Neutral Citation Number: [2021] EWHC 392 (Ch)

Case No: BR-2020-000418

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY & COMPANIES LIST (ChD)

IN THE MATTER OF KHADZI-MURAT DEREV
AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

7 Rolls Building
Fetter Lane
London EC 4A 1NL

Date: 24 February 2021

Before :

MR JUSTICE ADAM JOHNSON

- -

Between:

IGOR VITALIEVICH PROTASOV	**Applicant**
- and –	
KHADZHI-MURAT DEREV	**Respondent**

- -
- -

Harry Matovu QC (instructed by **Seladore Legal Limited**) for the **Applicant**
William Willson (instructed by **Taylor Wessing LLP**) for the **Respondent**

Hearing dates: 18 February 2021
Further written submissions: 19 February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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Mr Justice Adam Johnson:

Introduction and Background

1. Mr Khadzi-Murat Derev was declared bankrupt in Russia in July 2019, and the present Applicant Mr Protasov was appointed his bankruptcy manager.

2. Shortly before he was declared bankrupt Mr Derev left Russia and, as I understand the evidence, has been present in London since then. He has assets in England, including in particular interests in two high value properties, one at Montpelier Street and the other at Basil Street, both in London.

3. On 21 July 2020, the Applicant, Mr Protasov, made an application to the English High Court seeking recognition of the Russian bankruptcy in this jurisdiction under Article 17 of Schedule 1 to the Cross-Border Insolvency Regulations (the CBIR), which in terms reflects Article 17 of the UNCITRAL Model Law. (In what follows, where I refer to Articles of the Model Law, I am referring to the provisions of the Model Law as given effect in Schedule 1 of the CBIR). Recognition was sought of the Russian bankruptcy as a "*foreign main proceeding*".

4. The recognition application was heard only in December 2020, but in the meantime the Applicant feared there was a risk of dissipation of assets by Mr Derev. He therefore made a without notice application for interim relief, which was heard by Zacaroli J on 28 July 2020. It is clear from Zacaroli J's judgment that the application was made on the basis of Article 19 of the Model Law.

5. Article 19(1)(c) identifies certain types of provisional relief which may be ordered "*upon application for recognition*", but by reference to certain categories of relief that may be ordered *after* recognition. These are set out in Article 21. Article 21(1)(c) says that such relief includes an order " *... suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20*".

6. Having considered the evidence and heard submissions, Zacaroli J made the order sought. Paragraph 7 of his order is as follows:

> *"Until the Return Date or further order of the Court, the Debtor's right to transfer, encumber or otherwise dispose of any of his assets worldwide is suspended in accordance with the interim relief available under Article 19(1)(c) and Article 21(1)(c) of the Model Law."*

7. The "*Return Date*", as defined, was the date of the intended application for recognition of the Russian bankruptcy proceedings as a foreign main proceeding.

8. The Applicant's previous counsel made the application before Zacaroli J on the basis that the appropriate test to apply was that relevant to the grant of a freezing order. Zacaroli J had some doubts about whether that was the correct approach analytically. He commented as follows at [6]:

> *"It seems to me that the most appropriate analogy in relation to the suspension of dealing with assets is with a proprietary injunction that this court would grant in favour of a proprietary claim. That is because the Russian manager, on the basis of the Russian law evidence that I have seen, steps into the shoes of the bankrupt and is the only person entitled to deal with all the assets of the bankrupt. The consequences is that it is the manager and not the bankrupt who is entitled to claim property belonging to the bankruptcy estate from third parties, thus the claim to assets here has all the hallmarks of a proprietary claim."*

9. As Zacaroli J went on to note, the order sought included certain provisions which one would ordinarily expect to find in a freezing order. These included requirements for the provision of information by Mr Derev as to his worldwide assets – with initial disclosure to be provided within 3 days (para. 12), and then further disclosure by means of a witness statement verified by a statement of truth within 14 days (para. 13). Zacaroli J was satisfied that in any event, such provisions fell within Model Law Article 21(1)(d) (provision of information concerning the debtor's assets), which they plainly do.

10. Another provision is that in para. 10 of the order, which provides:

> *"This order does not prohibit the Debtor from spending £2,000 a week towards his ordinary living expenses and additional reasonable sums on legal advice and representation. But before spending any money the debtor must inform the applicant's legal representatives of the amount, purpose and source of the intended expenditure."*

11. At [17], Zacaroli J said that such provisions "*would not be appropriate in a proprietary injunction, but the claimant is happy to leave those in*."

12. The Order, once made, was duly served, and disclosure was provided by Mr Derev, although on the Applicant's case it was deficient. I will return to this point below.

13. As already mentioned, the recognition application was eventually heard on 1 December 2020 by Deputy Judge Karet. The requested recognition order was made, effective from 5.30pm on 1 December 2020.

14. There remained, however, the question of the order made by Zacaroli J. There was disagreement as to what should happen to that, but there was no time to resolve that disagreement at the hearing before Deputy Judge Karet, and so the matter comes before me.

