

**EASTERN CARIBBEAN SUPREME COURT  
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE  
COMMERCIAL DIVISION**

**CLAIM NO. BVIHCM 2013/00160**

**BETWEEN:**

**By way of Claim:**

[1] **RENOVA INDUSTRIES LIMITED**  
[2] **WEDGWOOD MANAGEMENT LIMITED**  
[3] **ZAPANCO LIMITED**  
[4] **LAMESA HOLDING SA**

Claimants/Applicants

**and**

[1] **EMMERSON INTERNATIONAL CORPORATION**  
[2] **~~TOMSA HOLDINGS LIMITED~~**  
[3] **~~ALABASTER ASSOCIATES LIMITED~~**  
[4] **~~GARDENDALE INVESTMENTS LIMITED~~**  
[5] **MIKHAIL ABYZOV**

[6] **ROMOS LIMITED** Respondent

[7] **FRESKO FINANCIAL LIMITED**  
Defendants

**And by way of Counterclaim:**

[1] **EMMERSON INTERNATIONAL CORPORATION**  
[2] **~~TOMSA HOLDINGS LIMITED~~**  
[3] **~~ALABASTER ASSOCIATES LIMITED~~**  
[4] **~~GARDENDALE INVESTMENTS LIMITED~~**

[5] **ANDREY TITARENKO** Respondent

Claimants by way of Counterclaim

**and**

[1] **RENOVA INDUSTRIES LTD**  
[2] **WEDGWOOD MANAGEMENT LIMITED**  
[3] **ZAPANCO LIMITED**  
[4] **LAMESA HOLDING SA**  
[5] **VIKTOR VEKSELBERG**  
[6] **INTEGRATED ENERGY SYSTEMS LIMITED**  
(a company incorporated under the laws of Belize)  
[7] **ODVIN FINANCIAL INC**

Applicants

[8] **GOTHELIA MANAGEMENT LIMITED**

[9] RENOVA HOLDING LIMITED  
[10] VLADIMIR KUZNETSOV  
[11] ALEXEI MOSKOV  
[12] ALEXANDER KOLYCHEV  
[13] MIKHAIL SLOBODIN  
[14] MAKSIM MAYORETS  
[15] RENOVA MANAGEMENT AG  
[16] PAO T PLUS

[17] INTEGRATED ENERGY SYSTEMS LIMITED  
(a company incorporated under the laws of Cyprus)

Applicant

[18] CLERN HOLDINGS LIMITED

[19] STARLEX COMPANY LIMITED  
[20] SUNGLET INTERNATIONAL INC

Applicants

[21] OOO RENOVA-HOLDING RUS

Defendants by way of Counterclaim

And by way of Ancillary Claim:

[1] MIKHAIL ABYZOV

[2] ROMOS LIMITED

Respondent

[3] FRESKO FINANCIAL LIMITED

[4] ANDREY TITARENKO  
[5] GOLDFORT LIMITED

Respondents

Claimants by way of Ancillary Claim

and

[1] RENOVA INDUSTRIES LTD  
[2] WEDGWOOD MANAGEMENT LIMITED  
[3] ZAPANCO LIMITED  
[4] LAMESA HOLDING SA  
[5] VIKTOR VEKSELBERG  
[6] INTEGRATED ENERGY SYSTEMS LIMITED  
(a company incorporated under the laws of Belize)  
[7] ODVIN FINANCIAL INC  
[8] FLOPSY OVERSEAS LIMITED

Applicants

[9] VLADIMIR KUZNETSOV  
[10] ALEXEI MOSKOV  
[11] ALEXANDER KOLYCHEV  
[12] MIKHAIL SLOBODIN  
[13] RENOVA MANAGEMENT AG

[14] RENOVA HOLDING LIMITED  
[15] PAO T PLUS

[16] INTEGRATED ENERGY SYSTEMS LIMITED  
(a company incorporated under the laws of Cyprus)  
Applicant

[17] CLERN HOLDINGS LIMITED  
[18] MAKSIM MAYORETS

Defendants by way of Ancillary Claim

**And by way of Third Ancillary Claim:**

[1] EMMERSON INTERNATIONAL CORPORATION  
Claimant by way of Third Ancillary Claim  
and

[1] VIKTOR VEKSELBERG  
[2] INTEGRATED ENERGY SYSTEMS LIMITED  
Applicants

[3] VLADIMIR KUZNETSOV  
[4] EVGENY OLKHOVIK  
[5] ANDREY BURENIN  
[6] YAKOV TESIS  
[7] ALEXEI MOSKOV  
[8] IGOR CHEREMIKIN  
[9] IRINA MATVEEVA  
[10] PAVLINA TSIRIDES  
[11] IRINA LOUTCHINA SKITTIDES  
[12] PHOTINI PANAYIOTOU  
[13] ARTEMIS ARISTEIDOU  
[14] A.B.C. GRANDESERVUS LIMITED

[15] STARLEX COMPANY LIMITED  
[16] RENOVA INDUSTRIES LIMITED  
[17] SUNGLET INTERNATIONAL INC.

