

PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov and others

Practice – Pre-trial or post-judgment relief – Freezing order – Assets – Claimant bank bringing arbitration proceedings against first defendant former President of bank (M) – Claimant alleging that second to fourth defendant companies being owned and controlled by M (corporate defendants) – Corporate defendants having shareholding in Ukrainian company whose largest shareholder being Cypriot company (Carlsbad) – Bank alleging that assets of corporate defendants being assets of M – Issue as to whether M being beneficial owner of Carlsbad – Claimant obtaining freezing order against corporate defendants relying on 'Chabra jurisdiction' – Corporate defendants applying to set aside freezing order – Whether good reason to suppose that M ultimate beneficial owner of Carlsbad – Whether application to be granted

[2013] EWHC 422 (Comm), Folio 2013/57, (Transcript)

QBD, COMMERCIAL COURT

POPPLEWELL J

26 FEBRUARY, 7 MARCH 2013

7 MARCH 2013

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

Mr D'Cruz for the Claimant

Ms Healy for the Second to Fourth Defendants

Eversheds LLP; Ince & Co

POPPLEWELL J:

[1] This is an application by the Second to Fourth Defendants (“the Corporate Defendants”) to set aside a freezing order granted ex parte by Cooke J on 16 January 2013 and continued by order of Flaux J on 1 February 2013. The Claimant (“the Bank”) brings its substantive claim against the First Defendant (“Mr Maksimov”) in arbitration

proceedings in London. The Bank does not assert a cause of action against the Corporate Defendants, but claims relief against them under the jurisdiction recognised in *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231 on the grounds that their assets are in truth the assets of Mr Maksimov. The Corporate Defendants seek to set aside the order against them on the grounds that:

“(1) the Bank's evidence does not fulfil the requirements for the exercise of the *Chabra* jurisdiction; and/or

(2) there was material non disclosure by the Bank when making the ex parte application to Cooke J.”

[2] The Bank is a public joint stock company incorporated under Ukrainian law which has carried on business as a medium sized bank in Ukraine since July 1992. Mr Maksimov was President of the Bank and Chairman of its Supervisory Board from 1996 until 2 November 2010. He is a Russian citizen with significant business interests in Ukraine. According to an interview he gave to a Ukrainian newspaper he purchased control of the Bank in 1995. When he ceased to be Chairman of the Supervisory Board in 2010 his son-in-law, Peter Baron, took over as Chairman and remained in that position until November 2011. Mr Maksimov is the subject of criminal proceedings brought in Ukraine, as a result of which he was in prison on remand between 22 December 2011 and 2 June 2012, since when he has been on bail.

[3] On 4 July 2012 the Bank commenced arbitration proceedings against Mr Maksimov in London. Its claim arises out of a Framework Agreement dated 19 November 2009 under which Mr Maksimov was to sell a major stake in the Bank to another major shareholder, TBIF Financial Services BV (“TBIF”). The sale was subject to conditions precedent which involved undertakings by Mr Maksimov that he would repay, or provide adequate security for the repayment of, loans which the Bank had made to companies owned and controlled by him during his tenure. The Bank claims that Mr Maksimov undertook to use his best efforts to fulfil such conditions precedent and has failed to do so. The damages claimed are equivalent to the sums outstanding on the loans minus the value of the security realised in relation to them, which is said to amount to US\$78,269.996 as at 8 January 2013.

[4] The Corporate Defendants are each companies registered under the laws of England and Wales. The registered shareholders of each are Starwell International Ltd, a company registered in St Kitts and Nevis. It is the Bank's case that these companies are effectively nominees for Mr Maksimov who exercises substantial control over them. It is the Corporate Defendants' case that they are beneficially owned by Mr Krykrytsev, Mr

Nikolchuk and Ms Petrenko respectively. Each of those individuals is resident in Ukraine and has sworn an affidavit in which he or she claims to be the beneficial owner of the relevant Corporate Defendant. Each of Mr Krykryvtsev, Mr Nikolchuk and Ms Petrenko deposes that the relevant Corporate Defendant is not owned or controlled by, or in any way connected with, Mr Maksimov.

[5] Each deposes that the Corporate Defendant holds no assets anywhere in the world with a value exceeding US\$50,000 save for a shareholding in a Ukrainian company PJSC Odeskyi Portovyi Holodylnyk ("OPH"). OPH is a Ukrainian company which provides transport, stevedore and cold storage services in Odessa. It is these shareholdings in OPH which comprise the assets whose ultimate beneficial ownership is in dispute on this application. Each of the Corporate Defendants owns 13,764,369 of its shares. OPH's largest shareholder is a Cypriot company, Carlsbad Enterprise Ltd ("Carlsbad"), which holds 14,999,998 shares. Those four shareholdings comprise about 94% of OPH's capital.

