CITATION: Belokon v. The Kyrgyz Republic et al., 2015 ONSC 5570
COURT FILE NO.: CV-15-10890-00CL
DATE: 20150908

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
VALERI BELOKON Applicant	Peter J. Cavanagh, for the Applicant
– and –	
THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC. Respondents	Matthew Latella, Matt Saunders and Christina Doria, for the Respondent Kyrgyzaltyn JSC No one appearing for The Kyrgyz Republic No one appearing for Centerra Gold Inc.
	HEARD: August 18, 2015

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] The respondent company Kyrgyzaltyn JSC ("KJSC") moves to set aside, or alternatively vary, the March 5, 2015 order of Justice Wilton-Siegel continuing a mareva injunction that he granted *ex parte* on February 25, 2015 (the "Belokon Mareva").

[2] KJSC submits that the Belokon Mareva should be set aside for failure to make full and frank disclosure, or because the prerequisites for a mareva injunction no longer subsist given events that have transpired since it was granted. In the alternative, KJSC submits that the Belokon Mareva should be varied because the assets that are frozen by the injunction greatly exceed the amount of the award that the applicant seeks to enforce in Ontario.

[3] This is the third mareva injunction granted in Ontario against KJSC in the recent past. In each case, an arbitration award was given outside Canada against the respondent country, the Kyrgyz Republic (the "Republic"). In each case, the award has been the subject of enforcement proceedings in Ontario. In each case, the assets in Ontario that were the subject of the mareva injunction were shares in Centerra Gold Inc. and related dividends and distributions. In each case, there has been the need to show a strong *prima facie* case that the Republic is the beneficial owner of the Centerra shares, which are held by KJSC.

[4] These three legal proceedings were brought by unrelated claimants. However, they have overlapped in subject matter and in time, creating some complications. Among other recent developments, after the Belokon Mareva was granted, one of the prior mareva injunctions was overturned by the Divisional Court, and in the other prior proceeding a significant decision was overturned by the Court of Appeal. Both now-overturned decisions were relied upon by the applicant when the Belokon Mareva was obtained from Justice Wilton-Siegel.

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Key background

[5] The applicant, Mr. Belokon, is a citizen and resident of Latvia. He purchased a local bank in the Republic in 2007. The Republic is a sovereign state located in central Asia.

[6] In 2010, the Republic took steps that Mr. Belokon believed amounted to the expropriation of his bank. He initiated arbitration proceedings under a bilateral investment treaty between Latvia and the Republic. On October 24, 2014, the Permanent Court of Arbitration gave an award against the Republic estimated to total approximately CAD$20.5 million (the "Belokon Award"). The Belokon Award was appealed to the Paris Court of Appeal, but there has been no stay pending appeal.

[7] KJSC is a company incorporated under the laws of the Republic. KJSC is wholly-owned by the Republic and is the registered owner of a 33% interest in the common shares of Centerra, being 77,401,766 common shares with a trading price of CAD$6.42 at about the time of the hearing of the motion. At that share price, the Centerra shares are worth approximately CAD$497 million.

[8] The applicant claims that the Republic beneficially owns the shares of Centerra nominally held by KJSC, and that he is entitled to levy execution on the Centerra shares to the extent necessary to satisfy the Belokon Award.

[9] Before the Belokon Mareva was obtained in this proceeding, two mareva injunctions were obtained against KJSC obtaining similar rights to Centerra shares.

First mareva injunction – Sistem Mareva

[10] On September 9, 2009, an arbitral tribunal issued an award against the Republic and in favour of a Turkish company, Sistem Mühendislik Inşaat Sanayi Ve Ticaret Anomic Sirketi "Sistem"). The award totaled US$9,147,470 (the "Sistem Award").

[11] Sistem subsequently brought an application to recognize and enforce the Sistem Award in Ontario. On January 5, 2011, Justice Echlin ordered that the Sistem Award be recognized and enforced in this province.

[12] Enforcement proceedings began, and it was determined that the Republic held no assets in Ontario. KJSC was then added as a party respondent and leave to amend was granted to claim that the Republic beneficially owned all of the Centerra shares held by KJSC.

[13] On August 17, 2012, Justice Strathy, as he then was, granted Sistem an *ex parte* mareva injunction that froze 4,000,000 of the Centerra shares and dividends and distributions payable to KJSC. That injunction was continued by order of Justice Newbould made on August 27, 2012.

