IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause No.: FSD 45 of 2016 (IMJ)

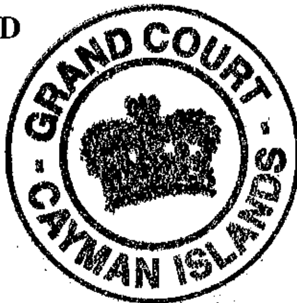
BETWEEN

(1) JSC MEZHDUNARODNIY PROMYSHLENNIY BANK

(2) STATE CORPORATION "DEPOSIT INSURANCE AGENCY"

Plaintiffs

AND



(1) SERGEI VICTOROVICH PUGACHEV

~~(2) ARCADIA NOMINEES LIMITED~~

Defendant

(3) DB MARINE

Non-Cause of Action Defendants

IN CHAMBERS

Appearances: Mr. N. Dunne of Walkers for the Plaintiffs and for the Joint Receivers.
Mr. N. McLarnon of Travers, Thorp, Alberga on behalf of Sellten Polska SP.Z O.O
Mr. J. Durston of Campbells on behalf of interested purchaser, Mr M Cooper.

Date of Hearing:	**28 July 2017**
Ruling Delivered:	**28 July 2017**
Reasons for Ruling delivered:	**30 August 2017**

HEADNOTE

Application for an adjournment of Plaintiffs and Joint Receivers summons to approve sale of distressed yacht - application made by non-party in relation to writ filed in separate action, claiming ownership of shares in company that owns yacht - purported transactions in breach of English WFO obtained by Plaintiffs against Defendant – Freezing Orders granted by Grand Court.

Role of Joint receivers - Court's discretion and case management powers - Court's power to prevent misuse of proceedings - Application for adjournment having effect of securing interim injunctive relief in favour of non-party without the usual undertakings as to damages or fortification.

REASONS FOR RULING

1. These are my reasons for refusing, what I have to say was a deeply unattractive application for an adjournment, made at the eleventh hour, in an uncommon manner, by a party that is not a party to these proceedings.

2. The application in respect of which an adjournment was sought was an application by the Plaintiffs and by the Joint Receivers (referred to in more detail below), for the Court's approval of the sale of a yacht DB9. I refused the application for an adjournment in the exercise of my discretion and case management powers, and went on to consider and grant approval for the sale.

Background

3. This matter has a long and involved history, involving Court proceedings in numerous countries, over a number of years, and involving many twists and turns. I will not attempt to set out a complete background, but will rather give a "*bare bones*" one, particularly because I understand that there is an application before the Court of Appeal on 12 September 2017 that relates to my Ruling on 28 July 2017 refusing the adjournment, and hence to these Reasons.

4. Mr. Pugachev was a prominent Russian businessman and the founder of the first Plaintiff. In July 2014, the Plaintiffs sought and obtained a worldwide freezing order ("the **English WFO**") from the High Court of England and Wales ("the **English Court**") against the First Defendant Sergei Pugachev ("**Mr. Pugachev**"), pursuant to section 25 of the ***Civil Jurisdiction and Judgments Act 1982***. This was in support of a claim brought against Mr. Pugachev in the Moscow City Commercial Court.. The Russian Court subsequently gave judgment against Mr. Pugachev in the sum of RUR 75,642,466,311.39 ("the **Russian Judgment**") and the English WFO was continued following that judgment.

5. The English Court had ordered Mr. Pugachev to provide asset disclosure pursuant to the WFO and, although he disclosed a number of assets (including DB9 and the shares in DB Marine), he refused to comply properly, breached orders of the English Court, and in February 2016 was found to be in contempt of court on 12 different counts (including for giving false evidence on oath, failing to give proper asset disclosure, dealing with assets in breach of the WFO, and leaving England in breach of the injunction). He was sentenced to the statutory maximum of two years. To date, Mr. Pugachev has not purged his contempts and has not served any part of his prison sentences, having fled the English jurisdiction.

6. The English Courts have produced a wealth of orders and written judgments dealing with different aspects of the disputes between the Plaintiffs and Mr. Pugachev. Numbered amongst these, are the judgments of the Court of Appeal, at [2015] EWCA (Civ) 906, and of Mrs. Justice Rose, at [2015] EWHC 2247 (Ch) [2016] EWHC 192 (Ch) and [2016] EWHC 258 (Ch). Most recently, there is the July judgment of Birss J at [2017] EWHC 1847(Ch).

7. The Plaintiffs have sought to enforce the Russian judgment in a number of jurisdictions, including the Cayman Islands.

8. On 20 April 2016 I granted the Plaintiffs' ex parte application for a freezing order ("the **Freezing Order**") in respect of the assets of Mr. Pugachev linked to the Cayman Islands, whether held in his own name or held through other entities such as Arcadia and DB Marine, the non-cause of action defendants. For avoidance of doubt, the order also specifically addressed movable assets registered in the Cayman Islands but located elsewhere.

9. A writ was filed in the Grand Court on 26 April 2016, seeking to enforce the Russian Judgment which was in the sum of RUR 75,642,466,311.39 or, at the time of filing equivalent to approximately (US $1.43 billion).

10. The Freezing Order was then served on (amongst others) Arcadia Nominees Limited ("**Arcadia Nominees**") and Arcadia Group Limited ("**Arcadia Group**") which were respectively the nominee shareholder of DB Marine which held shares on Mr. Pugachev's behalf and the registered office provider of DB Marine. After service was effected, Richard Rich, a director of both Arcadia Nominees and Arcadia Group, swore two affidavits on 10 May 2016, on behalf of each of these companies. The affidavit sworn on behalf of Arcadia Nominees indicated that 2000 shares in DB Marine had been transferred into Mr. Pugachev's personal name on 12 April 2016. In the Affidavit sworn on behalf of Arcadia Group, Mr. Rich stated that in addition, documents had been received from Mr. Pugachev instructing Arcadia group to transfer the shares from Mr. Pugashev to a Polish company called Sellten Polska SP.ZO.O ("**Sellten"**), whose sole shareholder and director was Wladislaw Telitski. Mr. Telitski was also at that time the sole director of DB Marine. The Arcadia Group indicated that the documents needed to effect this transfer were received after it had been served with the Freezing Order, and thus the transfer was not registered.