The Present Application

15. In short, the Applicant seeks to continue Zacaroli J's order on the footing that there remains a risk of dissipation of assets by Mr Derev. He puts forward evidence said to show that Mr Derev has been uncooperative in connection with the ongoing bankruptcy, and that unless restrained by means of an order he may still seek to put

assets beyond the reach of his creditors. The order sought by means of paragraph 2(a) of the Applicant's draft Order is as follows (as I will explain below at [27], the words in square brackets have now been superseded, and the order sought is for an extension of Zacaroli J's order pending a hearing in the Isle of Man):

> "*Pursuant to Article 21 of the Model Law:*
>
> *(a) the Order of Mr Justice Zacaroli dated 28 July 2020 … shall be continued [until a further hearing to be listed at the first available date after 15 January 2021]*"

16. Mr Derev says that there is no need for Zacaroli J's order to be continued and possibly no jurisdiction enabling the Court to continue it. He says that a recognition order has now been made, and that has the effect of suspending his rights in relation to his assets in just the same way as if he had been subject to an English bankruptcy order. That brings with it the entire infrastructure of the insolvency legislation which is a comprehensive code for dealing with the position of bankrupts, and there is no role within that framework for the making of freezing (or similar) orders against such persons.

17. Some ancillary questions also arise. These are: (1) Should the Court make a declaration under Article 20 of the Model Law, that Mr Derev's rights to deal with his assets have been suspended? (2) Should the Court make an order under Article 21(1)(e) of the Model Law, entrusting the realisation of Mr Derev's assets within Great Britain to Mr Paul Allen, a licensed insolvency practitioner? (3) What provision, if any, should be made as to the powers exercisable by Mr Allen? (4) Should an order be made under Article 21 of the Model Law expressly requiring Mr Derev to comply with his obligations under the Insolvency Act 1986, section 333, including his obligation to give information to Mr Allen? (5) If the order of Zacaroli J is continued, then should the proviso in relation to living expenses and legal fees remain in place? (6) Should provision be made to enable the Applicant to participate in an assessment of the legal fees expended by Mr Derev so far? (These come to roughly £400,000, which the Applicant says is obviously unreasonable).

18. The main point, however, is as to the continuation of Zacaroli J's order. In order to deal with that point, it is necessary to deal briefly with some further background.

Conduct and Assets of Mr Derev

19. The Applicant's case for continuation of Zacaroli J's order is premised on a continuing risk of dissipation of assets. The evidence is detailed, but the Applicant points to three matters in particular which, taken together with Mr Derev's historic behaviour in relation to the Russian bankruptcy proceedings, are said to give rise to concerns.

20. The first matter relates to a £200,000 loan due from an individual called Eleanora Boss. There is a loan agreement dated 16 May 2017 between Mr Derev and Ms Boss. The stipulated repayment date was 15 May 2020, but the loan has not been repaid. The loan amount was not identified as an asset either in Mr Derev's initial disclosure under para. 12 of Zacaroli J's order or in his witness statement served under para. 13. This is despite the fact that, on 7 August 2020, after Zacaroli J's order had been

served, the Applicant expressly raised the question of Mr Derev's connection with Ms Boss. In his witness statement Mr Derev said: "*Ms Boss acted as a broker for me during the acquisition of the Montpelier Street property and assisted with the financing for the acquisition. I paid her a commission for her services. I do not have any claim against Ms Boss and she does not hold any assets on my behalf*." That was plainly an inaccurate statement in light of the loan agreement but Mr Derev's position is that, at the time of making his witness statement, he had forgotten about it.

21. The second matter relates to a loan owed to Mr Derev under a loan agreement with an English company called Der London Limited, of which his daughter is the sole shareholder and director. The loan agreement is dated 26 January 2017. The loan amount is significant: some US$2,250,000, which was advanced for a period of five years, and so is repayable in January 2022. The loan to Der London was not identified by Mr Derev in his initial disclosure given in response to para. 12 of Zacaroli J's order, but it was dealt with in his witness statement, after a copy of the loan agreement (which the Applicant had obtained from Mr Derev's principal creditor in Russia) was provided to him. In his witness statement, Mr Derev said as follows: "*The loan to Der London Limited is not repayable until January 2022 and therefore I did not include this in my original assets disclosure schedule. I now understand the future assets are also within the scope of the order and this is now included in the asset disclosure schedule*." The Applicant says that this account is entirely unpersuasive, coming as it does from an experienced businessman such as Mr Derev: he must have realised that the loan was an asset which fell to be disclosed. The Applicant points to other matters of concern, including in particular the fact that the loan from Mr Derev is not reflected in the statutory accounts of Der London Limited (although they do refer to a loan in a similar amount payable to Mr Derev's daughter), and the fact that Mr Derev's daughter attempted to strike Der London Limited off the register of companies at around the time a claim was made against Der London in Russia.

22. The third matter relates to three luxury watches, having a combined value of about £140,000. These were disclosed by Mr Derev in response to Zacaroli J's order, including in his witness statement served under para. 13 of that order, but in a schedule which identified them as being in London. After the recognition order was made in December 2020, the Applicant's London solicitors duly asked for delivery up of the watches. The response that came was that Mr Derev had made an "*inadvertent error*" in relation to the asset disclosure, and in fact the watches were in Russia not London. There they remain, and as I understand it, efforts to secure their delivery up to the Applicant in Russia have stalled because of certain formalities about the proper manner of engaging with Mr Derev's Russian legal adviser, Ms Shvez.