[6] For reasons I shall explain, the critical issue for the purposes of this application is as to who is the ultimate beneficial owner of Carlsbad. The Bank contends that Carlsbad is, like the Corporate Defendants, a nominee company for Mr Maksimov and under his substantial control. The Corporate Defendants contend that Carlsbad is a company beneficially owned and controlled by Oleg Nemyrovskyy. Mr Nemyrovskyy was a member of the Ukrainian Parliament between 2002 and 2006, and both before and since that date has conducted a number of different businesses both within and outside Ukraine. He has made two witness statements in support of the Corporate Defendants' application, and represents the Corporate Defendants for the purposes of giving instructions to their solicitors. Carlsbad is paying the Corporate Defendants' costs in relation to this application.

THE LEGAL ISSUES

[7] I was referred to a number of authorities on the *Chabra* jurisdiction, including *SCF Finance v Masri* [1985] 2 All ER 747, [1985] 1 WLR 876, [1985] 2 Lloyd's Rep 206; *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231; *Cardile v LED Builder Pty Ltd* (1999) 162 ALR 294; *Dadourian Group International Inc v Azuri Ltd* [2005] EWHC 1768 (Ch); *Revenue & Customs Commissioners v Egleton* [2006] EWHC 2313 (Ch), [2007] 1 All ER 606, [2007] Bus LR 44; *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 2 All ER (Comm) 37, [2009] 1 WLR 665; *Yukos Capital Sarl v OJSC Rosneft Oil Company* [2010] EWHC 784 (Comm),

[2011] 1 All ER (Comm) 172; *Algosaibi v Saad Investments Co Ltd* (CICA 1 of 2010); *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWCA Civ 1042, [2011] 2 Lloyd's Rep 663, and *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakan)* [2011] EWHC 3143 (Comm), [2012] 2 All ER (Comm) 513, [2011] NLJR 29. The principles relevant to this application can be summarised as follows:

"(1) The *Chabra* jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a Defendant against whom the Claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a Defendant whom the Claimant asserts to be liable upon his substantive claim (the CAD).

(2) The test of 'good reason to suppose' is to be equated with a good arguable case, that is to say one which is more than barely capable of serious argument, but yet not necessarily one which the Judge believes to have a better than 50% chance of success.

(3) In such cases the jurisdiction will be exercised where it is just and convenient to do so. The jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive Defendants and have not acted to frustrate the administration of justice.

(4) A common example of assets falling within the *Chabra* jurisdiction is where there is good reason to suppose that the assets in the name of the NCAD are in truth the assets of the CAD. Such assets will be treated as in truth the assets of the CAD if they are held as nominee or trustee for the CAD as the ultimate beneficial owner.

(5) Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the *Chabra* jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the Claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary, but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD."

THE FACTUAL ISSUE

[8] It was not seriously disputed before me that there is a good arguable case that the OPH shares are being held by the Corporate Defendants as nominees for Carlsbad; and that those shares are therefore in the beneficial ownership and subject to the substantial control of whoever is Carlsbad's ultimate beneficial owner exercising substantial control over Carlsbad. That emerges from the way in which the Corporate Defendants acquired the shares.

[9] Prior to February 2012 the 94% shareholding in OPH was held by four companies which were vehicles beneficially owned by Mr Maksimov, namely Pelham, Lordus, Ivex and Budshlyakhmash (also known as Stroidormash). By agreements of 27 February 2012, those four Maksimov vehicles sold the shareholding, comprising 56,293,105 shares, to Carlsbad. On 15 March 2012, 13,764,369 shares were transferred to each of the Corporate Defendants leaving Carlsbad with 14,999,998 shares. The following considerations suggest that the Corporate Defendants hold such shares as nominees for Carlsbad:

“(1) The explanation for the transfer given by Mr Nemyrovskyy is that Carlsbad transferred approximately three quarters of the 56,293,105 OPH shares to the Corporate Defendants in order to avoid the effect of Ukrainian law, which requires the permission of the Anti-Monopoly Committee of Ukraine for ownership of more than 25% of a Ukrainian public company. The transfer left Carlsbad with a 25% shareholding in OPH. The rationale for the transfer was not therefore one involving any reason for the Corporate Defendants to acquire a genuine beneficial interest in the shares.

(2) The written agreements dated 15 March 2012, which are said to contain the transactions, record that the Corporate Defendants are obliged to pay the price (the equivalent of about US\$513,000 in each case) within 5 business days. However there is no suggestion that such price was paid and the Corporate Defendants' witness statements refer not to a sale but to a 'transfer' or 'distribution'.

