IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 815 OF 2011

BETWEEN:

IRISH BANK RESOLUTION CORPORATION LIMITED

QUINN FINANCE

QUINN HOTELS PRAHA, a.s. **Claimants**

AND

GALFIS OVERSEAS LIMITED **First Defendant**

AND

DEMESNE INVESTMENTS LIMITED **Second Defendant**

BEFORE: Chief Justice Kenneth Benjamin.

February 16, 2012.

Appearances: Mr. Rodwell Williams, SC for the Applicant, Iaroslav F. Gurniak.
Mr. Eamon Courtenay SC, Mrs. Ashanti Martin and Ms, Priscilla Banner with him, for the Claimants.

JUDGMENT

[1] The Applicant is Iaroslav F. Gurniak of the Ukraine. By an application filed on February 8, 2012, an order is being sought to add Mr. Gurniak as a party to the existing proceedings and for consequential orders as to the service of all documents in the matter. In addition, the application seeks the immediate vacating of the order of Court made on January 19, 2012 appointing Mark Hulse as Receiver of the First Defendant, Galfis Overseas Ltd. ("Galfis") and the filing of a report by the Receiver as to the conduct of the receivership.

[2] The Claimants have filed a notice of application dated February 13, 2012 seeking an order to cross-examine the Applicant upon his affidavit at the hearing of the application or upon any adjournment of the hearing. The stated grounds for the application are that there are conflicts between the Applicant's affidavit and the affidavit evidence filed on behalf of the Claimants and cross-examination is required to determine the veracity of the evidence relied upon by the Applicant.

[3] Learned Senior Counsel for the Applicant resisted the Claimants' application which the Court ruled ought to be heard ahead of the application by Mr. Gurniak. In sum, the Applicant contended that the Claimants have obtained the appointment of the Receiver with the object of primarily preventing the Applicant from protecting the interests of Galfis and, further, that the Applicant having tendered his Passport for identification purposes, there is no inconsistency or conflict for the Court to resolve by way of cross-examination.

[4] The power of the Court to order that the deponent to an affidavit be required to attend for cross-examination resides in Rule 30.1(3) of the Supreme Court (Civil Procedure) Rules. Rule 30.1(4) goes on to require that in the case of a hearing other than a trial, such an application must be made not less than 7 days before the hearing. This Application by the Claimant was made on February 13, 2012 and there is no demur that notice of the Applicant's Notice of Application was not received until February 10, 2012. Accordingly, it would have been impossible to allow for 7 days' notice to the Applicant ahead of the hearing on today's date (February 16, 2012). Be that as it may, the Court must take into account that the Applicant made his application on an urgent basis and, given the subject-matter, that an expedited hearing date was fixed.

[5] It is generally the practice that interlocutory matters are heard and resolved on the basis of evidence on affidavit. Equally, it is more the exception than the rule that cross-examination of a deponent on his or her affidavit is permitted. The decision whether or not to allow cross-examination lies within the discretion of the Court when the justice of the case so dictates (see: **Jones & Jones v Secretary of State for Wales (1995) 70 P. & C.R. 211** at p. 215, per Balcombe, L.J.). As I see it, the authorities allow for cross-examination in situations where there is plainly conflict in the affidavit evidence on an issue or issues which affect the outcome of the matter in a

direct and fundamental regard. The Court of Appeal has endorsed the availability of cross-examination on an affidavit at an inter-partes hearing of an application for an injunction (see: judgment of Morrison, JA in **Jose Alpuche et al v The Attorney General – Civil Appeal No. 8 of 2010** at para. 24). It therefore behoves this Court to determine whether there is a conflict of some gravity arising from the affidavit of the applicant to warrant the need for cross-examination of the Applicant.

[6] Before proceeding to resolve this question, it is salutary to bear in mind the background to this matter. On December 21, 2011, the Claimant commenced suit by Fixed Date Claim against the Defendants seeking a freezing order over the assets of Galfis in aid of foreign proceedings in Northern Ireland in respect of certain loan instruments and an order for the disclosure of assets of Galfis. Simultaneously, an application was made without notice for an interim freezing order and for a disclosure order. These applications were granted on an interim basis on December 22, 2011 with attendant orders for service and the inter partes hearing of an application for a continuation of the freezing order on January 19, 2012. On the latter date, in the face of service at the registered office of Galfis, service was not acknowledged; indeed there was no response from the Defendant nor was there any compliance with the order for disclosure of assets. Accordingly, the Court ordered that its orders of December 22, 2011 be continued until the hearing and determination of the substantive claim. The clear rationale was that the risk of dissipation of the assets of Galfis had not abated given the non-responsiveness of the Defendant, Galfis.