[14] Sistem then sought a declaration that the Republic beneficially owned the Centerra shares. KJSC opposed this relief arguing, among other things, that such an order could not be made without the Republic being properly served in accordance with the *State Immunity Act*, R.S.C. 1985, c. S-18 ("*SIA*"), which had not taken place.

[15] On April 15, 2014, Justice Thorburn found in Sistem's favour and declared that the Republic had an equitable interest in the Centerra shares (the "Sistem Declaratory Order"). Justice Thorburn also directed the Sheriff to seize KJSC's Centerra shares and dividends to satisfy Justice Echlin's January 5, 2011 order.

[16] The Sistem Declaratory Order was stayed pending appeal. The appeal was heard on October 29, 2014, with additional written submissions made in December 2014. The decision granting the appeal due to the failure to serve the Republic under the *SIA* was released in June 2015, as discussed below.

Second mareva injunction – Stans Mareva

[17] On October 30, 2013, Stans Energy Corp. filed a claim against the Republic with the Arbitration Court of the Moscow Chamber of Commerce and Industry (the "MCCI"). On June 30, 2014, the MCCI issued an award in Stans' favour, which required the Republic to pay Stans approximately US$118 million in compensation for breach of its investor rights with respect to a mining licence cancellation (the "Stans Award").

[18] The Republic challenged the MCCI's jurisdiction. The Republic filed an application with the Economic Court of the Commonwealth of Independent States (the "CIS Court"). The Republic also applied to the Moscow State Court to set aside the award based on the same jurisdictional argument.

[19] The application to the Moscow State Court was dismissed on July 1, 2014, and appealed to the Federal Arbitration Court of the Moscow District.

[20] On September 23, 2014, the CIS Court issued a short-form decision to the effect that Stans could not use Article 11 of the Moscow Convention on the Protection of the Rights of the Investor to clothe the MCCI with jurisdiction. More detailed reasons were issued on October 6, 2014.

[21] On September 26, 2014, the Federal Arbitration Court ordered the Moscow State Court to reconsider *de novo* its decision on jurisdiction because of the CIS Court's findings.

[22] On October 10, 2014, Stans moved for an *ex parte* mareva injunction in Ontario. Justice Penny granted the injunction (the "Stans Mareva"), freezing 47,000,000 of the Centerra shares

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and all dividends owed to KJSC, including the dividends that would otherwise have been released under the terms of a stay order made pending the appeal of the Sistem Declaratory Order. The Stans Mareva was then continued by Justice Newbould on October 20, 2014.

[23] By the time of the *ex parte* hearing before Justice Penny on October 10, 2014, both the CIS Court and the Federal Arbitration Court had rendered their decisions about jurisdiction. The status was the same when the parties appeared before Justice Newbould ten days later. Yet full disclosure of those decisions was not made in the Ontario proceedings.

[24] On January 5, 2015, Associate Chief Justice Marrocco granted KJSC leave to appeal the Stans Mareva.

[25] The hearing *de novo* before the Moscow State Court took place on April 28 and 29, 2015. At the conclusion of the hearing, the presiding justice set aside the Stans Award for want of jurisdiction.

[26] On May 15, 2015, just before the hearing of the Divisional Court appeal, the parties obtained the decision of the Moscow State Court setting aside the Stans Award. On June 10, 2015, the Divisional Court granted the appeal and set aside the Stans Mareva, as discussed below.

Belokon Mareva

[27] Mr. Belokon was the third party to seek an *ex parte* mareva injunction against KJSC in relation to the Centerra shares. At the time of his motion, heard on February 25, 2015, the Sistem and Stans Marevas still stood, as did the Sistem Declaratory Order, subject to appeals.

[28] The Belokon *ex parte* motion materials primarily consisted of an affidavit of Mr. Belokon regarding the Belokon Award and surrounding circumstances. There was also an assistant's affidavit appending documents. The motion relied on the Ontario court rulings against KJSC in the *Sistem* and *Stans* proceedings, including with respect to the Republic being the beneficial owner of the Centerra shares. The motion material did not, therefore, include the factual record that would have otherwise been required to sufficiently demonstrate that beneficial interest. In the *Sistem* proceedings, substantial evidence had been filed, including affidavit evidence on the law of the Republic, among other things. On the *ex parte* motion and going forward, the applicant took the position that it would be an abuse of process to allow KJSC to re-litigate the beneficial ownership issue, which had been decided against it in the *Sistem* and *Stans* proceedings.

