

JERSEY / JUDGMENT

Goldtron Ltd v Most Investment Ltd [2002] JRC 148 (09 August 2002)

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judgment

the DEPUTY bailiff: 1. This is an application by the defendant to set aside certain Mareva injunctions, granted ex parte by me on 18 th June 2002, on the grounds that the plaintiff did not make full and frank disclosure. FACTUAL BACKGROUND 2. Much of the background is not in dispute. The defendant is a company incorporated in Jersey and the plaintiff is incorporated in Singapore. On 28 th April 1998 the defendant agreed to buy 4,894,342 shares in a Russian company called "OAO Electriceskaya Svyaz ("the Company") at a price of US\$2.758 per share making an aggregate contract price of US\$13,500,000. The price was payable in three instalments with \$5million payable within ten days of registration of the shares in the defendant's name, \$4.25 million within three months of registration and a further \$4.25 million within six months of registration. The shares to be purchased amounted to 14.5% of the voting share capital of the Company. 3. On the same date, by an identical contract, the plaintiff agreed to sell a similar number of shares in the Company for a similar price on similar terms to Media Most B. V., a Dutch company. The obligations of both purchasers were secured by bank guarantees issued by a commercial bank called Most-Bank. Both agreements were governed by Russian law and provided that any dispute should be subject to arbitration at the International Arbitration Court of the Chamber of Commerce & Industry ("ICAC") in Moscow. 4. The shares in the Company were duly registered in the names of the two purchasers and the first instalment was paid in each case. However in August 1998 the rouble was substantially devalued by the Russian government and the remaining instalments have not been paid. 5. On 27 th November 1998 the defendant instituted arbitration proceedings before the ICAC pursuant to the contract. Despite the fact that the price was designated in US dollars, it sought a variation to the contract on the basis of the variation in the dollar/rouble exchange rate caused by devaluation. The defendant sought a decision that the first instalment of \$5 million should be deemed as fulfilment of its obligation to pay \$13.5 million under the agreement. Media Most B. V. instituted an identical arbitration in respect of its contract. 6. In circumstances which are in dispute and to which we shall refer later, the plaintiff brought a counterclaim in the arbitration proceedings on 13 th September 1999 seeking payment of the full outstanding purchase price. A similar counter claim was brought in the Media Most B. V. arbitration. 7. The arbitration panel dismissed the defendant's claim for variation and ordered the defendant to pay a total of \$9,537,613.20 on the counterclaim. The

decision was formally issued on 14 th April 2002. There is right to appeal within three months. A similar award was made in the Media Most B. V. arbitration. 8. On 18 th June 2002 the plaintiff presented an Order of Justice seeking to enforce the arbitration award pursuant to the Arbitration (Jersey) Law 1998 ("the 1998 Law"). Article 30 of the Law provides that a domestic arbitration award may, by leave of the Court granted on an ex parte application, be enforced in the same manner as a judgment. Article 43 provides that, subject to certain possible exceptions set out in Article 45, a Convention award (by which is meant an award made in a jurisdiction which is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) is enforceable in the Island either by action or in the same manner as a domestic arbitration under Article 30. Russia is a party to the New York Convention and accordingly the arbitral award in this case is a Convention award. 9. As indicated earlier the Order of Justice sought interim injunctive relief. The injunctions froze the assets of the defendant in Jersey up to a value of \$10 million and ordered the defendant and Parties Cited to disclose information concerning the defendant's assets. There was also a gagging order preventing the defendant and the parties cited from informing Mr Vladimir Gusinsky of the existence of the Order of Justice for a period of 14 days. According to the affidavit in support, Mr Gusinsky is a Russian independent media mogul who controls the Most Group and was a director of the defendant. The gagging order was apparently lifted by agreement before the expiry of the 14-day period. We should add that the defendant's affidavit refers to him as Mr Goussinsky but, for convenience, we will use the plaintiff's spelling. 10. The affidavit in support of the Order of Justice referred to the fact that there was a right of appeal against the award on procedural grounds and that the three-month period for such an appeal expired on 14 th July 2002. It pointed out that, to date, no appeal had been brought. In essence therefore, as presented to me, this was a fairly straightforward action to enforce an arbitration award where, although the time for appealing on procedural grounds had not expired, no appeal had been brought at the time. THE ALLEGATIONS OF NON DISCLOSURE 11. We have received affidavits sworn on behalf of the defendant suggesting that the plaintiff failed to comply with its duty to make full and frank disclosure when applying for ex parte injunctive relief. The affidavits are very detailed and we have also heard considered submissions. For the sake of brevity we will summarise the allegations briefly. The main allegation is that the plaintiff failed to disclose the existence of a likely defence to the validity of the arbitration award. This is said to arise in the following way:- (i) The arbitration award was not unanimous. There were three arbitrators of whom two, the chairman and the arbitrator designated by the plaintiff, signed up to the majority award. The third arbitrator, a Mr R A Petrosyan, who had been nominated by the defendant, filed a dissenting opinion. The fact that there was a dissenting opinion had not been disclosed when the injunction was obtained. (ii) The dissenting opinion raised a number of serious procedural criticisms of the arbitration process upon which the defendant would be relying in its appeal to the Russian courts, which had now been filed within the three-month time limit. Thus it was said that the chairman, a Mr L N Orlov was never validly appointed. Apparently a chairman may only be appointed by written order of the two other arbitrators or the order of the ICAC chairman. It is said that there is no document which confirms that either of these methods of appointment has been complied with. Secondly, it is said that the chairman has behaved in a partial and biased manner. Thus there is evidence that he telephoned the

