the Antipinsky bankruptcy proceedings. The arbitrations remain technically on foot in relation to VTB's claims against Antipinsky for (i) specific performance and (ii) damages for conspiracy; however the proceedings are stayed because of the Russian bankruptcy proceedings.

The Russian Proceedings

75. There are also proceedings in Russia which should be mentioned.

76. On 30 April 2019 (the same day as Teare J made an Order granting the WFO and continuing the Cargo Injunction) VTB unsuccessfully applied for interim measures against Antipinsky before the Murmansk Arbitrazh Court.

77. On 7 May 2019, VTB issued: (a) a substantive claim in the Murmansk Arbitrazh Court against MachinoImport and Antipinsky, seeking a declaration that the Antipinsky-MachinoImport Contract was invalid, (b) an application for provisional measures, this time in support of the new claim brought before the Murmansk Arbitrazh Court, and (c) a further application for provisional measures in support of the arbitrations between VTB and Antipinsky.

78. On 8 May 2019, VTB's substantive claim before the Murmansk Arbitrazh Court was rejected. The Court concluded that it had no jurisdiction and that VTB had no standing to challenge the Antipinsky-MachinoImport Contract, and the applications for provisional measures were rejected on technical grounds.

79. On 13 May 2019, VTB sued in the Moscow Arbitrazh Court (the "Moscow Proceedings") seeking to invalidate the Antipinsky-MachinoImport Contract as against Antipinsky and MachinoImport. VTB's claim was supported by an application for injunctive relief, which was dismissed on 17 May 2019.

80. On 18 June 2019, VTB applied to withdraw the entirety of the Moscow Proceedings. The Moscow Arbitrazh Court gave the required permission but only after it had admitted MachinoImport's formal defence document to the Court record.

81. On 3 September 2019, the Antipinsky bankruptcy proceedings commenced, in which VTB applied on 6 March 2020 to be admitted as a creditor for the equivalent of approximately €194 million. On 30 July 2020, VTB was admitted as a creditor in the Antipinsky bankruptcy proceedings. The Arbitrazh Court of the Tyumen Region decided that €203,734,548.32 (inclusive of interest) in total was due under the VTB-Antipinsky Contracts.

The Proposed Claims and Overlap

82. VTB now seeks to bring fraud claims against both Sberbank and MachinoImport within the framework of these proceedings. The claims are set out in VTB's Particulars of Additional Claim. Although the question of overlap is not relevant to the first issue for decision, it is so enmeshed with the other issues, and so closely tied to the facts and factual allegations, that it makes sense to deal with the claims brought and the question of overlap here, as part of the factual section of the judgment.

The proposed Part 20 claims against Sberbank and MachinoImport

83. VTB seeks to pursue two discrete claims against Sberbank.

84. First, VTB brings claims against Sberbank under the "Letter of Assurance" issued on 11 April 2019 in connection with the performance of contracts concluded between VTB and Antipinsky in March 2019. VTB contends that the Letter of Assurance contained false statements, which it argues give rise to claims for breach of warranty and in deceit. VTB accepts that this claim is limited to its alleged losses suffered under the March 2019 contracts, which represent a small part of its overall claim.

85. In summary, the untruthful statements are said to be that:

    i) Sberbank intended to support Antipinsky's performance of the March contracts. VTB contends that, in fact, Sberbank prevented Antipinsky from performing its earlier contracts leading to disruption of the March contracts;

    ii) Antipinsky had sufficient working capital to perform the March contracts. VTB contends that, in fact, Antipinsky was already hopelessly insolvent by 11 April 2019;

    iii) Sberbank did not intend to take action which could detrimentally affect Antipinsky's financial position. VTB contends that, on the contrary, Sberbank and/or its subsidiaries were taking preparatory steps in anticipation of bankruptcy and subsequently caused Antipinsky to enter bankruptcy proceedings;

    iv) Sberbank was not aware of potential action by other creditors. VTB contends that, in fact, Sberbank knew that one creditor had taken steps towards commencing enforcement action and that another was taking preparatory steps.

86. On the basis of these matters, VTB contends that it can recover damages:

    i) For breach of contractual warranty representing the value of shipments due under the March contracts on the basis that, if these statements had been true, the relevant contracts would have been performed;

    ii) In deceit, principally for the loss of a chance of recovering a substantial part of its outstanding prepayments between 11 and 29 April 2019.

87. Second, VTB also brings claims against Sberbank and MachinoImport under Article 1064 of the Russian Civil Code ("RCC"). These would, in English terms, be claims in unlawful means conspiracy. In summary, VTB alleges that Sberbank, as a major secured creditor of Antipinsky, assumed legal and *de facto* control of the refinery. VTB alleges that Sberbank then adopted a "*modus operandi*" of encouraging Antipinsky's counterparties to continue to trade with the refinery and to provide finance to it, with the

aim of "*maximis[ing] [Antipinsky's] revenue to [Sberbank's] benefit and then, when it suited [Sberbank's] commercial purposes, plac[ing] [Antipinsky] into bankruptcy…*".

88. VTB alleges that Sberbank induced Antipinsky's counterparties to provide finance through a series of unlawful means, including (a) making false representations that Sberbank would stand behind Antipinsky, (b) procuring Antipinsky to contract with MachinoImport and to require prepayments in respect of product which it knew the refinery did not have capacity to sell, and (c) misrepresenting and concealing the existence of "double sales" to induce VTB to continue to make prepayments.

89. The claims against MachinoImport are similar: that it has caused harm to VTB by its purchases of cargoes which it knew had been sold to VTB, by prioritising deliveries to Petraco and by failing to disclose both the Antipinsky-MachinoImport Contract and the sales to others.

90. VTB thus alleges that Sberbank and MachinoImport have (a) procured Antipinsky not to deliver numerous cargoes to VTB, and (b) caused VTB to make prepayments of €226.3 million to Antipinsky which it would not otherwise have made.

91. VTB alleges that the "diversion" of cargoes to other parties was at Sberbank's direction or with its knowledge and approval; and that Sberbank concealed the existence of inconsistent contracts and made false representations to VTB.

92. In addition to the loss of the two March cargoes (valued at c. US$27 million) which it says were wrongfully diverted to Petraco and which feature along with the Polar Rock Cargo in the claim against Petraco, VTB claims its outstanding prepayments (€226.3 million) as well as loss of profit on all outstanding shipments and an indemnity in respect of liability to its own off-takers.

Overlap

93. VTB contends that the proposed additional claims against Sberbank and MachinoImport "*almost entirely overlap*" with the issues in the Cargo Trial. The central point is that they "*all relate to the same fraudulent scheme in respect of the double-selling of VGO by [Antipinsky], via MachinoImport, to Petraco*". It submits that the applicants' approach wrongly ignores VTB's counterclaim against Petraco for declaratory relief and seeks artificially to limit what is in issue in VTB's tort counterclaim against Petraco.

94. It urges caution as to concentrating too hard on individual threads, praying in aid the approach in *VTB Capital Plc v Nutritek Corp* [2013] 2 AC 337 (SC) at [83] per Lord Neuberger:

> "there is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."

95. Further VTB suggests that given the fact that, if this were a domestic case, there would be no hesitation in joining third parties in a similar position, I should be very cautious about adopting a different course here.

96. As to the case for joinder of each party (and each party must of course be considered separately) VTB says in summary:

    i) As regards MachinoImport:

        a) MachinoImport's role was central to all the claims VTB pursues. MachinoImport was the forwarding agent who should have arranged delivery to VTB, but instead MachinoImport covertly installed itself as buyer of VGO promised to VTB.

        b) MachinoImport's dual role was thus the means by which Petraco acquired cargo promised to VTB, thus implementing the conspiracy between Antipinsky, MachinoImport and Sberbank, at the instruction of Sberbank.

        c) MachinoImport was party to both conspiracies. MachinoImport is liable in tort for procuring in bad faith Antipinsky's breach of contract by supplying VGO to Petraco that had already been committed to VTB.

        d) If VTB's allegations of bad faith conduct against MachinoImport are established, VTB will succeed both against MachinoImport under aArticle 1064 but also against Petraco for declaratory relief. These allegations are also of central relevance to VTB's tort claims against Petraco. Indeed, in VTB's pleading against Petraco, VTB expressly alleges that MachinoImport is liable under Article 1064.

    ii) With respect to Sberbank, the existence of discrete issues which need to be addressed in order to establish Sberbank's liability, does not entail an unacceptable expansion of the proceedings:

        a) Sberbank is alleged to be MachinoImport's co-conspirator.

        b) Sberbank is sued for its conduct in dishonestly procuring the breach by Antipinsky of its obligations to VTB and in dishonestly misrepresenting matters to VTB and in concealing matters from VTB. This is the same course of conduct that the Court will be considering in the claims against MachinoImport.

        c) With respect to Sberbank's control of Antipinsky, this is also alleged in the Points of Defence and Counterclaim. Sberbank's control of Antipinsky arises in VTB's claim against Petraco that the Antipinsky-MachinoImport Contract is void: in that connection, VTB alleges that Antipinsky acted in bad faith in entering into that contract; such bad faith may be proved by establishing a combination of Sberbank's bad faith and its control of Antipinsky.

97. Sberbank and MachinoImport dispute this and contend that the argument that the Cargo Trial and the proposed additional claims involve "*the same fraudulent scheme*" is wrong. They say that the facts in issue within the Cargo Trial are, therefore, narrowly focused and that the case against Petraco – and alleged *mutatis mutandis* against MachinoImport – is limited to an allegation of "bad faith" on the basis that Petraco and MachinoImport intended (or were recklessly indifferent and/or negligent) to procure or induce Antipinsky's breaches of contract. There is no claim in fraud or deceit and there is no

claim in conspiracy. In addition the proposed Part 20 claims against Sberbank and MachinoImport are of a radically different nature and scale, raising very different factual and legal issues.