11. Although Mr. Pugachev's attempts to transfer the shares in DB Marine pre-dated service of the Freezing Order on him, his efforts plainly took place in breach of the English WFO granted by the English Court in July 2014 and which remains in place.

12. In light of this information received from the Arcadia Group, and in order to prevent Mr. Pugachev from making further attempts to dissipate his assets, the Plaintiffs applied ex parte for the Freezing Order to be amended to prevent DB Marine from changing its registered office without first obtaining the leave of the Court. I made an amended Order in those terms on 13 May 2016 and the Freezing Order was continued on 7 June 2016 following a return date hearing. Neither Mr. Pugachev nor DB Marine attended or were represented at the return date hearing.

13. On 9 June 2016 the Plaintiffs filed an application for default judgment in respect of their claim against Mr. Pugachev, as no notice of intention to defend the proceedings had been filed. That application was granted on 10 June 2016 and judgment entered accordingly.

14. On 2 November 2016, I granted the Plaintiffs' application to enforce its judgment against Mr. Pugachev, by way of appointment of Receivers, Michael Saville and Hugh Dickson of Grant Thornton Specialist Services Limited ("**the Joint Receivers**"), each of whom are well-known to this Court as experienced professionals with extensive experience of Court appointments in similar roles. The Joint Receivers were appointed as Receivers (i) over Mr. Pugachev's shareholding in DB Marine; (ii) as Receivers and Managers of DB Marine; (iii) over luxury Cayman Islands registered motor yacht DB9; and (iv) over any other assets of DB Marine.

15. In support of the application for the appointment of the Joint Receivers, Rebecca Wales, of Hogan Lovells, the English Solicitors instructed by the Second Plaintiff, in her second affidavit described some very disturbing occurrences which the Plaintiffs characterised as demonstrating continued efforts by Mr. Pugachev to put assets beyond the reach of the Plaintiffs. This included a foiled attempt to transfer the registration of DB9 to an overseas register not aware of the Freezing Order, and also movements of the DB9 from its customary berth in the South of France. There were also alleged attempts to conceal the whereabouts of DB9 by moving it with certain locator equipment de-activated, and by attempting to re-name DB9 as "*Lady X*". Through some extraordinary investigations on the part of the Plaintiffs and their Agents, DB9 was traced to Turkish waters.

16. In Ms. Wales' Second Affidavit, she also indicated that it was envisioned that the Joint Receivers would instruct the same lawyers, Walkers, as did the Plaintiffs. It was stated that given that the application was being brought post-judgment, the interests of the Plaintiffs and the Joint Receivers were clearly aligned, and in their view there did not appear to be any conflict of interest that would cause any conflict of interest in the same lawyers being instructed. Ms. Wales indicated, however, that both the Joint Receivers and the lawyers in each jurisdiction would continue to keep that issue under review, and if a risk of conflict did arise in the future, it would be addressed at the time, either by putting in place an information barrier or by the Joint Receivers receiving independent advice from another law firm.

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17. On the same day as the Joint Receivers took control of DB9 in Istanbul, Turkey i.e. on 23 November 2016, Walkers received an email from Mr. McLarnon of Travers, Thorpe Alberga which said that his firm was "*in the process of being instructed by Sellten…*" The letter also demanded an undertaking that "*you will immediately take all steps to stop the seizure of the yacht.*" Walkers responded, to find out whether Travers, Thorpe Alberga had been formally retained. There was no response. However, in or about December 2016, Sellten commenced an application in Istanbul seeking the arrest of DB9. It was claimed, that Sellten is the legal and/or beneficial owner of the shares in DB Marine, not Mr. Pugachev, and therefore the Receivership Order was wrongly made. The application was refused by the Turkish Courts, both at first instance, and on appeal.

18. After the first arrest application was made, Sellten applied to the Turkish Court for a second time for an arrest order, this time on the basis of an invoice that was purportedly unpaid. That application has also been refused, both at first instance and on appeal.

19. On 8 February 2017, I had before me for hearing, a number of applications concerning the Receivership, including an application for the sharing of certain information between the Joint Receivers and the Plaintiffs. This application was served on Mr. Pugachev. On the very morning of this hearing, Mr. John McNutt sent a letter to the Court, which referred to himself as Mr. Pugachev's Senior Litigation Advisor, urging the Court to dismiss the application, and also asserting that Sellten is the owner of the shares in DB Marine, and substantially in similar terms to the claim now made by Sellten. I read this correspondence, but granted the Joint Receivers' applications. I found this approach by Mr. McNutt, and Mr. Pugachev, inappropriate, and deliberately last-minute. Plainly this was an impermissible attempt orchestrated to influence my decision. I attached no weight to this letter.

20. By summons filed 6 July 2017, the Plaintiffs, as well as Michael Saville and Hugh Dickson, in their capacity as (i) the Receivers of the entire issued share capital in DB Marine, (ii) Receivers and Managers of DB Marine, (iii) Receivers of the yacht known

as "DB9" and (iv) Receivers of the direct and indirect assets of DB Marine, (the "**Joint Receivers**"), applied for orders as follows:

a) The Joint Receivers do have approval for the sale of the yacht "DB9" on the Agreed Terms as defined in the Second Affidavit of Hugh Dickson, or on terms substantially the same as the Agreed Terms;

b) The Order of the Court dated 7 June 2016 herein be varied insofar as is necessary to give [sic] to permit the transfer of title to DB9 to any purchaser with the written consent of the Joint Receivers;

c) Upon completion of any sale pursuant to paragraph 1 hereof, paragraphs 1(4) (a) and (1) (9) of the Order of the Court dated 7 June 2016 herein be discharged.