23. Those are the specific matters of concern, but before moving on, it is also relevant to note certain further matters concerning Mr Derev's assets.

24. I have already mentioned above the Montpelier Street property. This is said to be jointly owned by Mr Derev and his wife, although subject to an outstanding mortgage in favour of Julius Baer Bank.

25. I have also mentioned the Basil Street property. This is owned by an Isle of Man company, Polar Sun Limited, and again is subject to a mortgage in favour of Julius Baer. The shares in Polar Sun are registered in the name of Fedelta Nominees

Limited in the Isle of Man, but are held on trust for Mr Derev and his wife. The professional directors are from the Fidelta Group in the Isle of Man.

26. In addition there are a number of accounts at Julius Baer Bank, as follows:

    a. A Sterling personal account at Julius Baer Guernsey held jointly by Mr Derev with his wife.

    b. A US dollar personal account at Julius Baer Zurich held jointly by Mr Derev and his wife.

    c. A Polar Sun corporate account held at Julius Baer Guernsey and managed by Fedelta Trust Limited in the Isle of Man.

    d. A corporate account in the name of another Manx company, Moonlight Limited, at Julius Baer Zurich. Moonlight is beneficially owned by Mr Derev and his wife in the same manner as Polar Sun, with Isle of Man directors and nominee shareholders from the Fedelta Group. The Julius Baer account holds a portfolio of assets having a current value of c. US$11m.

27. One can see that control of the assets held by the Isle of Man companies, and in particular the Moonlight account in Zurich which holds a substantial credit balance, is a matter of concern for the Applicant. It is principally for this reason, as I understand it, that he seeks continuation of the Order made by Zacaroli J. An application for recognition of the Russian bankruptcy has been made in the Isle of Man, but has yet to be determined – I understand it is now likely to be dealt with at some point in March 2021. Thus, the Applicant said in his Skeleton Argument for the present hearing:

> *"The Applicant asks the Court to continue the freezing injunction until the Russian proceedings and his appointment as bankruptcy manager have been recognised and appropriate orders made by the Isle of Man courts, which have jurisdiction over the offshore companies in which the Applicant has a beneficial interest and in whose name several of the Julius Baer accounts stand."*

28. One further point is relevant as to the position in the Isle of Man, which is that on 2 December 2020, the day after the recognition order was made by the English Court, the Applicant's solicitors in the Isle of Man, Callin Wild, wrote to lawyers representing the Fedelta Group, and said:

> *"In light of the recognition by the High Court of the Russian bankruptcy … Mr Protasov … intends shortly to take steps to seek recognition in the Isle of Man as well … In order to confirm that assets will be preserved for the benefit of creditors pending that application, we request an undertaking from the directors and legal owners of the Companies [i.e., Polar Sun and Moonlight] that they will abide by the terms of the Freezing Order [i.e. Zacaroli J's order] and (a) they will not in any event accept or accede to any instructions from or on*

> *behalf of Mr Derev regarding any dealings with shares in the Companies or with any assets of the Companies until after determination of an application in the Isle of Man for recognition of Mr Derev's bankruptcy and the appointment of Mr Protasov. In the absence of such an undertaking, we may well be compelled to make an application to the Isle of Man court for an injunction to prevent any such dealings pending an application for recognition."*

29. On 14 December, Mr Brooks of Simcocks wrote on behalf of Polar Sun and Moonlight to say:

> *"On the basis that you will be taking active and immediate steps to have the appointment of Mr Protasov/Mr Allen recognised in the Isle of Man, we hereby indicate that our client is willing to give, and does give by this letter, an undertaking in terms of Callin Wild's request contained in the letter of 2 December."*

The Order of Zacaroli J

Summary & the Parties' Positions

30. Should the Court continue the Order of Zacaroli J? This is the principal issue I have to determine, and I have come to the conclusion that the answer is no. My reasoning is as follows.

31. I accept the point made by the Applicant that Mr Derev's conduct continues to be a matter of serious concern. Looking at the three particular instances mentioned above, the explanations given by Mr Derev for his various defaults are unconvincing, at least when the matters are looked at together. One might have been able to put to one side, for example, the "*inadvertent error*" in relation to the luxury watches had it been an isolated incident, but if one sets it beside the matter of the Eleanora Boss loan and more importantly, the Der London loan, including the unexplained fact that that loan does not appear in Der London's statutory accounts, a pattern of behaviour emerges which I agree gives rise to legitimate concerns about Mr Derev's conduct vis-à-vis his creditors and his bankruptcy estate. Similar concerns might in other contexts have justified the making or continuation of a freezing order, but do not, in my view, justify the continuation of the interim order made by Zacaroli J on 28 July 2020.

32. My reason, in short, is that as matters now stand, there is no good reason for that order to remain in place.

33. There was detailed discussion before me as to whether there is jurisdiction for the Court to make or continue a freezing order in circumstances such as the present. Mr Matovu QC for the Applicant said certainly there was, under Section 25 of the Civil Jurisdiction and Judgments Act 1982 ("*CJJA*"), and/or under Article 21 of the Model Law combined with Section 37 of the Senior Courts Act 1981.