Discussion

98. Having carefully considered the competing submissions (to which the above summary cannot begin to do justice), I have formed the clear view that the overlap in this case is limited.

99. I bear well in mind the passage from *VTB v Nutritek* and also the fact that looking simply at causes of action can tend to neglect factual overlaps which may themselves have significance. However the Court has to form a view and has to try to be far sighted about the likely future course of the various claims; and in doing so at this stage it must be guided by the pleaded case.

100. This is a point which was made recently by the Supreme Court in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 [2021] 1 W.L.R. 1294 in the context of a jurisdiction challenge:

> "103. This was a jurisdiction challenge and concerned whether it was appropriate to grant permission to serve proceedings out of the jurisdiction on a foreign defendant. Those proceedings were meant to be as defined in the particulars of claim for which permission to serve out was sought. In this case the challenge was made on the grounds that the claimants had no arguable case against the anchor defendant. Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case.
>
> 104. If the issues are addressed by reference to the pleaded case, then the focus of the inquiry is clearly circumscribed and problems of lack of proportionality should generally be avoided.
>
> 105. In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. We were told that this is because they wanted to avoid producing various iterations of the pleading, but if they wanted to advance a case which was not reflected by their existing pleading then they should have amended it. In that way the proper focus of the inquiry can be maintained…"

101. I start therefore with a comparison of the pleaded cases.

102. The key allegations relied upon in the Points of Defence and Counterclaim as against Petraco are as follows:

    i) Four cargoes including the Polar Rock Cargo were "diverted" from VTB to Petraco;

    ii) Antipinsky was under a duty of good faith to VTB;

iii) Antipinsky breached its duty of good faith by contracting with VTB for product it did not intend to deliver and/or by entering into contracts with third parties by which it precluded itself from performing its prior obligations to VTB;

iv) Antipinsky passed title to MachinoImport;

v) MachinoImport (and, by privity, Petraco) are estopped from asserting title to the Polar Rock Cargo because, it is said, MachinoImport represented by its "*words and conduct*" that it was only acting as a forwarding agent for Antipinsky. Reliance is placed in particular on the period between 15 January and 18 April;

vi) Petraco is liable under Article 1064 RCC for knowingly inducing and/or procuring Antipinsky's breaches of its contracts with VTB. "*[T]o the extent relevant*", MachinoImport is also liable under Article 1064 RCC because it also procured Antipinsky's breaches for the same reasons as Petraco *mutatis mutandis*;

vii) "*To the extent relevant*" MachinoImport is liable under Article 1064 RCC for knowingly inducing and/or procuring Antipinsky's breaches of its contracts with VTB; and

viii) Any such breaches caused harm to VTB such that VTB has a claim under Article 1064 RCC.

103. Looking at the factual issues which are due to arise, VTB relies in particular on:

i) The 15 January 2019 Moscow Meeting between VTB, Sberbank, MachinoImport and Antipinsky (but not Petraco) at which, it is said, "*it was made clear to everybody at the meeting that, as matters stood, [Antipinsky] had committed its entire VGO output for February and March 2019 to VTB…*";

ii) A meeting on 26 February 2019 at the Langham Hotel (the "Langham Meeting") between VTB and Petraco at which, it is said, VTB advised that it had renewed its contractual relationship with Antipinsky and had agreed to provide Antipinsky with a rolling pre-payment facility; and

iii) Messages from MachinoImport to VTB on 6 March 2019, 19 March 2019, and 16 April 2019, which allegedly misrepresented the role of MachinoImport and/or the absence of sales by Antipinsky to other buyers.

104. The Particulars of Additional Claim are on any analysis far more wide-ranging:

i) Sberbank, which is mentioned effectively only in passing in the Points of Defence and Counterclaim, is placed front and centre. It is the Third Party, with MachinoImport only ranking as Fourth Party. There is an issue as to control of Antipinsky by Sberbank. There is a whole section of the factual background called "*Sberbank's modus operandi*";

ii) By contrast Petraco appears only at the fringes of the pleading;

iii) There is a discrete English Law claim under the Letter of Assurance against Sberbank;

iv) Unlike the Cargo Trial there is an allegation of a conspiracy to defraud VTB. That claim – one of joint enterprise – is at the heart of the Particulars. It concerns Sberbank and MachinoImport – but not Petraco;

v) There are secondary separate cases against Sberbank and MachinoImport extending both to individual cargoes (paragraph 114 of the proposed Particulars of Additional Claim) and the extent of the pre-payments (paragraph 115 of the same document).

a) Against MachinoImport there is in relation to the former reference to MachinoImport purchases. In relation to the latter there is a failure to speak/fraudulent misrepresentation case.

b) Against Sberbank there is reliance on the allegation of control and direction in relation to the individual cargoes, there is a separate representation case and a case of failure to correct MachinoImport's representation.

vi) There is an allegation that there was an attempt by Sberbank to maximise Antipinsky's revenue deliberately before it was put into bankruptcy;

vii) While there is some factual overlap (for example reliance in both pleadings on the Moscow Meeting and the emails of 6 March, 19 March and 16 April), there is reliance on a number of factual events which do not figure in the Cargo Trial pleadings:

a) a telephone conference between VTB, Sberbank, Antipinsky and Alvarez & Marsal on 11 December 2018;

b) a meeting in Moscow between VTB, Sberbank and Alvarez & Marsal on 24 December 2018;

c) a telephone conference between VTB and Sberbank on 21 January 2019;

d) a telephone call between VTB and MachinoImport on 23 January 2019;

e) a WhatsApp call between VTB and Sberbank on 7 March 2019;

f) a telephone conference call between VTB and Sberbank on 12 March 2019;

g) an email from Sberbank to VTB on 2 April 2019;

h) a meeting at Sberbank’s offices in Moscow (and a subsequent telephone call) between Sberbank and VTB on 12 April 2019; and

i) a telephone call between VTB and Sberbank on 18 April 2019.

viii) The claim advanced relates not just to four cargoes, worth $27 million, but to a further 22 cargoes sold to parties other than Petraco with a claim value of somewhere in the region of $300 million.

105. Taking the last point first, this is in and of itself an indicator of a very different range of factual inquiry. Simply proving facts in relation to the parts of the claim which are not in

issue in the Cargo Trial would inflate the documentation, and the witness evidence, and the trial length by an order of magnitude which, if not of an order with the increase in the size of the claim, cannot avoid being highly significant.

106. Secondly, I accept the submission that this mismatch between the nature of the claims in the two pleadings is significant and imports two very different trials. Sberbank submitted that given that the conspiracy claim involves an allegation of dishonesty, and that is not pleaded in the Cargo Trial, VTB would not be entitled to advance any such case within the Cargo Trial. VTB contends that this is an artificial distinction and that the conduct of MachinoImport and Petraco alleged in the Cargo Trial is "*the implementation of the conspiracy between [MachinoImport] and Sberbank*". However that is not its pleaded case in the Cargo Trial; and while Mr Gaisman QC tries to persuade me that I should wink an eye at this, it seems to me that (particularly given the long time lag between the making of these applications and their hearing which has provided ample scope for amendments – as they provided time for the service of 20 witness statements) I am entitled to assume that VTB's pleadings are in the state it wants them to be in. Although some reliance was placed on the stay which has been in place, that stay never applied to applications to amend the pleadings. If the matter went to trial on these pleadings VTB would not be permitted to advance its conspiracy claim in the context of the Cargo Trial.

107. Thirdly the preliminary indications of wide differences in ambit are supported by the fact that VTB itself says that it is alleging two separate conspiracies. It refers to (a) a "conspiracy" between Antipinsky, Sberbank and MachinoImport "*pursuant to which [Antipinsky] effectively banked [VTB's] prepayments before re-selling the same VGO to MachinoImport*", and (b) a "*separate… conspiracy between MachinoImport and Petraco*" to on-sell (some of) those cargoes to Petraco. This disjunction effectively reflects the different cases which are advanced in the proposed Part 20 proceedings and in the Cargo Trial.

108. That tacit acknowledgement is reflected in VTB's own position at an earlier stage when the question of conspiracy was in focus by reference to the scope of the arbitration. Leading counsel then instructed for VTB accepted that that dispute, which was intended to cover much of the territory now covered by the proposed Part 20 claims covered "a massively wider range" of matters.

109. If the two points are indeed separate then the different ambit of the factual inquiries involved takes on a considerable significance also. There are two different cases. Determining whether there was a fraudulent joint enterprise (Part 20) would involve inquiry into the conduct and motives of Sberbank and MachinoImport. That is a more complex and intrinsically different investigation to the Cargo Trial question of whether Petraco (and "to the extent relevant" MachinoImport) knew that their contractual arrangements would lead Antipinsky to breach its contractual obligations to VTB.

110. While MachinoImport figures in both claims it is very much a "supporting actor" in the Cargo Trial. The essence of that claim is about diversion of cargoes over a relatively short period of time. There is no case of collusion or joint enterprise or conspiracy. The pleading does not make clear whether the court hearing the Cargo Trial would actually need to make findings about MachinoImport's conduct. The allegation that the Antipinsky-MachinoImport Contract is void appears to rest on an allegation about Antipinsky's alleged bad faith, not that of MachinoImport. While VTB says that the facts pleaded amount to a plea of conspiracy it is certainly not made – as it would need to be,

as a matter of principle and also given that any such conspiracy would involve evidence of foreign law.

111. Perhaps most significantly the "double selling" which is at the heart of the Cargo Trial, and which was the reason why Teare J acceded to the Part 20 Application is only relevant to a small minority of the claim in the proposed Part 20 proceedings. The centre of gravity of the claim in the Part 20 proceedings moves to the consequences of Antipinsky's insolvency and "*prepayments made by VTB to [Antipinsky] that would not otherwise have been made*".