21. The summons was listed for hearing on Tuesday 25 July 2017 at 9: 30 a.m. in chambers, with a time estimate of 30 minutes.

22. However, on 21 July 2017, only the Friday before the scheduled hearing, a Writ of Summons was filed on behalf of Sellten against the Joint Receivers claiming, amongst other relief, a declaration that it is the beneficial owner of the shares in DB Marine. The suit is FSD 148 of 2017 (IMJ).

23. On 24 July 2017, communications were received by the Court from Mr. McLarnon of Travers, Thorp Alberga, representing Sellten, and indicating that it was Counsel's intention to attend the hearing on the 25th July and on behalf of Sellten seek an adjournment of the hearing of the summons in FSD 45 of 2016, pending the outcome of FSD 148 of 2017.

24. On 25 July 2017, Mr. Dunne of Walkers, who has represented the Plaintiffs and the Joint Receivers throughout the proceedings to date, attended on behalf of the Applicants, as did Mr. McLarnon on behalf of Sellten. Also in attendance was Mr. Goodman of Campbells, who said he was attending on behalf of Mr. Mike Cooper, a party that had expressed an

interest in purchasing DB9. Mr. Dunne objected to the presence of either of these parties or their legal representatives in chambers. I immediately enquired of Mr. McLarnon how he expected to be heard when he had not filed any application to intervene in the proceedings, or filed any application that would be similar to interpleader proceedings where one party claims to be the owner of assets. His response was that the Grand Court Rules regarding Interpleading, Order 17, only appear to apply to bailiffs and not to receivers, and that order 30 which deals with receivers, does not deal with this issue of claiming ownership of the subject asset. It was further Mr. McLarnon's argument that the Joint Receivers, who are officers of the Court, have been aware of Sellten's claim, and yet did not serve them with notice of the instant application seeking the Court's approval of the sale. He insisted that nothing could take away from his client's right to file a writ action.

25. It was now obvious to me that what was scheduled for a mere half an hour was about to become an extremely contested application in relation to a right to be heard, and seeking an adjournment, and therefore I fixed the hearing for Friday 28 July 2017. I further required Sellten to provide written submissions by 10:00 a.m. on 27 July, supported by authorities, setting out in detail Sellten's position which had been advanced orally, and which Mr. Goodman had on behalf of his client, adopted.

26. In particular, I ordered that Sellten deal with the following points:-

   a) The status of a hearing in chambers;
   b) Whether Sellten could be heard at the hearing;
   c) The Law on allegations of dishonesty and the requirements that need to be fulfilled.

27. In support of the application for approval of the sale, the Plaintiffs and the Joint Receivers filed the Second Affidavit of Hugh Dickson, filed on11 July 2017. Reliance was also placed on the Second Affidavit of Rebecca Wales, sworn 24 October 2016. After Sellten's filing of the writ, on 24 July 2017, the Third Affidavit of Ms. Wales was filed.

28. In relation to the application seeking to be heard, a draft affidavit of Anita Warhurst, an Attorney in Campbell's litigation department was produced to the Court on behalf of Mr. Cooper, with an undertaking that it would be filed. Sellten also filed the affidavit of Vladislav Telitski, sworn on 27 July 2017, who states that he is a director and owner of Sellten. This affidavit was relied upon in relation to the application for an adjournment and other issues raised by Sellten. On behalf of the Joint Receivers, a further affidavit, the Third Affidavit of Ms. Wales, sworn on 24 July 2017, was filed.

29. It was Sellten's position that the Court ought to hear from it in relation to the Joint Receivers' summons for court approval of the sale of DB Marine or its assets. On 28 July, Mr. Durston of Campbells appeared on behalf of Mr. Cooper and also adopted the submissions of Sellten in terms of the issue of the status of the proceedings in chambers and the issue of whether there was a right to be heard.

30. Mr. McLarnon submitted that, notwithstanding that the application was listed for hearing in chambers, as a matter of law, that has no effect on Sellten's attendance at the hearing. He argued that a hearing in chambers is not a hearing in secret, and that the starting point as a matter of constitutional and human rights law is that all hearings taking place in court are public hearings. Reference was made to the decision of Munby J (as he then was) in ***Clibbery v Allan*** [2001] 2 FLR 819, which was affirmed on appeal, [2002] Fam 261.

31. It was also Sellten's position that the Court has jurisdiction to, and should hear from Sellten, reliance being placed upon the decision of the Privy Council in ***Pricewaterhouse Coopers v Saad Investments Co. Ltd.*** [2014] 1 W.L.R. 4482.

32. On behalf of the Applicants, Mr. Dunne argued that both Sellten and Mr. Cooper had no right to be heard and further, that the application involves commercially sensitive information.

33. I ruled as follows:

"Whilst the general rule may be that the Court should ordinarily give public access to hearings in chambers where reasonable requests are made for the public to attend, the Court has the power to seal certain information, or limit publication of information, which may be commercially sensitive. The Court also has the power to exclude certain members of the public from a hearing on the same basis. In my judgment, Mr. Cooper and his legal representatives ought not to be present in this hearing where the Receivers take the position that there is commercially sensitive information. I accept that there is such information involved in this application.

However, in my view, Sellten and its Counsel has the right to be present. This is particularly so because of the application that it has indicated it wishes to make, to be heard on the question of whether the Joint Receivers' summons should proceed, which it seems to me should logically precede the hearing of the Receivers' summons for the approval of the sale, in any event."

34. At that point in the proceedings, Mr. Durston then withdrew from the hearing. Mr. McLarnon proceeded to make his application for an adjournment. After extensive argument, I refused the application for an adjournment. I indicated that I would provide my reasons for doing so in writing, as soon as I was able to. I said that I would try to do so by 11 August, but that it would in any event be done as soon as I was able to, as I was scheduled to be on a few weeks leave as of that very day and Sellten's application had arisen unexpectedly.