Applicants

Defendants by way of Third Ancillary Claim

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2020: April 20, 27;  
July 27.  
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**Appearances:**

Mr. David Quest, QC with him Miss. Arabella di Iorio and Mr. Shane Quinn for the Applicants  
Mr. Jonathan Crystal, with him Mr. Jonathan Child and Mr. Phillip Baldwin for the Respondent Mr.  
Andrey Titarenko

Mr. John Carrington, QC with him Ms. Reisa Singh for the Respondents Romos Limited and Goldfort Limited

## JUDGMENT

- [1] **WALLBANK, J. (Ag.):** On 25<sup>th</sup> February 2020 the Applicants filed an application seeking orders that unless the Respondents ‘fully and properly’ comply with an Order of this Court (by Mr. Justice Jack (Ag.)) made on 17<sup>th</sup> June 2019 (‘the 17<sup>th</sup> June 2019 Order’) within fourteen days of now being ordered to do so, the Respondents’ Amended Defence and Counterclaim and Ancillary Claim in these proceedings be struck out in their entirety. For the reasons set out below the Court’s decision is that the application stands dismissed with costs to the Respondents.
- [2] The Applicants can for convenience be called the Renova Parties. The Respondents are Mr. Andrey Titarenko (‘Mr. Titarenko’), Romos Limited (‘Romos’) and Goldfort Limited (‘Goldfort’). These Respondents are connected. The Court has been informed by Romos and Goldfort’s Counsel that Mr. Titarenko is the sole director of Romos and Goldfort.
- [3] The Order in question required the Respondents and certain other parties connected with the Fifth Defendant to the Claim (and other capacities in respect of these proceedings), Mr. Abyzov, to conduct reasonable searches for specified documents, and insofar as those documents were within their control, provide copies of them to the Renova Parties’ legal practitioners. Insofar as documents were alleged not to be in their control, the Respondents were to serve an Affidavit confirming that by no later than 4<sup>th</sup> November 2019.
- [4] The Applicants stated in their Notice of Application that as at the filing date of the application, none of the Respondents had complied with that Order. The other parties filed and served the Affidavit in respect of their own searches, albeit about a month late. In the circumstances the Applicants filed this application, seeking relief pursuant to rule 26.4 and/or 28.13(4), Civil Procedure Rules 2000 (‘CPR’).
- [5] The Applicants’ specific disclosure application had been made on grounds that the Respondents and the other disclosure respondents had jointly filed witness statements for the purpose of the trial which had been scheduled for this matter to commence on 5<sup>th</sup> June 2018.

A number of those witness statements made various references to documents, but some of those references were said by the Applicants to be insufficiently clear to allow the Renova Parties to determine either the identity of those documents and/or whether they had already been disclosed.

[6] The Applicants say that they followed up on their requests for disclosure through correspondence. At that time, initially, Messrs. Walkers acted for Romos and Goldfort and the other parties connected with Mr. Abyzov (who, for present purposes only, I shall refer to as 'the Abyzov Parties'). The Applicants say Messrs. Walkers did not respond to those requests. Then on 27<sup>th</sup> February 2020 Messrs. Walkers obtained an order to come off the record as acting for Romos and Goldfort. They continue to act for the Abyzov Parties. Mr. Titarenko instructed solicitors, Messrs. Lennox Paton, in around February 2019. Messrs. Lennox Paton likewise did not respond to the Applicants. Romos and Goldfort did not immediately instruct new solicitors.

[7] So the Applicants issued their specific disclosure application. Shortly before the hearing on 17<sup>th</sup> June 2019, the Abyzov Parties confirmed for the first time that certain of the documents had already been disclosed. The Abyzov Parties and the Respondents were ordered to conduct searches for and provide copies of a number of the other documents requested by the Applicants. If the disclosure respondents contended that they did not have any of the documents within their control, then they had to file and serve an Affidavit to that effect. The 17<sup>th</sup> June 2019 Order imposed a deadline on them of 4<sup>th</sup> November 2019 both for provision of copies and service of the Affidavit.

[8] The 17<sup>th</sup> June 2019 Order did not order or direct that the disclosure respondents should serve supplemental Lists of Documents. Nor did it order the disclosure respondents to provide the Applicants with document reference numbers to enable them to cross-check them against documents already disclosed and logged in the disclosure record.

[9] The Order of 17<sup>th</sup> June 2019 was not yet sealed as at the hearing date for the present application. The reason given by the parties was that they had failed to agree its terms. Counsel told me at the hearing of the present application that the disagreement does not concern the terms of the disclosure parts to the Order with which this application is concerned. The Respondents have seized upon the fact that the Order has not yet been sealed to argue

that they had no obligation to adhere to the deadlines contained therein. Although this argument survived in correspondence and even found its way into skeleton arguments for the hearing of this application, Learned Counsel for the Respondents had the good sense not to pursue the point in oral submissions. Under our legal system the point goes nowhere. The Respondents were present at the hearing on 17<sup>th</sup> June 2019 through their legal practitioners. By CPR 42.2(1)(b) a party who is present whether in person or by legal practitioner when an order is made is bound by its terms whether or not the order is served. The terms of the disclosure ordered that we are presently concerned with were unequivocal and there is no dispute about them. The Respondents cannot take shelter behind the disagreement over other expressions in the Order and its lack of seal to succeed with an argument that compliance has not yet been required. I will say no more about this misconceived argument.