112. These various points can be made in a variety of ways and with a variety of different emphases. One can focus down on particular parts, unpicking the issues which would be likely to feature in (say) a List of Issues for trial or a List of Issues for Disclosure. For example Sberbank produced a "*Table of Issues that are NOT common between the Cargo Trial and the Proposed Additional Claims*". There over eight pages are set out matters such as the control issue, the modus operandi, the joint enterprise and so forth each by reference to the specific allegations made in the pleading, in a form which is strongly reminiscent of such documents. But whichever way one rearranges or presents the pieces the points are broadly these. Thus though this document (despite a degree of overselling to which I will refer below) is a telling one – not least in that it does enable something of that forward projection of the way in which the trial would develop to deal with those issues – I do not count it as providing a separate ground of justification for the conclusion which I reach.

113. Of course I accept the submission that overlap remains; in fact that was not disputed. Plainly there is some overlap; there is an ingredient of bad faith in the Cargo Trial allegations – both against Petraco and MachinoImport and critical to those allegations are some common pieces of evidence. Those allegations of bad faith will therefore overlap with the wider field of battle in the Part 20 proceedings. I also accept that the "Table" at one or two places slightly oversells the point as to distinctness. But the fact of some overlap is a very different beast from what VTB claim to be an almost complete overlap.

114. Equally plainly if there were not jurisdictional issues one might well conclude that a single trial was the most desirable way to proceed (the expedited trial having long since departed). But that tells one almost nothing; the question is a different one when one brings into the equation the considerations relevant to jurisdiction.

115. Of the points raised by VTB the one which has troubled me the most is the submission that the same Russian law (Article 1064 RCC) claim arises against all three parties and this makes one set of proceedings desirable. However this is to fall into the very trap against which Mr Gaisman warned me in his oral submissions – excessive concentration on the cause of action, neglecting the factual building blocks of the claim.

116. There are Article 1064 claims against all three parties; but the claims are not all the same. To the extent that they truly are several claims, it follows that they do not assist VTB in the case on overlap. But further the bad faith (actual or Nelsonian knowledge of competing arrangements and/or breach of duty) for the purposes of the Petraco claim is not the same as the bad faith (conspiracy to injure) in the Part 20 claim. There is some common factual underpinning – but there is a wealth of factual underpinning which is only relevant to the second of these claims.

117. Ultimately I conclude that the applicants are correct in submitting that the overlap between the two claims is limited and a very long way from being "almost total". This is a conclusion which I shall revisit at the relevant points in the analysis below.

Issue 1: Is VTB a defendant?

118. The first issue is the one which both sides agree arises and which is a jurisdictional question – namely: is VTB a defendant so as to be able to utilise the Part 20 process? I will deal with that first before dealing with other questions which have seemed to me also to potentially arise.

119. The issue as to whether VTB is a defendant is a relatively narrow one. VTB contends in essence that VTB is clearly in the position of a defendant in the Cargo Trial and has standing to bring additional claims under Part 20. This, it says, is clear from the background to and the terms of the Blair Order, in particular concerning the fact, nature and consequences of Petraco's intervention. The essence of this point is that Petraco did not merely intervene in these proceedings; VTB would rather characterise it as the aggressor. VTB notes that Petraco positively sought a summary determination on its application of the issue of the ownership of the Polar Rock Cargo. Further VTB contends that the question of whether or not it is a defendant was effectively decided by the Order of Sir William Blair.

120. The applicants, for their part, say that CPR Part 20 has no application here because (a) Petraco has not brought a "claim" against VTB, (b) VTB is not a "defendant" but has always been and remains the "claimant". They rely on a line of authority from *C T Bowring & Co Ltd v Corsi & Partners Ltd* [1994] BCC 713.

The law

121. It was common ground that the fact that a party is named as defendant to a claim form is not determinative of whether they are to be regarded as a defendant and that a party may be both a claimant and a defendant in the same proceedings; and a party formally named as a claimant on the claim form may be a defendant for some purposes under the rules.

122. This frequently occurs where a claimant brings a claim and the defendant counterclaims. Another example given was *Burchell v Bullard* [2005] EWCA Civ 358, a case where a claimant builder sued for outstanding fees. The defendants brought a counterclaim for defective work. The claimant in turn brought a Part 20 claim against the sub-contractor responsible and the Court of Appeal held that it was a paradigm case for third party proceedings.

123. It is therefore broadly common ground that the terms "claimant" and "defendant" need to be applied in the context of the particular claim in issue. But there are points where (as is agreed to be the case here) it matters which side of the divide a particular party falls. The authorities are fairly limited. The main ones discussed at the hearing were the following.

124. The first trio relate to substantive claims brought without any originating process. The first of these is *JSC BTA Bank v Ablyazov (No.11)* [2015] 1 WLR 1287 – a case on which both sides placed considerable reliance. In that case the claimant bank obtained a freezing order that applied to assets of which foreign third parties claimed to be the beneficial

owners. The third parties applied to vary the freezing order so as to exclude the disputed assets. This was contested by the bank. In consequence, the judge directed a trial of the issue as to ownership of those assets. The third parties argued on appeal that the judge was wrong to do so and that the bank should have sought permission to serve a claim form out of the jurisdiction on the third parties and to join them as defendants to the action. The Court of Appeal rejected this contention and found the Judge had jurisdiction to order a trial of the issue of beneficial ownership.

125. In that case the third parties pointed to cases under the *Masri* jurisdiction where third parties had been joined as defendants to the proceedings [82]. However, in rejecting the argument on appeal Christopher Clarke LJ pointed out the difference to the case before him: "*The present case is not, however, one in which relief is sought by the bank against the applicants; but the reverse.*" [83].

126. The Court went on to consider whether it was appropriate for the Judge to direct the trial of further claims against the third parties for their alleged role in assisting the defendant's breach of court orders. Christopher Clarke LJ held at [88] that those claims had been wrongly included in the Order.

127. However, having said that, the Court considered whether the *Chabra* jurisdiction offered a route by which the second basis of claim could be pursued for the purposes of establishing jurisdiction. It indicated that it appeared that such a claim could have been brought within the proceedings via an application rather than via originating process if the correct procedure were followed (applying for permission to serve the application out of the jurisdiction making use of CPR r. 6.2(c) [94]).

128. The second is *GFN SA v Bancredit Cayman Ltd* [2010] Bus LR 587 (PC) which concerned the application of the Cayman Islands' procedural rule on security for costs entitling a defendant to seek security for costs against a claimant company in any "*action, suit, or other legal proceeding*". The issue in the case was whether applications in liquidation proceedings by alleged creditors of a company to challenge the liquidators' rejection of the proof of debt were in substance freestanding, originating applications which counted as an "*action, suit, or other legal proceeding*". The Privy Council determined that they were.

129. Lord Neuberger delivered the majority opinion of the Board and held at [31] that "*when deciding whether a particular application is an* '*action, suit or other… proceeding*' *or an* '*action or other proceedings*'*, the court must look at the substance of the application as opposed to its strict form*". At [32] he determined that the creditor's applications were in substance "*originating applications*" because:

> "They brought before the court issues which were not previously before the court, and which would not otherwise have been before the court… these applications were essentially free-standing. … The winding up proceedings merely provided the forensic framework in which the applications were made, or the procedural launch pad from which the applications were issued".

130. The third of the trio is *Re Dalnyaya Step LLC* [2017] EWHC 756 (Ch) [2017] 1 WLR 4264. It concerned an application for recognition by a Russian liquidator under the Cross Border Insolvency Regulations 2006 ("CBIR") resulting in a without notice recognition

order and an application for production of documents under s. 236 of the Insolvency Act 1986 against the managers of a trust company. The managers applied to set aside the recognition order and resisted the s. 236 application; they sought security for costs of the hearing of both applications. The liquidator resisted the application on the basis that neither the recognition application nor the application under s. 236 constituted "proceedings" or a "claim" for the purposes of CPR r. 25.12.

131. Rose J rejected the liquidators' contentions and held that:

    i) In determining who was entitled to security for costs, the nature and substance of the proceedings had to be examined: [58]-[60].

    ii) The application under the CBIR was a proceeding or claim; Rose J pointed to the provisions governing how such applications were to be dealt with, including allocation to the CPR multitrack and commented, "*I do not see how all this activity can take place without there being some kind of claim or proceeding brought by the foreign representative; this cannot all be done in a legal vacuum*": [64].

    iii) In addition, the managers could properly be described as defendants to the recognition application as parties antagonistic to the grant of the order: [65].

    iv) Further, the managers were not seeking any separate relief and had taken a purely defensive stance: [71].

    v) Rose J therefore held that the set aside application was "part and parcel" of the liquidator's original claim for the recognition order, with the consequence that the liquidator was still to be regarded as the "claimant".

132. The second trio of cases relates to applications for security for costs in the context of claims brought in relation to a cross-undertaking in damages.

133. The first of these is *CT Bowring & Co v Corsi & Partners* [1994] BCC 713 (CA), where a freezing injunction was discharged by consent and the defendant sought to enforce the cross-undertaking in damages. The claimant sought security for costs of the inquiry from the defendant. The Court refused its application for security on the basis that the defendant seeking compensation remained in the position of a defendant.

134. The focus there was on whether the defendant who had sought the inquiry was in the position of a claimant against whom security could be ordered. Millett LJ stressed the point that whether a party was in the position of a defendant was a matter of substance not form; "*in considering whether a party is a plaintiff or a defendant the court must have regard to the substantial and not the nominal position of the parties.*" He went on to emphasise the defendant's essentially reactive position, and its lack of choice in being brought into the proceedings.