34. For Mr Derev, Mr Willson said not, or said at least that if there was jurisdiction in the technical sense, it was not one which the Court should exercise. He said that the practice in the bankruptcy courts was not and never had been for the interests of a trustee in bankruptcy against the bankrupt to be protected by means of a freezing order, and that it would be damaging to that settled practice now to introduce the concept of the freezing order into what is intended to be a comprehensive code for dealing with a bankrupt's affairs. He said that to do so in the manner requested by the Applicant would be to set loose the Model Law and the CBIR from their insolvency moorings, with possibly wide-ranging and unpredictable results.

Civil Jurisdiction and Judgments Act 1982

35. To begin with, I am unpersuaded that Section 25 of the CJJA is in point. As is well known, Section 25 was introduced to give effect in English law to Article 24 of the Brussels Convention, and thereby to act as an antidote to the effects of The Siskina [1979] AC 210, in which the House of Lords held that an English injunction was not available against a party present overseas (on the facts, in Panama) and which was a defendant in proceedings in another jurisdiction (Cyprus): there was no gateway for service out against such a person under the then provisions of RSC Ord 11, rule 1.

36. When Section 25 first came into effect in 1987, it was only as regards proceedings falling within the Brussels Convention, and the Brussels Convention excludes insolvency proceedings from its scope (as does the later Brussels Regulation (Recast) (Regulation (EU) no. 1215/2012)). Mr Matovu QC however relies on the extension to Section 25 implemented in 1997 by means of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302).

37. Article 2 of the 1997 Order is as follows:

> "*The High Court in England and Wales or Northern Ireland shall have power to grant interim relief under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 in relation to proceedings of the following descriptions, namely – (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano contracting state or Regulation state; (b) proceedings whose subject matter is not within the scope of the Regulation as determined by article 1 thereof*."

38. Mr Matovu argued, relying on the underlined words, that whatever the position may have been prior to the introduction of the 1997 Order, it is now clear that insolvency proceedings fall within range of proceedings to which Section 25 applies, and thus there is jurisdiction under that section to continue Zacaroli J's Order.

39. It is obviously correct that the scope of Section 25 was enlarged in the sense described, but still, I am not persuaded that Section 25 is intended to have any relevance in a case such as the present, where an interim order is sought (or sought to be maintained) by a foreign bankruptcy manager against a debtor.

40. In ETI Telecom International NV v. Republic of Bolivia [2009] 1 WLR 655, a strong Court of Appeal had to consider the application of Section 25 in a case where the proceedings abroad, said to generate the need for the English injunction, were

themselves ancillary attachment proceedings in New York in aid of an ICSID arbitration. The Court refused the injunction on the basis that the foreign proceedings needed to to be "*substantive proceedings*", and that was not an apt description of the New York attachment. Lawrence Collins LJ said the following at [70]:

> *"I am satisfied that the foreign proceedings to which section 25 and of the 1997 Order are referring are proceedings on the substance of the matter. First, that appears from the legislative purpose of section 25 which was to implement article 24 of the Brussels Convention, and to reverse the effect of The Siskina [1979] AC 210. Article 24 itself speaks of the case where the courts of another contracting state have jurisdicition 'as to the substance of the matter.' In The Siskina Lord Diplock, at p. 256, referred several times to the court in which the substantive relief was sought (as did Lord Denning MR in the Court of Appeal, at page 234 ('the substantive case'). Secondly, the heading of the section refers to the jurisdiction of the English court to grant interim measures 'in the absence of absence of substantive proceedings' and legitimate assistance may be derived from that in construing section 25: Bennion, Statutory Interpretation, 5th ed (2008), pp. 745 et seq."*

41. Here, even adopting a generous interpretation of "*substantive proceedings*", I cannot see that the Russian bankruptcy process falls within that description. It is fair to describe it as a "*proceeding*", and indeed that is the language of the Model Law, but it is a proceeding of a particular type, which is not concerned with the vindication of private law rights in a litigation context, which seems to me to be the natural meaning of "*substantive proceedings*" in the context of Section 25. To quote from Article 2 of the Model Law, a "*foreign proceeding*" in the present context is:

> *" ... a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor or subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."*

42. Such a "*foreign proceeding*", in my judgment, does not qualify as a *substantive proceeding* within the scope of Section 25 of the CJJA.

Section 37 of the Senior Courts Act and the Model Law

43. That is not the end of the road, however. One must remember that a distinguishing feature of The Siskina was that the defendant was outside the territorial jurisdiction of the Court, and the action in that case failed because there was no available basis for the defendant to be served outside the jurisdiction with a writ claiming only interim relief.

44. The circumstances of this case are different. Mr Derev is within the jurisdiction: he is living in London and can be served with an order here, and the Court's contempt power can be exercised against him here. Mr Matovu QC said these are important

factors: the Court has personal jurisdiction over Mr Derev, and its power to make injunctions is untrammelled save by the requirement in Section 37 of the Senior Courts Act 1981 that an order will only be made where "*it appears to the court to be just and convenient to do so*." So far as Article 21 of the Model Law is concerned, it confers broad powers on the Court to make orders designed to protect the assets of the debtor, including (Article 21(1)(g)) the power to grant such additional relief as may be available to a British insolvency officeholder. That meant that just the same wide discretion conferred by section 37 of the Senior Courts Act should be available here.

