THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0007

BETWEEN:

AO ALFA-BANK

Appellant

and

KIPFORD VENTURES LIMITED

Respondent

Before:

The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Mde. Kimberly Cenac-Phulgence	Justice of Appeal [Ag.]
The Hon. Mr. Reginald T. A. Armour	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Lowenstein, KC with him Mr. James Gardner, Mr. Andrew Willins and Ms. Tamara Cameron for the Appellant
Mr. Allain Choo-Choy, KC with him Ms. Claire Goldstein, Mr. Robert Maxwell Marsh, and Ms. Jhneil Stewart for the Respondent

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2025: March 24, 25;
2026: July 29.

Interlocutory appeal – Interim injunction – Right of access to justice – Indefinite stay of proceedings- Whether the appellant was denied access to justice – Delay in judgment - Good arguable case – Foreign law – Whether the learned judge erred in finding the appellant had no good arguable case of tortious conspiracy under Russian law

The appellant, AO Alfa-Bank ("the Bank"), is a bank registered in Russia while the respondent, Kipford Ventures Limited ("Kipford"), is a company registered in the British Virgin Islands. Kipford is ultimately owned and controlled by Mr. Dimitri Ananyev and his brother, Mr. Alexei Ananyev ("the Ananyev brothers").

Pursuant to a loan agreement dated 25th October 2017 ("the Loan Agreement") the Bank advanced sums totalling US$140 million to a Russian mining company named

Krasnobrodsky Yuzhny ("KBY"), to finance one Mr. Dimitri Usanov's acquisition of KBY from the Ananyev brothers. The Bank alleges that it was induced to enter into the Loan Agreement by fraudulent misrepresentations.

On 15th December 2020, the Bank filed an ex parte application against Kipford seeking an interim injunction in support of a claim brought by it against Kipford ("the Original Action"). On 17th December 2020, Jack J granted the application and issued a worldwide freezing injunction against Kipford (the "First Injunction"). This First Injunction was later discharged by Jack J on 23rd November 2021 in an oral ruling.

The Bank appealed against Jack J's decision. This appeal was dismissed by the Court of Appeal which found that Jack J had been entitled to conclude that the Bank had no good arguable case of fraud against Kipford and that certain non-disclosures by the Bank at the ex parte hearing were serious.

On 13th January 2022, the Bank commenced a new action against Kipford under Claim No. BVIHC (COM) 2022/007 ("the New Action"). On the said date, the Bank issued the Second Injunction Application seeking a worldwide freezing injunction in the sum of US$165,666,859.94. On 25th January 2022, Kipford offered undertakings accepted by consent before the court not to dispose of its assets within or outside of the British Virgin Islands up to the value of US$142 million pending determination of the Second Injunction Application ("the Undertakings"). On the same date, the Original Action and the New Action were consolidated ("the Consolidated Action"). In the New Action, the Bank advanced claims under Russian law, specifically Articles 1064 and 1080 of the Russian Civil Code ("the RCC") and contended that Kipford is liable as a joint tortfeasor because it acted in concert and with common intent with the other participants in the alleged conspiracy and made at least some contribution.

On 23rd May 2022, Kipford filed an application seeking a stay of the Bank's claim in the Consolidated Action, alternatively, security for costs ("the Stay/SFC Application"). Kipford also later filed an application to adduce further evidence ("the Further Evidence Application").

The Second Injunction Application, the Stay/SFC Application, and the Further Evidence Application came on for hearing before the learned judge on 4th to 6th July 2023. In her judgment delivered in the Consolidated Claim on 29th February 2024, the learned judge, inter alia, dismissed the Second Injunction Application with costs to Kipford, stayed the claim until further order save for the payment and ascertainment of costs and finalizing the order and ordered the Bank to make interim payments on account of costs to Kipford. The learned judge also held that there is no arguable case of Kipford having joint liability in tort pursuant to Articles 1064 and 1080 of the RCC. The learned judge also found that even if the Bank had a good arguable case, discretionary factors arising from the Bank's designation under the sanctions legislation weighed strongly against granting a freezing injunction.

Dissatisfied with the learned judge's decision, the Bank filed a notice of appeal on 5th March 2024, which was amended on 26th June 2024. Kipford filed a counter notice of appeal on 15th July 2024. The main issues for consideration are: 1.) whether the learned judge failed to properly consider the applicable principles of law including, with reference to the sanctions legislation, in granting an indefinite stay of proceedings and making the costs orders which she did, and in so doing, denied the Bank access to justice and thereby made unlawful orders; and 2.) whether the Bank made out a sufficiently good arguable case, advanced before the learned judge at the interlocutory stage, of Kipford being liable for tortious conspiracy under Russian law, to warrant the issue of an interim freezing injunction pending trial.

Held: allowing the appeal and setting aside the judgment and consequential orders of the learned judge and making the further orders at paragraphs 75 and 79 of this judgment, that:

1. The right to access to justice properly understood and applied means that an order of the court amounting to an indefinite stay of proceedings issued at an interlocutory stage, thereby stifling the process indefinitely, is an impermissible intrusion on a party's right to access to the courts and therefore to justice. The right of access to the court is a fundamental common law right which comprises not only the right to open the court door by commencing proceedings but the right to adjudication. Ex facie, the order of the learned judge on 29th January 2024 staying the claim until further order, amounts to an indefinite stay of the proceedings.

2. The judge's exercise of discretion, that the Sanctions Regime was capable of being construed to mean that any judgment that the Bank may obtain against Kipford would not be enforceable by the Bank, was based on an erroneous construction of Regulation 58 (5) of the of the Russia (Sanctions) (EU Exit) Regulations 2019. The learned judge was also wrong to rely on the proposition that there was ongoing uncertainty as to whether the Bank could properly obtain one or more licenses to pay costs orders in Kipford's favour since the law is clear that the payment of adverse costs is licensable. The learned judge's decision and Orders thus pronounced and reasoned are accordingly plainly wrong. They amount to an error of law both on principle and as an erroneous exercise of discretion, in failing to pay due regard to the common law and to the Constitution, viz Article 16 (9) of a litigating party's constitutional entitlement to a fair trial.

   Mints and others v PJSC National Bank Trust and another company [2023] EWCA Civ. 1132 applied.

3. A good arguable case is one which is more than barely capable of serious argument, but not necessarily one that is considered to have more than a fifty percent chance of success at trial. In cases where a party relies on foreign law, that law must be pleaded and proved as a fact to the satisfaction of the court by evidence or sometimes by other means. The findings by a judge in respect of foreign law are matters of evidence and at the interlocutory stage, there was no viva voce evidence before the learned judge nor any cross examination of the parties' experts on their evidence. In this case, the learned judge had before her a totality of expert witness evidence setting out the areas where there was potential disagreement as between the parties' foreign law experts on their written evidence. The pleadings which were before the learned judge included a draft Amended Consolidated Statement of Case

which the parties agreed had been accepted as between them and argued fully before the learned judge but was not referred to by the learned judge in her judgment at all. In the circumstances, the learned judge was wrong to find as conclusively as she did that there is no good arguable case of Kipford having joint liability in tort pursuant to Articles 1064 and 1080 of the RCC.