135. The second case is *JSC VTB Bank v Skurikhin* [2018] EWHC 3072 (Comm). In that case the claimant applied for security for its costs in respect of an application by a party for an order appointing receivers by way of equitable execution. Andrew Henshaw QC adopted the test of an application that has no independent vitality of its own, that is "in substance a defensive measure" or that forms part and parcel of the claim. Following the

reasoning in *Dalnyaya* he held that an application to discharge a receivership order was in substance a defensive measure.

136. The third case is my own recent decision in *JSC Karat-1 v Tugushev* [2021] EWHC 743 (Comm) [2021] 4 W.L.R. 66. That was a case also concerning a freezing injunction which had been discharged. Mr Tugushev (the claimant) had obtained a WFO against Mr Orlov (one of the defendants). The WFO was subsequently set aside for non-disclosure. Companies owned by Mr Orlov, which were not parties to the proceedings, obtained an order for an inquiry as to damages and sought to recover losses caused to them by the freezing injunction. Mr Tugushev sought security for costs of the inquiry on the basis that he was in substance a defendant to a claim for damages under the cross-undertakings. That application was refused, substantially following *CT Bowring*. I concluded that there was no reason why the companies which were "*obvious likely 'collateral damage' resulting from the freezing order*", should be in a different position to the original defendant. Further I concluded that it did not matter that the inquiry raised issues which would not arise for determination in the main proceedings or that the inquiry would result in final (rather than interim) relief.

137. VTB contended that while the judgment was right in the result (or at least explicable) on the basis that (i) the companies were wholly owned by the defendant in the proceedings and (ii) the reasoning of *CT Bowring* applied on the basis that the companies seeking to enforce the cross-undertaking were simply the corporate vehicles of the defendant, I may have gone too far at a couple of points in the judgment where I stated that the principle applied wherever a claim was made under the cross-undertaking in damages, whether by a party a related third party or by an unrelated third party.

Discussion

138. It is perhaps convenient to start at this end of the authorities and consider whether these criticisms of the *Tugushev* judgment are well founded. This enables a consideration of the position so far as concerns the part of the Cargo Trial claim relating to the cross-undertaking in damages. After that consideration can be given to the particular features of this case which distinguish it from the classical undertaking in damages claims.

139. Having considered the criticisms made by VTB of the judgment in *Tugushev*, I do not accept them. I continue to consider that the principle in *CT Bowring* applies to a person seeking damages under the cross-undertaking – whether or not that person is a defendant. It is of course true that Dillon LJ and Millett LJ expressed themselves by reference to the position of a defendant; but that was the situation which arose for decision in that case.

140. I do not consider that the analysis changes materially if the person affected by the injunction is not the defendant. It would be every bit as strange if an unrelated third party were to be regarded, in this particular context of an inquiry into damages, as being in the position of a claimant as if a defendant or a company controlled by a defendant were. Each of these people is brought into the orbit of the proceedings, and affected by them not of their own volition, but as "part and parcel" of the relief which is sought by the claimant to the action and which is granted by the Court. They may make a claim, but they make a claim reactively and essentially defensively – the question of whether they are acting thus has to be looked at by reference to the original injunction, not simply focussing down on the application to enforce the cross-undertaking.

141. The claim which they make is not a claim in freestanding proceedings, but is part of an inquiry brought into being by the original litigation and injunction and permitted by the Court (the undertaking being given to the Court and the granting of an inquiry into damages being in the discretion of the court – see for example *Cheltenham & Gloucester v Ricketts* [1993] 1 WLR 1545 at 1555B). Indeed one might say that the logic of the position is stronger *vis a vis* the third party (who has not been identified as a wrongdoer *vis a vis* the claimant and has not chosen to contest proceedings) than against the participating defendant against whom *ex hypothesi* a good arguable case for some relief has been established.

142. The point can be well tested by the exercise performed in *CT Bowring*. If one interposes the position of the third party, the same result is indicated:

> "It was the plaintiff which chose to bring the proceedings … It was the plaintiff which chose to apply for interlocutory relief and to offer the court a cross-undertaking in damages as the price of obtaining such relief. It must have known that the injunction which it obtained might cause the [third party] loss, that it might subsequently be established that the injunction should not have been granted, and that the [third party] might seek to recover its loss by applying to enforce the cross-undertaking. It must have known that, if it chose to resist such an application, it might incur further irrecoverable costs. It did not qualify its cross-undertaking by making its enforcement conditional on the [third party] providing security for costs. Had it attempted to do so, its cross-undertaking would have been rejected and its application for an injunction refused. Having offered the court an unqualified cross- undertaking, it now seeks to protect itself against a situation which it must have been able to foresee. That it should succeed is not an attractive proposition.
>
> As for the [third party], it has had no choice in the matter. It has done nothing beyond reacting to the steps which the plaintiff has taken against it. …. The plaintiff obtained an injunction …. The [third party] claims that the existence of the injunction caused it loss; it seeks to recover the loss. It seeks only to be restored, so far as compensation can achieve it, to the position it was in before the proceedings began. The [third party] must counter-attack to recover ground lost by an earlier defeat, but it makes no territorial claim of its own; it cannot fairly be described as an aggressor.
>
> Although the [third party] is claiming monetary compensation for loss which it alleges it has sustained as a result of the injunction, it has no independent cause of action to recover such loss- It cannot bring separate proceedings, whether by writ or counterclaim in the existing proceedings- Its claim arises out of and is wholly dependent upon the plaintiffs cross-undertaking. Its only remedy is to enforce the cross-undertaking by applying under the liberty to apply in the proceedings in which the cross-undertaking was given."

143. Indeed in this case the "collateral damage" analogy goes somewhat further than it did in *Tugushev*; there the third parties were only likely to be affected. Here the injunction was explicitly and squarely aimed at Petraco – it was inevitable collateral damage if the injunction was not justified. It is unrealistic to describe Petraco, as VTB does, as "the aggressor". VTB had taken action which necessarily impinged on Petraco's position and had done so by means of an order in non-standard form, which has subsequently been found to be at least in some measure unjustified. Of course Petraco did not have to intervene; but nor does any affected third party have to seek redress for damage caused to it by an injunction. The fact that it is seeking relief cannot help VTB – that would always be the case in a cross-undertaking case. And of course that relief is confined to enforcement of the cross-undertaking, is calculated by reference to the cargo affected by the injunction and is sought to be funded by reference to the payment into court made as part of the injunction proceedings. The claim is perhaps as closely connected with the original injunction as can well be imagined.

144. This therefore is a starting point: to the extent that this is a claim under the undertaking in damages Petraco, not VTB, should be seen as being in the position of being the defendant; and by parity of reasoning VTB would be the claimant.

145. The question is whether the situation here is sufficiently different that the position should be regarded differently and the parties regarded as having "exchanged roles". There are a number of obvious distinctions. They are:

    i) There is as yet no claim under the undertaking in damages; that only arises if it transpires that the injunction was wrongly granted;

    ii) The claim under the undertaking is not the only matter in issue in the proceedings – there is at the heart of the proceedings the question of ownership of the Polar Rock Cargo;

    iii) Petraco has positively sought to obtain an early determination of both issues;

    iv) There is an order for VTB to serve Points of Defence.

146. As to the first of these I do not think that this makes any difference. The situation is not dissimilar to that in *Dalnyaya Step*, where affected third parties took the initiative in applying to set aside the recognition order. Even though there is as yet no order for an inquiry into damages under the cross-undertaking, the application is a necessary part of the journey to get to that point, and it is necessitated by and caused by the injunction.

147. Nor am I persuaded that the fact that that attack on the injunction involves the resolution of an arguably separate substantive issue (ownership) which could have been litigated in separate proceedings makes a difference. That "separate" issue is a necessary part of the challenge to the injunction and a precursor to the claim on the undertaking; it is not therefore truly separate. Further that issue of ownership would have no practical utility other than in this context once the cargo had been sold, rendering separate proceedings nugatory. Yet further those hypothetical separate proceedings could not obviate the need for the cross-undertaking proceedings, because the hypothetical separate proceedings could never result in compensation for the losses occasioned by the injunction.

148. Further while it is true that Petraco sought a summary determination of the ownership issue, that was a necessary building block for discharge of the injunction and for the substantive relief sought under the cross-undertaking. As for the sale of the Polar Rock Cargo, that was a step ultimately taken by consent to minimise risk and loss all round. This is not a free-standing, *Masri* type order for the trial of an issue. It is, again, integral to the injunction and focussed on the cross-undertaking.

149. Nor do I consider that there is anything in the Blair Order which makes a difference. Not only does that order not say that VTB is a defendant, even if it did *Stati v Kazakhstan* [2019] 1 WLR 897 shows that the mere act of directing pleadings to identify the parties' cases on an issue, to fix the order of pleadings, fix the timing for them, does not constitute the parties serving the particulars of claim as a claimant or the party responding to them a defendant. In that case David Richards LJ said at [22]:

> "It is a commonplace for a court to direct the trial of an issue within existing proceedings, naming the party on whom the burden to establish the relevant point lies as the claimant on the issue, whether it is a claimant or a defendant in the proceedings. The effect of such an order is not to constitute the issue a separate, free-standing set of proceedings."

150. Further, the very authorities upon which VTB itself relies (such as *GFN*) make plain that the formal designation cannot prevent a claimant from being in reality a defendant; it follows that the reverse is also true.

151. To the extent that reliance was placed on *Ablyazov* I consider that reliance misplaced. There is obviously a similarity in that in that case the Court of Appeal held that the Court in one sense recognised that the intervening third parties were claiming relief against the claimant of their own volition. However the question there was not concerned with the trial of a substantive claim, but one which involved unwinding a transfer so as to render the assets in issue under the injunction amenable to enforcement. There was no focus on the question which is key here, because it did not matter. Nor is there a legal or functional equivalence in respect of the potential secondary route outlined in that case. In particular the necessary first step in the secondary approach in respect of the *Chabra* defendants posited by the Court of Appeal in that case was service of an application on the existing party. Here, of course, Antipinsky plays no part in the Cargo Trial.