[29] In preparation for the *ex parte* motion, counsel to Mr. Belokon took steps to check the status of the other proceedings. A process server was instructed to search the Commercial List files for both the *Sistem* and *Stans* matters. There is no dispute that the Sistem Mareva had not been the subject of appellate review and had not been set aside. However, the applicant was aware that the Sistem Declaratory Order decision had been appealed to the Court of Appeal. Counsel had a process server attempt to obtain the Court of Appeal materials, but was told those

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materials were with the judges addressing the appeal, which was under reserve. Only the notice of appeal and a certificate were obtained.

[30] Before the *ex parte* hearing on February 25, 2015, counsel also searched CanLII and Westlaw in relation to both the *Sistem* and *Stans* proceedings. The CanLII search would ordinarily be expected to include the reasons for decision granting leave to appeal, released on January 5, 2015, but the reasons for decision were not online at the time. They are now. Counsel therefore proceeded with the *ex parte* motion unaware that leave to appeal had been granted in *Stans*.

[31] Therefore, when Mr. Belokon relied on three decisions in the *Sistem* and *Stans* proceedings in support of his claim for a mareva injunction, two of those decisions were the subject of appellate review. However, only one of the appeals was drawn to the attention of Justice Wilton-Siegel – the appeal of the Sistem Declaratory Order to the Court of Appeal.

[32] The *ex parte* mareva injunction was granted by Wilton-Siegel J. on February 25, 2015. His reasons for granting the order were as follows:

> The applicant has commenced an application for recognition and enforcement of an arbitral award dated October 24, 2014 in [the applicant's] favour and an order allowing the enforcement of the award against shares in the capital of Centerra Gold Inc. held by [KJSC].
>
> On this motion, the applicant seeks an order restraining [KJSC] from taking steps to obtain share certificates in respect of 6,500,240 shares in the capital of Centerra held in its name and restraining Centerra from transferring such shares.
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> The relief sought is in the nature of an interim interim Mareva injunction having an expiry date 10 days from now unless renewed. The requirements for the granting of such an injunction have been set out in *Chitel v. Rothbart* [1982] O.J. No. 3540 (C.A.). I find these requirements have been established for the following reasons.
>
> First, the Court has no reason to believe that the applicant has not made full and frank disclosure of all material matters in his knowledge, based on the motion record before the Court.
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> Second, the applicant has established a strong *prima facie* case to the effect that there is an arbitral award from a validly constituted arbitration tribunal in his favour. While the Kyrgyz Republic has filed appeal materials in the Paris Court of Appeal, the award

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> remains in force and no stay of enforcement of the award has been ordered as a result of the appeal.
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> Third, there is a strong *prima facie* case that the defendants in the arbitration award have assets here in the form of the shares of Centerra Gold Inc. registered in the name of [KJSC]. This issue has been addressed in decisions of Thorburn J. at 2014 ONSC 2407 and Newbould J. at 2012 ONSC 4983 in the case of *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, as well as by Newbould J. in *Stans Energy Corp v. Kyrgyz Republic*, 2014 ONSC 6195.
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> The applicant has also established by inference, a real risk of dissipation of assets. While the evidence is limited concerning efforts to remove the shares from Ontario, the respondents have taken every possible measure to avoid the payment of the award notwithstanding the public recognition of the award by a public representative of the Republic. In addition, the history of the two other awards that have been brought before this court suggests a course of action designed to thwart payment of any award rendered against the Republic. Moreover, Centerra and [KJSC] are negotiating a restructuring of Centerra that may render enforcement of the award impossible. It is also significant that the applicant has no evidence of any other assets in Canada against which to enforce the award, other than the shares in Centerra.
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> Lastly, the balance of convenience clearly favours the granting of an interim interim injunction. There are no facts before the Court that would establish any prejudice to [KJSC] from a restraining order of a ten day duration.
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> I note as well that the applicant has provided an undertaking regarding damages in paragraph 37 of his affidavit sworn February 17, 2015. … [Emphasis added.]

[33] The resulting order froze 6,500,340 Centerra shares and all dividends and distributions owed to KJSC. The frozen cash and shares are now worth about CAD$60 million.

[34] In the ordinary course, the *ex parte* order was for a period of ten days. The applicant brought a motion for an order continuing the injunction, which was returnable on March 5, 2015, also before Justice Wilton-Siegel.

