EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

IN THE MATTER OF TRISTAN OIL LTD
AND IN THE MATTER OF THE BUSINESS COMPANIES ACT, 2004 (AS AMENDED)

CLAIM NO. BVIHCM 0120 OF 2023

BETWEEN:

TRISTAN OIL LTD

Claimant/Respondent

-and-

THE SCHEME CREDITORS

Defendant

Appearances:

Richard Fisher KC with Rosalind Nicholson, Marcus Haywood and Iain Tucker for the Claimant/Respondent.

George Bompas KC with Alex Hall Taylor KC for the Republic of Kazakhstan and the National Bank of Kazakhstan

2024: 28 February;

19 March.

JUDGMENT

Application to set aside order sanctioning a scheme of arrangement – section 179A BVI Business Companies Act - interested parties for the purposes of a scheme - service of sanction order pursuant to CPR 42.12 - joinder of parties after final order – liberty to apply – access to court files pursuant to CPR 3.13 – fraud - public policy – non-disclosure

[1] **WEBSTER J [AG]**: The applications before the Court raise important issues about the rights of third parties to intervene in and challenge a scheme of arrangement that has been approved by the Court under section 179A of the BVI Business Companies Act 2004 ("**the BC Act**").

[2] On 1st November, 2023, Mangatal J sanctioned a scheme of arrangement between the claimant, Tristan Oil Limited ("**the Company**"), and its creditors ("**the Sanction Order**"). On 7th December, 2023 the Republic of Kazakhstan ("**Kazakhstan**") applied under the Civil Procedure Rules 2023 ("**the CPR**"), the inherent jurisdiction of the Court and/or the Court's general case management powers, for various reliefs including the setting aside of the Sanction Order. The relief sought by Kazakhstan includes:

(1) that Kazakhstan be declared an interested party for the purposes of the scheme of arrangement;
(2) that the Company be directed under CPR 42.12 to serve the Sanction Order on Kazakhstan, care of its legal practitioners in the jurisdiction;
(3) so far as necessary, under CPR 19.3, Kazakhstan:

(a) be joined as a party to the proceedings;

(b) be allowed to apply under the liberty to apply reserved by the Sanction Order, and be permitted access to the documents on the Court file in the proceedings;

(c) any seal on the file be lifted for that purpose; or

(d) alternatively, an order under CPR 3.13 that Kazakhstan may inspect the documents on the Court file; and

(4) the Sanction Order be set aside.

[3] The National Bank of Kazakhstan "(**NBK**") filed a similar application on 8th January 2024 seeking the same relief. Both applications are effectively before the Court in the form of a consent order between Kazakhstan and the NBK (together **"the Applicants**") and the Company seeking the Court's determination of four preliminary issues arising out of the applications by the Applicants. The preliminary issues are set out in paragraph 13 below.

Background

[4] The Company is a BVI registered company. Mr. Anatolie Stati is the sole shareholder and one of the two directors of the Company. The other director is Ms. Anna Silver who gave evidence for the Company. The Company was incorporated on 24th of October, 2006 as a special purpose vehicle to raise finance to fund the operations of two oil and gas companies operating in Kazakhstan, Kazpolmunay LLP and Tolkynneftegaz LLP (together "**the Guarantors**"). Mr. Stati also owned the Guarantors. The Company issued credit notes due in 2012 to various investors ("**the Original Noteholders**") and raised approximately US$531 million which it advanced to the Guarantors to fund their oil and gas operations in Kazakhstan.

[5] The Company alleges that Kazakhstan expropriated the Guarantors' rights and interests under contracts that they had for exploiting oilfields in western Kazakhstan. Mr. Stati and his son, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding

Limited (referred to collectively as ("**the Claimant Parties**") commenced arbitration proceedings against Kazakhstan in July 2010, the seat of arbitration being Sweden. The arbitral tribunal awarded the Claimant Parties approximately US$500 million in damages, interest and legal expenses to the Claimant Parties to be paid by Kazakhstan ("**the Award**"). The Supreme Court of Sweden rejected two attempts by Kazakhstan to set aside the Award. All avenues to challenge the Award in Sweden have been exhausted. The Award is a final order that cannot be challenged in Sweden.