152. Further the earlier part of the *Ablyazov* case tends to fall into line with the approach indicated above (although it does not deal squarely with the defendant point). In that case the Court of Appeal stated clearly in [88] that a very similar approach to that adopted by VTB here was not permissible:

> “This is, in my judgment, a step too far. The applicants sought to exclude the shares in Dregon Land from the relevant orders on the footing that Mr Ablyazov had no beneficial interest in them. That did not open the way for the bank to bring an entirely different claim that Lapointec and Limia should be required to return shares (of which they were in fact the beneficial owners) because they had been party to a disposition which was to their knowledge in breach of those orders. Any such application would need to be brought by some originating process.”

153. While I would not quite agree with Sberbank that the case offers binding authority that one cannot use an intervention by a third party as a basis for directing the trial of a substantive claim, it does provide a consistent, negative indication.

154. This approach ties in with the indications given in the authorities that generally a substantive claim will need to be commenced via a claim form. Obviously the position is not absolute, as *GFN* demonstrates, but I accept that the absence of a claim form is indicative. And *GFN* was a very particular case in a very particular context. The magic there was in the nature of an insolvency where the creditors were in the nature of claimants and the particular procedure mandated by statute enabled the making of a substantive claim in what would generally be an anomalous way. The position was similar in *Re Dalnyaya Step* where the context was again insolvency.

155. There will be other examples; VTB has given examples of some of them, such as declarations. But in general a substantive claim seeking monetary relief needs to be commenced by originating process.

156. I therefore conclude that VTB is not to be regarded as being a defendant. It follows that the court has no jurisdiction to permit Part 20 claims to be brought against Sberbank and MachinoImport and that the applicants' challenge succeeds.

157. It is however appropriate that I should set out my conclusions on the other points; the remainder of this judgment sets out those conclusions - albeit now on a hypothetical basis.

Other jurisdictional considerations and Issue 2: discretion

158. As I have noted this question of "Is VTB a Defendant?" was the question which the parties agreed was relevant and which was asked. However I raised with the parties a number of other questions as to jurisdiction. This was in part because there is a definite oddity about the question as posed in this context; and also because the jurisdictional question is potentially capable of being stress-tested against the situation which would pertain if one shifted the facts slightly.

159. One question, specifically raised as a discretionary (but not a jurisdictional) one by Sberbank, is whether the Part 20 procedure is apt at all in the context of an arbitration claim. This point links to a question which I posed: what would be the situation if VTB was a claimant? This is because if, in that case, it could join the third parties as defendants, the question posed would seem to be unnecessary; while if there is a problem in joining them as defendants that would seem to be suggestive. While Mr Gaisman eventually suggested that this was a route available, he did so with a degree of hesitation, and further consideration explained that hesitation.

160. The answer to the question given by Sberbank, and which seems to me to be correct, is that if VTB were a claimant it could not join the third parties as defendants because (i) the actual claim is an arbitration claim and (ii) in the arbitration claim, the Defendant is Antipinsky not Petraco. The result is that there is therefore no common issue which could found an application to join the applicants. The result is that it does not matter whether VTB is claimant or defendant; and that fact itself gives pause for thought.

161. Further the first half of this answer suggests to me that the real solution to the Part 20 point lies not in the magic of whether VTB is the claimant or defendant but in the nature

of an arbitration claim. I doubt that it is contemplated that arbitration claims should give rise to Part 20 proceedings at all. While Mr Willan QC suggested that there may be cases where a Part 20 defendant could be joined to an arbitration claim (giving the example of a situation where an arbitration claim for a declaration that the tribunal had not been properly constituted, and suggesting there might be a Part 20 claim under s. 18), I am not entirely persuaded that he is right about that; it is not a situation which seems to arise and the process of Part 20 would not seem apt. Certainly the process is not one which seems to have been within the experience of any of the vastly experienced teams in this litigation.

162. The concerns as to the aptness of the procedure are only reinforced when one considers the second half of the answer - the position so far as concerns service out of any proceedings adding the applicants as defendants. Here one encounters the problem that because the Defendant to the arbitration claim is Antipinsky the third parties would not be necessary and proper parties to that claim.

163. The result is that the only possible way in which jurisdiction can be engaged (either to add the applicants as defendants or as Part 20 defendants) is if one regards the Cargo Trial as a freestanding claim, akin to a Part 7 claim. However one of the few points on which everyone is agreed in this case is that the Cargo Trial is not a freestanding Part 7 claim. This is so even when one considers the Consent Order. It might (potentially) have been argued that the Consent Order created something akin to a Part 7 claim – and indeed Phillips LJ seems to have floated this as a possibility. But that, again, the parties have agreed is not the case. It appears that one reason why this may not have happened is the service out problem which I have mentioned. But if so it would be, as Mr Holmes QC indicated, anomalous if the party giving a cross-undertaking could use the inquiry as an opportunity to join parties under the less exacting terms of Gateway (4) instead of trying to (and possibly failing to) satisfy Gateway (3) with an originating process.

164. The next problem is that nor could Part 7 proceedings have been created in this form. Even assuming a submission to jurisdiction, the claim could not be a claim by Petraco – because Petraco has no freestanding claim. Petraco has never sought to bring any substantive claim against VTB. In its Points of Claim, while the question of ownership is live, it has sought relief solely under VTB's cross-undertakings in damages, arguing that the WFO and Cargo Injunction (together with the order for sale) had deprived it of the Polar Rock Cargo, which otherwise would have been delivered to it by MachinoImport.

165. The Part 7 issue also ties into the fact that arbitration claims are Part 8 claims. Then-instructed leading counsel for VTB observed at the hearing at which the Blair Order was made that this was "*… in effect, the trial of an issue within a Part 8 claim…*". Although this Part 8 point was not expressly prayed in aid by the applicants, it is worthy of note that:

    i) The CPR seems to envisage that Part 20 proceedings will be the exception rather than the rule in all Part 8 proceedings – that is why permission is always needed to bring Part 20 proceedings in a Part 8 claim (CPR 8.7).

    ii) Arbitration claims are themselves a limited sub-set of the Part 8 process.

166. Ultimately I am not asked to and do not need to decide whether any of the above means that there is no jurisdiction to add Part 20 defendants to arbitration claims and I therefore do not do so. I do however have considerable doubts as to whether there is jurisdiction to add defendants to or permit Part 20 proceedings in respect of a Part 8 arbitration claim; and I think it right to flag the issue as one which may arise for determination in another case. I note that HHJ Pelling QC seems to have expressed a similar scepticism in the recent case of *Shapoorji Pallonji v Yumn Ltd* [2021] EWHC 862 (Comm) at [6].

167. This brings me to the discretionary part of the consideration because even if (as I assume to be the case) the points above do not provide a further jurisdictional road block, they do feed into the analysis on discretion. Certainly Mr Willan is right in his submission that in the light of these points the situation in which a Part 20 process within an arbitration claim could be possible, let alone appropriate, would be very unusual.

168. To them are then added the considerations which relate specifically to the status of the proceedings as an arbitration claim. These are not insignificant.

169. This court has been seised of the matter pursuant to an Arbitration Claim made under CPR Part 62 – but only in its capacity as the supervisory court for six LCIA arbitrations.

170. There is important law as to the role of the supervisory Court. That role is very limited – it is there to support the arbitration and no more. Section 1 of the Arbitration Act 1996 states:

> "General principles.
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

171. This is reflected by dicta of this court. For example that of Colman J in *Kalmneft v Glencore* [2002] 1 Lloyd's Rep 128 at [57]: "*Supervisory intervention by the courts is minimal and well-defined*".

172. That is also reflected in the approach which these courts have taken to service out against non-parties and orders against non-parties, for example in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2015] 1 Lloyd's Rep. 191, *DTEK Trading SA v Morozov* [2017] 1 Lloyd's Rep. 126 – both of which the Court of Appeal chose not to overturn in *A. v C.* [2020] EWCA Civ 409; [2020] 1 WLR 3504. While it is well known that there is a range of views about whether that line should continue exactly as currently drawn, that is the position as matters stand.

173. All of this indicates to me that even if there is a jurisdiction to add Part 20 defendants to an arbitration claim, it is one which should be exercised sparingly.

174. Here, there are additional grounds for caution.

175. The first is that the arbitration claim itself is determined. The WFO has been continued subject to the removal of the prohibition on delivering the VGO, the Cargo Injunction has been discharged, and the Polar Rock Cargo has been sold. What is left in those proceedings is the working out of the consequences of the relief previously granted under the 1996 Act – essentially whether the undertaking in damages is engaged and if so what losses flow.

176. Secondly the additional claim contemplated is, as noted above, a very considerable expansion of the issue which was ordered to be tried.

177. That is significant where the court is specifically directed by CPR r. 20.9(2) to have regard to, amongst other matters, (a) the connection between the additional claim and the claim made by the claimant against the defendant, and (b) whether the additional claimant is seeking substantially the same remedy which some party is claiming from him.

178. In the Cargo Trial, the original "claim" made by Petraco was in substance for damages under the cross-undertaking, proceeding by reference to the injunctions and the arguments as to ownership to a conclusion that the injunctions wrongfully restrained MachinoImport from delivering the cargo to Petraco. The relief sought is damages, in the amount of the market value of the cargo and demurrage by way of payment out from the fortification provided by VTB to enable the cargo to be sold, representing the value of the Polar Rock Cargo. Implicitly, and consistently with previous estimates as to value those damages are less than US$30 million. No other relief is claimed. The "counterclaim" by VTB against Sberbank and MachinoImport is a substantially freestanding claim in tort. It also dwarfs the original claim - it seeks over US$300 million in respect of the alleged conspiracy to defraud VTB. It seeks substantially dissimilar relief. CPR r. 20.9 therefore points strongly against granting permission.