- [10] The Applicants stated in their application that despite a small exchange of emails between their legal practitioners and those of Mr. Titarenko in the second half of November 2019 indicating that some form of compliance might soon follow, that did not prove to be the case with respect to Mr. Titarenko. He provided neither copy documents nor an Affidavit.
- [11] The Applicants also said that Romos and Goldfort did not comply either.
- [12] This non-compliance was despite the fact that the Respondents had had some four months in which to do so.
- [13] On the face of it, that the Renova parties should then file an application for an unless order should come as little surprise. They did so on 25<sup>th</sup> February 2020.
- [14] Behind the face of the matter, however, there was, or at least appears to have been, ever increasing turmoil in the Abyzov/Titarenko camp. Following what appears to have been some kind of falling out (details of which have not been aired) between Mr. Titarenko and others on the Abyzov side, Messrs. Walkers decided to remove themselves from the record as representing Romos and Goldfort. This subsidiary dispute, if that is what it was, appears to have made compliance with the Order of 17<sup>th</sup> June 2019 rather complicated.
- [15] In mid-March 2020 the Respondents produced an Affidavit in response to the Renova Parties' unless order application. Their Affiant is one Ms. Natalia Khodasevich, who describes herself

as a Russian lawyer living in Belgium. She does not explain her relationship with the Respondents, but says she was authorized by them to make her Affidavit. Ms. Khodasevich attested that the Respondents were preparing to provide a number of documents in compliance with the 17<sup>th</sup> June 2019 Order, under cover of a letter which she said would contain certain clarifications. She then stated that certain categories of documents identified in the 17<sup>th</sup> June 2019 Order were not within the Respondents' control. Ms. Khodasevich ended her Affidavit with an observation (in reality a submission) that the unless order application sought by the Renova should be reviewed in the light of the disclosure and clarifications given and that in any event the unless order sought was 'tremendously disproportional', and that a more appropriate unless order would have been for certain paragraphs to be struck from the Respondents' witness statements.

[16] Mr. Titarenko produced a letter by email, dated 13<sup>th</sup> March 2020. He did so on behalf of Romos, Goldfort and himself personally. After first pressing the point that the 17<sup>th</sup> June 2019 Order had never been sealed or approved by the Court, and consequently (he argued) it was not appropriate for the Renova Parties to seek reliefs for non-compliance within the deadline set therein, Mr. Titarenko explained his position in relation to each category of documents. These were, respectively: lost (category 1 of Annex 1 to the 17<sup>th</sup> June 2019 Order), already disclosed (category 3 of Annex 1 to the 17<sup>th</sup> June 2019 Order and 2 and 7 of Annex 2, ditto), not found (category 4 of Annex 1 to the 17<sup>th</sup> June 2019 Order and category 8 of Annex 2, ditto), disclosed in part at least already (category 5 of Annex 1 to the 17<sup>th</sup> June 2019 Order and category 10 of Annex 2, ditto) with several enclosed further.

[17] Mr. Titarenko accepted that Romos and Goldfort should provide a Supplemental List of Documents, but alluded to a problem with this, in that their previous legal representative Messrs. Walkers had not (alleged Mr. Titarenko) explained to Romos and Goldfort their duty of disclosure and the terms of the 17<sup>th</sup> June 2019 Order, nor had they approached the Respondents for the purpose of disclosure pursuant to that order. Mr. Titarenko said that Romos and Goldfort would need to delay producing their Supplemental List of Documents until they could instruct new legal representation or have Messrs. Walkers restored as their legal practitioners of record. I understand that Romos and Goldfort have filed an application seeking to overturn the order whereby Messrs. Walkers were removed from the record, and consequential orders.

- [18] Mr. Titarenko stated that he would produce his list of documents as soon as he or his legal practitioners obtained from Messrs. Walkers the database of all documents disclosed by the parties within these proceedings.
- [19] On 19<sup>th</sup> March 2020 Mr. Titarenko's legal practitioners, Messrs Lennox Paton, wrote Messrs. Agon a letter purporting to serve the Affidavit of Ms. Khodasevich and also informing them that thirteen emails had also been sent to them from an email address apparently set up for the conduct by Romos and Goldfort of litigation.
- [20] On the same day, 19<sup>th</sup> March 2020, Messrs. Walkers wrote to the Renova Parties' legal practitioners, Messrs. Agon. Messrs. Walkers said they had already written twice to Agon seeking the Renova Parties' confirmation that they would not read documents disclosed to Agon by Romos and Goldfort, but that Agon had taken the line that Messrs. Walkers were not entitled to receive such confirmation. What this concerned was that Emmerson International Corporation ('Emmerson'), acting through Messrs. Mourant Ozannes, had obtained an injunction against Romos and Goldfort and Mr. Titarenko on 6<sup>th</sup> March 2020, continued on 16<sup>th</sup> March 2020, restraining them from communicating to any other person privileged and/or confidential documents and/or information arising from the joint retainer Romos and Goldfort and Emmerson had had with Messrs. Walkers. Messrs. Walkers were now trying to enforce the terms of that injunction. Messrs. Mourant Ozannes had also notified Messrs. Agon of the injunction, by letter dated 6<sup>th</sup> March 2020 and followed up with another letter, dated 19<sup>th</sup> March 2020, informing Messrs. Agon that they considered that the Respondents had breached the injunction by giving disclosure on 13<sup>th</sup> and 16<sup>th</sup> March 2020.
- [21] The Renova Parties, through Messrs. Agon, wrote to Messrs. Lennox Paton and to Romos and Goldfort by letter dated 20<sup>th</sup> March 2020. In this Messrs. Agon took the position that the Respondents had not served their disclosure materials. Messrs. Agon contended that documents provided by Romos and Goldfort under cover of an email dated 14<sup>th</sup> March 2020 had not been properly served. They also contended that an attempt to deliver the documents by hand by Romos and Goldfort's registered agents on 17<sup>th</sup> March 2020 did not constitute proper service. The ground for these contentions was given by Messrs. Agon as being that under the Commercial Court Rules, Romos and Goldfort are only permitted to act in litigation through a legal practitioner. Moreover, said Messrs. Agon, the purported service by Mr. Titarenko was also not effective because not all the documents referred to in Ms.