[6] Kazakhstan did not honour the Award and the Claimant Parties launched execution proceedings against it in Sweden (the seat of the arbitration), Belgium, Luxembourg, Italy, the Netherlands, England and the United States of America. These proceedings are continuing and are heavily contested. The consistent theme of Kazakhstan in the execution proceedings is that the Award was obtained by fraud and should not be recognised or executed in any of the countries where execution proceedings have been brought by the Claimant Parties.

[7] Eventually the Claimant Parties ran out of money to continue funding the ongoing litigation to enforce the Award. The Company decided to take steps to raise additional funds from new investors to continue the execution proceedings. Without the additional funding the enforcement actions would have ground to a halt and there would be no meaningful recovery of the Award. Having secured new sources of funding the Company proposed a scheme of arrangement with the Original Noteholders and the new investors ('**the Scheme**"). The essence of the Scheme in very general terms is that the new investors would become senior creditors and would be given priority in the waterfall of repayments by the Company. The Original Noteholders would receive repayment only after the senior noteholders were paid. This would amount to a variation of the rights of the original creditors. Therefore, it was necessary to propose and implement the Scheme.

Steps to approve the Scheme

[8] The Company initiated proceedings under section 179A of the BC Act to sanction the Scheme. Section 179A contemplates a three-step procedure for obtaining sanction of a scheme. The steps are:

(1) a hearing to consider whether a meeting of the creditors or shareholders (as the case may be) to consider, and if thought fit, approve the scheme by the required majority of 75% of the creditors or members present and voting;

(2) the holding of the meeting ordered by the Court; and

(3) if the scheme is approved by the required majority, a further hearing to consider whether the scheme should be sanctioned.

[9] The Company initiated the process by issuing a fixed date claim form on 29th June, 2023 seeking an order convening a meeting of the Company's creditors for the purpose of considering the Scheme. It also applied for and received an ex parte order sealing the Court's file in the scheme proceedings. On 15th August, 2023 the Company secured an order from Mangatal J to convene a meeting of the creditors of the Company to consider and, if thought fit, approve the Scheme. The meeting was duly held on 5th October 2023. The Scheme was approved by the majority of the creditors representing 81.8% in value of the creditors present and voting. The only creditor who did not approve the Scheme was King & Spalding, the Company's attorneys who by then were owed substantial amounts for fees. The amount owed to them represented approximately 12.5% in value of the creditors attending the meeting.

[10] The third step in the process was the sanction hearing which took place before Mangatal J on 1st November, 2023. The only creditor who opposed the Scheme was King & Spalding. On the first day of the hearing, which was scheduled to last three days, King and Spalding withdrew their objection. The hearing proceeded unopposed and the learned judge granted the Sanction Order. The Sanction Order

was duly filed with the Registrar of Companies as required by section 179A(4) of the BC Act.

[11] Following the grant of the Sanction Order the Company applied for and was granted Chapter 15 recognition in the United States by the United States Bankruptcy Court of the Southern District of New York. The new investors advanced funds to the Company and thereby became the Company's senior creditors. The funds were used to pay past and future expenses of the execution proceedings.

[12] As stated above Kazakhstan and NBK filed separate applications in the now completed scheme proceedings seeking the relief set out in paragraph 2 above. The main affidavit evidence in support of Kazakhstan's application was by Mr. Philip Carrington, an English solicitor in the firm of Herbert Smith Freehills, Kazakhstan's solicitors in England. Four other persons submitted affidavits on behalf of Kazakhstan. NBK's evidence was in the form of an affidavit by Mr. Peter Hardy, an English solicitor in the firm of Reed Smith LLP, NBK's solicitors in England. The evidence on behalf of the Company is contained in the fifth affirmation of Ms. Anna Silver, a director of the Company.