179. Because of this mismatch, permitting the "additional claim" to be introduced into these proceedings would expand the scope of the matters in issue far beyond the trial between VTB and Petraco. The "additional claim" would become the real substance of the proceedings. Even if Sir William Blair's original aspiration to conduct the Cargo Trial in three days may have been optimistic it is beyond doubt that the trial including the additional claim issues would be a hugely bigger endeavour. There would be a real element of allowing the tail to wag the dog – or as Mr Willan put it: "*It's not so much a case of the tail wagging the dog as the dog being dragged by its tail for some considerable distance*". Or one might say that the Part 20 proceedings are the cuckoo, vastly outgrowing the unfortunate host.

180. Added to this is the apparently perpetually stayed status of the arbitration claims in relation to which these proceedings are notionally supervisory. There has been a Partial Final Award, which gives VTB a right of over €200 million against Antipinsky; while there technically remain claims for specific performance and damages for conspiracy: (i) specific performance seems highly unlikely ever to be feasible given the insolvency and (ii) for similar reasons any further recovery of damages is equally dubious. If there is in reality no arbitration extant, the role of this Court as a supervisory jurisdiction is over -

save as it relates to the s. 44 proceedings. That is a very slim basis upon which to found such a major piece of litigation.

181. This is the more so when it cannot properly be said that this kind of trial was what was contemplated when the Cargo Trial was ordered. It is not in my judgment necessary to get into the detail of whether Sir William Blair should have been told more than he was of VTB's thinking as regards the potential for other parties. It is enough that it is clear that at the time he thought he was ordering a small expedited trial. It has transpired VTB wishes to have something which is profoundly inconsistent with that. It is entitled to try to persuade the Court that this is appropriate; but it cannot use Sir William's determination as adding any ballast to its arguments.

182. Taken together these points would (if the question had arisen) have persuaded me not to exercise the discretion to permit the issuance of Part 20 proceedings in respect of the Cargo Trial. This is a similar approach to that taken by Jacobs J in *Gaia River SA v Behike Ltd* [2020] EWHC 2981 (Comm) at [21]; but there without the added dimension of the arbitration context and the approach of minimal intervention.

183. I therefore do not need to consider the variation on *ex turpi causa* which was run by Sberbank as part of the argument on discretion. The argument was that the only reason that there are any proceedings between VTB and Petraco is that VTB wrongly obtained the Cargo Injunction and a WFO containing a non-standard prohibition on Antipinsky delivering VGO in the ordinary course of its business. Sberbank's point was that Phillips LJ has concluded that VTB had no legal basis for obtaining such relief and that had VTB not wrongly obtained such relief, there would not have been any prohibition on the delivery of VGO under existing contracts in the ordinary course of business, and Petraco would never have needed to intervene in the Arbitration Claim. The applicants therefore say that VTB should not be permitted to take advantage of its own wrong.

184. There may well be something in this argument. However I would not have given it much weight, in circumstances where some part of the injunction remained, that part of the injunction would still have contained sufficient within it to have potential to cause Petraco concern and – even without pursuing any counterfactual to a conclusion – it is far from clear that Petraco would not have acted similarly even if the injunction had been in the most orthodox of forms. As it is, I place no weight on this factor, however because I do not need to.

185. It follows that even if there were jurisdiction to permit the making of a Part 20 claim in this case, I would refuse to exercise the discretion to do so. For similar reasons, had the point been live it seems that there would have been issues as to at least some of the gateways relied upon (Gateways (4) and (4A)). On the latter point it is worth noting that the irony would then be that there would be a route to jurisdiction under Gateway (6)(c) – in respect of the Letter of Assurance claims which have no cross-over at all with the Cargo Trial – but none is in respect of the elements of the claim which have some crossover with the Cargo Trial.

Forum Conveniens

186. The argument on *forum conveniens* is composed of elements of agreement and elements of disagreement.

The points of agreement

187. The parties agree that the burden is on VTB to demonstrate that England is clearly the forum in which the claim can most suitably be tried in the interests of all the parties and in the ends of justice. They are also agreed on the elements which feed into that consideration, which is conducted by reference to such authorities as *The Spiliada* [1987] AC 460 at 475-484, *VTB Capital Plc v Nutritek International* Corp [2013] 2 AC 337 at [190] and *Lungowe v Vedanta Resources plc* [2020] AC 1045 at [66].

188. The parties are also in agreement that of these relevant elements, there is a very considerable body of factors which (subject to questions about the weight to be attached to them) point to Russia as the *forum conveniens*.

189. Those points can be summarised:

    i) Connections to Russia/absence of connections to England: it is agreed that absent the Cargo Trial, England would not be the proper forum for these claims. The connections with England are virtually non-existent, whereas the connections with Russia are overwhelming.

    ii) Location of parties: Antipinsky, MachinoImport and Sberbank are Russian businesses. VTB dealt with the relevant business through its Swiss office, but is closely connected with Russia (where some of the staff involved in the relevant events are based) given that it is the commodities arm of a major Russian banking group; the fact that VTB's predecessor was incorporated in England at the time of relevant events is irrelevant. Petraco operates from Switzerland.

    iii) Relevant events, subject-matter and loss: Again the comparison is between overwhelming (Russia) and virtually none (England):

        a) Russia: The claim relates to a refinery in Russia, which was taking prepayments and delivering oil products in Russia. Any conspiracy between Antipinsky, MachinoImport and Sberbank, would most probably have been formed in Russia. Virtually all of the relevant events took place in Russia, including all of the pleaded meetings involving VTB, Sberbank and MachinoImport. The loss principally consists of pre-payments made to Antipinsky in Russia, as well as the value of cargoes not delivered FOB in Murmansk, Russia. There are allegations that Sberbank controlled Antipinsky, which concerns matters taking place exclusively in Russia relating to the administration and governance of a Russian company (and which have already been considered within the Russian bankruptcy proceedings). The "Letter of Assurance" claims will require an investigation of the financial condition of Antipinsky (a Russian enterprise), which is a matter which necessarily features in the Russian bankruptcy proceedings.

        b) England: There is one meeting in London (not pleaded in the Particulars of Additional Claim). There have been some references to internal risk meetings in England; but these are plainly of marginal relevance.

    iv) Witnesses. No potential witnesses appear to be located in England. VTB's witnesses appear to be split between Switzerland and Russia. All of Sberbank's

witnesses are located in Russia. So too are MachinoImport's witnesses. The first language of the posited witnesses is Russian. Many of them would have to give evidence through interpreters even if (as VTB notes) some of them have given witness statements at this stage in English.

v) Documents. Documents will overwhelmingly be held outside England. Sberbank and MachinoImport hold their documents in Russia and usually in the Russian language. To the extent that documents are obtained from Antipinsky (which is far more likely to occur if the proceedings are taking place in Russia, given that Antipinsky and its bankruptcy administrator are in Russia) they will overwhelmingly be in Russian.

vi) Applicable law. The principal claim, i.e. for bad faith/ conspiracy to defraud, is governed by Russian law. There is a subsidiary claim which is governed by English Law.

Discussion

190. There are three main disputed issues. One major one concerns the question of whether the Cargo Trial operates as a "trump card" in the light of *Vedanta*. Others concern the significance of the Russian law issues and the risk of irreconcilable judgments.

Disputed Issue 1: The importance of Russian law

191. Dealing with the general situation first, Lord Mance held in *VTB* at [46]:

> "it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum."

192. In this case, the applicants say that it is overwhelmingly preferable for the Russian court to hear the proceedings because of the complexity of the legal issues involved. VTB for its part says that the complexity arguments are overegged and relies on two Russian law expert reports which suggest that the position is in fact clear.

193. VTB also contends that the Court should be slow to give weight to a contested assertion to the effect advanced by Sberbank and MachinoImport, in circumstances where it will also be said that whether the points are novel and complex is itself a novel and complex question or otherwise points in the direction of Russia (thereby giving rise to an infinite regression). It contends however that the key point is that these questions do not render Russia the appropriate forum, in circumstances where the same Russian law issues arise in respect of VTB's counterclaim against Petraco where damages are sought under Article 1064 RCC. The English court will therefore have to grapple with these issues even if the Jurisdiction Applications succeed.

194. Given the fact that *forum conveniens* is a point which now arises as a double contingency (i.e. if I am wrong both on jurisdiction and discretion), and that this is but one element within the *forum conveniens* analysis I will take these arguments relatively briefly.

195. I accept the submission that Russian law in the relevant respect is noticeably different to English Law. Article 1064 is part of the Russian Civil Code. While Mr Willan suggested that the Cargo Trial issue was akin to a *Lumley v Gye* claim, there is plainly a difference even as regards that aspect and that disjunction becomes more apparent when one turns to consider the separate claims sought to be brought in the Part 20 proceedings.

196. Moving further into the dispute the nature of the argument concerns the potential for a claim in tort where a claim in contract exists. There are issues as to whether concurrent claims are permissible at all, and if so the conditions which must be satisfied for the Russian Courts to permit such a claim. In particular there is an issue about whether the contractual claim must have been exhausted first (and, if so, when such exhaustion occurs).

197. As to the complexity of the arguments, it seems to me that a compelling case is made for this, so much so that I need not be unduly troubled by the submission that I should be slow to give weight to a contested assertion to the effect advanced by the applicants, in circumstances where it will also be said that whether the points are novel and complex is itself a novel and complex question or otherwise points in the direction of Russia, (and so on, by infinite regression).