(3) No commercial reason has been advanced for any of the alleged beneficial owners of the Corporate Defendants to have wished to have purchased the shares or to have assumed a beneficial interest on their own behalf. No explanation is given as to their interest in the shares. On the contrary, the only information given about them is that they are businessmen who have had a relationship of cooperation with Mr Nemyrovskyy. That suggests, if anything, a willingness to act as Mr Nemyrovskyy's nominee if asked to hold shares in order to facilitate the latter's desire to get round an unwelcome requirement of Ukrainian law.

(4) Mr Nemyrovskyy is providing all of the instructions and evidence on behalf of the Corporate Defendants in these proceedings, even though he has no official position with them, and Carlsbad is paying for them. In his witness statement he suggests that this is because Carlsbad is the biggest beneficial shareholder in OPH; but

this does not explain why he is better qualified to protect the interests of the Corporate Defendants than their purported beneficial owners. Their willingness to allow Mr Nemyrovskyy to represent them is suggestive that they are mere nominees of Carlsbad or whoever exercises substantial control over Carlsbad.

(5) There is an email dated 24 January 2003 from Mr Jams Rustambekov of Ince & Co, the solicitors for the Corporate Defendants, which asserts that the Corporate Defendants 'are controlled by the beneficial owner of Carlsbad'."

[10] The critical question on this application is therefore whether there is good reason to suppose that Mr Maksimov is the ultimate beneficial owner of Carlsbad, using Mr Nemyrovskyy as his nominee and acting through him in exercising control.

[11] Carlsbad was established in Cyprus on 18 May 1998. Its subscribing shareholders were two nominee Cypriot companies, Romanos Holdings Ltd and Scopaco Holdings Ltd, set up through local administrative agents for the purpose of holding the shares as nominees. In February 2012 new Cypriot administrative agents, C & P Business Administration Ltd, were appointed by Mr Nemyrovskyy to conduct the administrative affairs of the company. Shortly thereafter, the shareholding in Carlsbad was transferred into the name of Ms Svetlana Zorpa, an employee of C & P Business Administration Ltd, as the sole nominee shareholder.

[12] There is considerable evidence that Mr Maksimov has conducted his affairs through a large number of offshore companies which he has used as vehicles and nominees for the purposes of holding his own assets, without treating their separate corporate personality as a matter of any reality or significance. Accordingly where there is evidence that a company with nominee shareholders is under the substantial control of Mr Maksimov, I would readily accept that there is a good arguable case that its assets would be treated as in truth being the assets of Mr Maksimov for the purposes of enforcing any judgment obtained against him. In the particular circumstances of this case, it is legitimate to conflate the legally distinct tests of beneficial ownership and substantial control. If Carlsbad, a Cypriot company with admittedly nominee shareholders, is under the substantial control of Mr Maksimov, there is good reason to suppose that he is its ultimate beneficial owner.

BENEFICIAL OWNERSHIP AND SUBSTANTIAL CONTROL OF CARLSBAD

[13] The Bank's case relies heavily on documents which are concerned with shares in the Bank held by Carlsbad. Its case is based on documents because there is no one

currently employed by the Bank who was personally involved in any of the relevant events and transactions. The Bank's submissions may be summarised as follows:

"(1) The following documents establish at least a good arguable case that between 2004 and 2008 Carlsbad was owned and substantially controlled by Maksimov, because they show that Carlsbad was the vehicle through which Mr Maksimov held part of his shareholding in the Bank:

(a) the Bank's annual accounts for 2006 and 2007;

(b) a Shareholders Agreement dated 25 October 2005;

(c) the Statement of Claim in the action brought by Mr Maksimov in 2011 against TBIF in the Commercial Court in Kiev alleging breach of the Shareholders Agreement;

(d) the judgment of the Supreme Court of Ukraine dated 12 June 2012 in that action.

(2) There is no reason to think that the ownership and control of Carlsbad has changed at any stage, and indeed Mr Nemyrovskyy does not suggest that it has. Such evidence therefore establishes a good arguable case that Carlsbad remains owned and substantially controlled by Mr Maksimov.

(3) The evidence relied on by Mr Nemyrovskyy to establish his own beneficial ownership of Carlsbad does not cast doubt on that good arguable case."