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[35] Both KJSC and Centerra were represented on the return of the motion. No one appeared for the Republic. Unlike in the *Sistem* and *Stans* proceedings, there was no issue that the Republic was properly served under the *SIA*.

[36] Neither Centerra nor KJSC opposed the relief sought by the applicant, which was granted. The February 25, 2015 order was continued subject to further order of the Court. However, the order expressly provided that the continuation was "without prejudice to the rights of any party in relation to a motion to vary or set aside this Order."

[37] No immediate motion was brought to set aside or vary the Belokon Mareva. However, a few months later, the decisions on the outstanding appeals in *Sistem* and *Stans* were released:

(1) On June 10, 2015, the Divisional Court released its decision in the appeal from the Stans Mareva: *Stans Energy Corp. v. Kyrgyz Republic*, 2015 ONSC 3236 (Div. Ct.). The appeal by KJSC was allowed, and the Stans Mareva set aside, because the Stans Award that formed the basis for the order had been set aside by the Moscow State Court and because Stans had failed to make full and frank disclosure of all material facts regarding the jurisdictional challenges on the *ex parte* motion.

(2) On June 19, 2015, the Court of Appeal released its decision in the appeal from the Sistem Declaratory Order: *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, 2015 ONCA 447. The appeal by KJSC was allowed, and the Sistem Declaratory Order set aside, because the Republic was not properly served in accordance with the *SIA*. The Court held that without proper service, the judge could not make an order declaring the Republic's interest in the shares and then, by allowing execution, deprive the Republic of that interest: *Sistem* at para. 3.

[38] After the Court of Appeal released its decision in *Sistem,* KJSC brought this motion to set aside the Belokon Mareva.

Discussion

[39] The issues before me are the following:

(i) whether it is still open to KJSC to challenge the Belokon Mareva based on the sufficiency of the disclosure given when the *ex parte* order was granted on February 25, 2015;

(ii) if so, whether the applicant failed to make full and frank disclosure before Justice Wilton-Siegel on February 25, 2015;

(iii) in any event, whether the Belokon Mareva should be set aside due to the two appeal decisions released after it was granted; and,

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(iv) whether, if the Belokon Mareva is not set aside, it should nonetheless be varied.

[40] For the reasons set out below, I decline to set aside the Belokon Mareva based on the alleged failure to make full and frank disclosure, but do set it aside subject to certain terms because of the two appeal decisions released after it was granted.

(i) Entitlement to raise disclosure now

[41] KJSC makes two challenges to the disclosure made before Justice Wilton-Siegel on the *ex parte* motion. First, it submits that the applicant ought to have discovered the *Stans* leave to appeal decision through reasonable diligence and drawn it to the attention of Justice Wilton-Siegel. Second, KJSC submits that the court materials filed for the appeals should have been obtained and put before Justice Wilton-Siegel. KJSC also submitted in its factum that all the materials in relation to the two decisions under appeal ought to have also been put before Justice Wilton-Siegel, but did not pursue that position in oral argument.

[42] The applicant submits that the time to raise the issue of full and frank disclosure was on March 5, 2015, when Justice Wilton-Siegel was being asked to continue the *ex parte* order. At that time, KJSC obviously knew all about the *Sistem* and *Stans* proceedings because it was a party to them. Yet, at that time, KJSC did not allege any failure to make full and frank disclosure.

[43] KJSC relies on the terms of the March 5, 2015 continuation order, which expressly provides that the continuation is without prejudice to any parties' right to move to set aside or vary the Belokon Mareva. To that, the applicant submits that the "without prejudice" term relates only to setting aside the March 5, 2015 continuation order, not to challenges to the original *ex parte* order made on February 25, 2015. The applicant submits that the term does not provide an indefinite opportunity to challenge disclosure.

[44] Considering the terms of the Belokon Mareva, it is at least unclear that the "without prejudice" term forecloses a later attack based on the failure to make full and frank disclosure. The original *ex parte* order was expiring on its own terms on the day the continuation was granted. The *ex parte* order did not need to be set aside if not continued. The two orders are necessarily interrelated. As for delay, the challenge was brought within a matter of months and the interests of the applicant were protected by the Belokon Mareva in the meantime.

[45] An *ex parte* mareva injunction is extraordinary relief. The obligation to make full and frank disclosure is key to obtaining that relief. If the intention was to foreclose any challenge based upon the failure to make full and frank disclosure, the terms of the continuation order ought to have done so more clearly.