[7] By an application filed on January 13, 2012, the Claimants invoked the Court's power under section 27(1) of the Supreme Court of Judicature Act, Cap. 91 to appoint a receiver by an interlocutory order. The procedure for such an appointment is set out in Parts 17 and 51 of the Supreme Court (Civil Procedure) Rules 2005. The Claimants contended that there was no way of knowing whether the freezing order was serving the purpose intended as there was non-compliance with the order for disclosure of assets. The Court was invited to conclude that its orders were being ignored with the possibility of a flagrant breach of the freezing order.

[8] The employment of a receivership order in aid of a freezing order was discussed by Teare, J in the case of **JSC BTA Bank v Mukhtar Ablyazov [2010] EWHC 1770 (Comm.)** at paragraphs 13 – 17:

> "13. In deciding whether it is just and convenient to make the order all the circumstances of the case must be considered. Those circumstances cannot be exhaustively defined but the context of the present case, where a Receivership Order is sought in support of a Freezing Order, suggests, as a matter of principle, that at least the following matters should be considered.
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> 14. The appointment of a receiver prior to judgment displaces the defendant as the person in control of his assets. It is therefore an invasive remedy. When a Receivership Order is sought in support of a Freezing Order the court should therefore ask itself whether the Freezing Order has provided the claimant with adequate protection against the risk that the defendant's assets may be dissipated prior to judgment. For if it does provide adequate protection the Receivership Order will not be necessary and it will therefore be neither just nor convenient to grant the invasive remedy of a Receivership Order.
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> 15. In a case where there is evidence that a defendant has breached or is about to breach the terms of a Freezing Order the court may well conclude that the Freezing Order does not provide the claimant with adequate protection against the risk that a defendant's assets may be dissipated before judgment. It was suggested that such evidence is the only evidence capable of founding such a conclusion. I disagree. There may be other circumstances which show that the defendant cannot be trusted to obey the Freezing Order. In the present case reliance is placed on the defendant's inadequate disclosure of his assets. In my judgment inadequate disclosure may, depending on the circumstances of the case, enable the court to conclude that the Freezing Order does not provide the claimant with adequate protection.
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> 16. The risk that the appointment of a receiver may cause harm to the interests of the defendant will also have to be considered as will the adequacy of the claimant's undertaking in damages and any fortification of that undertaking which is offered. The potential for harm is greater where, as in this case, the application is to appoint a receiver over all of a defendant's assets. In such a case precisely how the receivers plan to take control of the defendant's assets will be a material consideration because it will have a bearing upon the damage likely to be caused to the defendant's interests.
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> 17. In all cases the court will have to weigh the competing factors in order to determine whether the making of a Receivership Order is just and convenient."

The Court adopted the learning set out in the foregoing dicta.

[9] The Court considered that the assets in issue were loan assignments capable of easy re-assignment unless restrained. In addition, there was no response on behalf of Galfis nor was there any response to the order for disclosure of assets. Dissipation loomed large as an aura of distrust had descended over Galfis. Given the nature of the assets at stake in the Northern Ireland proceedings and that Galfis was not a trading entity in the commercial sense, the Court ordered that Mark C. Hulse, Chartered Account, be appointed as the Receiver over the assets of Galfis.

[10] The order appointing the Receiver was made returnable for February 9, 2012. Consistent with the previous pattern, there was no appearance for or on behalf of Galfis and the Court ordered that the appointment of the Receiver be extended until trial. At that hearing, the Court considered the affidavit of Mark Hulse wherein he stated that he had received an e-mail dated January 31, 2012 from one Iaroslav Gurniak who claimed to be the beneficial owner of Galfis. Also exhibited to Mr. Hulse's affidavit was a Power of Attorney in the name of 'Yaroslav F. Gurnyak'.

[11] For completeness, I will here make reference to parallel proceedings by the Claimants against Aleman Cordero Galindo & Lee Trust (Belize) Ltd. in Claim No. 814 of 2011 in which a Norwich Pharmacal Order for disclosure of information to ascertain the identity of the beneficial owner of Galfis was sought and obtained on December 22, 2011. This reference is made solely for the purpose of demonstrating efforts of the Claimants to ascertain the beneficial ownership of Galfis.