Khodasevich's Affidavit had been provided, and such materials contained privileged documents that was subject to the injunction. Messrs. Agon also asserted that the Respondents' disclosure was in any event out of time. Messrs. Agon followed this up with a letter dated 20<sup>th</sup> March 2020 stating that they were taking steps to delete/destroy all copies of the documents provided by the Respondents.

[22] On 15<sup>th</sup> April 2020, Messrs. Sabals Law ('Messrs. Sabals') wrote a letter to Messrs. Agon on behalf of Romos and Goldfort. In this, Messrs. Sabals informed the Renova parties that they had been retained as counsel for Romos and Goldfort in relation to four applications pending before the Court and not generally. These included this unless order application. Messrs. Sabals maintained that the disclosure already provided by Romos and Goldfort and the accompanying Affidavit of Ms. Khodasevich constituted full compliance with the 17<sup>th</sup> June 2019 Order. Messrs. Sabals stated that they were enclosing the documents already provided by Romos and Goldfort to Messrs. Agon. Messrs. Sabals rounded off this communication with an invitation to the Renova Parties to withdraw their application, by 17<sup>th</sup> April 2020.

[23] Messrs. Agon replied by a letter dated 16<sup>th</sup> April 2020. They pointed out that Messrs. Sabals' letter had no enclosures. Messrs. Agon's first substantive point was that Romos and Goldfort's engagement of Messrs. Sabals was 'abusive'. Messrs. Agon argued that their separate representation from Mr. Titarenko would likely result in 'further disruption to the proper conduct of the litigation, confusion and increased costs'. Messrs. Agon said there is 'no reason why your clients cannot effectively be represented by Lennox Paton who already act for Mr. Titarenko'. Messrs. Agon also referred to an application the Renova Parties have filed, on 27<sup>th</sup> March 2020, seeking an order prohibiting separate representation. That application is not before the Court on this occasion so I will say no more about it.

[24] Next and lastly, Messrs. Agon addressed the disclosure matters. In essence, Messrs. Agon complained about the lateness of Messrs. Sabals' attempt to give disclosure and maintained that Messrs. Agon had already destroyed the documents provided. Thus, as far as the Renova Parties were concerned, nothing had changed and the Respondents remained in breach. Messrs. Agon also referred Messrs. Sabals to a letter Messrs. Agon had written to Messrs. Lennox Paton on 16<sup>th</sup> April 2020. The nub of that letter was that the Renova Parties maintained their objections to the disclosure by the Respondents. Messrs. Agon stated that in light of a plethora of defects, contradictions and ambiguities in the Respondents'

communications and the opaque nature of Romos and Goldfort's representation, the Renova Parties considered that their unless order application 'remains absolutely necessary'. Messrs. Agon also intimated that they would be seeking further orders requiring the Respondents to provide an appropriately referenced list of the documents showing their relevant disclosure reference numbers, and in default thereof, for the documents to be produced again, and requiring Mr. Titarenko in person (and not an intermediary) to file and serve an affidavit of compliance. Such orders would also be sought on an unless order basis. This is, I think, a fair and neutral summary of that letter. It does not however fully describe it. Whilst I have no doubt that the Renova Parties and Messrs. Agon would profess themselves utterly convinced that all their points in that letter are good points, it reads as a typical litigation solicitor's letter that seeks to tease out as many 'problems' as possible with what his opponent has said. It is patently clear to me that the Renova Parties had no intention whatsoever of moving towards any kind of conciliation, much less any willingness to take up Messrs. Sabals' invitation to withdraw the application.

[25] In the Renova Parties' skeleton argument for the hearing, their Learned Counsel maintained the Renova Parties' technical objections to the Respondents' disclosure attempts, as well as the demands they had made in correspondence for more informative/cross-referenced disclosure to be given and a personal affidavit from Mr. Titarenko.

[26] Their reliance upon authorities was terse to the point of begging the question what they must have left out. They first cited CPR 26.4(1);

"If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an 'unless order'."

[27] Then, they cited a passage from the English High Court case of **Orb a.r.l. v Ruhan**:<sup>1</sup>

"[...] the Court's orders are to be obeyed. The administration of justice depends on it. Maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself [...]. The Court regularly makes debarring orders where the failure does not directly impact on the substantive issues which fall to be decided at trial. It does so, for example when it stays proceedings for failure to provide security for costs. It is well established that such an unless or debarring order may be justified by failure to comply with a freezing order and ancillary disclosure order..."

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<sup>1</sup> [2016] 850 EWHC 850 (Comm) at paragraph 178 (Popplewell J).

[28] Noticeably absent was any case law authority on how the Court's undoubted power to make unless orders should be applied.

[29] At the hearing on 27<sup>th</sup> April 2020, Learned Queen's Counsel for the Renova Parties conceded that there had been partial compliance by the Respondents with the 17<sup>th</sup> June 2019 Order but maintained that this was a strong and obvious case for an unless order. He accepted that maintaining the application for strike-out as the sanction for failure to comply with an unless order would now be problematic and urged that lesser sanctions should be considered as the appropriate sanction. He also accepted that issues regarding Messrs. Sabals' representation of Romos and Goldfort need not trouble the Court on this occasion but could be reserved.