THE DOCUMENTS RELATING TO CARLSBAD'S SHAREHOLDING IN THE BANK

[14] The Annual Accounts for the Bank for the calendar year ending 31 December 2006 identified that Carlsbad was at the year end a 3.97% shareholder (having been a 7.23% shareholder at the end of 2005). The notes contained the following:

"As at 31 December 2006, the Bank was jointly controlled by the following parties: Kardan NV (Netherlands) acting through TBIF with holdings of 48.65% of the Bank's issued shares, and private shareholders Mr Sergey Maksimov, Mr Peter Baron and Ms Liudmila Maksimova (each a member of the Maksimov family) with combined direct and indirect holdings of 48.65% of the Bank's issued shares (which holdings are held through Bauman Trade Ltd, Hewpack Ltd, Wensin Ltd and Carlsbad Enterprises Ltd." (my underlining)

[15] An equivalent statement was included in the 2007 Accounts. By this stage Mr Maksimov had a personal shareholding in his own name of 3.95% and the Carlsbad shareholding was 3.31%. The note was in these terms:

"As at 31 December 2007, the Bank was jointly controlled by the following parties: Kardan NV (Netherlands) acting through TBIF with holdings of 48.82% of the Bank's issued shares, and private shareholders Mr Sergey

Maksimov (holdings of 3.95% of the Bank's issued shares), Mr Peter Baron and Ms Liudmila Maksimova (each a member of the Maksimov family) with combined direct and indirect holdings of 48.65% of the Bank's issued shares (which holdings are held through Bauman Trade Ltd, Hewpack Ltd, Wensin Ltd and Carlsbad Enterprises Ltd." (Again my underlining)

[16] These notes in the successive year's Accounts state clearly that Carlsbad was the vehicle through which Mr Maksimov or his family held the shareholding in the Bank of 3.97% and 3.31% respectively. They are clear statements in an important part of the public accounts, which were in each case signed off by Ernst & Young as auditors. Those statements must very likely have been seen and approved by Mr Maksimov as President and Chairman of the Supervisory Board. They are public statements to which Mr Maksimov was a party that he or his family were the beneficial owners of the shares in the Bank held in the name of Carlsbad. They strongly suggest that it was he who had substantial control over Carlsbad.

[17] Mr Nemyrovskyy's evidence in relation to Carlsbad's shareholding is contained in paras 24 to 36 and 39 of his second witness statement. He says that in 2004 Mr Maksimov suggested he buy some shares in the Bank, and Carlsbad did so acquiring a total of 7,999,999 shares for the equivalent of US\$6,931,672.31. The purchase was from a Maksimov company, Fondovy Tsentrl Ltd as to 30%, and from the Bank itself in the form of newly issued shares as to 70%. The agreement was made in December 2004 and the transfer completed by entry in the register in July 2005. He has produced copies of the agreement and documents to evidence payment of the price. He says that:

"Holding shares in the [Bank] was not one of my major business activities. In fact it was one of the smaller investments of mine and I did not have the expertise or time actively to look after Carlsbad's shareholding in the [Bank]. Accordingly, as a minority shareholder, I considered that it would be more appropriate to have a representative to look after my shares in the Bank I had a good relationship with Mr Maksimov, and in view of his position within the Bank and his expertise in financial affairs, I entered into an informal agreement with him that he would manage Carlsbad's shares in the Bank on my and Carlsbad's behalf. Neither Mr Maksimov nor any member of his family ever acquired legal or beneficial interest in Carlsbad's shares in the Bank at this time nor did he or his family ever have any control over Carlsbad."

[18] This does not seem to me to go very far towards diminishing the weight which can be attached to the statements in the Accounts. The informal understanding is unsupported by any documentation, and no explanation is given as to why such an arrangement in relation to a holding worth some \$7 million in a major Ukrainian Bank should not have been recorded in any document. The explanation for appointing Mr

Maksimov based on lack of time is surprising, and the suggestion of lack of expertise does not sit easily with the remainder of Mr Nemyrovskyy's evidence as to his success in business. Despite Ms Healy's brave attempts to suggest that the passage in the Accounts could be read consistently with Mr Nemyrovskyy's evidence, even Mr Nemyrovskyy accepted that the accounts were, on his case, inaccurate. He said he had not seen them at the time and only found out about them during these proceedings; had he known about them earlier he would have contacted Mr Maksimov and asked for them to be corrected as they were misleading. But even assuming that Mr Nemyrovskyy was unaware of the entries at the time, what is significant is that Mr Maksimov was asserting in a public document that he held the shares through Carlsbad. No reason was suggested as to how such a fundamental misunderstanding could have arisen or why Mr Maksimov would have wanted deliberately to misstate the position.

[19] The Shareholders Agreement of 25 October 2005 was between (1) thirteen companies described and defined as "Shareholders of Maksimov" who held about 84.5% of the shares in the Bank and (2) TBIF Financial Services BV who held 9.55% of the shares in the Bank and (3) the Bank. It provided for there to be purchases and new issues of shares in the Bank so as to give companies described as "Shareholders of Maksimov" on the one hand, and TBIF on the other hand, shareholdings of 49% each. The companies listed and defined as "Shareholders of Maksimov" included Carlsbad, whose shareholding of 7,999,999 was identified in the agreement. The other companies described and defined as "Shareholders of Maksimov" include companies which are established by the evidence to be Maksimov vehicles, and there is no reason to suppose that any of those other companies were not wholly owned and controlled by Mr Maksimov or his family.