Hualon Corporation v Marty Limited BVIHC COM 2014/0090 (delivered 20th November 2015, unreported) applied.

JUDGMENT

[1] **ARMOUR JA [AG.]**: The appellant, AO Alfa-Bank ("the Bank"), is a bank registered in Russia. The respondent, Kipford Ventures Limited ("Kipford"), is a company registered in the British Virgin Islands. This is an appeal against the interlocutory decision of the learned judge dated 29th February 2024, wherein the learned judge made the following orders:

(1) The further evidence application filed by Kipford is granted, with no order as to costs;

(2) The Second Injunction Application, filed by the Bank on 14th January 2022 is dismissed, with costs to Kipford to be assessed by another judge if not agreed within 14 days;

(3) Save for payment and ascertainment of costs and finalizing the Order herein, the claim is stayed until further order; and

(4) The Bank is ordered to make interim payments on account of costs to Kipford in the sums of US$450,000.00 and US$225,000.00. Interest is to run at 5% per annum on the US$450,000.00 from 23rd November 2021, and on the US$225,000.00 from 12th May 2023, until payment in full. Kipford is awarded the costs of both its applications on 8th

December 2021 and 14th June 2023 to be assessed by another judge if not agreed within 14 days.[1]

[2] In the court below, the Bank alleged that Kipford participated in a tortious conspiracy under Russian law to defraud the Bank of US$140 million advanced under a loan agreement dated 25th October 2017. The Bank sought a freezing injunction to prevent dissipation of Kipford's assets pending the determination of its claim in the court below.

[3] The Bank now appeals against the learned judge's decision. Kipford has filed a Counter-Notice of Appeal seeking to uphold the dismissal of the injunction on two additional grounds: (i) that there is no real risk of dissipation of assets by Kipford; and (ii) that the Bank's claims are time-barred under Russian law.

Background

[4] As stated, the Bank is registered in Russia. Kipford, the respondent, is a company registered in the British Virgin Islands. Kipford is ultimately owned and controlled by Mr. Dimitri Ananyev and his brother, Mr. Alexei Ananyev ("the Ananyev brothers").

[5] This appeal arises out of a loan agreement dated 25th October 2017 ("the Loan Agreement").[2] Pursuant to the Loan Agreement, the Bank advanced sums totalling US$140 million to a Russian mining company named Krasnobrodsky Yuzhny ("KBY"), to finance one Mr. Dimitri Usanov's acquisition of KBY from the Ananyev brothers.

[6] The Bank alleges that it was induced to enter into the Loan Agreement by fraudulent misrepresentations. The Bank relied on three categories of alleged misrepresentations. First, that Mr. Usanov represented that the mine contained 'high quality coal' and that KBY was 'an active business with potential for returns' ("mining

[1] Page 105 of the Core Bundle.
[2] Page 118 of the Core Bundle.

representations"). Second, that Mr. Usanov represented that he would contribute US$45 million of his 'own funds' to the transaction through his company Wolater Limited ("Wolater"). Third, that the Loan Agreement itself contained representations in clauses 4.1.8 and 4.1.9 that there were no circumstances that could have a material adverse effect on KBY's performance and that KBY's financial statements gave a true and fair view of its financial position.

[7] The Bank also alleges that the Ananyev brothers, KBY, and Mr. Usanov conspired to deceive the Bank. The Bank contends that Kipford, as a company ultimately controlled by the Ananyev brothers, participated in the conspiracy by receiving approximately US$48.34 million of the loan proceeds through a series of circuitous transfers purportedly pursuant to Receivables Assignment Agreements dated 2nd October 2017 and 30th October 2017.[3]

[8] Prior to the Second Injunction Application, from the refusal of which this appeal comes, on 15th December 2020, the Bank had filed for an earlier ex parte application against Kipford seeking an interim injunction in support of a claim brought by it against Kipford, namely under Claim No. BVIHC (COM) 2020/0219 ("the Original Action"). On 17th December 2020, Jack J granted that application and issued a worldwide freezing injunction against Kipford ("the First Injunction").

[9] The First Injunction next came on for an inter partes hearing before Jack J on 17th and 18th November 2021. On 23rd November 2021, Jack J delivered an oral ruling, discharging the First Injunction and set out his reasons in a written judgment dated 14th December 2021.[4]

[10] Jack J found that the mining representations were too vague to be actionable and that the 'own funds' representation was true, because Wolater did in fact use its own funds to acquire the shareholding in a limited liability company, Redwade, which in

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[3] Page 108 and 147 of the Core Bundle.
[4] BVIHC (COM) 2020/0219 (delivered 14th December 2021, unreported) at page 4 of the Core Bundle.

the Original Action was pleaded as being the one hundred per cent owner of KBY. He also found that the Bank had been guilty of serious non-disclosure at the ex-parte hearing, having failed to disclose two Russian court cases: (i) the Bank's claim against its technical consultant IMC Monta ("IMC") for professional negligence; and (ii) a claim by KBY and Wolater to set aside the share sale and purchase agreement for fraud, which had been dismissed by the Russian courts.

[11] Notwithstanding that he discharged the First Injunction, Jack J commented on the risk of dissipation of assets by Kipford, at paragraph 54 of his judgment, in these terms:

> "…in respect of dishonest assistance, constructive trust, tracing and restitution …The points are properly arguable … But since fraud has not been proved to the relevant standard, that argument drops to one side. If the claimant did meet the **Niedersachsen**[5] test, then I would find there was a real risk of dissipation. The way monies have been moved shows a real risk that assets will continue to be moved so as to render execution difficult or impossible. But in the event, these points do not save the freezing order."

[12] The Bank appealed Jack J's decision to the Court of Appeal on 14th January 2022. On 12th May 2023, the Court of Appeal delivered its judgment dismissing the appeal and upholding Jack J's decision. The Court found that Jack J had been entitled to conclude that the Bank had no good arguable case of fraud against Kipford and that the non-disclosures by the Bank were serious.[6]

Second Injunction Application before Mangatal J

[13] On 13th January 2022, prior to the discharge of the First Injunction but subsequent to Jack J's oral ruling, the Bank commenced a new action against Kipford under Claim No. BVIHC (COM) 2022/007(the "New Action"). On 13th January 2022, the Bank issued the Second Injunction Application seeking a worldwide freezing injunction in the sum of US$165,666,859.94.