[30] The most helpful and indeed determinative submissions in relation to the law were, if I may respectfully say so, advanced by Learned Counsel for Romos and Goldfort, led by Mr. Carrington, QC.

[31] Learned Counsel for Romos and Goldfort referred to the case of **Maxime v Maxime**.<sup>2</sup> There the court stated the following principles, culled from a number of jurisprudential sources:

"[17] In Rayden and Jackson (Relationship Breakdown, Finance and Children/Relationship Breakdown and finances/Division D at Paragraph 23.805) the authors had this to say:

"A Hadkinson Order, or 'an unless order', is not strictly a method of enforcement, but rather a case management order. In Hadkinson v Hadkinson it was established that the Court may, at its discretion, refuse to hear a party to ongoing proceedings who remained in breach of an extant order unless and until that party remedied such breach."

[18] Rayden and Jackson went on in the following paragraph (Ibid at paragraph 23.807) to say that

"Such orders are draconian in effect and so necessitate a rigorous adherence to the rules. Hadkinson orders are not, and should not be, commonplace; they constitute case management orders of the last resort in substantive proceedings where a litigant in is wilful contempt."

...

[20] In the case of **Mubarak v Mubarak** (2006 EWHC 1260 (Fam)) the court outlined six questions which should be considered by the court, to wit:

- (a) Is the party in contempt?
- (b) Is there an impediment to the course of justice?
- (c) Is there any other effective means of securing compliance with the court's orders?

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<sup>2</sup> DOMHMT2014/0022.

- (d) Should the court exercise its discretion to impose condition having regard to the question?
- (e) Is the contempt wilful?
- (f) If so, what conditions would be appropriate?

[21] In **M v M (Financial Provision)** ([2010] EWHC 2817 (Fam)) the court ruled that “it was a strong thing for a court to refuse a party to a cause, and it was only to be justified by great considerations of public policy. It was a step which a court would only take when the party itself impeded the course of justice and there was no other effective means of securing his compliance. The fact that a party has disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued to impeded (*sic*) the course of justice in the cause by making it more difficult for the court to ascertain the truth or enforce the orders which it might make, then the court in its discretion, refuse (*sic*) to hear him until the impediment was removed or good reason was showed why it should be removed (Paragraph 1 of the Held.)”<sup>3</sup>

- [32] Learned Counsel for Romos and Goldfort also referred to a judgment of this Court in **JSC MCC Eurochem v Livingston Properties Equities Inc et al.**<sup>4</sup> where Eder J stated at paragraph [13]:

“... it is ultimately a matter for the Court’s discretion as to whether or not to impose an unless order. Thus, as stated by Jackson LJ in *Malofeev v VTB Capital Plc* it involves “...weighing up competing factors and possible prejudice to both parties.””

- [33] Moreover, Learned Counsel for Romos and Goldfort referred to the case of **Scatliffe v BVI Health Authority**<sup>5</sup> in which Ellis J stated:

“[20] ...Generally, unless orders are normally used where a party has repeatedly failed to comply with rules of court or court orders and the Court determines that this non-compliance must cease. (*Hytex Information Systems Ltd v Coventry City Council* [1997] 1 W.L.R. 1666 at 16767 (*sic*))”

[21] An unless order is an order which directs a party to perform some process requirements by a certain date and specifies the consequences of default. The particular consequences may vary according to the circumstances. Thus, an unless order may direct that unless a party files an expert report by a certain time, the party will not be allowed to rely on expert evidence. Alternatively, it may direct that unless a party gives disclosure by a certain time, the party’s statement of case would be struck out. The latter direction is exceptional and is generally made in serious cases of contumelious failure to comply with court orders. This approach is no doubt based on the general reluctance of courts to decide a case on procedural grounds rather than on its real merits.”

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<sup>3</sup> *Maxime v Maxime* DOMHMT2014/0022 (unreported, delivered 4<sup>th</sup> July 2019) at paragraphs 17, 18, 20, 21 (Stephenson J).

<sup>4</sup> BVIHCM2015/0097 (unreported, delivered 23<sup>rd</sup> June 2016).

<sup>5</sup> BVIHCV2011/0087. (unreported, delivered 1<sup>st</sup> June 2015).

- [34] Learned Counsel for Romos and Goldfort considered how the **Maxime v Maxime** criteria should be applied in this case.
- [35] To the question, are the Respondents in contempt, Mr. Carrington, QC answered: no, they complied with the 17<sup>th</sup> June 2019 Order by filing and serving Ms. Khodasevich's Affidavit and by providing documents on 14<sup>th</sup> March 2020.
- [36] To the question, is there an impediment to the course of justice, Mr. Carrington, QC submitted that there has been no impediment to a fair trial, and the Applicants have not even alleged that there is any.
- [37] To the question, is there any other effective means of securing compliance with the Court's orders, Mr. Carrington, QC submits that there is no need to ensure compliance here, but should the Court disagree appropriate directions would need to be made, bearing in mind that the Respondents do not have access to the document database held by Messrs. Walkers.
- [38] To the question, should the court exercise its discretion to impose condition having regard to the question, Mr. Carrington, QC submits not, since if the Respondents do not disclose the documents referred to in their witness statements their case would be the weaker for it.
- [39] To the question, is the contempt willful, Mr. Carrington, QC answers in the negative, in that any delay in compliance is explained by the falling-out between the Respondents and the other Abyzov parties and Romos and Goldfort's problems with representation.
- [40] To the question, if contempt was wilful, what conditions would be appropriate, Mr. Carrington, QC, contends that no conditions would be appropriate here, but recovery of database would be a critical factor before conditions should be contemplated. He pointed out that the witness statements in issue were made in 2018, whereas the Respondents' difficulties accessing the document database arose in late 2019.
- [41] Mr. Carrington, QC submitted that the Applicants should have withdrawn their application and that prosecuting it after the disclosure documents were produced and the Respondents' position had been attested to was contrary to the Overriding Objective of the CPR of dealing with cases justly. He submitted that an unless order is not appropriate in light to the disclosure