[20] Ms Healy suggested that this description being applied to Carlsbad was consistent with Mr Maksimov's authority under the informal agreement to manage the Carlsbad shares on Mr Nemyrovskyy's behalf. I have difficulty in reading the agreement in that way, and in particular with it being consistent with Mr Nemyrovskyy's evidence that Mr Maksimov could not make any significant decisions in relation to Carlsbad's shares without his specific authorisation. In particular:

"(1) The agreement involves the 'Shareholders of Maksimov' being treated as an indivisible group who would have to exercise rights and fulfil obligations as whole, it being a matter of indifference which corporate vehicle within that description was used. There are no rights or obligations which are specific to Carlsbad, or to any

one of the other twelve Maksimov companies who are defined together with Carlsbad as 'Shareholders of Maksimov'.

(2) The Preamble to the Shareholders Agreement refers to an accompanying agreement under which the 'Shareholders of Maksimov' are to sell 19,500,000 shares to TBIF for US\$16.25 million.

(3) Clause 1.2 involves an obligation on the 'Shareholders of Maksimov' to pay US\$5 million, plus an amount calculable as capitalised profits, to subscribe for newly issued shares.

(4) Clause 3.1 grants TBIF and the 'Shareholders of Maksimov' a right to share equally in any sale by a minority shareholder.

(5) Clause 3.2 grants an entitlement to the 'Shareholders of Maksimov' to buy a 50% shareholding in Pravex in certain circumstances."

[21] All these provisions suggest that the companies described and defined as "Shareholders of Maksimov" are under the single control of one individual and that there is no reason to divide the rights and obligations inter se. They suggest Mr Maksimov's absolute control of all thirteen, which is what the natural meaning of the language suggests.

[22] Moreover cl 11.4 involves Mr Maksimov personally guaranteeing all the obligations undertaken by the "Shareholders of Maksimov". It is difficult to see any reason why Mr Maksimov would be prepared to do so in relation to Carlsbad if it were a vehicle for Mr Nemyrovskyy. Ms Healy suggested that Mr Maksimov would feel comfortable that Mr Nemyrovskyy would indemnify him if the guarantee were called on in relation to Carlsbad, but it is difficult to draw this conclusion from Mr Nemyrovskyy's evidence of the informal agreement about management of the shares.

[23] There is a further anomaly which casts doubt on Mr Nemyrovskyy's account. The Shareholders Agreement bears the company stamp of Carlsbad against a signature said to be that of Ms Rostovskaya, whom Mr Nemyrovskyy describes as his trusted person who managed the day to day affairs of Carlsbad from its inception to February 2012. Mr Nemyrovskyy exhibits a statement from Ms Rostovskaya in which she says that Mr Maksimov has never had any power of attorney in relation to Carlsbad. Yet this is the role which Mr Nemyrovskyy asserts Mr Maksimov played in relation to Carlsbad's shares in the Bank.

[24] The Bank's case is not advanced to any significant degree by reliance on the Statement of Claim in the action brought by Mr Maksimov in 2011 against TBIF in the Commercial Court in Kiev; nor by the judgment of the Supreme Court of Ukraine dated 12 June 2012. The status of the shareholders and who controlled them were not matters in issue, and the references to Maksimov shareholders, or shareholders of Maksimov, were no more than a record of the language used in the Shareholders Agreement itself.

[25] For these reasons I consider that the evidence about the Annual Accounts and the Shareholders Agreement presently before the court is strongly suggestive of Mr Maksimov being at those times the owner of Carlsbad, who exercised substantial control over it.

THE CORPORATE DEFENDANTS' EVIDENCE

[26] On behalf of the Corporate Defendants, Ms Healy relied primarily upon the evidence of Mr Nemyrovskyy contained in two witness statements and the evidence from representatives of the administration agents of Carlsbad in Cyprus.

[27] In his statements Mr Nemyrovskyy says that he is, and has always been, the beneficial owner of Carlsbad; and that Carlsbad has never been owned or controlled by Mr Maksimov and "has nothing to do with Mr Maksimov".