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[5] A reference to **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH & Co. KG (The Niedersachsen)** [1983] 1 WLR 1412 and [1984] 1 All ER 398.
[6] BVIHCMAP2021/0047 (delivered 14th January 2022, unreported).

[14] On 25th January 2022, Kipford offered undertakings accepted by consent before the Court not to dispose of its assets within or outside of the British Virgin Islands up to the value of US$142 million pending determination of the Second Injunction Application (the "Undertakings" or "Consent Undertakings"). On the same date, the Original Action and the New Action were consolidated ("the Consolidated Action").

[15] In the New Action, the Bank advanced claims under Russian law, specifically Articles 1064 and 1080 of the Russian Civil Code ("the RCC"). The Bank contended that Kipford is liable as a joint tortfeasor because it acted in concert, coordination, and with common intent with the other participants in the alleged conspiracy and made at least some contribution.

[16] The Bank asserted that following the Russian Invasion of Ukraine on 24th February 2022, the Bank became a designated entity under sanctions legislation in various jurisdictions, including the United Kingdom, the British Virgin Islands, the European Union, and the United States of America.

[17] On 23rd May 2022, Kipford filed an application seeking a stay of the Bank's claim in the Consolidated Action, alternatively security for costs ("the Stay/SFC Application"). On 20th June 2023, Kipford also filed an application seeking permission to adduce further evidence, namely the First Affidavit of Dimitry Ananyev dated 2nd June 2023 ("Ananyev-2") and the Second report of Roman Zykov dated 2nd June 2023 ("Zykov-2") ("the Further Evidence Application").

[18] The Second Injunction Application, the Stay/SFC Application, and the Further Evidence Application came on for hearing before Mangatal J on the 4th to the 6th July 2023. The learned judge delivered her interlocutory judgment in the Consolidated Claim on 29th February 2024,[7] and made the following orders:

[7] Judgment; Mangatal J, paragraph 135.

(1) The further evidence application filed by Kipford is granted, with no order as to costs;

(2) The Second Injunction Application, filed by the Bank on 14th January 2022 is dismissed, with costs to Kipford to be assessed by another judge if not agreed within 14 days;

(3) Save for payment and ascertainment of costs and finalizing the Order herein, the claim is stayed until further order; and

(4) The Bank is ordered to make interim payments on account of costs to Kipford in the sums of US$450,000.00 and US$225,000.00. Interest is to run at 5% per annum on the US$450,000.00 from 23rd November 2021, and on the US$225,000.00 from 12 May 2023, until payment in full. Kipford is awarded the costs of both its applications on 8th December 2021 and 14th June 2023 to be assessed by another judge if not agreed within 14 days.

[19] At paragraph 127 of the judgment, the learned judge held that "there is no good arguable case of Kipford having joint liability in tort pursuant to Articles 1064 and [1080] of the RCC. None of the unlawful conduct relied upon by the Bank at paragraphs 88-89 of the CSOC is alleged to be conduct on the part of Kipford." She further held that "there is no sufficient evidence to tilt the balance from negligent or innocent to an inference of dishonesty."[8] The learned judge also held that, even if the Bank had a good arguable case, discretionary factors arising from the Bank's designation under the sanctions legislation weighed strongly against granting a freezing injunction. She found that "any judgment that the Bank may obtain would not be enforceable by the Bank against Kipford," and that there was "ongoing uncertainty" as to whether the Bank would obtain licenses to pay costs orders.[9] The learned judge also commented that the Bank was "in essence attempting to have a

[8] Paragraph 127 at page 102 of the Core Bundle.
[9] Paragraph 129 at page 103 of the Core Bundle.

second bite of the cherry." This was because "the case of accounting fraud could well have been advanced before Jack J at the first application."

The Appeal

[20] Being dissatisfied with the learned judge's decision, the Bank filed a Notice of Appeal on 5th March 2024. An amended Notice of Appeal was filed on 26th June 2024. Kipford filed a Counter Notice of Appeal on 15th July 2024.

[21] The Bank has advanced numerous grounds of appeal, which can be distilled under the following headings:

(1) Procedural unfairness- that the learned judge's delay of seven and a half months in delivering judgment resulted in procedural unfairness, including the failure to consider oral submissions, post-hearing written submissions, and the Court of Appeal decision in **Mints and others v PJSC National Bank Trust and another company (or Mints CA);**[10]

(2) Good arguable case- that the learned judge erred in finding that the Bank had no good arguable case of tortious conspiracy under Russian law, by resolving critical disputed questions of fact and difficult questions of law at an interlocutory stage and by overlooking the Bank's amended pleading, evidence, and Russian law expert evidence;

(3) Sanctions and discretion – that the learned judge erred in her treatment of sanctions legislation and the Bank's right of **access to justice**, including by relying on the wrong authority (the first instance High Court decision in Mints rather than the Court of Appeal decision);

(4) Second bite of the cherry – that the learned judge erred in commenting that the Bank was seeking a "second bite of the cherry";

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[10] [2023] EWCA Civ. 1132.

(5) Stay and interim payments – that the learned judge erred in granting a stay and interim payment orders.

Counter Notice of Appeal

[22] In the Counter Notice of Appeal, Kipford seeks to uphold the learned judge's dismissal of the Second Injunction Application on two additional grounds that did not form part of the learned judge's reasoning, namely: (i) No real risk of dissipation of assets by Kipford has been established and therefore the Second Injunction Application is dismissed, and (ii) the claims against Kipford are time barred pursuant to Articles 196 and 200 of the RCC and therefore the Second Injunction Application is dismissed.

Appellant's Submissions in Support of the Appeal

[23] The central complaint running through the Bank's appeal against the orders of the learned judge is that the delay of seven and a half months in delivering judgment after a three-day hearing resulted in extreme procedural unfairness. The Bank complains that the learned judge resorted only to the pre-hearing written skeleton arguments and did not consider the oral submissions made over three days, the post-hearing written submissions filed by the parties in July 2023, or the Bank's email of 6th October 2023 drawing the Court's attention to the decision of the English Court of Appeal in **Mints v PJSC National Bank Trust**.

[24] The appellant also points out that the judgment contains only nine short paragraphs of discussion and analysis, which amount to little more than conclusions, while the remaining 127 paragraphs consist almost wholly of recitals of the parties' skeleton arguments. The Bank submits that this want of reasons itself justifies setting aside the judgment.

[25] The Bank cited **Dansingani v Canara Bank**[11] for the proposition that where there has been a lengthy delay in giving judgment, the appellate court must exercise special care in reviewing the evidence and reasoning. The Bank submits that the delay of seven and a half months, exceeding the three-month period identified in **Floreat Investment Management Limited v Churchill**[12] triggered enhanced scrutiny.

[26] The appellant further submits that the learned judge overlooked that Kipford had confined its Stay/SFC Application at the hearing so that it did not seek a stay unless the court found that payment of costs was impossible. The learned judge nonetheless granted a stay despite making no such finding. Similarly, the Bank contended that the learned judge granted the Further Evidence Application in its entirety even though Kipford had abandoned most of that application in oral submissions.