[12] In paragraph 5 of his affidavit in support of the Application to be joined as an interested party in the present proceedings, Mr. Gurniak described himself in the following terms:

> "I am a reputable businessman specialising in company reorganisations and restructuring. I have over twenty years' experience in this business."

To the affidavit was exhibited a copy of his Ukrainian passport inclusive of a photograph. Mr. Gurniak asserted his beneficial ownership of Galfis and also exhibited a copy of Bearer Share No. 1 of Galfis. He averred that he only became aware of these proceedings on January 24, 2012 after retaining solicitors for representation in the Northern Ireland proceedings. At paragraphs 34 to 40 of his affidavit, Mr. Gurniak sets out what he considers to be the prejudicial consequences to Galfis of the receivership.

[13] The supporting affidavit of Caroline Prunty deposed that her firm had been instructed to represent Mr. Gurniak as of January 20, 2012 in the Northern Ireland proceedings; but, the firm was unable to proceed having been made aware of the appointment of the Receiver to Galfis. In the same vein, in relation to proceedings in the Russian Federation, Zafarov Artur, an Attorney-at-Law with chambers in the city of Moscow swore that he represented Galfis in a number of cases as a creditor of Finansstroy having been contacted by Mr. Gurniak in March 2011; however with the appointment of a Receiver he said that he is unable to represent Galfis in upcoming Bankruptcy proceedings and, in his words 'to exert the company's rights under the loan reassignments'.

[14] The reference to loan reassignments is of some note given that Mr. Gurniak made passing reference in para. 4 of his supporting affidavit in the following terms: "Galfis is now unable to protect its interests and account for its prior actions, in particular, when the loans in question were reassigned." In the course of argument, Learned Senior Counsel for the Claimants made reference to thirty (30) re-assignment agreements dated November 26, 2011 turned up by the Claimants. The said agreements are exhibited to the Third Affidavit of Daphne McFadzean filed in these proceedings. These agreements are purported to be signed by Iaroslav Gurniak and are stated to come into effect on January 16, 2012. Plainly, if these agreements are to take effect, the freezing order would have been rendered otiose and Galfis would have no incentive to defend proceedings before the Russian bankruptcy tribunal. This must logically support the retention of the Receiver.

[15] The conflict on affidavit highlighted on behalf of the Claimants is referable to the identity and professional standing of the Applicant, Mr. Gurniak. The affidavit of Sergiy Grebenyuk, an Attorney-at-Law retained by the Claimants, filed on February 6, 2012 detailed conversations with one Gurnyak Yaroslav Frankovich. Paragraph 8 states that Mr. Grebenyuk was told by the Mr. Gurnyak he spoke to that he is currently unemployed but worked at a construction site in Moscow last summer at which time his brother approached him to sign certain documents relating to Galfis for a modest fee.

[16] These matters are cause for suspicion as to the identity of the true beneficial owner of Galfis. This issue is fundamental to the Court acceding to an application for the adding of the person bearing the name Iaroslav Gurniak as a party to the present proceedings. I can hardly agree that there is no conflict, as Mr. Grebenyuk stated that

the person he spoke to, who confirmed that he knows about Galfis, conceded that he had no genuine connection to Galfis beyond signing documents presented to him by his brother.

[17] As was earlier iterated, the Receiver was appointed as there was no representation on behalf of Galfis, coupled with the difficulty experienced in the companion Norwich Pharmacal proceedings in obtaining information as to the identity of the beneficial owner of the bearer shares in Galfis.

[18] Mr. Gurniak having come forward asserting beneficial ownership, the Court must ensure that it is not being in any way deceived by a nominee who has merely lent his name to the proceedings.

[19] As I see it, unless satisfactory evidence of beneficial ownership is forthcoming, the Applicant's application cannot be advanced. There are no suggested alternative courses of action; hence, the Court must contemplate the preliminary application of the Claimants.

[20] Galfis is an international business company incorporated in Belize. As such the situs of ownership of the shares is in Belize. This is provided for by section 140 of the International Business Company Act, Cap. 210 and operates to confer jurisdiction on this Court.

[21] In the premises, it is ordered that Mr. Iaroslav F. Gurniak appear before the Court in Chambers on Thursday 23rd February 2012 or on such other days the Court may appoint to be cross-examined on the affidavit filed in support of the Notice of Application on February 8, 2012. Costs shall abide the outcome of the application. For the avoidance of doubt, it is ordered that notice to the Applicant of the application by the Claimants be abridged to three days.

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KENNETH A. BENJAMIN
Chief Justice