45. As to these submissions, I agree that there is, so to speak, jurisdiction in the strict sense over Mr Derev, but it is a separate question whether the present is a proper case for the exercise of that jurisdiction.

46. This important, although perhaps elusive, difference was explained as follows by Lord Scott in his speech in Fourie v. Le Roux [2007] 1 WLR 320, at [25] (emphasis added):

> *"The references to jurisdiction made both by Sir Andrew Morritt V-C and by the deputy judge ... read as though they had in mind jurisdiction in the strict sense. If they did, then I think they were wrong. It seems to me clear that Park J. had jurisdiction, in the strict sense, to grant an injunction against Mr Le Roux and Fintrade. Both were within the territorial jurisdiction of the court at the time the freezing order was made. Both were, shortly after the freezing order had been made, served with an originating summons in which relief in the form of the freezing order was sought… The power of a judge sitting in the high court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court act 1981 and its statutory predecessors. It derives from the pre-Supreme Court of Judicature Act 1871 (36 & 37 Vict c 66) powers of the Chancery courts, and other courts, to grant injunctions … The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted."*

47. It seems to me that this same analysis is apt in the present case. There is jurisdiction in the strict sense against Mr Derev. Insofar as Mr Willson submitted that there is no jurisdiction in this case, I disagree with him. But are there relevant restrictions and limitations which serve to inhibit the proper exercise of that jurisdiction? In my view there are.

48. One can begin by thinking about purely domestic bankruptcy cases. As Mr Willson pointed out, it is simply not part of the practice of the bankruptcy courts for the interests of a trustee vis-à-vis the bankruptcy estate to be protected by means of freezing orders or other injunctions. It seems to me that that is not because of a lack of jurisdiction in the strict sense, but because the bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted.

49. Consistent with this, researches by the parties in this case have identified only one instance of the freezing order jurisdiction being used in proceedings against a bankrupt. The case is Raithatha v. Williamson [2012] EWHC 909 (Ch), [2012] 1 WLR 3559. There, the bankrupt had certain entitlements to future benefits under a pension scheme which did not fall within his bankruptcy estate, and an injunction was granted restraining his ability to realise those benefits pending determination of an application by the trustee in bankruptcy to claim them under an income payments order under section 310 Insolvency Act 1986. The parties also drew my attention to Deutsche Schachtbau v Ras-Al-Khaimah [1990] 1 AC 295 (a cross-border rather than a purely domestic case), in which Lord Goff at p. 361 appears at least to have contemplated the possibility of the Court granting an injunction in aid of winding-up proceedings (see Gee on Commercial Injunctions, at fn 380 in §6-087, although it seems that what Lord Goff had in mind was an injunction operating pre-winding up, rather than an injunction post winding-up which restrains dealing with assets in a liquidation).

50. Raithatha v. Williamson though was an exceptional case, because the assets in question were future assets and were not part of the bankruptcy estate. The somewhat oblique comments of Lord Goff in Deutsche Schachtbau were not part of his reasoning and at most are a recognition of the obvious breadth of the jurisdiction available under Section 37, and not a mandate or encouragement to exercise it in a case such as the present.

51. In my judgment, therefore, these very limited references only prove the point: no doubt in many cases there will be jurisdiction "*in the strict sense*" over a bankrupt, which in principle would enable a freezing order or similar order to be made, but given the infrastructure of the insolvency regime which operates in any event to deprive the debtor of control of his worldwide assets (Insolvency Act 1986 s.306), and to confer wide-ranging powers on his trustee (for example in relation to the obtaining of information: Insolvency Act 1986 s.366), and all of that subject to the general control of the Court (Insolvency Act 1986 s.363) whose powers include expressly a power of arrest (Insolvency Act 1986 s.364), there is no real need or scope for the freezing order jurisdiction to be exercised.

52. Turning to the present case, it seems to me that in short, the same logic applies: the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified. In this case, I am not persuaded that any special or exceptional reasons exist.

53. I should amplify this reasoning a little by reference to the CBIR/Model Law.

54. First, a general point. Regulation 2(2) of the CBIR permits the Court to consider the *travaux préparatoires* and expressly refers to the 1997 Guide to Enactment of the UNCITRAL Model Law (UN Doc A/CN.9/442). The Guide to Enactment states at [21b]: "*The Model Law presents to enacting States the possibility of aligning the relief resulting from the recognition of a foreign proceeding with the relief available in a comparable proceeding under the national law*".