[13] The scene was set for a heavily contested application and on 1st February, 2024 the parties narrowed the issues and entered into a consent order that the following matters be tried as preliminary issues:

(1) Whether Kazakhstan and NBK, or either of them, should be declared interested parties for the purposes of the Scheme;
(2) Whether the Company should be directed (pursuant to CPR 42.12) to serve the Sanction Order on Kazakhstan and/or NBK;
(3) Whether Kazakhstan and NBK, or either of them –
    (i) should be joined as parties to the proceedings;
    (ii) be permitted to apply pursuant to the liberty to apply provision in the Sanction Order; and/or

(iii) be permitted to access the documents on the Court's file in the proceedings, or to inspect any such documents; and/or

(4) Whether the Applicants' applications should be summarily dismissed or struck out

[14] A related issue but not a part of the Scheme proceedings is that in or about early 2023, the Applicants obtained certain money judgments against the Claimant Parties in proceedings before the High Court in England. The Applicants then obtained ex parte orders in the BVI registering the judgments as judgments of the BVI Court ("**the Registered Judgments**"). On 5th May, 2023, the Claimant Parties applied to set aside the Registered Judgments. The set aside application is scheduled for hearing by the Commercial Court on 27th and 28th March, 2024.

Preliminary Issue 1 – Whether Kazakhstan and NBK, or either of them, should be declared interested parties for the purposes of the Scheme.

[15] Section 179A of the BC Act describes a scheme of arrangement (for the purposes of this case) as a Court approved compromise or arrangement between a company and its creditors. Once the scheme is voted on by the required statutory majority and approved by the Court in accordance with section 179A it becomes binding on all the creditors in the defined classes even though it will affect their rights as creditors and even further if they did not vote with the majority to approve the scheme. It is an arrangement between the company and its creditors and, generally speaking, third parties are not involved in the process of considering and sanctioning the scheme.

[16] It is common ground in this case that Kazakhstan and NBK are not creditors of the Company. Nonetheless, they have asked the Court to declare them persons who are interested in the Scheme because:

(1) the Award was obtained by fraud perpetrated by the Claimant Parties and findings of fraud were made by reputable courts in Europe in the

execution proceedings.[1] The funds generated by the Scheme will be used by the Company to harass Kazakhstan by pursuing the execution proceedings of the Award that was obtained by fraud; and

(2) the Claimant Parties, against whom Kazakhstan and NBK have the Registered Judgments[2], will occupy a lower position on the waterfall of payments by the Company and the Applicants' ability to execute the Registered Judgments against them will be prejudiced.

[17] The BC Act does not define who is an interested person for the purposes of a scheme of arrangement. The issue of who is an interested party in a scheme usually arises when the scheme is being considered by the Court at the sanction stage. There are cases where the courts have allowed third parties to be heard, or acknowledge that they can be heard, when the sanction application is being considered by the Court. In **Re BAT Industries plc**[3], a decision of Neuberger J (as he then was) that was relied on by both sides, some of the creditors of a company objected to the proposed scheme by the members of the company to restructure and reorganise the company so that it would become a subsidiary of another company. The creditors who objected did so on the ground that if the scheme was implemented the company would be unable to meet damages awards that might be awarded against it in extant proceedings in the United States. In dealing with this case learned counsel for the Company, Mr. Richard Fisher KC, noted in his skeleton argument at paragraph 64 that Neuberger J opined that the Court could take account of the views of third parties who are affected by the scheme itself or any subsequent step which is clearly dependent or consequent on the sanctioning and implementation of the scheme. However, the Judge cautioned that:

> "I should emphasise that my conclusions on these two points do not mean that the court has some sort of roving commission at the suit of any objector who claims some sort of prejudice as a result of a scheme for which sanction is sought pursuant to s.425(2) [of the Companies Act 1985]. Mr Richards' points all have force in the sense that they emphasise, as do the

[1] See paragraph 57 below.
[2] See paragraph 14 above.
[3] Unreported 3 September 1998 – Neuberger J.

passages I have quoted from Buckley, that a s.425 scheme is essentially a domestic matter between the company and its members (at least where the scheme, as here, is one between the company and its members and not between the company and its creditors)."