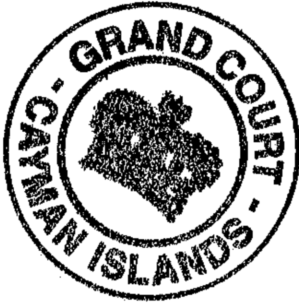
35. I had indicated to Mr. McLarnon on 25 July 2017 that I thought that he should have filed an application to intervene in these proceedings, and he insisted he did not have to do so. However, oddly, on 21 August, an application was filed on behalf of Sellten seeking to be joined in these proceedings.

Sellten's Arguments for Adjournment

36. Mr. McLarnon in his oral and written submissions, referred to and relied heavily upon the decisions of the Court of Appeal of England and Wales in ***Shalabayev v JSC BTA Bank*** [2016] EWCA Civ 987 and ***JSC BTA Bank v Ablyazov and ors*** [2014] EWCA Civ 602. Reference was made by Counsel to sub-paragraphs 61 (v) and (vi) of ***Shalabayev***, where Gloster LJ stated:

"(v) As in ***In re Norris****, the time and place for Mr. Shalabayev to assert his civil law rights over the property was when the bank attempted by the application for the charging order to deprive him of his claimed interest in it of Bensborough. Although Mr. Shalabayev became aware in the spring of 2011 of the restriction placed by the bank on the proprietorship register relating to the property on 18 April, 2011, as described in his affirmation dated 18 October 2011, I see absolutely no reason why it was incumbent upon him, at the stage, to spend money, which according to him he could not afford, in engaging in a full-scale war with the bank. He would have to have challenged the receivership order over Bensbourogh, so as to remove the restriction on the property, at a time when the bank had not obtained a judgment against Mr. Ablyazov, and in circumstances where no doubt the onus would have been on Mr. Shalabayev to establish that the bank could not justify its claim to what at that stage was merely interlocutory freezing order relief against Mr. Ablyazov and Bensbourogh. Indeed, unless Mr. Shalabayev could have demonstrated that he needed to sell, or raise finance on, the property at that stage, the court may well have approached the question on the balance of convenience and adjourned the substantive issue as to ownership until after such time as the bank had obtained judgment against Mr. Ablyazov.*

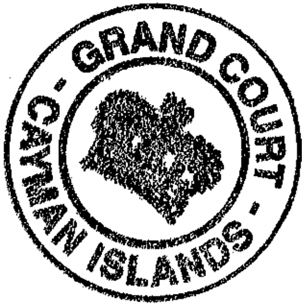
(vi) It was at the stage of the bank's application for a charging order, in circumstances where the onus was on it to prove that Mr. Shalabayev had no interest in the property that he became "directly affected" and (as Lord Hobhouse said in In re Norris, at para 23) " has the right to invoke the remedies of the court in the defence of [his] civil rights". Thus it was



the charging order stage that the bank was required to establish under sections 1(1) and 2(1) of the Charging Orders Act 1979 that Mr. Ablyazov had a beneficial interest in the property and that Mr. Shalabayev had no such interest in the property or in Bensbourogh. The bank was only entitled to a charging order under section 2(1) over such interest as its judgment debtor had. Moreover, under both the 1979 Act (section 3(5) and CPR r.73, 10A, Mr. Shalabayev, as a party claiming to be interested, had the right to object to the making of a final charging order and, at the very least, to invite the judge to direct a determination of an issue relating to the ownership of the property. Adapting what Lord Hope and Lord Hobhouse said in re Norris (at paras 6 and 25 respectively), it cannot be an abuse of process for a third party claiming an interest in property, to whom a right is given by the 1979 Act and CPR Pt 73 to make representations to the High Court, to seek to exercise that right just because he or she gave evidence in committal proceedings (to which the third party was not a defendant) in support of the defendant's case that he had not lied and that the property was not his. Mr. Shalabayev is not "misusing" the procedure of the High Court; he is making the proper use of the civil jurisdiction of the High Court to protect his alleged proprietary rights as the 1979 Act and the CPR both contemplate that he should."

37. At paragraph 12 of his written submissions, Counsel refers to the two decisions and states:

> *"12...... extremely strong Courts of Appeal in England and Wales (Jackson, Gloster and King LJJ and Moore-Bick, Elias and Christopher Clarke LJJ) accepted without any difficulty that in instances where there were adverse claims to the beneficial ownership of property subject to a receivership, those claims ought to be tried before the property was dealt with. It is surprising that the Joint Receivers, JSC or the DIA are now opposing the position taken by Sellten, given that their English solicitors*



must be aware of these authorities as (1) they are both extremely recent and (2) Hogan Lovells were involved in them and unsuccessful in the position taken on behalf of their clients. At [84] of Ablyazov, Christopher Clarke LJ held " The Judge was not, in my view, in error in deciding that he had jurisdiction to decide, and in deciding, that there should be a trial as to the issue 'where lies the ultimate beneficial ownership of the Dregon land shares'."

38. The submission continues at paragraph 14 as follows:

> *"14. In inviting the Court to discount Sellten's objections on a summary basis without first providing Sellten the opportunity to have its proceedings concerning the true ownership of DB Marine tried, the Joint Receivers, JSC and the DIA are inviting the Court to fall into error and proceed on a basis which is fundamentally unfair, in breach of the rules of due process and Articles 7 and 15 of the Cayman Islands Bill of Rights."*

39. Turning now to Sellten's evidence, in paragraph 6 of his affidavit, Mr. Telitski states that the purpose of his evidence is to formally record Sellten's request that the Court not make any order on the Joint Receivers' summons until after the proceedings in FSD 148 of 2017 have been determined at trial. It is to be noted that Mr. Telitski's affidavit was filed after Ms. Wales' third affidavit, in which, amongst other points, Ms. Wales alleges that, contrary to Sellten's assertions in its writ, there are a number of connections between Mr. Pugachev and Sellten. She further asserts that the Sellten claim is a tactical contrivance designed to obstruct the Plaintiffs' attempts to enforce the Russian Judgment and the Joint Receivers' efforts to realize the best value for DB9 by selling it on the terms set out in the second affidavit of Mr. Dickson.