[27] It was also submitted that the learned judge decided the applications by reference only to the pre-hearing skeleton arguments, without regard to the oral submissions that modified the parties' cases.

[28] With respect to the finding that the Bank had **no good arguable case**, the Bank submits that the learned judge erred in that regard. The Bank contends that, while the learned judge correctly stated that she should not resolve critical disputed questions of fact or difficult points of law, she then proceeded to do precisely that in a single paragraph of six sentences resolving the scope of Russian joint tortfeasorship law, its application to the facts, and the question of dishonesty. The Bank cited the judgment of Farara J(Ag)[13] in **Hualon Corporation v Marty Limited**[14] at paragraph 43, that a good arguable case is "one which is more than barely capable of serious argument, but not necessarily one that I consider would

[11] [2021] EWCA Civ 714.
[12] [2023] EWCA Civ 440.
[13] As he then was; now Farara JA (Ag).
[14] BVIHC COM 2014/0090 (delivered 20th November 2015, unreported).

have more than a 50 percent chance of success at trial." The Bank submitted that its case cleared this threshold, pointing to: (i) the draft Amended Consolidated Statement of Claim, which all parties referred to and the learned judge overlooked; (ii) the extensive evidence of the underlying fraud, including the Receivables Assignment Agreements and the circular movement of US$45 million; and (iii) the expert evidence of Russian law, including material disputes between the parties' experts.

[29] The Bank emphasises that its case does not require Kipford to have made any representation. Under Russian law, a person may be liable as a joint tortfeasor where he acts in concert and with common intent with others and makes at least some contribution to the harm. The Bank's case is that Kipford made such a contribution by agreeing to receive the proceeds of the fraud pursuant to the Receivables Assignment Agreements.

[30] The Bank further submits that the learned judge erred by applying BVI law to the Bank's claim without first determining that the double actionability rule applied. The Bank relies on **Red Sea Insurance Co v Bouyges SA**[15] for the proposition that the double actionability rule does not apply where the claim is governed by a foreign law sufficiently connected to the claim. The Bank also submits that the learned judge failed to consider its case on attribution of the Ananyev brothers' knowledge and intention to Kipford.

[31] The Bank also submits that the learned judge erred in concluding that there was insufficient evidence to tilt the balance from an innocent to a dishonest inference. The Bank argued that the timing of the Receivables Assignment Agreements, 23 days before and 5 days after the execution of the Loan Agreement, the absence of any legitimate commercial rationale, and the circuitous movement of funds provided a strong evidential basis for an inference of dishonesty. At the very least, argued the Bank, this was a matter for trial.

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[15] [1995] 1 AC 190.

[32] The Bank submits, moreover, that the learned judge fundamentally erred in her treatment of the sanctions legislation and, relied on the statement of Chancellor Sir Julian Flaux at paragraph 178 in **Mints (CA)** that the right of access to court is a fundamental common law right. The Bank submitted that refusing a freezing injunction on sanctions-related grounds intruded into this right. Any such intrusion can only be justified if clearly authorised by primary legislation and is the minimum necessary. The learned judge failed to apply this principle.

[33] With respect to the learned judge's comment on "the second bite at the cherry,"[16] the appellant submits that this was wrong in fact and law. The Bank submits that its evidence explained why the accounting fraud case could not have been advanced before Jack J. The Bank only discovered the relevant facts after the First Injunction hearing, through documents obtained in December 2019 and 2020, and through the Criminal Expert Report received in April 2021.

[34] Further, the learned judge failed to apply the correct test for abuse of process as in **Henderson v Henderson**[17] and did not consider the relevant factors in **Koza Limited v Koza Altin Isletmeleri,**[18] including that it may be harder to establish abuse in an interlocutory context.

[35] With respect to the judge's ruling on Kipford's Stay Application, the Bank argues that a stay could not be justified in the circumstances, given the judge's conclusion that security for costs would stifle the claim. The learned judge also erred in making interim payment orders without considering that the Bank could not comply until Kipford provided banking coordinates for a licence application. Further, that the learned judge overlooked that Kipford had narrowed its Stay/SFC Application so

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16 Judgment; Mangatal J, paragraph 126.
17 (1843) 3 Hare 100.
18 [2021] 1 WLR 170 at [42].

that it did not seek a stay unless payment of costs was impossible. The learned judge made no such finding yet granted a stay.

[36] As indicated prior, the Bank also submits that the learned judge erred in granting the Further Evidence Application in its entirety. The Bank noted that at the hearing, Kipford had confined its application to paragraphs 8-15 of Ananyev-2 and abandoned Zykov-2. The learned judge nonetheless granted permission for the whole of both documents, deciding an application that was not before her.

Respondent's Submissions in Opposition to the Appeal

[37] Kipford submits that the Bank's complaints of procedural unfairness are exaggerated and without merit. Kipford noted that a period of seven and a half months' deliberation in the context of complex applications heard over three days is not unreasonable, particularly where that period straddled the summer court vacation. The respondent relied on the BVI Court of Appeal's decision in **Lau Man Sang et al v King Bun Limited et al,**[19] where a delay of five months was held not to be a ground for appeal.

[38] Further, a judge is not required to address every single point submitted by the parties. The learned judge had summarised the parties' arguments at length in the earlier parts of her judgment (paragraphs 53-64 and 70-89). As to **Mints CA,** the respondent submits that the learned judge was not obliged to revisit her analysis in light of a decision handed down after the hearing, particularly where the Bank did not seek permission to make further submissions.

[39] Kipford submits that the learned judge correctly concluded that the Bank has no good arguable case. Kipford identified the fundamental flaw in the Bank's pleaded case, is that all of the fraudulent misrepresentations relied upon are alleged to be conduct by KBY, Mr Usanov, or Wolater, and not conduct by Kipford. Kipford invited

[19] BVIHCMAP2021/0034 (delivered 7th July 2023, unreported).

the Court to examine paragraphs 88-89 of the Consolidated Statement of Claim and observe that Kipford is not mentioned. The only way the Bank seeks to tie Kipford to those unlawful acts is through the assertion that because Kipford received part of the proceeds of the loan, it must have acted in concert with the other alleged conspirators. Kipford submits this assertion ignores the evidence that the funds were received pursuant to historic loan and assignment agreements entered into in connection with the corporate restructuring of a Russian media group, considerably pre-dating the Loan Agreement.