[28] As to the commercial activity of Carlsbad in the fifteen years of its existence, Mr Nemyrovskyy states that Carlsbad is a company he has used for his own business purposes and is "the principal vehicle" he has used to invest in the construction and trading projects in the Ukraine with which he is concerned. He describes such projects, in which he invests "through Carlsbad", as including the construction of the Kempinskii Hotel in Odessa, the construction of the Odessa Port Silo, the construction of an oil terminal in Uzhgorod, West Ukraine, and the construction of a hotel/apartment complex in the Crimea. The only documents produced which might support such activity by Carlsbad were a credit agreement dated 18 September 1998 under which Carlsbad was to provide Naftoservice Ltd (which Mr Nemyrovskyy says is another of his companies) with a short term loan of 5 million Deutschmarks, to be provided by 31 December 1998 and repayable at 25 September 1999, for the purposes of financing the construction of a terminal for "renovation of fuel and grease materials", which may be the oil terminal in Uzhgorod mentioned by Mr Nemyrovskyy; and four transfer orders purportedly signed by Mr Nemyrovskyy's wife between November 2012 and February 2013, giving instructions for a total of US\$88,000 to be transferred from Carlsbad's account at Bank of Cyprus to

an account in the name of Naftoservice Ltd at the Bank. Quite apart from the unexplained inconsistencies between the agreement and the transfers, in time and amount, this evidence affords no independent corroboration that Carlsbad was being used for Mr Nemyrovskyy's benefit, and to be fair neither Mr Nemyrovskyy nor Ms Healy suggested that it did. The documents were produced to support an argument in Mr Nemyrovskyy's statement that because Naftoservice opened an account at the Bank in 1998 and "regularly received payments from Carlsbad's bank account in Cyprus", the Bank would have been well aware that he was behind Carlsbad when this and other client accounts (unspecified) were opened by Mr Nemyrovskyy. This seems to me to be a non sequitur, and was not relied on by Ms Healy.

[29] It does strike me as surprising, however, that Mr Nemyrovskyy produced no documentary corroboration of his assertion that Carlsbad was used by him as his principal vehicle for investment in commercial and industrial projects throughout its life. Apart from the perplexing Naftoservice documentation described above, the only documentary evidence of any commercial dealings by Carlsbad is its holding of shares in the Bank between 2005 and 2008 which, as explained above, link it to Mr Maksimov; and the purchase and resale of the OPH shares in early 2012, at a time when Mr Maksimov's assets were under pressure from his creditors. If it were the case that Mr Nemyrovskyy had used Carlsbad as the principal vehicle for investment in his own commercial projects between 1998 and 2013, which he implies were substantial in size and number (Mr Nemyrovskyy described the shareholding in the Bank as one of his smaller investments which he did not have time actively to look after), I would have expected him to have produced supporting documents which would be likely to exist and which would have considerably assisted the Corporate Defendants' case.

[30] As to the setting up and administration of Carlsbad, Mr Nemyrovskyy states that he set it up in 1988 with the assistance of local agents Scordis Papapetrou & Co He nominated a Russian woman living in Cyprus as director, Ms Galina Rostovskaya. He describes her as "my trusted person who managed the day to day affairs of Carlsbad from its inception to February 2012". He says she returned to Russia in 2012 and so had to relinquish her director's position. New administration agents, C & P Business Administration Ltd, were then appointed, and one of their employees, Ms Zorpa replaced Ms Rostovskaya as Carlsbad's sole director in February 2012. Mr Nemyrovskyy states that "since 1998, I have given all of the instructions in relation to the company's affairs to Galina and then to her successor [Ms] Zorpa". Since these were the directors resident

in Cyprus, I take the reference to the company's affairs and day to day affairs to mean those relating to corporate administration rather than commercial activity.

[31] The Bank advanced a number of reasons why I should not accept what Mr Nemyrovskyy says in his witness statements at face value in the absence of corroborative supporting documentation. Some had more force than others, but I accept the submission that I cannot place significant weight on uncorroborated assertions by Mr Nemyrovskyy in his witness statements. I am particularly influenced by the following:

“(1) In his first witness statement, Mr Nemyrovskyy said that Mr Maksimov did not have any connection with Carlsbad. This was before the Bank had adduced evidence of the documents it relied on, and in particular the Accounts and the Shareholders Agreement. When Mr Nemyrovskyy had to give his explanation for those documents, involving the alleged informal agreement and a trusted relationship between himself and Mr Maksimov, what he said in his first witness statement was shown to be inaccurate and misleading.

(2) Mr Nemyrovskyy states in his evidence that the Corporate Defendants are beneficially owned by Mr Krykryvtsev, Mr Nikolchuk and Ms Petenko respectively. For the reasons given earlier in this judgment, there is good reason to suppose that these are not the true beneficial owners of the Corporate Defendants but merely nominees for Carlsbad and that whoever beneficially owns and substantially controls Carlsbad is the beneficial owner of the Corporate Defendants. There is good reason to suppose that to describe Mr Krykryvtsev, Mr Nikolchuk and Ms Petenko as the beneficial owners of the Corporate Defendants is inaccurate and misleading.