40. At paragraphs 9-14 (inclusive), Sellten's representative states as follows:

"9. Whilst the Joint Receivers, JSC and the DIA have had many months to work on their evidence and prepare for the hearing before the Court, Sellten has not, owing to the fact the Joint Receivers, JSC and the DIA did not give Sellten notice of the summons for an order approving the proposed sale. Furthermore, none of the Joint Receivers, JSC, or the DIA have provided any of the documents in Cause 45 of 2016 to Sellten. Sellten is therefore currently in the dark as to the contents of most of the documents before the Court notwithstanding that I have requested information from the Joint Receivers but this has been refused.[VT1/1-2]

10. The sole purpose of this affidavit is to put the Court on notice that a claim is pending before it in FSD 148 of 2017 in which Sellten seeks to establish its beneficial interest in the property which it believes the Joint Receivers are asking the Court to approve for sale[VT13-28]. <u>It is Sellten's position that the Court ought not to exercise its discretion to sanction the sale while the issue of the beneficial ownership of the shares in DB Marine remains pending before the Court, and that the Court ought, in the exercise of its case management discretion, to adjourn the Joint Receivers summons to be heard after the issue of the ownership of the shares in DB Marine has been determined by way of trial proceedings.</u> I am informed that the trial of Sellten's proceedings could be set down to come on as a speedy trial in the event that the Court appointed Joint Receivers contend that there is some urgency to the disposition of the matter.

11. The sale of the shares in DB Marine took place in April 2016 well before any orders were made by the Courts of the Cayman Islands. Mrs. Wales is wrong to the extent that she tries to suggest that I or Sellten was aware of any orders of <u>the Cayman Courts</u> at the time the sale of the shares took place.

12. Since becoming aware of the appointment of the Joint Receivers, and the steps they took to seize the yacht in Turkey, Sellten has been locked in proceedings in Turkey to protect its interests. <u>Sellten did not come to the</u>

Cayman Court because the immediate threat to the yacht was from the Joint Receivers' attempts to seize the yacht in Turkey. Sellten therefore approached the Turkish Courts to protect its interests. Sellten has spent many hundreds of thousands of euros (as can be seen from RW-3/108) on maintenance and repair of the yacht. It is simply wrong and misleading for Mrs. Wales to suggest that Sellten has not taken the steps necessary to protect its interests or that Sellten's proceedings in Cayman are connived at to protect Mr. Pugachev. As soon as Sellten became aware that the joint receivers were taking steps to try to secure the Court's approval of a sale, Sellten took the necessary steps to protect its position before the Cayman Court.

Contact with Sergei Pugachev

13. I readily admit that I know Sergei Pugachev and that I have been in contact with Mr. Pugachev and have conducted business involving yachts with him. There should be nothing suspicious or surprising about that. My professional background and experience is in shipping and yachting. Mr. Pugachev is a well-known international businessman who owned luxury yachts. Sellten bought the shares in DB Marine as a commercial transaction to acquire the yacht, refurbish it and make a profit out of the acquisition. Egina is another company involved in yachts, my area of expertise. I do not know what Mrs. Wales says about Egina in her first affidavit which she refers to in her Third Affidavit because she has not shared the documents her clients have filed in these proceedings with Sellten, so I cannot at this stage comment further on Mrs. Wales' assertions in relation to Egina.

14. Mr. Pugachev sold Sellten the shares in DB Marine as I saw a legitimate commercial opportunity to be made out of the acquisition of the yacht. Upon becoming aware that receivers were appointed over the company I bought from Mr. Pugachev, I have been in regular contact with him seeking redress. I became aware of the Joint Receivers' summons for the order for approval of the sale because Mr. Pugachev informed me

about it. There is nothing unusual or suspicious about Mr. Pugachev passing this information on, Indeed, I would expect a former owner who is made aware that an asset purchased from him is about to be sold would contact that person to let them know about the sale."
(My emphasis)

41. In the course of explaining why the Court should adjourn the hearing of the summons, Mr. McLarnon indicated that whilst he was not asking the Court to determine the issues raised in the FSD 148 proceedings, he nevertheless wished to draw the Court's attention to the legal basis behind Sellten's claim in those proceedings. Mr. McLarnon's written submission, at paragraph 15 states that: "*Sellten claims declarations that it is the owner of DB Marine. Its case is not complicated and the applicable law can be shortly and succinctly stated.*"

42. Reference was made to a Share Sale and Purchase Agreement, purportedly entered into between Mr. Pugachev as seller, and Sellten as buyer, whereby Sellten agreed to purchase 2,000 fully paid equity shares in DB Marine. The consideration for the sale of shares is stated to be US$12,000,000.

43. Reference was made to the *Agreement on Full Discharge of obligations under Share Sale and Purchase Agreement* allegedly entered into by Mr. Pugachev and Sellten. By this agreement it was agreed that Sellten's liability under the Share Sale and Purchase Agreement would be replaced in full by a new liability on a promissory note transferred pursuant to the terms and conditions of the Agreement. The promissory note in the amount of US$ 12,000,000 was issued by Sellten on 5 April 2016 and has a maturity date on demand but not earlier than 5 April 2017.

44. Counsel referred to a number of authorities and lines of argument by which he arrives at the conclusion that under Cayman Islands law, the Agreements made between Mr. Pugachev and Sellten, together with the delivery of the promissory note and the yacht

have transferred the beneficial ownership of Mr. Pugachev's shares in DB Marine to Sellten.

45. Counsel went on to submit that the fact that at the Date of the Share Sale and Purchase Agreement and the Full Discharge Agreement, Arcadia Nominees Limited and not Mr. Pugachev was registered as shareholder of DB Marine on the facts of this case does not render invalid or avoid the Agreements.