[46] I conclude that the "without prejudice" term of the Belokon Mareva leaves open this challenge. However, I will take the timing of the motion to set aside into account to the extent that it is relevant to the other issues before me.

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(ii) Full and frank disclosure

[47] There is no dispute between the parties about the law regarding the obligation to make full and frank disclosure when seeking an *ex parte* injunction. That obligation was summarized by Justice Sharpe, as he then was, in *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.), at paras. 26-28, as follows:

> It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:
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> > There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.
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> For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts and law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.
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> If the party seeking *ex parte* relief fails to abide by the duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party. (Citations omitted.)

[48] Thus, a moving party seeking an *ex parte* mareva injunction must make full and frank disclosure of all relevant facts to the motion judge. This includes not only the facts supporting

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the moving party's position, but also the facts relevant to the respondent's case. The moving party must present, to the best of its knowledge, the points that could fairly be made against it by the respondent: *Komarnycky v. Laramee,* 2012 ONSC 6503, [2012] O.J. No. 5439 (Comm. List) at para. 2; *Valeo Sylvania L.L.C. v. Ventra Group Inc.*, [2001] O.J. No. 5629 (S.C.J.) at paras. 16-17.

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[49] The applicant accepts the obligation to make full and frank disclosure. However, he did not know about the *Stans* leave to appeal proceedings and did not have the various appellate court materials that KJSC submits ought to have been disclosed. This is not a case of concealment.

[50] The applicant agrees that the leave decision was material. Had he known about it, it would have been disclosed. Counsel submits, however, that they exercised proper diligence in making inquiries before the *ex parte* hearing.

[51] The main issue regarding the leave to appeal decision is therefore whether proper inquiries were made. A party seeking an *ex parte* mareva injunction must make proper inquiries before seeking the *ex parte* relief. The duty of disclosure includes any additional facts the party would have known had those inquiries been made: *Brink's-Mat Ltd. v. Elcombe and Others*, [1988] 1 W.L.R. 1350 (C.A.) at 1356; *Factor Gas Liquids Inc. v. Jean*, [2010] O.J. No. 2999 (Div. Ct.) at para. 76.

[52] The extent of the inquiries that will be held to be proper, and therefore necessary, will depend on all the circumstances: *Brink's-Mat Ltd.* at 1357.

[53] KJSC filed an affidavit showing that counsel could have telephoned the Divisional Court office and found out whether there was a motion for leave to appeal and any decision on leave to appeal. KJSC submits that the steps taken by Mr. Belokon's counsel did not amount to proper inquiries.

[54] While I agree that the inquiries that were made did not meet the standard of perfection, I conclude that the applicant showed proper diligence in the circumstances. Quite some time had passed since the Stans Mareva had been granted, in the context of proceedings that are usually pressed forward quickly. The searches that were done ought to have revealed the reasons for decision granting leave to appeal. For whatever reason, the reasons for decision were not posted on CanLII at that point in time. For this, I am reluctant to fault counsel.

[55] The second aspect of the alleged non-disclosure is the failure to put the full appeal materials for both outstanding appeals forward on the *ex parte* motion and the related failure to put forward KJSC's facta in those appeal proceedings. KJSC's evidence was that the Court of Appeal facta were readily available, as was the Divisional Court file. KJSC submits all of the appeal material ought to have been obtained and placed before Justice Wilton-Siegel. On this point, the applicant does not concede that all of those court materials would be material but in any event the applicant did not have all of those materials.

[56] Focusing on the Court of Appeal materials, that appeal was drawn to Justice Wilton-Siegel's attention. It is notable that he did not require the moving party to produce the notice of appeal, facta or other appeal materials. Most if not all cases of non-disclosure arise in circumstances where the judge hearing the motion is at a disadvantage in not knowing what information is available. This case is different. Obviously, any judge knows that if an appeal is under reserve at the Court of Appeal, there are appeal materials including a notice of appeal and facta. It is also notable that KJSC did not put forward the full appeal record on this motion to set aside. Initially, KJSC put forward none of those materials. Later, KJSC did put forward the facta, but only after counsel to Mr. Belokon delivered the affidavit about the court file searches undertaken in preparation for the *ex parte* motion.