[18] Mr. Fisher KC also relied on the following statements of counsel that were accepted by Leech J in **Re Lamo Holdings BV**[4]

> "In principle, a party not bound by a scheme has standing to appear at the sanction hearing and oppose the sanction of the scheme. There are no statutory restrictions seeking to limit the class of persons who can address the Court or the considerations which can be taken into account by the Court. However, the Court does not have a roving commission at the suit of any objector who claims prejudice as a result of a scheme, and the Court's discretion must be kept within proper bounds."
> "The Court cannot ignore objections of a third party on the basis that they are better raised in another forum. The Court must apply its own legal principles to determine whether it is right to sanction the scheme. However, the Court is entitled to consider whether the objecting party will have other opportunities in other legal proceedings to voice its objection, especially where the relevant subsequent steps (which form the basis for the objection) have only a remote and inchoate connection with the scheme."[5]

[19] The principles in these cases are reflected in the Explanatory Statement that was circulated to the creditors before the meeting of the creditors in August 2023 which states in paragraph 12.1 -

> "The Court may also be prepared to hear such representations and objections by counsel for any other person whom they are satisfied has a substantial economic interest in the Scheme. Therefore, it is possible that objections will be made at or before the Sanction Hearing and that any such objections will delay or possibly prevent the Scheme from being sanctioned and becoming effective." (Emphasis added)

This passage neatly summaries the need for third parties to voice their objections to a scheme in a timely manner and definitely before the scheme is sanctioned.

[20] The two cases that I have referred to, as well as other cases cited by counsel on both sides, and the Explanatory Statement, leave me in no doubt that the Court has

[4] [2023] EWHC 1558.
[5] Ibid at paragraph 54.

a discretion on the hearing of a section 179A sanction application to hear objections from third parties to the proposed scheme. However, a scheme of arrangement is a matter between a company and its creditors, and the Court should exercise its discretion carefully to allow third parties to object to the scheme and, a fortiori, to rely on third party objections to refuse sanction. This is particularly true when the objectors have alternative avenues for voicing their objections. The Court does not have a roving commission to override the wishes of the company as approved by its creditors.

[21] Applied to the facts of this case there are three major obstacles that the Applicants have to overcome before this Court can find that they, or either of them, can be declared persons with a relevant interest in the Scheme.

[22] Firstly, the Applicants have not brought any case to the Court's attention where the objections of third parties have been entertained by the Court after the scheme had been sanctioned by the Judge. The cases that were cited deal with applications by objectors during the proceedings for the sanctioning of the scheme.

[23] It is at the sanction hearing that the Court will hear and deal with objections by third parties. Now that the Scheme has been sanctioned and the proceedings brought to an end, the Court has a very limited power to reopen a scheme that has been sanctioned under section 179A of the BC Act. I will deal with those circumstances below.

[24] The second point flows directly from the first. The Sanction Order is a final order of the Court, and this Court does not have power to set aside its own final orders. The remedy for a person who is dissatisfied with the final decision of the Court is to appeal to the Court of Appeal or file a fresh action claiming that the order sanctioning the Scheme was procured by fraud. Mr. Bompas KC, did not dispute this principle. He submitted that the Court can revisit a final order if the person applying can show that there has been a material change in circumstances since the order was made or that the judge who made the order was misled on the facts. He relied on the

decision of this Court in **Michael Wilson & Partners Limited v Temujin International Limited and others**[6] where these points were made. However, the facts in **Michael Wilson** are different and the case is distinguishable. It involved an interlocutory application to vary a disclosure order made in the context of a freezing injunction. This was an interlocutory application and the resulting order could have been challenged in any of the two circumstances outlined in the case. However, the position regarding a final order is different. A final order can only be revisited by the Court of Appeal on appeal, or by a fresh action based on fraud.[7]

[25] There is no provision in the CPR to amend or vary a final order of the Court and the Court does not have an inherent jurisdiction to do so. In **Roult v North West Strategic Health Authority**[8], a decision of the Court of Appeal in England, the issue was whether the claimant in a personal injury claim was bound by the terms of a final settlement approved by the lower court. The claimant attempted to vary the terms of the settlement because of changed circumstances. The trial judge rejected the application and the Court of Appeal dismissed an appeal against the judge's decision finding that the settlement was a final order and could not be revisited by the lower court. At paragraph [15] Hughes LJ said:

> "But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part. And it especially does not apply where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

[26] I am satisfied that the Sanction Order made by Mangatal J on 1st November, 2023 was a final order and that it should not be revisited or amended in any way by this Court.