46. Reference was made on behalf of Sellten to a Declaration of Trust dated 4 October 2010 under the terms of which Arcadia Nominees held the shares on trust for Mr. Pugachev.

47. The submission also concludes by arguing that "*There is no legal basis for the Cayman Court to find that a third party corporate service provider's failure to update the register of members in accordance with the written resolutions of a company's directors results in the transferee shareholder losing its rights to the transfer or the transfer being rendered invalid.*" (my emphasis)

The Arguments on behalf of the Plaintiffs and the Joint Receivers

48. The Plaintiffs and Joint Receivers have filed three sets of skeleton arguments. The first is dated 21 July 2017 and addressed the position before the writ filed by Sellten on the very same day, 21 July 2017. The second is the Supplemental Skeleton Argument, dated 24 July 2017, and the third is the Further Supplemental Argument dated 28 July 2017.

49. Indeed, at paragraph 24 of the skeleton dated 21 July 2017, under the heading "*Full and Frank Disclosure*", the view was expressed that it was unlikely that the application would be defended, and thus the Plaintiffs and the Joint Receivers wished to bring to the attention of the Court, a number of matters (a - e) of that skeleton, including, at sub-paragraph a, (that which would cover Campbell's client Mr. Cooper):

"a. Other expressions of interest have been received in respect of the purchase of DB9. The Joint Receivers have taken the view that the conditions attached to these make them unrealistic and thus not a viable option for realizing the yacht."

50. Put simply, the Applicants say that there is no coincidence between the last minute nature of the proceedings in FSD 148 of 2017, and nor do they accept that Sellten is an independent third party. They submit that a brief examination of the circumstances suggests that in fact, "*Sellten is intimately linked with Mr. Pugachev, and acts as cat's paw on his behalf.*"

51. There are a number of matters which the applicants rely upon as demonstrating clear links between Sellten and Mr. Pugachev. It was also submitted that the issuing of the writ by Sellten forms part of a clear pattern of attempts by Mr. Pugachev and his associates to frustrate or distract from attempts to enforce judgments against him. Part of that pattern includes the making of last-minute applications aimed at derailing enforcement efforts.

52. It was submitted by Mr. Dunne that the Sellten writ is plainly abusive. Firstly, he submits that Sellten has been aware of the appointment of the Receivers since (at the very latest) 23 November 2016 yet has chosen not to issue the writ until some 9 months later.

53. Secondly, Counsel submits that the writ seeks orders restraining the Joint Receivers from proceeding with any sale of DB Marine or DB 9, yet no application has been made for interim relief in this regard.

54. It was submitted that, whilst the writ is not presently before the Court, the Court is entitled to take a preliminary view at this stage of its likely veracity and the extent to which its mere issue should be entitled to interfere with the Joint Receivers' application. In doing so, it is entitled to take into account Mr. Pugachev's past conduct. Reference was made to, for example, the statement of Bingham CJ in ***Arab Monetary Fund v Hashim***, Unreported, CA, 21 March 1996, where his Lordship stated:

"It would, in my judgment, be contrary to law, justice and common sense that a man who has shown himself willing wantonly to abuse the process of the court should be permitted to invoke that same process for his own ends…"

55. The position of the Applicants was summarised as being that the claim in the writ is not genuine; its issue is motivated by and designed to serve the interests of Mr. Pugachev. Further, it was argued that it is likely to be susceptible to being struck out in due course, and in the circumstances the Court should disregard it for the purposes of the present application. An application has since been filed, on 18 August 2017, by the Joint Receivers, to have the writ struck out, or alternatively stayed.

56. At paragraphs 24 and 25, the supplemental arguments conclude that Sellten's approach is entirely unacceptable and state:

"<u>Conclusion</u>

….

24. That approach is entirely and obviously unacceptable, particularly in circumstances where there is ample evidence to suggest that the writ is not issued in good faith and instead represents an attempt by or on behalf of Mr. Pugachev to obstruct the Plaintiffs' proper efforts to enforce their judgments against him. That is an enterprise which the court should deprecate, not encourage.

25. The Joint Receivers have been in office for some eight months, and are in control of what is beyond any sensible argument a distressed and depreciating asset, which continues to incur significant costs on a daily basis. There is a plain and obvious risk of prejudice to the Plaintiffs as unchallenged judgment creditors in the event that the sale of DB9 is delayed. It is of course the case that no order is presently sought for

payment out of monies to the Plaintiffs, the relief at present being limited to liquidation of the asset at a price which represents a proper market value, and as such the risk of prejudice to Sellten (even if their claim had merit, which it does not) is minimal. In all of the circumstances, the Court can and should proceed to grant the Plaintiffs and the Joint Receivers the relief sought."

57. In the Further Supplemental argument, Mr. Dunne argued that the question before the Court is whether approval should be granted for the Court appointed Joint Receivers to sell an asset of DB Marine and thereby preserve the value in the company. He made the point that that asset sale does not prevent the Court subsequently making a decision in respect of Sellten's belatedly issued claim regarding ownership of the shares of DB Marine, nor would Sellten's purported interest be adversely affected by the sale (which sale is in fact intended to prevent any further loss of value. He submitted further, that despite the damage likely to be caused if the sale does not proceed, Sellten is attempting to thwart the sale without applying for injunctive relief and providing the necessary undertakings and fortification to compensate that damage in due course.

58. Mr. Dunne asked me to view the evidence of Mr. Telitski with caution.

DISCUSSION AND ANALYSIS

59. In essence, what was before the Court is an application by Joint Receivers who are validly appointed unless and until they are discharged. They are proposing a course of action which in their professional judgment as officers of the Court is the best way to preserve value in DB Marine, regardless of who owns it, having regard to the distressed nature of the DB9 yacht and the alleged debts surrounding it.