55. Turning then to Articles 19-21 of the CBIR, Article 19 deals with forms of provisional relief which may be applied for *prior to* recognition of a foreign proceeding. It is headed "*Relief that may be granted upon application for recognition of a foreign proceeding*", and provides as relevantly follows (I have underlined in the quotations below the wording which is particularly relevant to the current analysis):

> *"(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including –*
>
> *(a) staying execution against the debtors assets;*
>
> *(b) entrusting the administration or realisation of all or part of the debtors assets located in Great Britain to the foreign representative or another person designated by the court …*
>
> *(c) any relief mentioned under paragraph 1(c), (d) or (g) of article 21.*
>
> *(2) Unless extended under paragraph 1(f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.*
>
> *(3) The court may refuse to grant relief under this article is such a relief would interfere with the administration of the foreign main proceedings.*"

56. Article 20 is headed, "*Effects of recognition of a foreign main proceeding*." Here, the Russian proceedings have been recognised as a "*foreign main proceeding.*" Article 20(1) and (2) provide relevantly as follows (emphasis added):

> *"(1) Upon recognition of a foreign proceeding that is a foreigh main proceeding, subject to paragraph 2 of this article:*
>
> *(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;*
>
> *(b) execution against the debtor's assets is stayed; and*

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(2) The stay and suspension referred to in paragraph 1 of this article shall be –

(a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 …; and

(b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case,

and the provisions of paragraph 1 of this article shall be interpreted accordingly."

57. Article 21 of the Model Law is headed, "*Relief that may be granted upon recognition of a foreign proceeding.*" Article 21(1) provides as follows (again, my emphasis):

"*Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including–*

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;

(b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;

(f) extending relief granted under paragraph 1 or article 19; and

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986."

58. Looking then at what has happened in this case:

i) Zacaroli J was faced with an application under Article 19 for an order operating as a provisional suspension of Mr Derev's right to deal with his property, pending determination of the application made for recognition of the Russian bankruptcy.

ii) The making of such a provisional order is authorised by Article 19(1)(c). Structurally, this is achieved by means of a cross-reference to Article 21(1)(c), which contains a discretionary power to suspend the debtor's rights *post*-recognition, in cases where that is necessary.

iii) Although at the invitation of the Applicant's counsel, Zacaroli J applied the test for the granting of freezing injunctions, his order was designed to achieve the provisional suspension of the debtor's rights contemplated by Article 19(1)(c) and Article 21(1)(c). It is convenient to set out again para. 7:

> *"Until the Return Date or further order of the Court, the Debtor's right to transfer, encumber or otherwise dispose of any of his assets worldwide is suspended in accordance with the interim relief available under Article 19(1)(c) and Article 21(1)(c) of the Model Law."*

iv) When the recognition order was made by Deputy Judge Karet on 1 December 2020, the provisional suspension was overtaken by a permanent suspension of Mr Derev's rights, deriving from a combination of Article 20(1) and Article 20(2). Article 20(1) sets out the general position under the Model Law ("*the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended"),* and although Article 20(1) is "*subject to*" any provisions of domestic law identified in Article 20(2), in this jurisdiction there is no difference between the two, because the relevant domestic law is that in the Insolvency Act 1986, which has just the same suspensive effect on the bankrupt's rights to deal with his assets as that described in Article 20(1). (Of course, that may not be the same in all jurisdictions, and the scheme of the Model Law involves accepting that domestic laws may well give rise to different effects: as the Guide to Enactment explains at [3], "*[t]he Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law"*. Instead its objective is a more modest one, namely to provide "*a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency*.")

59. Pausing there, if one stops to ask what utility there is in continuing Zacaroli J's Order, it is rather difficult to see any. He ordered a provisional suspension of Mr Derev's rights to deal with his assets, and there is now a permanent suspension which has just the same scope and effect (Article 20(2)) as if Mr Derev "*had been adjudged bankrupt under the Insolvency Act 1986*", and which is "*subject to the same powers of the court … as would apply under the law of Great Britain in such a case*." I think it right to say that the suspension thus operates as to Mr Derev's assets worldwide (see ss. 306 and 436 Insolvency Act 1986), and in any event Mr Willson expressly accepted that it did (and that is consistent with Zacaroli J's order: see above at [58(iii)]). Moreover, as Mr Willson also pointed out, the effect of the recognition

order is to import into the conduct of Mr Derev's bankruptcy the wider infrastructure of the insolvency legislation, including the provisions as to co-operation of the bankrupt, Court supervision, and the power of arrest already mentioned above at [51].

60. The idea that Zacaroli J's order should fall away is in any event consistent with the express terms of Article 19(2) and 21(1)(c). As noted above, Article 19(2) provides, "*Unless extended under paragraph 1(f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon"* (my emphasis). True it is that Article 21(1)(f) contemplates that some forms of relief may be continued after recognition, but Article 21(1)(f) cannot have been intended to apply to the extension of a provisional order which has been overtaken by the automatic effects of a later order for recognition.

61. That view is reinforced by a proper reading of Article 21(1)(c), which provides relevantly as follows (again, my emphasis):

> *"Upon recognition of a foreign proceeding … the court may … grant any appropriate relief including –*
>
> …
>
> (c) *suspending the suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20*."

62. It seems to me, having regard to the underlined words, that this discretionary power is intended to be available in those instances where the automatic effects of recognition under Article 20 do not include all the effects described in Article 20(1), which may be the case (for example) where the relevant domestic laws in play under Article 20(2) (to which Article 20(1) is expressly subject) do not have precisely the consequences which Article 20(1) contemplates. In such a case, Article 21(1)(c) flags the possibility of an order being made post-recognition to plug the gap; and if such an order has been made provisionally prior to recognition, Article 21(1)(f) permits it to be extended.