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[6] BVIHCV2006/0307 (unreported).
[7] **Daniel Terry v BCS Corporate acceptances limited and another** [2017] EWCA Civ 2422**.**
[8] [2009] EWCA Civ 444.

[27] The third reason why I do not think that Kazakhstan should be declared an interested party is that Kazakhstan does not have a relevant interest in the Scheme. By 'relevant interest' I mean an interest that would be affected by the Scheme itself, or the implementation thereof, in a way that is sufficient for a court to say that the Scheme should not be sanctioned. Kazakhstan claims a relevant interest on two bases, namely:

(1) the Scheme will provide the Company with funds that will be used to finance the continued execution proceedings to collect the Award that was obtained by fraud, and

(2) the fact that the changed waterfall of repayments means that the Claimant Parties will receive less. This will prejudice the Applicants' ability to execute the Registered Judgments it now has against the Claimant Parties.

[28] I reject the first reason because Kazakhstan does not have a right not to be pursued for the recovery of the amount due under the Award, whether or not the Award was obtained by fraud. The aim of the Scheme was to raise funds to continue the attempts to recover the Award. Kazakhstan's attempts to set aside the Award in the seat of arbitration (Sweden) have failed and the Award is final and unimpeachable. The Applicants have resisted enforcement efforts and their attempt to set aside the Sanction Order appears to be another attempt to frustrate the efforts of the Company and the Claimant Parties from recovering the huge amounts that are still owing on the Award. The Applicants will be able to pursue the issue of fraud, as they have been doing, in the various execution proceedings. Conversely, the Company and its creditors will be prejudiced by the inability to pursue the execution proceedings and collect the amounts due under the Award.

[29] The other reason that Kazakhstan has for saying that it has a relevant interest in the Scheme is that the implementation of the Scheme will likely result in the Claimant Parties receiving less from the Company in the new waterfall of repayments. This may be so, but it is not a matter that would cause a court to withhold sanction of the

Scheme. The Scheme is an arrangement between the Company and its creditors. The Applicants are not creditors. They are third parties and their rights are against the Claimant Parties as contained in the Registered Judgments. Those rights are not affected by the Scheme or its implementation. The fact that the Claimant Parties may have less assets against which the Registered Judgments can be enforced is not a sufficiently proximate event which would cause the Court to withhold sanction of the Scheme.

Conclusion on interested party

[30] Considering the matters in the preceding paragraphs I do not think that Kazakhstan is entitled to a declaration that it is an interested party for the purposes of the Scheme. Kazakhstan does not have a relevant interest as defined above, and even if it did, the Court does not have jurisdiction at this stage to revisit the final order contained in the Sanction Order. The same conclusions are true for NBK. Preliminary Issue 1 is decided in favour of the Company

Preliminary Issue 2 - Whether the Company should be directed to serve the Sanction Order on Kazakhstan and NBK, or either of them

[31] CPR rule 42.12 is self-explanatory. Insofar as it is relevant to this case it states that:

> "(1) If in any claim an order is made which might affect the rights of persons who are not parties to the claim, the court may at any time direct that a copy of any judgment or order be served on any such person. …
> (5) Any person so served, or on whom service is dispensed with:
> (a) is bound by the terms of the judgment or order; and
> (b) may take part in any proceedings under the judgment or order.
> (6) Notwithstanding paragraph (5), any person to whom that paragraph applies may apply within 28 days to discharge, vary or add to the judgment or order."