60. At paragraphs 7-18 of Mr. Dickson's very detailed affidavit, he points out why the instant sale proposed is a unique opportunity and represents the best chance of securing the best net outcome reasonably attainable by DB Marine. Without going into the sensitive commercial information, I think it important to note that the Agreed Terms are subject to a condition precedent to be satisfied within 60 days from June 15 2017, that the

transaction is approved by the Grand Court. The other condition precedent, being that the then ongoing proceedings in Turkey by Sellten be resolved in the Joint Receivers, acting on behalf of DB Marine, has been fulfilled. There is no evidence from Mr. Telitski given to this Court that contradicts or says anything otherwise as to the distressed state of DB9 nor as to the fact that DB9 is lying in the Ursa Shipyard. It seems to me undeniable that in considering whether or not to grant Sellten's application for an adjournment, the 60 day time period for obtaining the Court's approval is a factor that any reasonable Court would have to take into account.

61. It was in all of these circumstances, that I exercised my undoubted discretion in refusing the application for an adjournment. It was in my judgment proper for that application by the Joint Receivers to proceed irrespective of any argument in relation to Sellten's writ. Although Sellten's filing of the writ is not inconsistent with the literal application of procedural rules, it would nevertheless be unfair to the Plaintiffs and the Joint Receivers, and indeed, detrimental to the value in DB Marine, to adjourn the application for sale approval. The sale of DB9 would not prevent the Court later determining Sellten's belatedly made claim to the shares in DB9. It was surely Sellten's free choice not to file the writ until the last minute. Sellten's delay in filing its writ was its own choice; it cannot be just to allow it to pray in aid its own delay, and to all of a sudden breathe urgency into a situation which it plainly did not treat as such before now. In the circumstances, it plainly cannot be said that there has been any breach of Sellten's right to a fair hearing or any other of its civil rights.

62. I have been guided by the wise and discerning words of Lord Bingham, cited by Mr. Dunne, in ***Johnson v Gorewood & Co*** [2002] 2 AC 1, where the learned Law Lord stated, in dealing with the issue of "*Abuse of process*" that:

> *"The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the*

right to bring a genuine subject of litigation before the court;....This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in Hunter v Chief Constable of the West Midlands Police [1982] AC 529, 536, an 'inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."
(my emphasis)

63. I think that to adjourn the application in the circumstances, and on the bases, and in the manner put forward by Sellten would clearly bring the administration of justice into disrepute among right-thinking people - see the quotation from ***Johnson v Gorwood*** above. The circumstances are such that, when taken in their totality, they pointed in one just direction and one direction only, which was to refuse the application for an adjournment.

64. I agree with Mr. Dunne's characterisation of this last-minute attempt by Sellten as being unacceptable. There are many reasons why I have taken that view and I will outline them in summary below.

65. I am of the view that I am entitled, in considering this last-minute application for an adjournment by a non-party, to take into account all of the circumstances. Whilst not considering the Sellten writ claim in any exhaustive detail, I am entitled to have regard to my preliminary views as to the genuineness and nature of the eleventh hour writ claim. Sellten's argument that the Court cannot reach any view in that regard without the benefit of cross-examination is wrong. Courts must be in a position to prevent misuse, or at least to refuse to assist, misuse of its procedure in a way which, although not inconsistent with

the literal interpretation of the rules, is nevertheless, a misuse. Courts have to be astute to prevent misuse and are entitled to expect full candour from parties – see the strong dicta in ***South Wales Fire and Rescue Service v Smith*** [2011] EWHC 1749, cited by Mr. Dunne.

66. Thus, whilst justice may be blind, that does not mean that it must not be insightful.

67. At paragraph 8 of the Statement of Claim, Sellten pleads that it is *"an independent corporation, incorporated under the laws of the Republic of Poland. Mr. Pugachev is not connected to Sellten and has no interests either directly or indirectly in Sellten."*

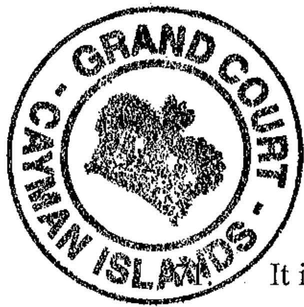
68. However, in my judgment, there are plainly links between Mr. Pugachev and Sellten, which were not mentioned in the writ. In her third affidavit, Ms. Wales identifies the following connections, amongst others:

a. The sole director of Sellten, Mr. Telitski, was also the sole director of DB Marine at a time when the entire shareholding of DB Marine was owned by Mr. Pugachev and previously served as a director of another of Mr. Pugachev's companies Egina S.a.r.l. and has therefore been associated with him since at least July 2013;

b. Mr. Telitski was an employee of Luxury Consulting Limited, Mr. Pugachev's English family office, which was described by Rose J in her judgment in the English Court, as operating as "*his personal wallet*".

69. Mr. Telitski only admitted that Mr. Pugachev was "*a contact*" after Ms. Wales' third affidavit was filed. Whilst now admitting that he knows Mr. Pugachev as a "*contact*", Mr. Telitski, instead of frankly telling the Court that Egina is also a company connected to Mr. Pugachev and of which he was a director, Mr. Telitski is content to say "*he does not know what Mrs. Wales has said about Egina*".

70. I find that both the initial assertion of independence, and then the subsequent admission of previous contact only after the connections are expressly pointed out by Ms Wales is telling.



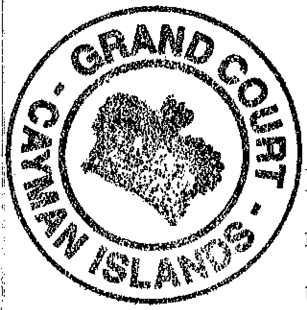
It is noteworthy that in paragraph 14 of his Affidavit, Mr. Telitski in essence admits that he did not independently hear about the summons for approval of the sale; it is Mr. Pugachev who told him about it. This is another connection.

72. Whilst asserting that Sellten is not owned or controlled by Mr. Pugachev (paragraph 17), Mr. Telitski has not chosen to share with the Court who is the beneficial owner of Sellten.