(3) The Carlsbad shares in the Bank were retransferred to a Maksimov company, Webbing Ltd, in 2008, but there is reason to doubt whether that was an arm's length transaction. Mr Nemyrovskyy has produced two sale agreements pursuant to which such transfer is said to have occurred. One is for sale of 5,839,999 shares for 12 million Euros. The only part of the price which is alleged to have been paid or discharged is approximately 1.6 million Euros, and that by set off of the purchase price for OPH shares (in 2012). There was a payment of 1.628 million Euros in July 2011 but this is said to have been in respect of interest. The balance of about 10.4 million Euros has still not been paid. Mr Nemyrovskyy suggests that in 2010 he obtained security in the form of a personal guarantee from Mr Maksimov and a pledge of shares in Stroidormash, and further security in 2012 in relation to assets of Kiev River Port, but the fact remains that on Mr Nemyrovskyy's account of events the payment arrangements were left vague and there has been no attempt to recover the greatest part of the price for the shares in the period of almost five years since they were retransferred to a Maksimov company. The second agreement with Webbing in 2008 is for the sale of 2,160,000 shares for US\$7.2 million. Mr Nemyrovskyy says that this sum was paid in April and May 2008, but has produced no supporting evidence of the payments, despite the specific point being made in the Bank's evidence that the absence of evidence of payments suggests that transfer of the shares was between entities under the same ownership and control. No

evidence was advanced as to any difficulty in obtaining evidence of payment and Mr Nemyrovskyy has produced evidence of other money transfers where it has suited him.”

[32] The doubt which is legitimately cast on the arm's length nature of the sale of Carlsbad's shares in the Bank to Mr Maksimov in 2008 also provides further reason to suppose that the transfer of the OPH shares by the Maksimov companies to Carlsbad in early 2012 was not an arm's length transaction. No payment was made by Carlsbad for the OPH shares. The payment obligation was said to be extinguished by assigning the right to the price from the selling companies to Webbing Ltd and then setting off the alleged price due to Carlsbad for retransfer of the shares in the Bank under the 2008 agreement. If there is doubt as to whether the transfer of the shares in the Bank to the Maksimov company Webbing Ltd was a genuine arm's length transaction, that casts doubt on whether there was indeed any obligation on a Maksimov company to pay to Carlsbad that which Mr Nemyrovskyy says was treated as the consideration used to pay for the OPH shares.

[33] I also note that Mr Nemyrovskyy advances no reason why Mr Maksimov might have wanted to sell the shares in the Bank in 2004 and then repurchase them again in 2008, whilst retaining the power merely to manage them in the interim. The absence of any suggested commercial rationale for doing so supports the Bank's argument that the shares were always subject to his control.

[34] The Corporate Defendants rely not only on evidence from Mr Nemyrovskyy but also from those involved in the corporate administration of the company in Cyprus. A witness statement from Mr Ponomarenko of C & P Business Administration Ltd confirms that his firm was appointed in February 2012 to manage the company's affairs and that he receives all his instructions from Mr Nemyrovskyy. He produces company records. None records the identity of the beneficial owner or the person from whom instructions were received in the period prior to his appointment. There is exhibited a “Secretary's Incumbency Certificate” dated 20 February 2013 which certifies that Mr Nemyrovskyy is the beneficial owner of the company. There is also a Declaration signed by Ms Zorpa and Mr Nemyrovskyy dated 20 February 2012 which acknowledges that she holds the shareholding as nominee and trustee for him. No equivalent documents are provided for the earlier period. Mr Ponomarenko deposes that he has searched the records and found no reference to Mr Maksimov and no entry which would suggest that he is in any way connected to the company. He also deposes that the company was set up in 1998 under the instructions of Mr Nemyrovskyy and that its original shareholders were set up for the

sole purpose of holding the shares in the company on behalf of Mr Nemyrovskyy as the beneficial owner. It is not clear on what basis he makes this assertion, since he was not involved in the company at the time and he does not say it is derived from any records; it is not supported by any of the documents he chooses to exhibit to the affidavit. In the face of the other evidence I have recorded, I do not regard this as taking the Corporate Defendants' case much further. It provides no independent evidence of the position prior to 2012. It is consistent with Mr Maksimov using Mr Nemyrovskyy as a nominee "beneficial owner" of Carlsbad since that date, when his assets came under pressure from creditors, and indeed before that date.