[32] The Court has not been directed to any written decision of a court in the Eastern Caribbean where CPR 42.12 was considered. Approaching the matter from first principles, the rule empowers the Court to serve a non-party with an order that affects the rights of the non-party. The use of the words "judgment or order" in

paragraph 5 suggests that the rule applies to interlocutory and final judgments or orders. Where an order is served on a non-party under the rule he or she is bound by the terms of the order and he or she can apply to discharge or vary the order. Before making an order under this rule in this case the Court must be satisfied of two things:

(1) that Kazakhstan's and/or NBK's rights will be affected by the Scheme or its implementation, and

(2) that it is an appropriate case to make the order.

[33] I said enough in paragraph 28 above to make it clear that Kazakhstan does not have a right not to be pursued for payment of the Award. Further, that the potential impact that the implementation of the Scheme may have on the Applicants' ability to execute and get payment on the Registered Judgments is not a right that has been affected by the Scheme.[9]

[34] Finally, I bear in mind that the Applicants were aware since late June 2023 that the Company had filed a fixed date claim form seeking Court approval of the Scheme. On 18th July, 2023 their BVI lawyers, Carey Olsen, wrote to Walkers, the Company's BVI lawyers, requesting disclosure of the fixed date claim form and other documents relating to the Scheme. They also advised Walkers that:

> "We reserve our clients' right to seek to intervene in the proceedings relating to the Scheme to the extent necessary to protect our clients' interests, and/or to apply for leave to inspect documents on the court file, to the extent that you are not willing to provide these voluntarily.'

[35] On 26th July, 2023 Walkers replied to Carey Olsen denying the Applicants' right or entitlement to receiving the Scheme documents, advising them that the rights attached to the shares of the Company were not being altered in any way by the Scheme. The letter continued –

> "It follows that your clients have no rights against the Company which give them standing in respect of the Scheme, or which entitle them, or could

[9] See paragraphs 29 above

> entitle them, to intervene in the Scheme, much less to seek to intervene in the court proceedings which concern only the Company and its creditors. Furthermore and in any event, not only is your client a stranger to the Company's proposed Scheme, their interests are directly adverse to the Company and the interests of its creditors. Your client has no legitimate interest in the Scheme."

[36] Notwithstanding the outright refusal by Walkers to disclose any documents or information about the Scheme to the Applicants' BVI lawyers, Kazakhstan chose not to take any other step to obtain information about the Scheme until November 2023. Their explanation for the delay in not taking further steps is that they were satisfied by the correspondence in July with Walkers that the Scheme would not affect their position. In a letter dated 24th November, 2023 to Walkers they said –

> "On the basis of that correspondence [in July], our client understood that the Scheme would not affect its position, that it would have no standing in relation to the relevant proceedings as a result and that, practically speaking, the Scheme would be nothing to do with it."

[37] The Applicants also complained that the sealing the Court's file in the Scheme proceedings was a contributing factor why they did not apply sooner for the relief that they are now seeking. However, they did not take steps, as they could have, to get the Court to lift the seal on the file or to give them access to the documents on the file.

[38] It is clear from the Applicants' inaction between July and November 2023, and from their explanation for their inaction in the letter of 24th November, 2023, that they took a deliberate decision not to pursue any steps to compel the Company to disclose information about the Scheme and/or to allow them to participate in the sanction proceedings. This is not a satisfactory explanation for not taking action in a matter where the parties have been involved in acrimonious disputes for 13 years or more and the Applicants' claim that their substantial interests have been and are being affected by the Scheme. The delay, coupled with the lack of a relevant interest in the Scheme and the fact that the Sanction Order is a final order, are sufficient to find that the Court, in its discretion, should not make an order under CPR 42.12 that the Sanction Order be served on the Applicants.

[39] Preliminary Issue 2 is decided in favour of the Company.

Preliminary Issue 3 – Joinder, liberty to apply and access to documents on the Court's file

[40] Preliminary Issue 3 comprises a main issue and two sub-issues. The main issue is whether the Applicants or either of them should be joined as parties in the proceedings. The sub-issues are that if they are joined, whether they should be permitted to apply under the liberty to apply provision in the Sanction Order and/or whether they should be granted access to the documents on the Court's file.