defendant's lawyers by mistake, thinking that he was speaking to the plaintiff's lawyers. He is said to have advised them (i.e. the plaintiff's lawyers to whom he thought he was speaking) to bring a counterclaim to the defendant's claim. He went on to tell the plaintiff's lawyers (as he thought) to "attack" and "not to give up". He also gave advice on some procedural issues. When the defendant's lawyers disclosed their true identity, he terminated the telephone conversation quickly. Thirdly, it is said that the records of the arbitration process have been falsified in a number of respects e.g. by purporting to refer to hearings which had never taken place. Fourthly, it is said that the arbitration award did not deal with the second limb of the defendant's claim, namely that the contract should be treated as terminated as opposed to being varied. Fifthly, it is said that the counterclaim was never properly lodged or served in accordance with the rules so that it was not open to the panel to make a finding upon it. (iii) Thus there are said to be serious issues concerning the validity of the arbitration award. This was known to the plaintiff because of the contents of the dissenting opinion of Mr Petrosyan, which dealt with them at length. Furthermore it was known to the plaintiff that the defendant would seek to rely on these points in order to oppose the enforcement of the award in a foreign court because exactly the same points arose in relation to the Media Most B. V. arbitration. In relation to that arbitration Media Most B. V. had appealed to the court in Moscow relying upon these grounds. Furthermore the plaintiff had sought to register and enforce the Media Most B. V. award in the Dutch courts. In the Dutch proceedings Media Most B. V. had filed a defence opposing enforcement and relying on the very matters listed above as constituting reasons for the Dutch court not to enforce the arbitration award. Thus it was not simply a question of the plaintiff failing to foresee a possible line of defence. The plaintiff knew what line of defence would be taken by the defendant in this case because it is accepted by all parties that the issues arising in relation to the two arbitrations are identical. The plaintiff therefore failed in its duty to disclose a possible defence to the action when applying for the ex parte injunctions. 12. The defendant also relied upon a number of other matters, which we would summarise briefly as follows:- (i) Paragraph 9 of the affidavit in support of the Order of Justice stated that Most-Bank had 'refused' to pay under its guarantee obligation. In fact the Russian courts had upheld Most-Bank's contention that it was not legally obliged to pay under the guarantees as they were apparently not properly executed. The use of the word 'refused' was pejorative and misleading in context. It carried the risk of prejudicing the Court against the defendant because of the apparent connection arising from the similar name of the bank. (ii) It was also misleading to refer, as was done in both the Order of Justice and the affidavit, to the defendant 'defaulting' on the two outstanding instalments of the purchase price. It was true that the defendant had not paid these instalments but it had not simply failed to pay. It had taken the view that the devaluation of the rouble had led to a very different position and had taken the initiative by instituting arbitration proceedings in order to see if an arbitration panel agreed with it. This was very different to a conventional 'default' and the use of that word did not fairly represent what had occurred in this case. (iii) The Russian version of the award referred at its conclusion to the fact that a 'dissenting' opinion was attached to the majority award. The English translation of the award referred only to a 'separate' opinion (although it was not in fact attached to the document exhibited to the affidavit). This was a misleading description of the opinion. (iv) Paragraph 18 of the affidavit in support stated that the defendant had sought to