given. Mr. Carrington, QC stressed that an unless order is a draconian form of relief and that in this case there was no allegation even made of any contumelious breach. He further urged that no allegation had been made either that the delay in giving the disclosure affected or affects the timetable to trial.

[42] In relation to the Applicants' submission that various other verification and confirmatory orders should now be granted, also on an unless order basis, Mr. Carrington, QC submitted that the Applicants are 'stuck' with what they have applied for; they cannot change the relief they seek and ask for an unless order that they had not sought in their application. He submitted that any such further orders are case management orders in nature and are a natural corollary to working out the proper functioning of the 17<sup>th</sup> June 2019 Order, and that it would not be appropriate for draconian unless order sanctions to be imposed.

[43] Learned Counsel for Mr. Titarenko, Mr. Crystal, added the following submissions to those of Mr. Carrington, QC.

[44] Mr. Crystal replied to the Applicants' demand that Mr. Titarenko should himself file and serve an Affidavit of compliance by pointing out that nowhere in the 17<sup>th</sup> June 2019 Order does it require an Affidavit by Mr. Titarenko himself. The Affidavit was given by a duly authorized person and that suffices.

[45] Mr. Crystal stressed that Mr. Titarenko currently has no access to Messrs. Walkers' document database so Mr. Titarenko is currently unable to identify document numbers. He also stressed that Mr. Titarenko's explanation for his delay is that there had been a falling out with Emmerson.

[46] Mr. Crystal submitted that this application should be seen as an attempt by the Renova Parties to have Mr. Titarenko removed from this litigation. He submitted that no amount of compliance by the Respondents would satisfy the Renova Parties.

[47] Mr. Crystal argued that the unless order relief sought was tremendously disproportionate. He submitted that proportionality works at two levels; firstly, in the relief being sought and secondly in what he described as the arms available to each side. He argued that a strike-out of the Respondents' entire statements of case would be grossly disproportionate to the alleged failure

to disclose some documents after the Respondents' witnesses had mentioned them and secondly that the debacle between the Respondents, Emmerson and Messrs. Walkers had caused the Respondents to lose access to the document bank. This has left the parties with 'unequal arms'.

[48] Mr. Crystal submitted that the application should be dismissed, with consequential orders given. He contended that the Court should not succumb to a temptation to make some different kind of order than which the Applicants had sought in their application, which they had not formally amended. He observed that an application is not amended through correspondence.

[49] Mr. Quest, QC in reply for the Applicants, urged that the Respondents have not said that they had made any attempt to comply by the date set for disclosure. There is no dispute that there had been a breach. There is equally no suggestion that the falling out between the Respondents, Emmerson and Messrs. Walkers prevented compliance with the original order.

[50] Thus, addressing the **Maxime v Maxime** criteria (for the first time), Mr. Quest, QC submitted as follows.

[51] To the question, is the party in contempt, Mr. Quest, QC, answered in the affirmative – the Respondents had been in breach until 13<sup>th</sup> March 2020 and they still have not complied fully now.

[52] To the question, is there an impediment to the course of justice, Mr. Quest, QC answered in the affirmative, because the purpose of disclosure is that the Renova Parties should be able to see why the Respondents' witnesses said what they said and whether the witness statements are consistent with the underlying documents. Mr. Quest, QC urged that failure to comply with disclosure orders is always an impediment to justice.

[53] To the question whether there is any other effective means of securing compliance with the court's orders, Mr. Quest, QC observed that plainly there is not, since without the unless order application the Respondents would not have complied with the order. They had completely ignored it until the unless order application had been filed and served.

- [54] To the question whether the Court should exercise its discretion to impose conditions having regard to the question, Mr. Quest, QC answered in the affirmative but accepts that a strike-out sanction would now be problematic. In other words, as Mr. Crystal also observed, Mr. Quest, QC now accepts that strike-out is an inappropriate sanction.
- [55] To the question whether the contempt had been wilful, Mr. Quest answered in the affirmative. Absent any explanation for the Respondents' original breach, it must be seen to have been wilful.
- [56] To the question if the contempt had been wilful, what conditions would be appropriate, Mr. Quest, QC urged that a lesser sanction than strike-out would not be appropriate but the Respondents should now be given a last chance.
- [57] Mr. Quest, QC maintained that Mr. Titarenko should be compelled to make the Respondents' Affidavit of compliance as he is pre-eminently the appropriate person to do so, and he should not be allowed to hide from eventual cross-examination behind the assertions of Ms. Khodasevich, whose qualifications and capacity to make such an Affidavit remain unclear.