Joinder

[41] Paragraph 3 of the strike out application prays that in so far as is necessary the Applicants be joined as parties to the proceedings pursuant to CPR 19.3. Rule 19.3 deals with the procedure for joining a new party. The principles underlying such an application are in rule 19.2(3) which provides -

> "The court may without an application add a new party to proceedings if –
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
> (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

The Applicants submitted that paragraphs (a) and (b) CPR 19.2(3) apply to this case because the joinder of the Applicants as new parties would help to resolve all the matters in dispute in the proceedings and there is an issue involving the Applicants which is connected to the matters in dispute in the proceedings. Therefore, it is appropriate to join the Applicants so that the Court can reconsider its decision with the benefit of the Applicants' evidence and submissions. They relied on the recent decision of this Court in **Esther Developments Limited v Villa Cornucopia**

Limited[10] which repeats the well-known principle that the Court has a broad discretion in deciding whether to add a new party to proceedings. I have also considered the cases cited by the Applicants including **Re Pablo Star limited**[11].

[42] There is no doubt that the Court has a wide discretion under CPR 19.3 to add new parties to a claim, but the discretion must be exercised judicially. The issues that the Applicants have invited the Court to consider for joining the Applicants are:

(1) whether the Award and its enforcement constitute a fraud; and

(2) whether the Court should as a matter of public policy have approved the Scheme which will assist in the furtherance of the fraud and which may lead to the commission of money laundering offences.

[43] I have already found that the allegation of fraud was a live issue before the arbitration tribunal in Sweden and the tribunal did not find that there was fraud. The issue of fraud is being dealt with and will be resolved by the various courts in which the execution proceedings are taking place. It is not necessary to join the Applicants as parties to the completed claim for sanctioning the Scheme so that the issue of fraud can be considered.

[44] I will deal with the alleged breach of BVI public policy below.[12] Suffice it to say at this stage that public policy is not a sufficient reason to join the Applicants as parties to the completed claim for sanctioning the Scheme.

[45] In all the circumstances the application or request for joinder of the Applicants is refused.

Liberty to apply

[10] BVIHCV2022/0290 delivered 27th January, 2023.
[11] [2017] EWCA Civ 1768.
[12] Paragraph 57 below.

[46] Having refused the applications for service of the Sanction Order under CPR 42.12 and for joinder of the Applicants under CPR 19.3, it is not necessary for the Court to make an order on the issue of whether the Court should give the Applicants liberty to apply pursuant to the liberty to apply provision in the Sanction Order. That option is not available to a non-party. Nonetheless, I will deal with the issue.

[47] A liberty to apply clause is often included in an order where there are matters flowing from the order which may need to be worked out, if necessary, by returning to Court. In the words of Somervell LJ in **Cristel v Cristel**[13]**:**

> "Prima facie, "liberty to apply" is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself be varied."[14]

[48] A liberty to apply in a sanctions order is often included because a scheme of arrangement can raise issues when it is being implemented that require resolution by the Court. It was not included to allow even the parties to the scheme, far less third parties, to apply to the Court to vary the terms of the scheme or set it aside. As stated above this can only be done by way of an appeal to the Court of Appeal against the Sanction Order or by a fresh claim seeking to set aside the order on the basis of fraud.

[49] There is no merit in the Applicants' position that the liberty to apply allows the Court to vary or set aside the Sanction Order.

Access to the Court file

[13] [1951] 2KB 725 at 728.
[14] Ibid per Somervell LJ at 728.

[50] The final aspect of Preliminary Issue 3 is whether the Applicants should be permitted access to the documents on the Court's file in the proceedings, or to inspect any such documents.

[51] The right or entitlement of a non-party to proceedings to inspect and or take copies of documents or record files in the proceedings is regulated by CPR 3.13 which reads:

> "(1) On payment of the prescribed fee, and a person is entitled, during office hours, to inspect and take a copy of any of the following documents filed in the court office, namely-
>
> (a) A claim form, notice of application made on the 8.1(6) or a statement of case, but not any documents filled with or attached to the statement of case;
> (b) a notice of appeal;
> (c) a judgment or order given or made in court; and
> (d) with the leave of the court, which may be granted on an application made without notice, any other document."