[40] In this regard Kipford referred to the oral submissions made before the learned judge, referring her to the evidence of Mr. Ananyev and, the transactions evidenced by the historic loan and assignment agreements exhibited to Ananyev-1 and Ananyev-2 showing that the underlying loans were made between 2008 and 2010, that the assignment agreements were dated 16th December 2014, and that the Receivables Assignment Agreements to Croston Consultants Limited were dated 2nd and 30th October 2017, respectively. The respondent submits that these agreements were entered into over a long period and had nothing to do with the Loan Agreement. Kipford relied on the principle in **Three Rivers District Council v Bank of England**[20] at [185]-[186] that there must be some fact "which tilts the balance and justifies an inference of dishonesty." Kipford submits that the Bank had failed to identify any such fact.

[41] As to the Russian law issue, Kipford submitted that the parties' experts were agreed as to the relevant legal principles; the dispute was as to application, which the learned judge was entitled to assess. Kipford further submits that the Bank's reliance on the draft Amended Consolidated Statement of Claim did not advance its case, as the amendments did not introduce any new evidence and did not alter the core elements of the Bank's case.

[20] [2001] UKHL 16.

[42] Kipford submitted that the learned judge was correct to take into account the Bank's designation under sanctions legislation as a powerful discretionary factor. Kipford argued that the fundamental rationale for a freezing injunction is to preserve assets against which a judgment can be enforced. If a judgment would not be enforceable, the basis for the injunction collapses.

[43] Kipford distinguished **Mints (CA)** on two grounds. First, the Mints appeal was not concerned with the enforcement of judgments (see [148]). Second, Regulation 58(5) of the Russia (Sanctions) (EU Exit) Regulations 2019 does not address coercive enforcement by court order. The respondent further submitted that the Bank's right of access to justice is not absolute and must be balanced against Kipford's rights, including its right to recover its costs. Kipford noted that the Bank's own evidence demonstrated that it had been unable to find any bank willing to process payments from the Bank.

[44] As to practical problems in making payment, Kipford submitted that the learned judge's findings were based on the Bank's own evidence, including the 3rd and 4th Affidavits of Mr Jeffrey Kirk setting out the Bank's extensive but unsuccessful attempts to find a bank willing to process payments. The respondent submitted that it does not lie in the Bank's mouth to suggest that Kipford ought to have adduced evidence to contradict the Bank's own evidence.

[45] Kipford submitted that the learned judge's comment about a "second bite of the cherry" was an accurate observation. Kipford noted that the Bank had previously sought a freezing injunction before Jack J based on essentially the same factual matrix, and that Jack J had discharged that injunction. The Bank was now seeking a second freezing injunction based on a re-characterisation of the same underlying events. Kipford submitted that the learned judge was entitled to take this into account as a discretionary factor. Kipford further noted that the Bank's evidence on timing was summarised by the learned judge at paragraphs 53-64 of her judgment; she was not required to accept that evidence.

[46] Kipford submitted that the learned judge was correct to grant a stay. Kipford noted that the Bank's own evidence demonstrated that it could not pay adverse costs orders or provide security for costs. The Bank had approached or investigated 31 financial institutions, and none had agreed to provide the requisite services. In these circumstances, Kipford submitted that it was just and proportionate to stay the proceedings. As to the interim payment orders, Kipford submitted that the learned judge was entitled to make those orders to ensure that Kipford was not left out of pocket while the Bank pursued its claim.

Counter Notice of Appeal

Respondent's Submissions

[47] Kipford submits that the counter-notice should be upheld. On risk of dissipation, Kipford submitted that the Bank's case was essentially based on the allegations of dishonesty. If the learned judge's finding that there is insufficient evidence to support an inference of dishonesty stands, the foundation of the Bank's case on risk of dissipation is undermined. Kipford noted that it has not dissipated any assets and has voluntarily given undertakings not to dispose of its worldwide assets up to US$142 million, which have remained in place for over two years.

[48] On limitation, Kipford submitted that the Bank had a real opportunity to discover the relevant facts by no later than 14th August 2018, when it arranged for Binta to take over control of Wolater and KBY. Even before that point, the Bank's information rights under the Loan Agreement provided it with an opportunity to discover the relevant facts. The Bank's claim was issued on 14th January 2022, more than three years later, and is therefore time-barred under Russian law pursuant to Articles 196 and 200 of the Russian Civil Code.

Appellant's Submissions in Response to the Counter Notice of Appeal

[49] The Bank submitted that the counter-notice should be dismissed. On risk of dissipation, the Bank noted that Jack J had found a real risk based on the way monies were moved, not merely on the nature of the claim. The Bank submitted that Kipford's argument is premised on the good arguable case finding; if the Bank succeeds on that point, the risk argument falls away.

[50] As a matter of BVI law, foreign limitation laws only apply if they extinguish a right, not if they merely bar a remedy.[21] The Bank submitted that there is a good arguable case that the Russian limitation provisions merely bar a remedy. Further, even if Russian law applies, the Bank has a good arguable case that its claim is not time-barred because it did not learn of the relevant facts until after November 2021, and its claim was issued on 14th January 2022. The Bank submitted that questions of when a claimant should have discovered a fraud are quintessential issues for trial.

Issue

[51] Notwithstanding that the Bank has structured its appeal and arguments in support thereof in a particular order, referable to its grounds of appeal (which I have summarised earlier at paragraph 21, supra) I am of the view that the issues which arise on this appeal should be addressed in a different order of priority.

[52] In my view, the main issues which arise for consideration of this court are as follows:

(1) Whether the learned judge failed to properly consider the applicable principles of law including, with reference to the sanctions legislation, in granting an indefinite stay of proceedings and making the costs orders which she did, and in so doing, denied the Bank **access to justice** and thereby made unlawful orders; and

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[21] Chen Mei-Huan v Victory Success Holdings Ltd BVIHC COM 44/2019 (decided 30th November 2020, unreported) at [61]).

(2) Whether the Bank made out a sufficiently **good arguable case** on the case advanced before the learned judge at this interlocutory stage, of Kipford being liable for tortious conspiracy under Russian law to warrant the issue of an interim freezing injunction, pending trial.

Discussion

Issue No. 1: **Access to Justice**

[53] The important issue of constitutionality and statutory interpretation arising on this appeal involves the principle of **Access to Justice**. It has been addressed variously by the parties in their written skeleton arguments and submissions and in their oral submissions before this Court. I consider this to be the pre-eminent ground of appeal, involving, as it does, the common law and constitutionally guaranteed rights of persons to gain access to the Courts, and encompassing the right, in the case of a civil claim such as the present, to have the claim adjudicated upon by the court from the interlocutory stage through to judgment.

[54] The substance of the Bank's complaint in this regard was developed across its Grounds of Appeal (#3 and sub paragraphs) and in its arguments in its Updated Skeleton Argument,[22] and orally before this Court in respect of (a) injunction discretion and (b) the procedural applications before the learned judge in respect of the stay, security and interim payments, with respect to her analysis of the impact of UK/BVI Sanctions Legislation and, her failure to have regard to, and to apply, the reasoning of the UK Court of Appeal in **Mints CA**.