prolong the litigation, thereby giving the impression that the defendant was simply stringing things out in order to avoid paying up. In fact, as the plaintiff knew, the delay arose out of the many and varied procedural irregularities which were outlined in the dissenting opinion. (v) Paragraph 16 of the affidavit in support alleged that the defendant and Media Most B. V. both formed part of the conglomerate known as the MOST Group which was owned by Mr Guskinsky. It went on to state that ZAO Media Most, the leading company of the MOST Group had been declared bankrupt on 29 th May 2001 (thereby supporting the inference that the defendant was financially at risk). The defendant submitted that this was most misleading. First, there was no connection between ZAO Media Most and the defendant other than the fact that Mr Guskinsky was a director of both. Secondly ZAO Media Most had not been declared bankrupt. It had merely been made the subject of a formal liquidation order by the Russian court upon the application of the Tax Inspectorate. This was a purely formal order which did not indicate any financial difficulty. Furthermore there was an inconsistency in the affidavit in that the English version said that ZAO Media Most had been declared bankrupt whereas the Russian version stated ZAO Media Most had declared itself bankrupt. Neither was correct. (vi) In paragraph 16 of the affidavit in support, it was alleged that the deponent had been "unable to obtain detailed information about the company assets". This carried the implication that the defendant had been uncooperative or secretive. The truth was that the deponent had never asked the defendant for any financial information and it was therefore misleading to describe the position in this way. 13. In response to the main allegation - that the probable defence had not been disclosed - Mr Thompson submitted that there was no obligation to do so because the award was as determined by the majority. It was as if one was faced with a decision of the English Court of Appeal made by a 2:1 majority. The decision was that of the majority and that was what was relevant for the Court to know when considering whether to enforce it. In any event the award had referred to the fact that there was a 'separate' opinion and the text of the majority award dealt at very considerable length with the various procedural issues in order to dismiss them. Accordingly, anyone reading the majority award would have been aware of the existence of the issues. He also disputed a number of the subsidiary allegations summarised in paragraph 12 above. THE NATURE OF THE DUTY TO MAKE FULL & FRANK DISCLOSURE 14. The essential feature of judicial proceedings is that each party has the opportunity of putting his case. Thus the Court will not generally hear only one side to a dispute. However, on occasions, this is necessary either because of the urgency of the matter or because the very nature of the relief requested requires that it be done in the absence of the other party (e.g. the obtaining of an injunction freezing assets because it is feared that the other side will remove them). Even then, the other side has the right to bring the matter back before the Court at the earliest opportunity for an inter partes hearing. Clearly there is great scope for injustice if orders are made in the absence of one party. If the court 'wrongly' imposes a freezing order on a party's assets because it has been misled by the applicant, serious damage may be caused without that party having had the opportunity to put its case to the Court. Accordingly it is fundamental and of the highest importance that a party applying for ex parte relief must be completely frank with the Court and must put before the Court any matters which militate against the making of the order in question. 15. In our judgment a short and accurate summary of the duty lying upon the party applying for ex parte relief is to be found in the