[52] In this case the Court's file was sealed by order of Mangatal J on 29th July, 2023 largely to preserve the confidential information contained in the Scheme. Now that the proceedings have come to an end the seal on the file should be lifted. This means that the documents listed in subparagraphs (a), (b) and (c) of rule 3.3 are available for inspection and copying by the Applicants and any other person. The documents covered by subparagraph (d) are not available for inspection or copying by the applicants or any other person who is not a party to the Scheme proceedings. Such documents are only available where a non-party applies for and is granted permission by the Court to inspect and or take copies of the subparagraph (d) documents in the Court's file.

[53] Based on my findings above that the Applicants do not have a relevant interest in the Scheme, their interests are such that they should be protected by not implementing the Scheme, and the delay in applying for access to the documents, the applicants' application to inspect and take copies of the documents on the Court's files is refused.

[54] Preliminary Issue 3 comprising joinder, liberty to apply and access to documents on the Court's file has been decided in favour of the Company. Before turning to the fourth preliminary issue of whether the Court should dismiss the Applicants' set aside applications, I will deal with two other matters that were raised in the proceedings.

Public policy

[55] The Applicants' fallback position is that even if they do not have standing to participate in any way in the Scheme proceedings, the Court should be mindful that it may be sanctioning a fraudulent scheme that involves money laundering offences that are contrary to the laws and the public policy of the BVI.

[56] The submission that the Scheme is contrary to the public policy of the BVI court should not be seriously considered at this stage. The Scheme that was before the learned judge on the sanction application was based on the Award against Kazakhstan which was made after a full trial in which there were serious allegations of fraud against the Claimant Parties. The arbitral tribunal in the seat of the arbitration (Sweden) did not find that fraud was proved and the Swedish Supreme Court rejected two attempts by the Applicants to set aside the Award. All avenues to challenge the Award in Sweden have been exhausted and the Award is now unimpeachable.

[57] The Award has been recognised and/or not set aside in Italy and the United States despite allegations of fraud by Kazakhstan in those proceedings. Recognition applications in the Netherlands and Belgium were rejected on account of findings of fraud. These decisions are being appealed. Recognition applications in England were discontinued with adverse costs consequences against the Claimant Parties. The proceedings have been stayed in Luxembourg in favour of private criminal proceedings against the Claimant Parties brought by Kazakhstan. There have also been proceedings in Gibraltar, Moldova and the proceedings in the BVI recognising

the Registered Judgments made by the courts in England. Details of the enforcement and other proceedings were disclosed to the creditors in the Explanatory Statement.

[58] It is difficult to see why it would be contrary to public policy of the BVI for the Company to rearrange its affairs with its creditors in order to pursue the enforcement of the Award. The fact that the Sanction Order is now final and the Applicants have other remedies for the alleged fraud are additional reasons why the public policy argument should not be considered at this stage.

Nondisclosure

[59] I find that there was adequate disclosure in the Explanatory Statement of the reasons for the Scheme (raising funds to continue the execution process) and of the various proceedings that have been launched by and against the Company and the Claimant Parties regarding the Award. It is significant that none of the Scheme creditors (who are directly affected by the Scheme) have complained about the level of disclosure provided by the Company in the Explanatory Statement.

Conclusion on the preliminary issues

[60] The first three preliminary issues have been decided in favor of the Company. It follows that the fourth preliminary issue must also be decided in favour of the Company and the set aside applications be dismissed.

Disposition

[61] The order of the Court is:

(1) The four preliminary issues are decided in favour of the Company.

(2) The Order dated 29th July, 2023 sealing the Court's file is vacated and the seal is lifted.

(3) The notices of application filed by Kazakhstan and NBK on 7th December, 2023 and 8th January, 2024 respectively, are dismissed.

(4) Costs of the applications to be paid to the Company by the Applicants jointly and severally. Such costs to be assessed if not agreed within 21 days.

[62] The Court acknowledges the invaluable assistance of leading counsel and those assisting them.

Paul Webster (Ag.)
High Court Judge

By the Court

Registrar