[55] In its Skeleton Arguments[23] and oral submissions before this Court, with respect to the import of the Court of Appeal decision in **Mints CA**, King's Counsel for Kipford argued that it was wrong "to describe the pursuit of a claim without the benefit of a worldwide freezing order as a denial of access to justice".

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[22] Paragraphs 4 (2), (4), (6); 18 (4); 29 (1), (4); 36 (4), (6); 52-58; 59; 60; 61; 62; 63; 64; 65; 66; 67; 68; 69; 70; 71; 74 (a); 75; 76; 77; 78; 79; 80; 81; 98; 99; 100-107; 108-112; 113; 114-118].

[23] Respondent's Skeleton Arguments paragraph 59.6.

[56] Kipford's counsel sought to develop this argument by relying on an exchange in the Court of Appeal in **Mints CA** between Kings Counsel Pillow and the Chancellor, Sir Julian Flaux, referring to the judgment of the Court of Appeal at paragraph 148 where the Chancellor stated, "I would note here that the present appeal is not concerned with any issue of enforcement of a judgment and whether that would infringe the sanctions regime." That point was developed at some length by King's Counsel in terms that Regulation 85(5) specifically concerns what may be paid into a frozen account of a designated person and that, this does not concern the enforcement of judgments generally. King's Counsel relied on the passage of Chancellor Sir Julian Flaux at paragraph 148 of **Mints CA** to submit that the Court of Appeal's decision is not authority for the proposition that a judgment in favour of a designated person is generally enforceable in that person's favour against a defendant's assets.

[57] I am of the view that this submission relies too narrowly on the Chancellor's reasoning in the Court of Appeal judgment with reference to the application of Regulation 58 (5) to the facts of the case before him. With respect, that submission is not sustainable on the wider construction of general principle which is clearly articulated by the Court of Appeal decision in **Mints CA**.

[58] This right of access properly understood and applied means that an order of the court amounting to an indefinite stay of proceedings -issued at an interlocutory stage - thereby stifling[24] the process indefinitely, is an impermissible intrusion on a party's right of access to the courts and therefore to justice.

[59] The Order (among others) made by the learned judge on the 29th January 2024 was that "Save for payment and ascertainment of costs and finalising the Order herein, <u>the claim is stayed until further order.</u>"[25] (emphasis supplied)

[24] Goldtrail Travel Ltd v Onur Air Tasimacilik [2017] 1 WLR 3014.
[25] Judgment:, Mangatal J, paragraph 135 (3).

[60] Ex facie, this Order is an indefinite stay of the proceedings. It is made more pellucid given the learned Judge's earlier reasoning that, what "...points away from the Court granting the injunction are the fact that under the Sanctions Regime, any judgment that the Bank may obtain would not be enforceable by the Bank against Kipford,"[26] and that the "...interests of justice favour a case management stay of the proceedings until further order, until such time as the Sanctions Legislation is revoked or the Bank ceases to be designated as a sanctioned entity."[27] The learned judge appears to have arrived at this conclusion on a misunderstanding of what the Mints High Court decision was dealing with, as articulated in the very paragraph, in her further statement which follows on: "This is because Mints mainly dealt with whether or not a license can be granted to cover payment of an adverse costs order."

[61] The principle of access to justice was articulated clearly by the Court of Appeal decision of Chancellor, Sir Julian Flaux in **Mints CA**, which is worth quoting in some detail, the more so since the learned judge below made no reference to that Court of Appeal judgment, notwithstanding that it had been brought to her attention:

> "The right of access to the court is a fundamental common law right. It comprises not only the right to open the court door by commencing proceedings, since if the right ended there it would be a hollow one. It encompasses the right in the case of a civil claim such as in the present case, to have the claim adjudicated upon by the court, in other words, where the cause of action is a valid one to obtain a judgment in one's favour. That the right includes the right to adjudication and thus judgment is clear from all the authorities [citing] ex parte Witham as a whole... Lord Reid JSC in UNISON ... 'the constitutional right of access to the courts' from the speech of Lord Diplock in Attorney General v Times Newspapers ...[and] all three judgments in the Court of Appeal ...in R v. R. The right is not limited to litigants of whom the court approves or who satisfy some objective moral standard. The court system in England and Wales does not have outlaws or, as they were described in **Taruta**, pariahs…"[28]

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[26] Judgment : Mangatal J, paragraph 129.
[27] Judgment : Mangatal J, paragraph 130.
[28] Mints CA: paragraph 178.

> "It is quite clear that an indefinite stay of proceedings ... would amount to an intrusion on the right of access to the courts..."[29]
>
> "In my judgment none of the other provisions of SAMLA contains any clear and unambiguous curtailment on the right of access to the courts. ... As set out above, I have determined, without reference to the principle of legality, that on their proper construction Regulations 11 and 12 do not prohibit the entry of a money judgment, but that if it were necessary to have resort to the principle of legality, the words of those Regulations should be read down and construed so as not to curtail the right of access to the court including to have a claim adjudicated upon and if successful to obtain a money judgment."[30] [All emphasis supplied]

[62] The learned judge's decision and Orders thus pronounced and reasoned are accordingly plainly wrong. They amount to an error of law both on principle and as an erroneous exercise of discretion, in failing to pay due regard to the common law[31] and to the Constitution, viz Article 16 (9)[32] of a litigating party's constitutional entitlement to a fair trial.

[63] The learned judge accordingly failed to apply the law to the Bank's case, affording a litigating party in the British Virgin Islands its fundamental right of access to justice. She committed an error which was plainly wrong in law, based on her misunderstanding of the Sanctions Regime as prescribed by SAMLA and as adopted in the British Virgin Islands.

[64] To summarise on this issue: [a] Regulation 58 (5) is properly construed as permitting payment into a frozen account of the amount of a money judgment in respect of a pre designation obligation; [b] the loss of freezing relief which would otherwise be in place would be clearly an impediment to the right to access to have an effective judicial remedy; [c] the payment of adverse costs was licensable.

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[29] Mints CA: paragraph 182.
[30] Mints CA: paragraph 210.
[31] Goldtrail, supra.
[32] BVI Constitutional Order 2007: For the determination of the existence or extent of his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law.

[65] The judge proceeded, wrongly, to grant an indefinite stay and wrongly issued the Orders made in respect of Security for costs and Interim payments on account of costs.

[66] The judge's exercise of discretion, that the Sanctions Regime was capable of being construed to mean that any judgment that the Bank may obtain against Kipford would not be enforceable by the Bank, was based on an erroneous construction of section 58 (5). The learned judge was also wrong to rely on the proposition that there was ongoing uncertainty as to whether the Bank could properly obtain one or more licenses to pay costs orders in Kipford's favour since the law is clear that the payment of adverse costs is licensable.