decision of Bingham J. in *Siporex Trade S. A. -v- Comdel Commodities Limited*

(1986) 2 Lloyds L. R. 428 at 437 :- "The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied upon before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made if there had been full disclosure." 16. We must emphasise the passage concerning the exhibiting of numerous documents. It is not sufficient for a plaintiff to be able to say that, buried somewhere amongst the voluminous exhibits, the point at issue was available to the judge. The duty is much more stringent. All defences actually raised by the defendant or which can reasonably be expected to be raised in due course must be identified and fairly summarised in the affidavit. If the affidavit itself is voluminous, counsel may need to refer the judge to the relevant points. The overriding duty of the applying party and his advocate is to ensure that all actual or possible defences (and other material matters) are brought to the specific attention of the judge so that he may consider them before making his order. DID THE PLAINTIFF FULFIL ITS DUTY IN THIS CASE? 17. We are in no doubt that the plaintiff failed in its duty in this case. The picture presented by the Order of Justice and accompanying affidavit was of a routine arbitration award which would in due course be likely to be enforced under the 1998 Law. The time for appealing had not yet expired but there was nothing in the papers to suggest any particular grounds for appeal. The fact that, buried in the detail of the lengthy majority award which was exhibited to the affidavit, the arguments raised by the defendant were disposed of was, for the reasons mentioned earlier, nowhere near the necessary level of disclosure. 18. In fact, as we now know, the position was very different. As the plaintiff well knew, there were allegations of serious procedural impropriety in relation to the arbitration. In the identical arbitration concerning Media Most B. V. that company had appealed to the Moscow court against the arbitration relying upon the points mentioned in the dissenting judgment. Furthermore, in the proceedings in Holland to enforce the Media Most B. V. arbitration, the defence had filed a pleading raising all these points and relying upon them as being grounds why the Dutch court should not enforce the award. As the plaintiff admits, the same legal arguments apply in respect of both arbitrations. This was not, therefore, a case where the plaintiff had to imagine the defence which the defendant might wish to raise in the

proceedings before this Court. It knew the defence which would be raised. 19. Clearly this Court cannot know whether the allegations of procedural impropriety made by the defendant are well founded. In the first place this will be a matter for the Moscow courts to adjudicate upon. But the fact that these disputes exist puts a very different complexion on the situation and does not accord with the picture painted by the Order of Justice and supporting affidavit. In our judgment this was a serious case of non-disclosure. It is not necessarily the case that, if the material had been disclosed, the decision to grant the injunctions would have been different. That is a matter to which we will have to return shortly. But, as the judge considering the application, I was deprived of the opportunity of considering important information which might have affected my decision. 20. In the light of this finding we can deal very briefly with the other allegations of non-disclosure summarised in paragraph 12. We will revert later to the topic covered in sub-paragraph (v). We do not agree with the criticism at sub-paragraph (vi) but we accept the points made in sub-paragraphs (i) - (iv). Nevertheless, had these matters stood alone, they would not have been sufficient to discharge the injunctions. POSSIBLE SANCTIONS FOR NON-DISCLOSURE 21. Clearly if the material which has not been disclosed would have led the judge not to have granted the ex parte relief in the first place, that is the end of the matter. The injunction will be discharged and not re-imposed. However that is often not the position. As Bingham J. made clear in the passage referred to above in *Siporex* the Court may discharge the injunction even if, had there been full disclosure at the time, the judge would nevertheless have granted the ex parte relief. The reason for this approach is to emphasise the importance which the Court places on the need for full and frank disclosure and to act as a deterrent to future applicants by making clear the serious consequences which may follow in the event of non-disclosure. 22. But even where the Court has discharged an injunction on the grounds of non-disclosure, it has a discretion to re-impose the injunction. The circumstances in which it would be right to do so were considered by the English Court of Appeal in the case of *Brink's Mat Limited -v- Elcombe* (1988) 1WLR 1350. Two particularly useful passages are as follows:- Balcombe LJ said this at p.1358: "The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained. See *Rex -v- Kensington Income Tax Commissioners*, ex parte *Princess Edmond de Polignac* (1917) 1KB 486, 509 . But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the courts to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained.... Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly, I would not wish to define or limit the circumstances in which it may be exercised" Ralph Gibson LJ said this at 1357:- "6. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without

examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper enquiries and to give careful consideration to the case being presented.

7. Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded : " per Lord Denning M. R. in *Bank Mellat-v-Nikpor* (1985) (FSR 87 24). The Court has a discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue that order, or to make a new order on terms." 23. In our judgment this reflects the position at Jersey law. In cases of comparatively minor non-disclosure the Court may well continue or re-impose the order. But in cases of serious non-disclosure, even if innocent, as described by Ralph Gibson, LJ the normal order will be to discharge the order and not re-impose it. As Balcombe LJ said, the power to re-impose should be used sparingly. The reason for this is to ensure compliance with the duty to make full and frank disclosure. If it became the case that injunctions were routinely re-imposed, with the only penalty being one of costs, not only would plaintiffs and their advisers begin to take this duty less seriously; but defendants would eventually give up applying to set aside injunctions obtained as a result of non-disclosure if their only 'reward' were simply to recoup the costs of the application, with the injunction remaining in place. This would in turn further reduce the pressure on plaintiffs to make full disclosure. 24. We are in no doubt that the gravity of the non-disclosure by the plaintiff was such that the injunctions must be discharged. We do however accept that the non-disclosure was 'innocent' in the sense that the relevance of the omitted facts was not perceived. The question is whether we should re-impose the injunctions, visiting the plaintiff only in costs as a sanction for the non-disclosure, or whether we should refuse to re-impose them. THE NATURE OF THE INJUNCTIVE RELIEF 25. As Donaldson M. R. stated in *Deutsche Schachtbau GmbH-v-Ras Al Khaimah National Oil Co*

- (1987) 2 All ER 769 at 780, it is at least doubtful whether a post-judgment injunction is correctly described as a Mareva injunction. The Mareva injunction introduced into English Law the concept of freezing assets of a defendant in advance of judgment. The Court had always assumed a jurisdiction to grant an injunction in aid of enforcement of a judgment. Nowadays the expression 'Mareva' has come to include post-judgment as well as pre-trial relief. 26. However, the fact that a particular Mareva injunction is made post-judgment in order to aid enforcement is clearly a material factor for the court when considering the exercise of its discretion. In such cases the plaintiff has established judicially that he is owed money by the defendant. It is therefore comparatively straightforward for the court to make an order freezing assets and requiring accompanying disclosure so as to ensure that the court's order is given effect and the judgment is not rendered nugatory. Conversely, in a pre-trial case, a plaintiff merely asserts a claim. The court does not know

whether the claim is well founded. It may be that the defendant will show in due course that he does not owe the money claimed. The threshold for obtaining a Mareva injunction in the latter case will clearly be much higher than in the case where the court has already held that the amount is due and it is simply a question of enforcement. As Donaldson M. R. put it in *Deutsche Schachtbau* at 783:- "The case for imposing an injunction was much stronger than Bingham, J. thought it was, because DST was an actual and not a potential creditor. The purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that DST might at some later date be able to establish its claim, i.e. the ordinary Mareva situation." 27. The normal post-judgment injunction is in aid of a judgment of the court. However it is clear that it is not limited to a judgment. In *Deutsche Schachtbau* itself the High Court had given leave on an ex parte application for a foreign arbitration award to be enforced in England as a judgment but this was stayed pending appeal. The Court of Appeal clearly treated this as equivalent to a post-judgment injunction. 28. In *Gidrxsimi Shipping Co. Limited -v- Tantomar-Transportes Maritimos Lda*

- (1994) 4 All ER 507, Colman, J. considered the question of a worldwide disclosure order in connection with the enforcement of a domestic arbitration award. He held at 519, that the absence of a court judgment, as distinct from an arbitration award, should make no difference for it is the policy of the law that arbitration awards should be satisfied and executed. He went on to emphasise that quite different considerations applied post-judgment or post-award as compared with pre-trial relief. In that particular case there were two arbitration awards at issue; one had been turned into a judgment under the relevant provisions of the Arbitration Act 1950 but leave had not been given to enforce the second arbitration and it was possibly going to be the subject of proceedings to set it aside for misconduct. Yet the judge made no distinction between them and considered that he was dealing with a post-award position. 29. In this case, we are dealing with a Convention award, i.e. a foreign award but one which is capable of enforcement in Jersey in the same way as a domestic arbitration. The clear policy of the 1998 Law is that such awards should be satisfied and enforced in the same way as judgments. The comments of Colman J., referred to above, are just as apposite in respect of the facts of this case. 30. It is true that this case is not on all fours with either *Deutsche Schachtbau* or *Tantomar*. In the former case, leave (albeit stayed) had been given by the court to enforce the foreign arbitration award as a judgment. In *Tantomar*, the court was concerned with a domestic arbitration. However, for the reasons that we have given, we see no grounds for drawing a distinction between a domestic arbitration and a Convention award. In this case the parties have chosen to arbitrate their differences. There is an award of the arbitration panel. The plaintiff seeks to enforce the arbitration award. Subject only to any appeal to the Moscow courts, this Court is obliged to enforce the award unless the defendant satisfies the Court that one of the exceptions in Article 45 of the 1998 Law applies. We consider that Mr Thompson was correct in submitting that the injunctions in this case are in aid of the enforcement of an arbitration award and that the applicable principles are those for post-