63. Self-evidently, however, there is no gap to plug in this case, because there is no difference between the effects described in Article 20(1) and the effects of the relevant domestic law (the Insolvency Act 1986) referenced in Article 20(2). Looked at in that way, I find it inescapable that Zacaroli J's Order should now fall away. That outcome is consistent not only with the scheme of the Model Law, which I have described, but also with the common sense view that its purpose is now spent.

Other Justification for Continuing Zacaroli J's Order

64. Is there any other justification for continuing Zacaroli J's order? The grounds relied on by Mr Matovu in effect came down to the following: (a) Mr Derev is not to be trusted, and administration of his estate is likely to be assisted if an order is made (or continued) specifically directed to him which contains a penal notice and thus (implicitly) the threat of contempt proceedings; and (b) the continuing effect of the

order on the Fedelta Group in the Isle of Man, who have given undertakings which refer to the order.

65. I do not consider these are good reasons for continuing the order.

66. As to (a), the inclusion of a penal notice in a court order is a pre-requisite to the effective commencement of proceedings for contempt for breach of that order: see CPR, Rule 81.4(2)(e). In this case, however, now that the foreign bankruptcy has been recognised, the ongoing conduct of that bankruptcy is subject to the supervision of the Court (Insolvency Act, Section 363), and such supervision includes the exercise by the court of its power of arrest in appropriate cases (Insolvency Act 1986, Section 364) which is not contingent on the service of an order bearing a penal notice.

67. These and other related provisions no doubt explain why the freezing order (or similar) is not a regular feature of the domestic bankruptcy regime. Extensive powers already exist to enable the conduct of the bankrupt to be monitored and policed. The Applicant has not explained satisfactorily why such powers are not sufficient in the present case to protect the position of the estate when (or so it seems) they are sufficient in all other bankruptcy cases.

68. As to (b), neither am I persuaded that that order needs to be maintained because of the Fedelta Group's undertaking. Quite aside from anything else, that undertaking is not limited by reference to Zacaroli J's order. What Callin Wild requested (see above at [28]) was an undertaking from the directors and legal owners of Polar Sun and Moonlight that (a) they would abide by the terms of Zacaroli J's Order, and (b) they would not *in any event* accept or accede to any instructions from or on behalf of Mr Derev regarding any dealings with shares in those companies or with any assets of the companies until after determination of the pending recognition application in the Isle of Man.

69. The undertaking was given in that form, and limb (b) is obviously independent of (a). If the Applicant's real motivation is to preserve the value of the Fedelta Group undertaking, I cannot see how the present effectiveness of that undertaking is compromised by the discharge of Zacaroli J's order.

Other Aspects of the Proposed Order

70. I return to the further points mentioned at [17] above.

(1) Declaration

71. The Applicant seeks a declaration confirming the position in law following the making of the recognition order: i.e., a declaration that Mr Derev's right to transfer or dispose of his assets was suspended as of 5.30pm on 1 December 2020.

72. As noted above, that is an automatic consequence of recognition under Article 20(1)(c) of the Model Law. The Applicant nonetheless seeks an express declaration in order to facilitate the management of the bankruptcy estate and dealings with third parties who are given notice of the recognition order.

73. I did not understand Mr Derev to resist this application. I am persuaded of the utility of making a declaration and so propose to do so. Mr Derev proposes that any declaration should refer to his rights in relation to his assets worldwide having been suspended. That seems to me to be correct as a matter of legal analysis (see above at [57]), and also unobjectionable, and I will therefore so order.

(2)&(3) Appointment of Mr Allen and his Powers

74. Paragraphs 2(b) and (c) of the Applicant's proposed Order provide as follows:

> *"(a) The administration and the realisation of any or all of the Debtor's assets located in Great Britain is entrusted forthwith to Paul Allen, licensed Insolvency Practitioner, of FRP Advisory, 110 Cannon Street, London EC4N 6EU.*
>
> *(c) Mr Allen shall be entitled to exercise such powers of an insolvency officeholder and/or trustee in bankruptcy under the laws of England and Wales as are reasonably necessary (i) to get in and realise the Debtor's assets located in Great Britain as disclosed in Mr Derev's First and Second witness statements served in these proceedings, save for personal chattels other than the Rolex, Parmigiani and Vacheron Constantin watches identified in the Debtor's assets disclosure, which are located at Flat 5, 14 Montpelier Street, London SW7 1EZ and Flat 4, 20 Basil Street, London SW3 1AR.*

75. In the event, the appropriateness of these orders in principle was not seriously disputed by Mr Derev, but his counsel Mr Willson did express concerns about (a), insofar as it might be taken to ignore the joint interest Mr Derev's wife claims in the London assets disclosed by Mr Derev. Mr Willson also queried the breadth of (c) and the continuing reference to the luxury watches, which he said are now in Russia.