198. Even being cautious about this point I am persuaded that the issue is both novel and complex. I have been provided with over 160 pages of (fairly dense) expert reports. They are supported by over 2,400 pages of exhibits. There is very little agreement between the experts – even the two applicants' experts take markedly different views, though tending to the same outcome. There are all sorts of complications. For example, at the straightforward end of the spectrum, there are some issues as to the best way to convey the meaning of some of the Russian law materials. There are, at the other end of the spectrum, obviously detailed issues as to whether cases are best analysed as showing this putative rule, or as pertaining to particular subject matter jurisdictions such as tax or crime. There are questions as to what would constitute exhaustion. The approach to these will obviously depend on construing the decisions in question, and may turn on quite short passages in those judgments looked at under a very intense spotlight.

199. Further, regardless of where they come out as to the correct answer in the evidence for the application, almost all of the experts (including VTB's own expert) have either in their reports or in academic pronouncements indicated that there is complexity. The vivid phrase *"epicentre of controversy"* was indeed used by Professor Baibak in one publication. To the extent that VTB's experts have suggested otherwise in their reports for this hearing, I am not persuaded by that evidence.

200. I am therefore satisfied that *prima facie* the Russian law issue, because it is complex, provides another significant reason why Russia would be the *forum conveniens*.

201. I also note that it is a particularly unappealing prospect to ask a judge of this court to express a view as to an area where Russian law appears to be hotly contentious and indeed in the process of development. This is the more so when any appeal from a decision on Russian law here would be impeded by being a decision on facts and expert evidence, where the Court of Appeal is very unlikely to interfere, whereas in Russia the full appeals process would be available.

202. Two further points were made to mitigate the force of this point. The first was that given that Sberbank's expert Professor Asoskov posits the exhaustion of remedies as the precondition for the bringing of such a claim, that condition will be satisfied by the time of trial because the bankruptcy will be complete. The second was that given that he also posited an exception where it is clear that contractual recovery is not possible, that condition is or will be met. In either event, says VTB, the Russian law issues while possibly complex now will not be so at the time of trial. The problem with this is that it is an argument which only works if Professor Asoskov's analysis is the one preferred; if Dr Gladyshev's view however is correct the issue will not have gone away.

Disputed Issue 2: The risk of irreconcilable judgments: Russian law

203. Realistically VTB concentrated less fire on the question of whether the Russian law was complex. However it placed considerable weight on a related factor – the risk of irreconcilable judgments. Its case was that in a sense it mattered little how complex the Russian law was if it was going to have to be decided in the Cargo Trial in any event.

204. As for the question of whether these issues would require to be decided in the Cargo Trial in any event it may be the case that as matters stand some aspect of the Russian law does have to be decided; but aside from questions as to ambit of that dispute (and it seems quite possible that the different nature of the claim has some impact on this) that claim is not one that has to be brought in the Cargo Trial. That issue is only in the Cargo Trial because VTB has willed it so.

205. There is also the question of whether existing proceedings in Russia are likely to give rise to a risk of irreconcilable judgments. As to this I was not persuaded that there was real risk in this respect. The VTB petition appears to be the procedural admission of the debt created by the Partial Final Award in the arbitrations, and to pertain to matters which are unlikely to be in issue in the Cargo Trial or the proposed Part 20 proceedings.

206. The Promsvyazbank petition is more complicated. The first aspect pertains to a claim in unjust enrichment relating to some of the non-Polar Rock Cargo stored by the Polar Rock's owners. However I was not persuaded that it demonstrated VTB taking a contradictory position such that the Court would be concerned about the risk of irreconcilable judgments. The remaining aspects of this petition relate to the date of Antipinsky's insolvency, and VTB's knowledge of it. Here there may be some cross-over, but I did not judge it to be of a significant nature, such that inconsistency would create an issue.

207. As for the challenge of certain creditors to Sberbank's proof of debt, while that does squarely raise the question of Sberbank's control of Antipinsky, the allegation is very different (and narrower) to that advanced in this proposed claim and moreover that litigation is not litigation to which VTB is a party so as to create any estoppel against it.

Disputed Issue 3: The risk of irreconcilable judgments (other aspects)

208. VTB also relied on the risk of irreconcilable judgments as regards other facts – in particular the factual issue as to double-selling, the diversion of cargoes intended for VTB and the status of the Antipinsky-MachinoImport Contract as well as the factual issues underpinning the case of bad faith. In particular it was submitted that the extent of Petraco's knowledge is inextricably bound up with the extent of MachinoImport's

knowledge and it would be a "complete mess" if the findings as to one alleged co-conspirator contradicted the findings as to the other – which VTB sees as a significant possibility.

209. That there is some risk of irreconcilable judgments as relating to those factual aspects which arise in both claims is plain and is indeed accepted. As probably necessarily follows from the determinations I have already made I do not accept the submission that these are fundamental points which go to the heart of the matter in each claim and are of the utmost seriousness. This brings us to the point of asking: is even this lower degree of risk of irreconcilable judgments one which I am bound to find renders England the *forum conveniens*?

Disputed Issue 4: Is the Cargo Trial a Trump Card?

210. VTB naturally placed much emphasis on the authorities which emphasise the desirability of hearing all related claims in one forum. Reference was made to the dictum of Brandon LJ in *The El Amria* [1981] 2 Lloyd's Rep 119, at 128rhc:

> "I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries."

211. Also relied on were *JSC BTA Bank v Granton Trade Ltd* [2011] 2 All ER (Comm) 542, *Donohue v Armco Inc* [2002] 1 All ER 749 and *BAT Industries Plc v Windward Prospects Ltd* [2014] 1 Lloyd's Rep 559.

212. However the centre of the argument was the decision in *Lungowe v Vedanta Resources Plc* [2020] 2 AC 1045.

213. In that case the Supreme Court considered the application of *forum conveniens* in the context of linked claims concerning toxic emissions from a mine in Zambia. The claimants were local residents who claimed that the mine's workings had affected them. They claimed damages from Konkola Copper Mines ("KCM"), the operator of the mine, and Vedanta, the parent company of KCM. Vedanta was sued in England as of right under Article 4(1) of the Brussels Regulation Recast. KCM was served out of the jurisdiction on the basis that it was a necessary or proper party to the claim against Vedanta. It was a case where every factor indicated that Zambia was the appropriate venue, but due to the decision in *Owusu v Jackson* [2005] QB 801 (ECJ), it was not possible for the claim against Vedanta to be stayed on *forum non conveniens* grounds. Coulson J and the Court of Appeal held that this meant that England was the proper forum, basing their decision in significant part on the risk of irreconcilable judgments. However, Vedanta had volunteered to submit to the jurisdiction of the Zambian Court so that the related claims against KCM and Vedanta could be resolved in that forum.

214. At [75] Lord Briggs observed:

> "Vedanta had by the time of the hearing offered to submit to the jurisdiction of the Zambian courts, so that the whole case could be tried there. This did not, of course, prevent the claimants from continuing against Vedanta in England, nor could it give rise to any basis for displacing article 4 as conferring a right to do so upon the claimants. But it does lead to this consequence, namely that the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?"

215. He rejected Leggatt J's proposition in *OJSC VTB Bank v Parline* [2013] EWHC 3538 (Comm) that because a claimant has a right to sue the anchor defendant in England, there is "*no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings*," and concluded that if there is a more appropriate forum for the claims to be heard in the interests of justice, the English court will expect a claimant to relinquish an entitlement to sue an anchor defendant in England, or accept the risk of irreconcilable judgments.

216. There therefore arises a question as to what the *Vedanta* decision imports for this case, and in particular whether (per VTB) it simply carves out a narrow exception to the general rule in circumstances where the risk of overlapping judgments arises "purely" as a result of the choice of the claimant (and not where the choice of this forum is a rational one); or (per applicants) whether *Vedanta* evinces a step change, placing a new emphasis on the fact that the English Court will not go out of its way to assist a litigant to avoid the risk of irreconcilable judgments by joining foreign defendants to English proceedings where there is a more obviously appropriate forum and the litigant has brought the risk of irreconcilability upon itself.

217. The case has been considered in subsequent authorities, which are of some assistance in answering this question.

218. In *ED&F Man Capital v Straits (Singapore) Pte Ltd* [2020] 2 All ER (Comm) 515 (CA), the jurisdiction dispute arose against the background of an exclusive jurisdiction clause in favour of England, and pre-action disclosure proceedings brought by the claimant elsewhere (in Singapore). Upholding the decision at first instance, that there was a "world of difference" between the choice being considered in *Vedanta* and the choice in that case, a strong Court of Appeal rejected a submission that post *Vedanta* wherever the claimant had chosen to proceed against different defendants in different jurisdictions as had occurred here, multiplicity of proceedings and the risk of irreconcilable judgments ceased to be a factor of any real significance.

219. It held at [43] that:

> "there is nothing in the decision of the Supreme Court in Vedanta which represents a step-change in the law requiring the Court in the present case to discount the importance of the avoidance of multiplicity of proceedings and the risk of irreconcilable judgments as a factor favouring resolution of all the claims against all the defendants in one forum, England."

220. It went on specifically to ask itself what general principle could be derived from *Vedanta* and answered the question by saying that the principle went no further than the passage at [69] of that judgment and that the ratio was to be found at [87].

221. Concluding at [46] the Court held that in *Vedanta* "*Lord Briggs JSC cannot have been intending to lay down some wider general principle which would apply to factual situations other than the one he was considering, nor would any such wider general principle be binding on this Court*." Rather, it was the fact that the anchor defendant had offered to submit to the foreign court which was crucial in Vedanta. In the case before the Court of Appeal, there was no such offer by the anchor defendants and therefore it could not be said that the risk of irreconcilable judgments arose from the decision of the claimant [47]. The Court therefore held [49] that the judge had been correct to distinguish *Vedanta* and to refuse to set aside the order for service out of the jurisdiction on the basis that it remained desirable for all the claims to be determined in a single forum, England.