[35] Reliance is also placed on a document attached to Mr Nemyrovskyy's second witness statement which he says is a statement signed by Ms Rostovskaya, who was the director of Carlsbad between 1998 and 2012. It is dated 20 February 2013 and says:

"It was Mr Nemyrovskyy Oleg the actual owner of the above company who appointed me to this position. Over a period of 1998-2007 Mrs Verlinskaya Marina, Mr Nemyrovskyy's Oleg daughter was formally the sole and exclusive owner of the above company and since 2007 til February 2012 it was Mr Nemyrovskyy Oleg who was the sole and exclusive owner of the company who actually ran it since the moment of the set up of Carlsbad Enterprises Ltd Mr Maximov SV has never been a shareholder of Carlsbad Enterprise Ltd or participated in running it. He has never had any powers of attorney."

[36] This supports the Corporate Defendants' case but is inconsistent with Mr Ponomarenko's affidavit that it was Mr Nemyrovskyy himself who was the beneficial owner throughout the period from 1998. It is not supported by any contemporaneous company records.

[37] It is important to keep in mind that the exercise upon which the court is engaged is not the trial of an issue as to whether Mr Maksimov substantially controls Carlsbad, but a determination whether the evidence establishes that it is more than barely arguable that such is the case. For the reasons I have given I am persuaded that the Bank has reached the threshold of a good arguable case. On the totality of the evidence currently before me, there is good reason to suppose that Carlsbad was and remains a company owned and substantially controlled by Mr Maksimov. Whether that will prove to be so upon a full trial of the issue remains to be seen. Accordingly, subject to questions of material non disclosure, the freezing injunction should apply to the assets in the names of the Corporate Defendants.

NON DISCLOSURE

[38] Mr Maltsev's first affidavit, which contained the evidence supporting the ex parte application to Cooke J, relied on two matters as suggesting that Mr Maksimov was the ultimate beneficial owner of OPH, and therefore of the OPH shares held by the Corporate Defendants:

“(1) OPH was named as the borrower of two of the loans in Annexe 6 of the 2009 Framework Agreement, which were described as 'Loans related to the Seller' ie Mr Maksimov.

(2) Three named persons known to be closely connected to Mr Maksimov held senior positions of responsibility in OPH.”

[39] The Corporate Defendants contend that there was material non disclosure in relation to each assertion. As to the first, it is the Corporate Defendants' case that at the time of the Framework Agreement in 2009, Mr Maksimov was indeed the ultimate beneficial owner of the OPH shares, but that the four companies through which he owned them had sold them to Carlsbad in early 2012. The Bank was aware of the interim sale to Carlsbad, it was contended, because the Bank had commenced proceedings in Kiev in October 2012 seeking to invalidate the transfer of OPH shares from Budshlyakhmash to Carlsbad. Despite this, Mr Maltsev's affidavit did not focus on the ownership of Carlsbad, which is the issue which has ultimately proved critical to the order made against the Corporate Defendants.

[40] The explanation for this is that the Bank knew only of the sale of a quarter of the shares to Carlsbad. It knew nothing of the transfer of the shares by Ivex, Lordus and Pelham to Carlsbad, or of any transfer of shares from Carlsbad to the Corporate Defendants. It was unaware that Carlsbad had been involved in any interim sale, and did not seek freezing relief against Carlsbad itself. It therefore had no reason to know that Carlsbad was a relevant entity in relation to those OPH shareholdings which the documents revealed were legally held by the Corporate Defendants. So far as the Bank knew, those shares were unconnected to the sale by Budshlyakhmash of the other OPH shares to Carlsbad, which was the only transaction of which it was aware. This was an understandable conclusion, and not one to which substantial criticism can be attached. This did not amount to material non disclosure so as to warrant setting the order aside.

[41] The second criticism made by the Corporate Defendants of Mr Maltsev's affidavit is that the three named individuals had ceased to hold the identified positions within OPH at the time of the application, having been replaced in April 2012. Their replacement was apparent from a public website, so that the Bank ought to have been aware that they no

longer held the alleged or any position within OPH. It appears that the information in Mr Maltsev's affidavit had come from that same website, which is a registry of information for joint stock companies in the Ukraine; but the section which had been consulted and relied on (a translation of which was exhibited to the affidavit) was OPH's most recent Annual Report filed at the registry, which showed the individuals as holding the relevant positions. The part of the website which showed that they had been removed was not searched by the Bank when preparing Mr Maltsev's affidavit, and those involved were unaware that this other part of the website contained information which was updated more regularly or that it contained different information as to the positions held by the three individuals at OPH. If any criticism is to be attached to the Bank in this respect, it is relatively minor, and not such as to warrant setting aside the order.

CONCLUSION

[42] The order will remain in place against the Corporate Defendants until trial or further order. I will hear the parties on whether I should give directions for the trial of the issue between the Bank and the Corporate Defendants as to the ownership of the OPH shares.

Judgment accordingly.