judgment injunctions rather than pre-trial relief. The threshold is therefore considerably lower, as was made clear by Donaldson, M. R. in *Deutsche Schachtbau . THE BALANCE OF CONVENIENCE* 31. Mr O'Connell emphasised that the jurisdiction to re-impose injunctions should be exercised sparingly and that there must be compelling circumstances to justify it. Far from there being such circumstances, he submitted that there were insufficient grounds to justify the imposition of the injunctions in question. He referred to the matters relied upon in the plaintiff's affidavit in support of the Order of Justice and argued as follows:- (i) In relation to the suggestion that there was concern about the financial position of the defendant because it was connected with ZAO Media-Most which had been declared bankrupt, he submitted firstly that there was no evidence of any connection (other than that Mr Guskinsky was a director) and secondly that ZAO Media-Most was not bankrupt. The procedure to which it had been subject was not indicative of any financial difficulty. There were accordingly no grounds upon which the Court could use what had happened to ZAO Media-Most as grounds for concern about the financial position of the defendant. In any event there was no evidence that the defendant was in financial difficulties. (ii) There was no evidence of any risk of dissipation of assets. There was merely an assertion by Miss Minaeva, the Russian lawyer who was the deponent of the affidavit in support of the Order of Justice. She believed the defendant would attempt to remove assets from the jurisdiction. The only matters relied upon in support of that assertion were the points in relation to ZAO Media-Most and the assertion that the defendant had sought to prolong the arbitration process. However it was clear from the evidence now available to the Court that the arbitration process had taken longer than usual because of the manifest irregularities in the procedure and the need for the defendant to challenge those irregularities. We agree that no weight is to be placed on the alleged prolonging of the arbitration process. 32. We have carefully considered Mr O'Connell's submissions, which were much more detailed than the brief summary we have given above. Furthermore we have reminded ourselves that the jurisdiction to re-impose injunctions following a serious non-disclosure must be exercised sparingly. Nevertheless we have concluded that this is a case where we should do so. We summarise our reasons briefly as follows:- (i) We accept that there are serious issues to be argued before the Moscow court in relation to the alleged procedural irregularities in connection with the arbitration. Nevertheless, this is a case where the defendant agreed to pay \$13.5 million for the shares in the Company (which it now owns), of which sum it has paid only \$5 million. The agreement is quite clear in designating the purchase price in US dollars. The defendant sought to vary the agreement in view of the devaluation of the rouble but an arbitration panel has rejected that application. At present there is an arbitration award which the plaintiff seeks to enforce in Jersey. For the reasons which we have given, we are in a post-award situation. The general policy of the Court is to assist in the enforcement of arbitration awards by seeking to ensure that funds are available to meet such awards. As mentioned earlier, the threshold for obtaining injunctive relief post-award is considerably lower than when seeking pre-trial relief. (ii) The plaintiff seeks to rely upon the fact that an associated company, ZAO Media-Most is in financial difficulty and that this gives