222. The second relevant case is *National Bank Trust v Mints* [2021] EWHC 692 (Comm), where Sir Nigel Teare encapsulated *Vedanta* as follows:

> "Where the risk of irreconcilable judgments arises because the claimants have chosen to exercise a right to sue a party in England rather than in a jurisdiction which is an available (and appropriate) forum the risk of inconsistent judgments loses its force because it has arisen from the claimants' own choice".

In that case however the judge came to the opposite conclusion because while Russia was otherwise the appropriate forum, a Russian judgment would not have been enforceable against the Mints defendants' assets in Cayman, whereas an English judgment would. At [67] the judge said: "*I accept that the Claimants exercised a choice to sue the Mints Defendants in England. But it was reasonable for them to make such a choice because of the relative ease of enforceability of an English, compared with a Russian, judgment*."

223. Among the available fora, England therefore became "the only rational choice", even though the Russian courts were available. Reliance was also placed on this judgment for its emphasis on the importance of a single forum in claims relating to conspiracy, and its recognition that an increased risk of irreconcilable judgments could be a factor even if the risk could not be altogether eliminated.

224. As for the legal question on *Vedanta* implicitly posed by the parties' differing approaches, I would venture to suggest that what *Vedanta* does is some way short of a step-change; and can most properly be seen as a reminder or point of emphasis. It emphasises the overall test and the fact specific nature of that test. If it makes a difference, that difference is to remind the Court when considering these issues that multiplicity of proceedings is only ever a factor, though it may be a factor of predominant importance in some cases – depending on the facts.

225. The position here is both similar to and different from *Vedanta*. There is no real link to England; this is in essence a Russian case. It is before this court "purely" because VTB has chosen to bring an arbitration claim here. However there are two "non-choice" factors: (i) that claim was brought in support of the claim which VTB had to bring in London-based arbitration and (ii) Petraco cannot bring a claim on the cross-undertaking in damages in Russia. Thus part of the claim will continue here regardless; there is no question of the whole case being capable of transplantation.

226. The position here is also distinct from the position in *ED&F Man* - where substantive proceedings had to be brought here and the other proceedings were mere pre-action proceedings; here there is no requirement to bring proceedings here, and while the arbitrations must be brought here, VTB was under no obligation to seek interlocutory assistance from the supervising court. Further in addition to the other tie to Russia there has been at least some engagement of the Russian jurisdiction by VTB itself. The case is also different from *Mints* where there was evidence as to enforcement difficulties if the case was heard in Russia and an implicit acceptance that Russia would in the circumstances have been an irrational option.

227. I do not accept (as was tacitly suggested by Mr Gaisman) that Sir Nigel Teare in *National Bank Trust* should be taken as laying down a test of general application at [67] where he referred to a rational choice. Any such test would not really sit with the approaches in previous cases of high authority. Nor, if he did, would I accept the submission that the only rational choice for VTB was to make its Article 1064 claims against Petraco in England. I see this case as more akin to *Vedanta* – or to *ED&F Man*, but in reverse. The proceedings here should be seen as akin to the pre-action disclosure proceedings in Singapore in *ED&F Man*. The decision there was in essence that the tail of voluntary interlocutory proceedings should not wag the dog of the contractually agreed centre of gravity of the substantive litigation.

228. I would consider here likewise that the tail of the proceedings accessory to now defunct arbitrations should not wag the dog of a substantive dispute which is truly a Russian case. The risk of irreconcilable decisions is – as it must be – a factor. But it is not a trump card. And, given my conclusions earlier as to the limited nature of the overlap, while it must be a factor which is taken very seriously it does not become a factor of huge weight.

Weighing the uncontested factors in favour of Russia

229. Having reached a conclusion on the main contentious issues, it is then necessary to assess just how strong are the uncontested factors in favour of Russia.

230. Any balanced reflection on those factors produces the result that the scales are extremely heavily weighted against this jurisdiction. Of course not all of the factors I have outlined above are of huge weight – and some of them are perhaps of less weight than they used to be. The location of events of course points toward Russia; but at the same time this court spends much of its time dealing with disputes whose centre of gravity is elsewhere. It therefore carries less weight than the huge preponderance of location factors in its favour might suggest.

231. Similarly the location of the parties and their documents, though a factor, is possibly less of a factor in these days, when law firms have representatives in most jurisdictions who can assist in the preparation of the case, and the disclosure exercise – and indeed when

the balance of disclosure has moved so much towards electronic documents, which are less location specific.

232. But there remain very weighty aspects. In this case there will be very serious focus on Sberbank's and MachinoImport's state of mind, motives and actions. This has an impact on how one views the documentary aspect; with the best will in the world, translations are not the ideal vehicle for this. This is the more so where (as is often the case when this type of allegation is made) the court is likely to want to examine internal messages and discussions between colleagues, which may be drafted informally.

233. Here I agree entirely with the submission made by Lord Goldsmith QC that it is far better to be working in the native language than from translations. This is a point which has also been referenced in *Mousavi-Khalkali v Abrishamchi* [2019] EWHC 2364 (Ch) by HHJ Eyre QC at [88]:

> "The difficulties of translation and of interpreting the effect of what was said are compounded when the court is dealing with text messages, manuscript notes, and similar documents. Those are written in abbreviated form with context being of great importance in determining what an abbreviation meant or was intended to mean and with ample scope for argument about the true effect of a particular abbreviated note. It is already clear that there will be such dispute here. In such cases the outcome can depend on a judge having to make a determination between different nuances of meaning. That can involve a difficult exercise of judicial assessment even when the judge is a speaker of the language used. A judge working from a translation of notes (and in this case an English judge is unlikely to be familiar even with the script in which the notes are written) is in a markedly worse position to decide on a party's contention as to what was meant by a particular abbreviation than a judge who is a speaker of the language in question and who can make an assessment for him or herself of the credibility of a particular account of what was meant by a note."

234. Of course many of the documents which have emerged thus far are actually in English – including the contracts and some of the pleaded emails. But it remains overwhelmingly likely that many of the key "informal" documents will be in Russian – as will the key source material for the Russian Law exercise. That is an area where working in translation is particularly inefficient, as there is a tendency for even skilled translators to differ and for there to be real scope for disagreement on the exactly correct translation of a key word in a decision or article.

235. Here there is also the factor of the Antipinsky bankruptcy; if there is a need to get documents from the bankruptcy administrator that will inevitably be much easier in Russia.

236. A similar point applies to witness evidence. Of course the court can take evidence through interpreters, and indeed remotely through interpreters. It is well used to doing so. But there is no doubt that (leaving aside the efficiency aspect – interpreted evidence inevitably taking longer and therefore being less efficient) interpreted evidence is less

easy to assess than evidence in a person's first language. To the limited extent that demeanour can properly come into the equation it becomes much more difficult to judge when the words accompanying it come later and in another person's voice. This is a point of some significance when serious allegations of dishonesty are in play.

237. There are also greater problems in testing a witness's evidence as robustly when they are giving evidence through an interpreter. The flow of evidence is disrupted; it becomes less easy to know when a lengthy answer can be interrupted; and there is ample scope for voluntary and involuntary confusion on the witness's part as to understanding the question.

238. Witness evidence and questions as to use of language here is likely to be of considerable importance. VTB's allegations bring a significant number of individuals into the firing line as to their honesty. In one instance, referenced at paragraph 58 of the Particulars of Additional Claim, VTB attributes detailed nuance to particular words alleged to have been said in a telephone conference attended by numerous individuals in Russia.

239. There is then the question of applicable law. The principal claim, i.e. for conspiracy to defraud, is governed by Russian law. Whilst the contractual claim under the "Letter of Assurance" is governed by English law, it seems unlikely that that claim will give rise to difficult issues of law: the issues will largely be factual ones, i.e. whether the statements were false and, if so, what loss has been suffered. But as regards Russian Law as I have concluded above there will have to be very considerable and complex Russian Law evidence, which is likely to have to be given through translated documents (a factor dealt with already) and orally though translators if the matter proceeds here. Such oral evidence will take much longer than would be the case in Russia and will be less efficient because of the need to explain basics and building blocks.

240. Of course some of the documents and witnesses and issues will be common between the Cargo Trial and the broader proposed Part 20 case. But for the reasons I have already given that overlap is only partial and cannot stop these factors presenting a very weighty factor in the balancing exercise.

Conclusion

241. I therefore need to pull together all these various factors and perform the exercise indicated by Lord Briggs at [66] of *Vedanta.*

242. Mr Gaisman urged me not to emulate King Solomon and divide VTB's litigation into two. Of course, it follows from what I have already decided above, that that is my decision. However even had I reached different conclusions on jurisdiction and on discretion, I would have concluded that this was a case where the burden of establishing that England was "clearly and distinctly" the most appropriate forum was not discharged, and that the court should refuse to exercise its discretion to permit service out.

243. Ultimately this decision comes down to a balancing exercise and so heavy are the factors in favour of Russia that unless the question of the proceedings here were a trump card (or in this context possibly a trump weight) – as I have decided it is not – the answer could only be that Russia is the *forum conveniens*.

244. As for the proposal of a case management stay, which in the circumstances does not arise, I shall just say that I am not attracted by that proposal, which requires Petraco to submit to the jurisdiction of the Russian Court, which it has not indicated any willingness to do, and where the undertaking in damages issues – including the issues as to whether that undertaking should be enforced – can only be decided here. If the parties to the arbitration claim were to reach a consensual position as to stay of the Cargo Trial that would be different.