[57] The timing of this motion also reflects on the materiality of the alleged non-disclosure. KJSC was fully apprised of the status of the *Sistem* and *Stans* proceedings when it appeared on the motion to continue on March 5, 2015. It was a party to those proceedings. It had the leave to appeal decision in *Stans*. It had all the appellate court material. Yet it did not raise material non-disclosure. Nor did KJSC immediately move to set aside the Belokon Mareva. It waited. Only after both appeal decisions were released did it move to set aside the Belokon Mareva. While not conceding a lack of materiality before that time, before me KJSC's counsel indicated that the materiality of the two appeals came into focus after appeal decisions were released. That was the assessment of KJSC, the party fully aware of the other proceedings and most affected by the Belokon Mareva. That assessment falls well short of the strident position now taken about full and frank disclosure.

[58] The duty of full and frank disclosure is not rigid. As put in *United States of America v. Friedland* at para. 31, the duty is not to be imposed in a formal or mechanical manner. There must be some latitude.

[59] The extent of court inquiries that may be required and the extent of the court material from related proceedings that may require disclosure will no doubt vary from case to case. In the circumstances of this case, I conclude that sufficient inquiries were made. As a result of those inquiries, the leave to appeal decision, facta and full appeal materials were not obtained and the moving party therefore could not disclose them even if disclosure had been required. I am not prepared to set aside the Belokon Mareva for failure to make full and frank disclosure.

(iii) Impact of subsequent events

[60] In the alternative, KJSC submits that the Belokon Mareva ought to be set aside because its foundation has been fatally eroded as a result of the two appeal decisions.

[61] There is no issue between the parties about the requirements to obtain a mareva injunction. They are set out in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.) and drawn from *Third Chandris Shipping Corp. v. Unimarine S.A.*, [1979] Q.B. 645 (C.A.). For the purposes of this motion, I will focus on the third requirement, that there be grounds to conclude that the defendant has assets in Ontario. This is the aspect of the test for which the applicant

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must show a strong *prima facie* case that the Centerra shares are beneficially owned by the Republic.

[62] At the time the Belokon Mareva was first granted, Mr. Belokon's motion relied on the Sistem and Stans Marevas, and the Sistem Declaratory Order, to meet this part of the test. Evidence to independently demonstrate beneficial ownership was not put forward. On the *ex parte* motion and going forward, the applicant took the position that it would be an abuse of process to allow KJSC to re-litigate the beneficial ownership issue in this proceeding. KJSC had participated in the prior proceedings and the issue had been determined against it in all three of the prior rulings relied upon.

[63] The Stans Mareva has been set aside. It can no longer be relied upon for its finding against KJSC regarding beneficial ownership.

[64] The Sistem Declaratory Order has also been set aside. Counsel to Mr. Belokon correctly observed before me that it was set aside due to a failure of proper service, rather than on its merits. However, as the Court of Appeal made clear, proper service on the Republic was a necessary first step to dealing with the beneficial ownership issue.

[65] That leaves only the Sistem Mareva. The applicant takes the position that because the Sistem Mareva has not been formally overturned, the position of KJSC is unchanged. The applicant submits that abuse of process principles still foreclose KJSC from re-litigating the question of whether there are sufficient grounds to conclude that the Republic has a beneficial interest in the Centerra shares for the purposes of a mareva injunction. I disagree.

[66] In overturning the Sistem Declaratory Order, the Court of Appeal spoke in strong terms about the consequences of the flawed service in the *Sistem* proceedings, as follows:

> [3] … I would allow the appeal. The Republic was not properly served in accordance with the SIA. Without proper service, the application judge could not make an order declaring the Republic's interest in the [Centerra] shares and then depriving the Republic of that interest.
>
> …
>
> [52] In none of the previous proceedings has the court directly considered and ruled on the issue of whether service on the Republic's Washington embassy was in accordance with s. 9(1)(a) of the SIA. To the extent that in other decisions involving these parties, courts may have declined to address that issue based on [KJSC]'s lack of standing, that position was taken *per incuriam*. As a preliminary matter, a court must always determine whether service was properly made on an absent named party whose

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> interests will be affected by the order sought. … [Emphasis added; footnotes omitted.]

[67] Although the Sistem Mareva was not directly under appeal, this finding casts enough doubt over the process followed that it would not plainly be an abuse of process for either KJSC or the Republic to be permitted to dispute the Republic's alleged beneficial interest in the Centerra shares in this proceeding. This does not mean that the dispute would be successful. Neither appeal decided that there was no beneficial interest.

[68] The applicant emphasizes that the Sistem Mareva is final in the sense that there are no longer any appeal rights and it has not been overturned. Finality is important, and especially so for the parties in that case. But the applicant is not a party to that litigation.