grounds for supposing that the defendant may also be in such difficulty. As to whether there is a connection between the defendant and ZAO Media-Most, we are quite satisfied that, for the purposes of an interlocutory hearing, there is strong prima facie evidence of such a connection. The defendant's own affidavit refers to the fact that Mr Guskinsky has built up the "Media-Most Empire". Mr Guskinsky is a director of the defendant. The defendant and Media-Most BV acted in concert to buy similar amounts of shares in the Company on similar terms represented by the same lawyers. The defendant bears a similar name. In our judgment it is hopeless to suggest that there was no evidence of any connection between the companies. Mr O'Connell pounced on an assertion in the affidavit of Miss Lebedeva, a Russian lawyer, made in reply to the defendant's affidavit, to the effect that the plaintiff believed the defendant to be a subsidiary of Media-Most and pointed out that there was no evidence of this at all. We agree that there is no evidence of that particular relationship but we are quite satisfied from all the circumstances of the case that we can safely infer a connection between the defendant and ZAO Media-Most to the extent that Mr Guskinsky has a substantial interest, whether direct, indirect or as a beneficiary under a trust, in both companies. Indeed the affidavit filed on behalf of the defendant does not specifically assert that there is no such connection. (iii) The evidence in relation to the financial position of ZAO Media-Most, is, we have to say, unsatisfactory on both sides. Neither side has produced a copy of the order of the relevant Russian court, which is presumably a public document. This would set out the statutory basis for the order. The plaintiff's affidavit simply asserts bankruptcy. In response to the affidavit filed on behalf of the defendant, Miss Lebedeva states (without giving the grounds for such statement) that the basis of the application to place ZAO Media-Most in liquidation is to be found in Federal Law No.6 - FZ on Insolvency (Bankruptcy) (dated 8 th January 1998). She goes on to exhibit various newspaper articles which suggest that ZAO Media-Most is incapable of paying all its creditors. We have to say that reliance upon newspaper articles to prove insolvency carries no weight whatsoever. Conversely, the defendant's affidavit merely asserts "the correct position in relation to ZAO Media-Most is that it was made the subject of a formal liquidation order by the Russian court upon the application of the Tax Inspectorate. Under the Russian system this is purely a formal order and does not indicate any financial difficulties." Later it refers to the process as a statutory winding-up of the company. This raises more questions than it answers. (iv) Given the unsatisfactory nature of the evidence on both sides, we do not think that we can place great weight on this aspect of the matter. Nevertheless, it appears to be the case that, even on the defendant's version, ZAO Media-Most was placed in some form of compulsory winding-up against its will on the application of the Tax Inspectorate. Mr O'Connell suggested that we might wish to hear the defendant's deponent, Mr Stepanyants in person. We declined to do so on the grounds that it is up to the parties to put in their affidavits all the relevant evidence upon which they wish to rely so that the other side has an opportunity of considering that evidence. If we had allowed Mr Stepanyants to give evidence on additional matters, the plaintiff would not have been in a position to respond to such points at the hearing. (v) As to the question of dissipation of assets, it is often the case that there is no concrete

evidence of an intention on the part of a defendant to remove assets from the jurisdiction. The case of Third Chandris Shipping Corporation -v- Unimarine SA