## **Discussion**

- [58] The material terms of CPR 26.4 have been set out above. The Applicants also rely upon CPR 28.13(4). This provides:
- “On an application under paragraph (2) the court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out.”
- [59] There is no dispute that the Respondents have complied with the 17<sup>th</sup> June 2019 Order, at least in part, and albeit belatedly.
- [60] Mr. Quest, QC for the Applicants, acknowledged that in light of the steps taken by the Respondents to comply with the order it would be 'problematic' for the Applicants to hold out for an immediate unless order that the Respondents' statements of case be struck out if they do not give better compliance.

[61] That acknowledgement dooms the application for the relief the Renova Parties had sought, even if one accepts (which I do not) that the application as filed sought proportionate relief. In my respectful judgment, the application in the form it took should never have been made. Even if I am wrong on that, the application became untenable once the Respondents took the steps they did to comply with the disclosure order. Concerning the form of relief sought in the application, a glance at the Notice of Application and the Draft Order filed with it shows that only two heads of relief were sought: an unless order with strike out of the Respondents' statements of case as the sanction and an order that the Respondents pay the costs of the application. No request was made for some lesser sanction, such as striking out of part of the Respondents' statements of case (which would include striking out parts of their witness statements), further or in the alternative relief or some other relief as the Court might think fit. That omission lends force to Mr. Crystal's submission that the Renova Parties' goal with this application was to secure the exclusion of Mr. Titarenko from these proceedings. If they were really concerned about getting the documents, or clarifying the references to the documents in question, they can have been expected to have cast their prayer for relief in somewhat broader and more flexible terms.

[62] The Court undoubtedly has wide powers to make orders in order to further the Overriding Objective of dealing with cases justly.<sup>6</sup> It is not bound by the confines of the relief sought by an applicant. Indeed, the court must seek to give effect to the Overriding Objective when it exercises any discretion given to it by the CPR and interprets any rule.<sup>7</sup> I do not interpret CPR 26.4 and/or 28.13(4) as ruling out less draconian unless order sanctions when the Overriding Objective would be served thereby. The question is what sort of order, if any, this Court should make.

[63] I accept that the criteria recapitulated in **Maxime v Maxime**<sup>8</sup> are those that I must consider and apply. They are guidelines and not hard and fast rules. Ultimately the higher principle of furthering the Overriding Objective<sup>9</sup> of dealing with cases justly must be applied.

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<sup>6</sup> CPR 1.2, 26.1(2)(w), 26.2.

<sup>7</sup> CPR 1.2.

<sup>8</sup> *Maxime v Maxime* DOMHMT2014/0022 (unreported, delivered 4<sup>th</sup> July 2019) at paragraphs 17, 18, 20, 21 (Stephenson J).

<sup>9</sup> CPR 1.1.

[64] Considering these criteria, I first accept that the Respondents had been in contempt by their breach of the provisions of the 17<sup>th</sup> June 2019 Order until 13<sup>th</sup> March 2020. The Respondents have sought to purge their contempt. There is room for argument whether or not the Respondents have as yet complied fully. I think the Respondents ultimately accept that they have not, or may not have done so, but they say they are unable to access the document database held by Messrs. Walkers. The degree of culpability for any continuing contempt by the Respondents is debatable.

[65] The reason this is debatable is because there are numerous questions that remain unanswered about the alleged falling-out between the Respondents, Emmerson and Messrs. Walkers. Focusing specifically upon the Respondents' relationship with Messrs. Walkers, the Respondents made rather disturbing allegations against Messrs. Walkers that they did not explain the Respondents' disclosure obligations pursuant to the 17<sup>th</sup> June 2019 Order and that they did not approach the Respondents for their disclosure. Obviously, I cannot determine the truth of these allegations on the materials before me now, but it does suggest at least that the Respondents, rightly or wrongly, feel under-served by Messrs. Walkers in respect of compliance with the 17<sup>th</sup> June 2019 Order. It is also unclear to me whether it had been Messrs. Walkers who took responsibility for preparing the Respondents' witness statements in which the various documents were mentioned. If that is right, it would be somewhat unattractive for Messrs. Walkers to take a line now that they will not provide the Respondents with the very documents they had seen fit to include references to in the witness statements, and indeed that Messrs. Walkers wish to block the Respondents from providing any documents that Messrs. Walkers and Emmerson claimed to be privileged and/or confidential documents. It is also unclear to me why Messrs. Walkers appear to be so reticent about allowing the Respondents access to the document database for the purposes of their giving full and proper disclosure when Emmerson would have a duty to disclose the documents anyway. I also ask myself why Messrs. Walkers apparently did not communicate anything of substance on behalf of the Respondents to Messrs. Agon when it became clear that the deadline in the 17<sup>th</sup> June 2019 Order would not be met. I note that Messrs. Walkers obtained the order to remove themselves from the record on behalf of Romos and Goldfort only two days after the Applicants filed their unless order application. It would be natural for Romos and Goldfort to be set back by the loss of legal representation and thus delayed in their further response. The Respondents took a little over two weeks to take steps to comply. Seen in the overall factual context, which includes that Emmerson had obtained an injunction against the Respondents enjoining them

from giving disclosure, that was prompt. It is regrettable that the Respondents did not immediately seek to put the Applicants on notice of their intended compliance, although that may have been due in significant part to Mr. Titarenko's erroneous (but, from a civil law subject's point of view, understandable) view that the 17<sup>th</sup> June 2019 Order need not yet have been complied with. The long and the short of it is that I cannot tell how much of the Respondents' delay in compliance was caused by Messrs. Walkers rather than the Respondents.