Issue No. 2: No Good Arguable Case

[67] With respect to the finding that the Bank had **no good arguable case.** It bears reminding ourselves, as an important consideration, that what was before the learned judge were <u>interlocutory applications only</u>. This was not a trial. There was no viva voce evidence nor cross examination of witnesses which the learned judge was called on to evaluate. The entirety of the evidence before the learned judge was on affidavit, including written expert reports. These points are important for the reasons, firstly, that this court is in as good a position as the learned judge to assess the correctness of her decisions, both as to fact and law;[33] and, secondly, having regard to the long line of authority and principles governing the treatment of evidence at the interlocutory level on the issue of serious issue to be tried or a good arguable case.[34]

[68] The Court has reviewed as well as listened to the substantive and comprehensive submissions on the part of the appellant Bank and the respondent Kipford on the issue of whether the Bank has made out a good arguable case or not. The Bank

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[33] Gee on Commercial Injunctions, 7th Edn (2021) para 24-045.
[34] American Cyanamid v Ethicon Ltd [1975] 1 All E. R. 504 and Ninemia Maritime Corporation v Tave Schiffahrtsgesellshaft Gmbtt ("The Niedersachen") [1984] 1 All ER 398.

submits that the learned judge erred in holding that it had not made out a good arguable case; Kipford submits she did not err.

[69] There are three areas in which this issue is to be considered. Firstly, as already pointed out, what was before the learned judge was an interlocutory application. Secondly, as the Bank contends, while the learned judge correctly stated that she should not resolve critical disputed questions of fact or difficult point points of law, she then proceeded to do precisely that in a single paragraph of six sentences, resolving the scope of Russian joint tortfeasorship law, its application to the facts, and the question of dishonesty. Thirdly, in the determination arrived at by the learned judge of no good arguable case, she made a finding with respect to foreign law against the background of there being before her significant expert evidence as to the applicability and meaning of foreign law, that is to say Russian law. The editors of **Dicey, Morris & Collins on the Conflict of Laws** [35] in their discussion of proof of foreign law start by setting out a rule: Rule 2-(1) states: "Where a party relies on foreign law, that law must be pleaded and proved <u>as a fact to the satisfaction of the court by evidence</u> or sometimes by other means." (emphasis supplied).

[70] On this issue of no good arguable case the Bank cited the case of **Hualon Corporation v Marty Limited**.[36] This case is helpful in two respects to underscore why the learned judge was wrong to have concluded as she did in the very short paragraph 127, that the appellant had not made out a good arguable case. Firstly, the Bank submitted that its case cleared the **Hualon Corporation** threshold of good arguable case, pointing to: (i) the draft Amended Consolidated Statement of Claim, which the learned judge overlooked; (ii) the extensive evidence of the underlying fraud, including the Receivables Assignment Agreements and the circular movement of US$45 million; and (iii) the expert evidence of Russian law. It relied

[35] 16th ed. 2022.
[36] BVIHC COM 2014/0090 (delivered 20th November 2015, unreported).

on paragraph 43 of the dictum of Farara J(Ag),[37] that a good arguable case is "one which is more than barely capable of serious argument, but not necessarily one that I consider would have more than a 50 percent chance of success at trial." Secondly, there is the further important point which the **Hualon Corporation** decision reminds us of. An issue in that **Hualon Corporation** case involved a conflict between the attorneys appearing for the parties with respect to Vietnamese law, that is to say evidence before the court as to the applicability of foreign law (which is also an issue in this case). After reminding himself of the appropriate caution governing the treatment of evidence at the interlocutory level on the threshold for a good arguable case,[38] Justice Farara (Ag) in the **Hualon Corporation** stated in terms "it is not for me at this stage to resolve on the documents and affidavits before me the key issues of fact regarding the exact nature and legal effect under Vietnamese law … there are some important factual issues… the resolution of these issues will involve questions of Vietnamese law."

[71] There were significant submissions made before this court with reference to the applicability or not of Russian law. I am fully mindful of that. I have taken into consideration the arguments made forcefully by the Bank and Kipford, and in particular by Kipford that, there was a degree of agreement as between the parties with respect to the applicability of Russian law. Nevertheless, I take into consideration that there was before the judge a totality of expert witness evidence highlighted in the **Schedule A Table**[39] setting out the areas where there was potential disagreement as between the parties' foreign law experts on their written evidence. I take into consideration further, the state of the pleadings which were before the judge, which included a Draft Amended Consolidated Statement of Case which the parties agreed had been accepted as between them and argued fully before the learned judge but which was not referred to by the learned judge in her judgment at all including the amended paragraph 87A, which pleads "Where that

[37] As he then was, now Farara JA (Ag), citing American Cyanamid and The Niedersachen.
[38] Supra.
[39] Core Appeal Bundle pages 799-804.

test is satisfied by a defendant, they will be deemed to have satisfied each of the requirements in RCC Article 1064 so long as they made at least some contribution to the harm, even if it was intangible or indirect." I take into consideration that findings by a judge in respect of foreign law are matters of evidence and that, at the interlocutory stage there was no viva voce evidence before the learned judge nor any cross examination of the parties' experts on their evidence.

[72] On the authority of **Hualon Corporation** and indeed **Dicey and Morris**, supra, I am of the view and so hold that the learned judge was wrong to find, as conclusively as she did that "there is no good arguable case of Kipford having joint liability in tort pursuant to articles 1064 and 108 of the RCC …In sum there is no sufficient evidence to tilt the balance from negligent or innocent to an inference of dishonesty. Thus, the necessary inference regarding the fund movement between Croston and Kipford is absent." [40] This is the most central and fundamental finding which I do not consider that the learned judge was lawfully correct to arrive at, at the interlocutory stage. I therefore find that the learned judge was entirely and blatantly wrong to have arrived at that conclusion at the interlocutory stage of this matter.

[73] On Issue No. 2 therefore, that is to say whether or not the judge was correct to have held that the appellant had made out no good arguable case of tortious conspiracy or of having joint liability in tort pursuant to articles 1064 and 1080 of the RCC, I am of the view and so hold that in so finding the judge erred significantly, both as a matter of law and in the exercise of her discretion.

Disposition

[74] Accordingly, having regard to my determination on Issue One, Access to Justice and Issue Two, No Good Arguable Case, I allow this appeal and set aside the judgment and the consequential orders of the learned judge, namely (i) the Order of dismissal of the Second Injunction Application filed by the Bank on the 14th January

[40] Judgment: Mangatal J, paragraph 127.

2022 [paragraph 135(2)]; (ii) the Order for the Indefinite Stay and payment of costs to Kipford [paragraph 135(3)]; (iii) the Orders that the Bank make interim payments on account of costs to Kipford [paragraph 135(4)]; and (iv) the Order granting the Further Evidence Application filed by Kipford.