- (1979) 2 All ER 972 and the comments of Bingham, J. in *Siporex* at 439 make it clear that the fact that the party against whom a Mareva injunction is sought is a company which has no published accounts and about which nothing is known in relation to its business or financial position may be sufficient grounds for granting such an injunction. That is the position here. This is an application to set aside a Mareva injunction. One might have expected the defendant to produce evidence to the Court that it was quite wrong for an injunction to be granted because the company was clearly willing and able to meet the award if upheld on appeal. Yet nothing of this nature was produced. The affidavit is not even sworn by an officer of the company, merely by the Russian lawyer who represents the interests of the defendant. We are told nothing of the nature of the defendant's business. Was this the only transaction into which it entered or is it a substantial holding or trading company? What is the nature of its financial position? We have not been shown any balance sheet or other accounts and have been told nothing about the nature, location or substance of its assets. Nor has the defendant put forward any particular grounds of hardship. Mr O'Connell made the point that any freezing of a company's account is by definition an interference with its right to deal with its assets as it thinks fit and gives rise to hardship. Nevertheless, in a case such as the present where, on the face of it in the light of the arbitration award, the defendant owes a substantial amount of money to the plaintiff, the defendant has only itself to blame if it says nothing about any particular hardship it will suffer. e.g. the funds are committed to bona-fide trading activities. (vi) In our judgment, given that this is a case of post-award relief, the complete absence of any evidence about the financial position of the defendant or the nature of its business or the offer of any security (whether in whole or in part) for the award is sufficient for us to conclude that there is a risk of dissipation of assets in the event of the injunction being lifted. 33. In all the circumstances we are in no doubt that, notwithstanding the non-disclosure by the plaintiff, this is one of those cases where, in our discretion, we should re-impose the injunctions. POSTSCRIPT (i) Gagging Order 34. As stated earlier, a gagging order was made preventing Mr Gusinsky from being informed of the proceedings for 14 days. It was subsequently discharged by agreement. However a gagging order is an exceptional order. It requires convincing evidence to justify it. There were not the beginnings of such evidence in the papers presented to me. The plaintiff should not have asked for such an order and I should not have granted it. 35. Given the exceptional nature of a gagging order, it is not sufficient for such an order simply to be included, without more, as part of the prayer for interim relief in the Order of Justice. If a gagging order is being sought, the affidavit in support must refer specifically to this fact and must then go on to explain why such an order is required and the grounds for submitting that it is justified. (ii) Readiness of the plaintiff to respond to an application to set aside an injunction. 36. In this case, despite having agreed a hearing date for the defendant's application to set aside the injunctions, the plaintiff applied for an adjournment on the basis that the affidavit filed on

behalf of the defendant was lengthy and complex and required a response from the plaintiff's deponent, Miss Minaeva, who was on holiday. The Court refused the application to adjourn. We wish to emphasise, that if a plaintiff takes the step of restraining a person from dealing with his assets - a drastic invasion of a person's rights - he has to anticipate that there may be a prompt application to set aside or vary the injunction. The plaintiff must therefore be at the ready to respond to such an application. It is not acceptable for a plaintiff, having set the Court's procedure in motion, to then argue that it needs a lengthy period to justify the continuation of the ex parte relief. The Court will of course not be unreasonable. It is right that a plaintiff should have the opportunity to respond to evidence produced by a defendant in support of an application to set injunctive relief aside; but it is incumbent upon the plaintiff to act as a matter of urgency. 37. For the reasons which we have given we re-impose the injunctions contained at paragraphs 1 - 5 of the Order of Justice. [The court heard arguments on costs] 38. I order the plaintiff to pay the costs of the defendant on an indemnity basis. It is true that the injunctions have been re-imposed. But these proceedings were necessary only because of the serious failure of the plaintiff to fulfil its duty to the Court. The defendant succeeded in getting the injunctions discharged and acted perfectly reasonably and properly in bringing the application. The need to emphasise to plaintiffs the gravity with which the Court views serious non-disclosure requires that the plaintiff pay the costs of and incidental to this application on an indemnity basis notwithstanding that, following discharge, we have decided to re-impose the injunctions. Mr Thompson submitted that the defendant did not need to go into such detail at this stage in relation to the alleged defects in the arbitration process, but, in my judgment, the matters raised by the defendant were material and the level of detail did not go beyond that which was reasonable. Authorities. Arbitration (Jersey) Law 1998: Article 30 Siporex Trade S. A-v-Comdel Commodities Limited (1986) 2 Lloyd's L. R. 428 at 437. Brink's Mat Limited -v- Elcombe (1988) 1WLR 1350. Schachtbau GmbH-v-Ras Al Khaimah National Oil Co (1987) 2 All ER 769 at 780. Gidrxsimi Shipping Co. Limited -v- Tantomar-Transportes Maritimos Lda (1994) 4 All ER 507. Third Chandris Shipping Corporation -v- Unimarine SA (1979) 2 All ER 972. Re JL Young Manufacturing Company

[1900] 2 Ch 753 CA. Lumley-v-Osborne [1901] 1 KB 532. Savings and Investment Bank, Ltd-v-Gasco Investments (Netherlands) BV [1984] 1 WLR; [1984] 1 All ER 296. Page Last Updated: 28 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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