[66] The first criterion, whether the Respondents are currently in contempt, is thus not satisfied in a clear way. This inclines me away from making what is an exceptional and draconian order.

[67] In relation to whether there is an impediment to the course of justice, I agree with Mr. Quest, QC that failure to comply with disclosure orders is always an impediment to justice. Conceptually that is correct. That said, the Respondents have evinced an intention to give further disclosure if they can find documents and/or regain access to the document database, to file Supplemental Lists of Documents (although not required by the 17<sup>th</sup> June 2019 Order), and no trial date has yet been set. The proceedings are still at an early procedural stage in certain respects (a case management conference is part heard and there are jurisdiction and other challenges yet to be heard). At this point therefore, any impediment to justice is more conceptual than actual. There is plenty of opportunity in the life of this matter (if it runs its course) for any such conceptual impediment to be resolved. I also note that the Applicants did not cite an impediment to the course of justice as a ground for seeking an unless order. Mr. Quest, QC's submissions on this were simply a case of quick thinking on his feet.

[68] On the question whether there is any other effective means of securing compliance with the court's orders, in my respectful judgment there is. I think Ms. Khodasevich, and through her, Mr. Titarenko were right that a more proportionate unless order sanction (if any should be appropriate) would have been for paragraphs to be struck from the Respondents' witness statements rather than for their entire statements of case to be struck out. That would have struck a just balance, particularly in light of Mr. Carrington, QC's submission, which I accept, that the Respondents' own case would be weakened if they were not to produce the documents in question. On a balance of prejudice, it is the Respondents who have more to lose through non-disclosure than the Applicants. This is not an argument from the perspective of hindsight. This concerns a fair balance that could have been struck by the Applicants when

they formulated their application, but they chose not to do so. Choices have consequences and it forms no part of the Court's role to protect a party from their own decisions.

[69] Concerning the question whether the Court should exercise its discretion to impose conditions having regard to the issue of further and/or better compliance, I think it would risk wreaking an injustice to do so, since it remains unclear to me to what extent the Respondents will be prevented by Emmerson from accessing Messrs. Walkers' document database. I am satisfied that such access is a critical factor here. Since the Respondents will already face an inherent disadvantage if they are prevented by Emmerson's legal practitioners from accessing documents the Respondents previously had access to, I am satisfied that it would be contrary to the Overriding Objective if this Court were now to impose some time limit and some sanction upon the Respondents to make good any remaining compliance matters, particularly as it remains uncertain when, if ever, access to the database is restored. This Court will therefore refrain from imposing any conditions at present.

[70] Concerning the question whether the contempt had been wilful, the correct answer, I think, is that I cannot tell on the material before the Court how much responsibility for failure to comply with the 17<sup>th</sup> June 2019 Order should in reality be ascribed to Messrs. Walkers or to the Respondents. But the more important factor is that the Respondents have acted to purge their contempt, even if it remains unclear whether they have fully done so.

[71] In sum, whilst I am of the respectful opinion that the Applicants had been justified in seeking a form of unless order (but not the form of relief that they did) given the Respondents' apparently persistent inaction in the face of a clear order, it was misconceived of the Applicants to have persisted with their application once the Respondents' compliance efforts became apparent. The host of technical points raised by the Applicants somehow to negate the fact of disclosure finds absolutely no favour with me. It is clear to me that their purpose was to try to keep the Respondents in breach of the 17<sup>th</sup> June 2019 Order so that the Applicants could maintain their application.

[72] Moreover, whilst I am of the opinion that the Applicants had been justified in seeking an unless order, they were not justified in seeking as a sanction that the Respondents' statements of case should be struck-out in their entirety. That was indeed 'tremendously disproportionate' relief

sought. The application should never have been brought in the form that it was. It ought therefore to be dismissed, with costs awarded to the Respondents.

[73] Lastly, I see no reason to amend the 17<sup>th</sup> June 2019 Order to require Mr. Titarenko himself to file an Affidavit of compliance. I appreciate that the Renova Parties want to be able to challenge the Respondents' compliance through cross-examination of Mr. Titarenko, and I equally appreciate that Mr. Titarenko might consciously want to avoid that, and therefore choose to interpose a less accessible, indeed inaccessible, affiant, but the Court was content on 17<sup>th</sup> June 2019 to do no more than to require an Affidavit. In circumstances where the Respondents themselves are likely to be prejudiced if they cannot produce the documents their witnesses mentioned, I do not see that it would advance matters to facilitate such a cross-examination opportunity to require Mr. Titarenko to file and serve an Affidavit.

[74] The problems seen by Messrs. Agon with Romos and Goldfort's representation by Messrs. Sabals do not give rise to an issue that needs to be decided on this occasion. When or if they are raised again the Court can address them then.

### **Disposition**

[75] The Order of the Court will therefore be that the application stands dismissed, with costs to the Respondents. The parties will be accorded an opportunity to address the Court further on the issue of costs. I have in mind that there is some room for argument as to the date from which costs should be ordered, and possibly other aspects.

[76] I take this opportunity to thank learned counsel for their assistance during this matter.

**Gerhard Wallbank**  
High Court Judge

**By the Court**

**Registrar**