[75] We are reminded by the **Caribbean Civil Court Practice 2024**[41] that, consistent with the vintage authority of **Hadmoor Productions Ltd v Hamilton**,[42] having found as I have that the learned judge erred fundamentally in law and in the exercise of her discretion, a Court of Appeal, albeit initially a court of review only "… becomes entitled to exercise an original discretion of its own."[43] Accordingly, in exercise of that original discretion, I further order that the Consolidated Action be set down for an expedited trial before another judge who will have all the powers of the Supreme Court to case manage the matter appropriately, including at trial. Pending that setting down and the assigned judge assuming conduct of the Consolidated Action I grant an interim injunction to the Bank, against Kipford, in the terms set out in paragraph [79.B] next. In framing the text of that interim injunction, I have deliberately drawn on the language of the Undertaking given by Kipford to the court below in the Consolidated Action, by consent on the 25th January 2022, which Undertaking is already part of the record before this Court and has been referred to.[44]

[76] Given my findings, Orders and Directions in this regard, save for the issue of delay, I do not consider it necessary for me to go on to consider and pronounce on the other issues which have been raised before this court, particularly since the matter will now have to go before another judge for trial. I turn next to delay.

[77] Both parties made submissions and cited authorities on the time it took for the learned judge to deliver her judgment in the matter, with the Bank complaining of

[41] Third Edition, Lexis Nexis/Butterworths, January 2024, page 495.
[42] [1983] 1 AC 191, HL.
[43] Lord Diplock, Hadmoor Productions supra, page 220.
[44] Paragraphs 14 and 47, infra.

procedural unfairness wrought on the Bank by that delay. Kipford submitted that the Bank's complaints of procedural unfairness are exaggerated and without merit and noted that a period of seven and a half months' deliberation in the context of complex applications heard over three days is not unreasonable. As I have already stated and, given the approach that I have taken on the two issues which I have identified and, the orders and directions which I give in this judgement, it is not necessary for me to make any finding with respect to the delay complained of. I do however acknowledge the authorities referred to by both parties. Whether occasioned by the delay or otherwise, the gravamen of the complaint on which the Bank has succeeded is that in her erroneous findings of law and in her failing, blatantly, to exercise her discretion properly, the learned judge can be acknowledged as having failed to pay proper regard to all of the material which was placed before her, including the parties' draft amended pleadings and submissions and, **Mints CA**, to highlight the more significant.

[78] On the subject of delay, it is appropriate that I acknowledge and apologise to the parties for my own delay in the delivery of this judgment, the responsibility for which I accept as mine, with apology also to my judicial colleagues. The material has been voluminous. I have done my best to obey the mandate of the authorities, to exercise special care and to have undertaken enhanced scrutiny in reviewing the evidence and reasoning which has led to my own conclusions.

[79] These are the Court's Orders and Directions:

[A] This appeal is allowed and the interlocutory judgment of Mangatal J dated the 29th February 2024 is hereby set aside along with the further consequential orders of the learned judge, namely (i) the Order of dismissal of the Second Injunction Application filed by the Bank on the 14th January 2022 [paragraph 135(2)]; (ii) the Order for the stay of the claim and payment of costs to Kipford [paragraph 135(3)]; (iii) the Orders that the Bank make interim payments on account of costs to Kipford [paragraph 135(4)]; and (iv) the Order granting the Further Evidence Application filed by Kipford.

[B] Pending review by the judge of the High Court who will be assigned to take conduct of the Consolidated Action, an interim injunction is hereby granted by this Court against the respondent Kipford Ventures Limited (hereinafter "Kipford") with immediate effect. –

(1) Kipford will not in any way cause or permit:

(a) The removal from the British Virgin Islands (hereinafter the "BVI") of any of its assets which are in the BVI up to the value US $142 million; or

(b) The disposal of, dealing with, encumbrance or diminution of the value of any of its assets whether they are inside or outside of the BVI up to the same value.

(2) Paragraph B1 applies to all of Kipford's assets, whether or not they are in Kipford's own name, whether they are solely or jointly owned, and whether Kipford is interested in them legally beneficially or otherwise. For the purposes of this injunction, Kipford's assets include any asset which Kipford has the power, directly or indirectly, to dispose of or deal with as if it were Kipford's own. Kipford is to be regarded as having such a power if a third-party holds or controls the property in accordance with Kipford's direct or indirect Instructions.

(3) The injunction in paragraph B1 includes the following assets in particular:

(a) Any shares or interest in shares held directly or indirectly beneficially or legally in Kipford;

(b) Any shares or interests in shares held directly or indirectly, beneficially or legally by Kipford in any other company, wheresoever situated, including, but not limited to authorizing such companies to dissipate or transfer their assets;

(c) Any money of Kipford standing into its credit in any bank account wheresoever situated, including the amount of any cheque drawn on such account which has not been cleared.

(4) If the total value of charges or other securities (the unencumbered value) of Kipford's assets in the BVI exceeds US $142 million Kipford may remove any of those assets from the BVI or may dispose of or deal with them so long as the total unencumbered value of Kipford's assets still in the BVI remains above US $142million.

(5) If the total unencumbered value of Kipford's assets in the BVI does not exceed US$142 million Kipford must not remove any of those assets from the BVI and must not dispose of or deal with any of them. If Kipford has other assets outside of the BVI, it may dispose of or deal with those assets outside the BVI, so long as the total unencumbered value of its assets, whether in or outside the BVI remains above US $142 million.

Provision of Information

(6) Kipford is directed to provide to the Bank's legal practitioners by no later than 21 days from the date of the judgment, a letter from Kipford's Legal Practitioners, updating the asset disclosure that Kipford has already provided since the Undertaking provided by Kipford and referred to in the Consent Order entered before the Honourable Mr. Justice Adrian Jack (AG) in Claim BVIHCM 2022/007 dated the 25th January 2022, specifically in the form of an updated "Asset and liability summary table" referred to therein, together with a short explanation of any material changes in Kipford's assets since the entry of the said Consent Order was filed.

Permitted Exceptions to this Injunction

(7) This interim injunction does not prohibit Kipford from spending a reasonable sum on legal advice and representation. But before

spending any money Kipford is directed and ordered to tell the Bank's legal representatives where the money is to come from.

(8) This interim injunction does not prohibit Kipford from dealing with or disposing of any of its assets in the ordinary and proper course of business.

(9) Kipford is at liberty to agree with the Banks legal representatives that this interim injunction should be varied in any respect, provided that any such variation must be in writing, made on application inter partes to and approved by the High Court.

[C] Costs of this appeal and costs in the court below to be paid by the respondent Kipford to the appellant Bank, to be assessed by a judge of the High Court Commercial Division, if not agreed.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Kimberly Cenac-Phulgence
Justice of Appeal [Ag.]

By the Court

Chief Registrar