[69] Without the ability to rely on the three prior rulings to show a strong *prima facie* case that the Republic has assets in Ontario, there is simply no sufficient evidentiary record before me to support the Belokon Mareva in regard to the third requirement. This is sufficient to conclude that the substratum for the Belokon Mareva has been significantly compromised due to the recent appeal decisions.

[70] I therefore conclude that it is appropriate to set aside the Belokon Mareva, subject to terms that recognize that there may well be the requisite beneficial interest. Mr. Belokon should have a reasonable opportunity to put forward evidence in that regard given the shifting legal landscape, especially because it was apparent from the evidence and oral argument before me that KJSC intends to remove the Centerra share certificates from the jurisdiction to the extent that has not already occurred, and remove the cash that has accumulated from the dividends and distributions, as soon as possible.

[71] I conclude that the Belokon Mareva should be set aside as of September 28, 2015, subject to further order of the court. Further, if another motion for a mareva injunction is brought, it shall be on notice.

(iv) Whether the Belokon Mareva should be varied

[72] There is no basis to continue to freeze assets with a value of more than double the amount of the Belokon Award, even in the short period of time before the Belokon Mareva will be set aside under the terms set out in this decision. I therefore order that it be varied now.

[73] Before me, the parties agreed that the Belokon Mareva should be varied, at least with respect to the number of shares that are frozen. They disagreed about the extent to which the dividends and distributions that have accumulated should continue to be frozen, and the related question about the number of shares that should be substituted for the amount in the Belokon Mareva.

[74] Not surprisingly, both sides submitted that they should have the cash. There is now over CAD$20 million in dividends and other distributions that have accumulated due to the course of

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events and are frozen. KJSC wants these funds to assist it in the continued operation of its business in the Republic. Mr. Belokon wants the funds frozen as certain security for the enforcement of the Belokon Award.

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[75] In my view, a combination of cash and shares is more appropriate than allowing either side to have all the cash. This approach balances the parties' respective interests.

[76] I therefore vary the Belokon Mareva to continue to freeze only CAD$10 million of the cash already frozen from dividends and other distributions in relation to the Centerra shares. In turn, I vary the number of Centerra shares that are the subject of the Belokon Mareva to 3,787,879. To arrive at this figure, I have used the 52-week low for the share price, $3.96, rather than the mid-point, given recent market volatility. I have used the amount of $25 million as the current amount of the Belokon Award inclusive of interest and costs, based on information provided by the applicant. The balance of the cash and shares currently frozen under the Belokon Mareva may be unfrozen immediately. The Belokon Mareva, as varied, remains in force until September 28, 2015.

[77] In the circumstances, I need not deal with the other request made by KJSC, that the applicant provides security for his undertaking as to damages.

Order

[78] I therefore order as follows:

(1) the Belokon Mareva shall be set aside on September 28, 2015 at 4PM EDT, subject to further order of the court;

(2) any further motion for a mareva injunction in these proceedings shall be brought on notice; and,

(3) the Belokon Mareva is varied, effective today, as follows:

(i) to substitute 3,787,879 for the figure 6,500,240 in paragraph 3 of the February 25, 2015 order, as continued and amended in paragraph 2 of the March 5, 2015 order;

(ii) to substitute 73,613,987 for the figure 70,901,526 in paragraph 13 of the February 25, 2015 order, as continued by the March 5, 2015 order; and,

(iii) to amend paragraph 11 of the February 25, 2015 order, as continued by the March 5, 2015 order, by adding the words ", up to a maximum of CAD$10 million" to the end of that paragraph.

[79] If there are implementation issues, counsel may contact me, including counsel to Centerra.

[80] If the parties are unable to agree on costs, KJSC shall make its costs submissions by delivering brief written submissions together with a bill of costs by September 28, 2015. The applicant may respond by delivering brief written submissions by October 2, 2015. This timetable may be modified on agreement between the parties provided that I am notified of the new timetable by September 28, 2015.

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Justice W. Matheson

Released: September 8, 2015

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CITATION: Belokon v. The Kyrgyz Republic et al., 2015 ONSC 5570
COURT FILE NO.: CV-15-10890-00CL
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SUPERIOR COURT OF JUSTICE

VALERI BELOKON

Applicant

– and –

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC.

Respondents

REASONS FOR DECISION

Justice W. Matheson

Released: September 8, 2015