76. On the substance, I am satisfied that I should make the orders sought. Paragraph (a) tracks the wording of the Model Law at Article 21(1)(e) (see above at [57]), which is concerned with remission of local assets to the office holder in the foreign main proceeding (see Sheldon, Cross-Border Insolvency, 4th Edn. at para. 3.84). I am satisfied that Mr Allen is appropriately qualified and should be appointed. As to paragraph (c), the powers conferred are admittedly broad, but that seems to me unobjectionable, because as Mr Willson submitted in the debate about continuation of Zacaroli J's order, the powers conferred by the domestic insolvency regime *are* broad. Indeed that point underpinned his submission that Zacaroli J's order did not need to be continued.

77. Mr Willson's remaining points are really no more than drafting. Nothing in the orders proposed is intended to compromise any ownership interest Mrs Dereva may have in assets which are jointly owned. I think that is obvious but if necessary it can be reflected in a Recital to the order or in a carve-out in sub-paragraph (b). I invite the parties to seek to agree a suitable form of wording.

(4) Section 333 Insolvency Act 1986

78. Paragraph (3) of the proposed order seeks to impose on Mr Derev an express requirement to "*comply with the duties set out in section 333 of the Insolvency Act 1986.*" Again, in the event I did not detect any serious objection to this provision on Mr Derev's part. In a sense the proposed order is otiose, because Mr Derev is subject to those duties anyway. I would not wish to encourage the routine making of applications for orders which are merely declaratory of the position which obtains under the Insolvency Act in any event, but in this case I see no harm in making the order, and it may have some utility. If I have no authority to make it under Model Law Article 21 because it is not a form of "*relief*", I consider I have authority to make it under Insolvency Act 1986, Section 363 ("*General control of the court*.")

(5)&(6) Costs

79. The question whether the proviso in relation to legal fees in Zacaroli J's order should remain in place does not arise, because I have reached the conclusion that that order should be discharged.

80. There remains however a question about the legal fees expended so far on Mr Derev's behalf. These are in the region of £400,000, and Mr Derev asks that an additional amount of some £35,000 should be added to that, representing further costs incurred since the date of the recognition order. The sums paid so far have all been paid from the US$ account at Julius Baer bank in Zurich, which is a joint account in the names of Mr Derev and his wife.

81. As to the additional £35,000, Mr Derev asked (in effect) for authority to draw the required sum from the same joint account. Mr Matovu said that authority should be denied, because from the date of the recognition order if not before, it is clear that the Applicant has what is effectively a proprietary claim to any funds in the name of Mr Derev, and Mr Derev should not be permitted to spend monies on legal costs which properly speaking are monies belonging to the bankruptcy estate.

82. I see the force of that point, but it nonetheless seems to me that, for so long as the order of Zacaroli J subsists, Mr Derev should be entitled to the benefits afforded him by para. 10 of that order. I would therefore propose to authorise the final payment referred to; indeed, strictly speaking on my analysis, my authorisation is not needed – it is already provided by para. 10.

83. The final point is this. The Applicant seeks an order to grant him a right to assess the legal expenses incurred by Mr Derev. More particularly, in light of *United Mizrahi Bank Ltd. v Doherty* [1998] 1 WLR 435 at 440 and *Phillips v Symes* [2002] 1 WLR 853 at [78], the Applicant seeks an order allowing him the right to have the bills rendered to Mr Derev by his lawyers Taylor Wessing assessed under s.70 of the Solicitors Act 1974, and to participate in such assessment and to make representations.

84. Mr Willson said that this application was premature, largely because the funds disbursed in respect of legal expenses have all been paid from an account held jointly by Mr Derev and his wife. Thus, factual questions arise as to whether funds of the bankruptcy estate have in fact been disbursed, and if so to what extent.

85. I am sympathetic to Mr Matovu's argument, but I have reached the view that I should not make any order on this point at this stage, largely because it was raised late in the day, was not supported by an Application Notice, and was the subject of only limited submissions. Assessment of the expended costs will itself be time-consuming and will involve further costs. Questions of proportionality may arise, which in turn may be affected by the question of Mrs Dereva's interest in the relevant account: if, say, half of the fees have in reality been paid from her assets, then the costs of detailed assessment may appear less justifiable than if they have all been paid from Mr Derev's assets and therefore from the bankruptcy estate. There is also a question about the inter-relationship of the proposed assessment and the protection afforded by para. 10 of Zacaroli J's Order: if the incurred costs are assessed down on a s.70 Solicitors Act assessment, does that automatically mean that they were not reasonable costs within the meaning of Zacaroli J's order, or do other considerations arise from the fact that that Order was intended to operate flexibly and to provide authorisation in advance for expenditure on legal costs? If the conclusion is that the costs *were* unreasonable, then what practical consequences flow from that? Does the Applicant say he should be able to claim the unreasonable excess from Mr Derev, and is there any point in him trying to do so if Mr Derev's estate is insolvent? There may be simple answers to these questions, but I do not feel they were properly explored before me, and consequently have reached the conclusion that it would be inappropriate and unfair to make an order at this stage.

Conclusion

86. In conclusion, the Applicant's applications are granted to the extent identified above. I would ask counsel for the parties pleas to co-operate with a view to settling an agreed form or order arising from this judgment.