73. Even within the body of the Statement of Claim and alleged sale transaction there are, as Mr. Dunne puts it, "*red flags*". No money appears to have changed hands in the course of the alleged transaction: instead Sellten simply issued a promissory note for the purchase price. I accept Mr. Dunne's submission that that amounts, in essence, to Mr. Pugachev giving US $12 million of unsecured credit to a company with which he is alleged to have no connection. It's not easy to see how that could accord with either common or commercial sense. This purported series of transactions undeniably took place against the background of the English WFO.

74. It is also the case that the manner in which Sellten presents its submissions is not quite accurate in a number of ways. In particular, it appears to conflate Sellten's purported interests in the shares of DB Marine with the yacht DB9. Sellten claims to be the owner of the shares in DB Marine, not DB9.

75. Also, whilst Mr. Telitski's complaint at paragraph 16 of his affidavit is that Sellten was given no notice of the application for sale, he omits to deal adequately with the fact, that having been aware of the appointment of the Receivers from November 2016, Sellten (in common with Mr. Pugachev), elected not to challenge that order. It cannot be a proper answer that it decided to bring the Turkish arrest proceedings instead. The application which Sellten chose to make in Turkey makes essentially the same claims that it now makes in the writ action that has only now been issued on 21 July 2017 in the Cayman Islands. No application has previously been made in the Cayman Islands to challenge the

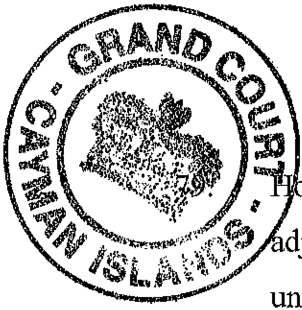


Receivership Order, the Freezing Order, or the judgment entered against Mr. Pugachev, notwithstanding that the Grand Court clearly has jurisdiction over any dispute about the terms of those orders or any dispute as to the ownership of shares in DB Marine, a Cayman Islands Company, and notwithstanding that Sellten has known of the receivership order since November 2016.

76. In Sellten's written submission there was a strident assertion that the Court should attach no significance to the alleged "*failure*" of the Arcadia Group to register the transfer. That is an extraordinary submission; as opposed to failing to register, the Arcadia Group were in fact restrained from doing so by the Freezing Order issued by this Court, and rightly did not breach that Order.

77. In addition, although in paragraph 11 of his affidavit Mr. Telitski claims not to have been aware of any orders of the Cayman Court in April 2016, he does not address the question of whether he was aware of the English WFO which also prohibited any dealing by Mr. Pugachev with either the shares in DB Marine or DB9. This in circumstances where Mr. Telitski was the sole director of DB Marine and an employee of Mr. Pugachev at the time of the English WFO.

78. Indeed, there is another aspect of Sellten's application that is troubling. In the written submissions on behalf of Sellten at paragraph 15, mention is made of Sellten's claim in the writ as being for declarations that it is the owner of DB Marine. However, the writ also claims an order restraining the Joint Receivers from proceeding with any sale of the shares of DB Marine and/or the assets of DB Marine. The tactical nature of Sellten's action is obvious in its argument that it had no need to seek an interim injunction because the Joint Receivers were obliged to apply for Court sanction prior to selling DB9. That would seem to be incorrect. I agree with Mr. Dunne, both as a matter of construction of the Receivership order (which gives the Receivers inherent power to realise property) and also as a matter of law, no authority having been cited for that proposition.



79. However, in any event, Sellten's application really amounts to an application not just to adjourn approval of the instant proposed sale, but seeks to prevent approval of <u>any</u> sale until its writ claim is dealt with. That is in essence an attempt to obtain injunctive relief.

80. Had this Court been asked to consider an application for an interim injunction, the Court would have had to consider the issue of whether there were serious issues to be tried, with a real prospect of success. The Court would have had to assess whether damages would have been an adequate remedy for Sellten. The Court would have had to assess whether, on the balance of convenience the sale should proceed in order to preserve the value of DB Marine, an asset which the Joint Receivers have given evidence is a severely distressed asset which is depreciating and exposing DB Marine to ongoing and significant expenses on a daily basis. Indeed, the Joint Receivers' position is that the sale and effect of liquidating the asset is actually to preserve value in DB Marine, not destroy it. In the event that an injunction was considered appropriate, the Court would have required an undertaking as to damages from Sellten. The issue of fortification would also have arisen for consideration, given that Sellten is a foreign company with no assets in the jurisdiction.

81. As to the cases relied upon by Sellten, ***Shalabayev and Ablyazov.*** In my judgment, those cases are clearly distinguishable. Acceding to Sellten's application would amount to the Court granting an adjournment because of a writ which has clear problems. These problems include that the writ requires the Court to declare the validity of a purported transaction that took place in clear breach of the English WFO. Here ownership of the shares in DB Marine and of DB9 was admitted by Mr. Pugachev in the course of the English proceedings; that was not in issue. Thus, dealing with the shares of DB Marine and DB9 were indisputably prohibited by the English WFO.

82. I granted the Plaintiffs' and the Joint Receivers' application as I was satisfied that the Joint Receivers' duties to the Court, and in assisting the Plaintiff in the lawful execution of their rights as judgment creditors, have been fulfilled.

83. Before leaving this matter, I wish to say something briefly about paragraph 33 of Sellten's written submissions. In that paragraph, reference was made to my remarks on 25 July 2017 when the summons first came on before me. At that time, I sought to find out why an application was not being made by Sellten to intervene or to make an application in the nature of interpleading, or for interim injunctive relief. Counsel has characterised this as "*The Court's criticism*". The written submission goes on to state: "*With respect, that criticism was both unfair and unfounded. The Court would appear to have been influenced in its criticisms by the content of the Affidavit of Rebecca Wales and the written submission of the Joint Receivers.....*". Suffice it to say, that I consider this submission unfortunate. It is all the more so in light of Sellten's belatedly filed application (on 21 August 2017), for leave to intervene in these proceedings, this being one of the very issues raised by the Court in the first place on 25 July 2017.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT