

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 0160 OF 2013

BETWEEN:

By way of Claim:

- (1) RENOVA INDUSTRIES LIMITED**
- (2) WEDGWOOD MANAGEMENT LIMITED**
- (3) ZAPANCO LIMITED**
- (4) LAMESA HOLDING SA**

Claimants

and

- (1) EMMERSON INTERNATIONAL CORPORATION**
- ~~(2) TOMSA HOLDINGS LIMITED~~**
- ~~(3) ALABASTER ASSOCIATES LIMITED~~**
- ~~(4) GARDENDALE INVESTMENTS LIMITED~~**
- (5) MIKHAIL ABYZOV**
- (6) ROMOS LIMITED**
- (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**

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 SYSTEMS LIMITED
(a company incorporated under the laws of Belize)
- (7) ODVIN FINANCIAL INC
- (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
(a company incorporated under the laws of Cyprus)
- (18) CLERN HOLDINGS LIMITED
- (19) STARLEX COMPANY LIMITED
- (20) SUNGLET INTERNATIONAL INC.
- (21) OOO RENOVA HOLDING RUS

Defendants by way of Counterclaim

And by way of Ancillary Claim:

- (1) MIKHAIL ABYZOV
- (2) ROMOS LIMITED
- (3) FRESKO FINANCIAL LIMITED
- (4) ANDREY TITARENKO
- (5) GOLDFORT LIMITED
- (6) EMMERSON INTERNATIONAL CORPORATION

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
- (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
(a company incorporated under the laws of Cyprus)
(17) CLERN HOLDINGS LIMITED
(18) MAKSIM MAYORETS
(19) LIWET HOLDING AG
(20) BERDWICK HOLDINGS LIMITED
(21) TIWEL HOLDING AG
(22) A.B.C. GRANDESERVUS LIMITED
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
(3) VLADMIR 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.
Defendants by way of Third Ancillary Claim

Appearances:

Mr. Paul McGrath QC, Miss. Arabella di Iorio, Mr. Michael Bolding and Mr. Andrew McLeod for the Vekselberg Parties;
Mr. Philip Marshall QC, Mr. Robert Weekes, Mr. Ajay Ratan, Miss. Colleen Farrington, Mr. Oliver Clifton and Mr. Daniel Burgess for Emmerson International Corporation

2019: May 27 to 30
June 19

JUDGMENT

Abuse of process — whether refusing to submit to the jurisdiction is an abuse

Acknowledgement of service — whether filing an acknowledgement of service form debars party from disputing service

Asset disclosure order — whether an order against two respondents is joint or several — whether on an alleged breach an “unless” order is appropriate

Ex parte order — setting aside — whether respondent’s case fairly presented — whether aggressive presentation of case a free-standing ground for setting aside — whether the duty to make inquiries triggered

Freezing order — whether application should have been made inter partes

Service outside the jurisdiction — Chabra order — whether a gateway exists for service out on a non-cause of action defendant

[1] **JACK, J [Ag.]**: This the latest stage in very large-scale litigation which has been going on since 2013.

[2] I shall use the following shortened forms to describe the relevant people and entities:

“ABC”: ABC Grandeservus Ltd, a Cypriot company, a corporate services administrator owned by the Tsirides family;

“Mr. Abyzov”: Mikhail Abyzov, one of the main protagonists locked in dispute with Mr Vekselberg;

“The Abyzov Parties”, sometimes called the APs in other documents: various companies and people associated with Mr. Abyzov, including Emmerson;
 “B&T”: Berdwick and Tiwel;
 “Berdwick”: Berdwick Holdings Ltd, a Cypriot company and an indirect subsidiary of RHL;
 “Brookweed”: Brookweed Trading Ltd, a Cypriot company wholly owned by IES Cyprus;
 “Emmerson”: Emmerson International Corporation, a BVI company;
 “IES Belize”: Integrated Energy Systems Ltd, a Belize company and a subsidiary of RHL;
 “IES Cyprus”: Integrated Energy Systems Ltd, a Cyprus company, part of the RHL stable until 13th October 2017, when Renova Bahamas transferred its 85 per cent shareholding to Renova Rus;
 “KES”: CJSC KES-Holding, a Russian company, wholly owned by IES Cyprus until 7th September 2018, when 52.7% of the shares were transferred to Merol;
 “Mr Kremer”: Vladimir Kremer, a business associate of Mr. Vekselberg;
 “Liwet”: Liwet Holding AG, a Swiss company and, until the contentious transfers of shares in it, an indirect subsidiary of RHL;
 “Mr. Lobanov”: Andrey Vladimirovich Lobanov, the son of Mr. Kremer;
 “Merol”: Merol Trading Ltd, a Cypriot company controlled by Israeli investors;
 “Mr. Michaelides”: Charalambous Michaelides, a director of RHL;
 “The Next Generation Trust”: a Cypriot trust, the trustee of which is ABC;
 “Oerlikon”: O C Oerlikon AG, a valuable Swiss company;
 “Mr. Olkhovik”: Evgeny Nikolaevich Olkhovik, a business associate of Mr. Vekselberg;
 “The Olympus Trust”: a Cypriot trust, the trustee of which is ABC;
 “The Polaris Trust”: a Cypriot trust, the trustee of which is ABC;
 “Renova Bahamas”: Renova Industries Ltd, a Bahamian company and subsidiary of RHL;
 “Renova Rus”: OOO Renova Holding Rus, a Russian company, the head of the Russian group of Renova companies;
 “RHL”: Renova Holdings Ltd, a Bahamian company, the head of the non-Russian group of Renova companies;
 “RIT”: Renova Innovation Technologies Ltd, a subsidiary of RHL;
 “S+B”: Schmolz+Beckenbach AG, a valuable Swiss company;
 “Sulzer”: Sulzer AG, a valuable Swiss company;
 “T Plus”: PAO T Plus or Publichnoe Aktsionernoe Obshectvo T Plus, a very large Russian energy company;

“Tiwel”: Tiwel Holding AG, a Swiss company and a direct subsidiary of RHL;

“Mr. Vekselberg”: Viktor Vekselberg, one of the main protagonists locked in dispute with Mr. Abyzov;

“The Vekselberg Parties”, sometimes called the VPs or V/RPs in other documents: various companies and people associated with Mr. Vekselberg.

- [3] The Abyzov Parties’ primary claim is for US\$893,470,360 plus interest due, it is said, pursuant to an exit mechanism given them under the terms of a joint venture agreement between them and the Vekselberg Parties, as varied from time to time. Many allegations and claims of fraud and misrepresentation are also made.

The recent procedural background

- [4] The current procedural skirmish follows a transfer of shares in Liwet in May 2018 to three Cypriot trusts, the Polaris Trust, the Olympus Trust and the Next Generation Trust. The transferor of the shares was Berdwick, a Cypriot company, which is an indirect subsidiary of RHL, a Bahamian company. In each case the trustee is a Cypriot company, ABC. ABC is a corporate administrator owned by the Tsirides family and independent of both the Vekselberg and Abyzov Parties. Liwet held shares in two valuable Swiss companies, S+B and Oerlikon. The Abyzov Parties were concerned that these share transfers were a dissipation of assets, which would entitle them to a freezing order. They were also concerned that shares in another valuable Swiss company, Sulzer, was liable to be dissipated. These shares were held by Tiwel.
- [5] On 16th May 2018 Emmerson issued an application pursuant to CPR rule 17.1(1)(e) for an asset disclosure order. Wallbank J heard the application on 5th and 6th June 2018 with both sides represented by the leading counsel who appeared before me on the current applications. On 29th October 2018 Wallbank J handed down a long and detailed judgment granting the asset disclosure order, but limited to the Liwet transfers, not to the other asset transfers which had been

argued before him. Mr. Vekselberg and RHL were ordered to provide certain documents within seven days. (I shall turn to the precise wording of the order below.) Mr. Vekselberg (but not RHL) applied for a short extension of time for compliance. Wallbank J gave him until 19th November 2018 to comply.

[6] The Abyzov Parties were not satisfied with the completeness of the disclosure given by Mr. Vekselberg pursuant to the asset disclosure order. On 3rd December 2018 Emmerson applied for an “unless” order against him requiring him to provide further disclosure of documents.

[7] In the meantime, Emmerson considered that they had grounds to seek a freezing order against RHL. A major ground on which they sought the freezing order was that RHL was in breach — indeed, they said, in deliberate and contumelious breach — of the asset disclosure order. RHL could not, Emmerson argued, rely on the production of documents by Mr. Vekselberg to satisfy their own obligations under the asset disclosure order: RHL had to produce documents themselves. On 19th November 2018 Emmerson applied *ex parte* to Wallbank J for a freezing injunction against RHL. During the course of that hearing, word was passed to counsel for Emmerson that Mr. Vekselberg (in accordance with the extension granted him) had just provided disclosure pursuant to the asset disclosure order, but no one on the Emmerson side had at that time been able to read it. Notwithstanding that development Wallbank J granted the freezing order against RHL, limiting the sum frozen to US\$893,470,360.

[8] On 4th December 2018, RHL applied to discharge or vary the freezing order and sought an extension of time for complying with the disclosure obligations under the freezing order. That application was heard on 12th December 2018. Wallbank J extended time for compliance with the disclosure obligation and imposed a “confidentiality club” obligation on Emmerson. This provided that documents produced by RHL were to be confidential to Emmerson’s BVI legal team (which included the English counsel instructed). The application to discharge or vary was adjourned.

- [9] In the meantime, on 3rd December 2018 Emmerson had issued an application for a freezing order against Mr. Vekselberg, Berdwick, Liwet, Tiwel and ABC. The order sought against Mr. Vekselberg was an ordinary world-wide freezing order. The orders sought against the other four were *Chabra* orders, or at least purported to be *Chabra* orders. The application was heard *ex parte* on 31st December 2018, under conditions of some difficulty. The judge was in France; Mr. Marshall QC, Mr Weekes and Mr. Ratan were in London; and the remainder of the Emmerson's legal team was in the BVI. All communication was by video conferencing facility. Documents had been submitted electronically to the judge, but he could not open at least one of the electronic bundles. The judge granted the freezing order sought against the five respondents. No confidentiality club was imposed in respect of the disclosure of assets ordered as part of the freezing order.
- [10] The judge also granted Emmerson permission to amend the pleadings. Purportedly pursuant to this grant of leave, Emmerson subsequently added not just a claim for declarations in support of *Chabra* relief, but also a personal claim against B&T and ABC for conspiracy and causing loss by unlawful means.
- [11] ABC applied to set aside the orders made against it. Prior to the hearing ABC abandoned its application to set aside the *Chabra* order. I heard their application on 7th and 8th May 2019. On 9th May 2019 I delivered an oral judgment in which I disallowed the purported amendments by which Emmerson had sought to add the personal claims against ABC.

The applications for determination

- [12] There are before me four applications:
- (a) the application made 4th December 2018 by RHL to discharge the freezing order made by Wallbank J on 19th November 2018, as adjourned by him on 12th December 2018;
 - (b) an application made 8th February 2019 by Mr. Vekselberg to discharge the freezing order made against him by Wallbank J on 31st December 2018;

(c) an application of the same day, but amended on 22nd February 2019, by B&T:

- (i) to discharge the freezing order made against them by Wallbank J on 31st December 2018;
- (ii) for a declaration that they have not been served; and
- (iii) for a declaration that the Court has no jurisdiction over the claims against them; and

(d) the application by Emmerson made 3rd December 2018 (as amended on 6th February 2019) for orders:

- (i) that “unless Mr. Vekselberg fully and properly complies with the Court’s asset disclosure order” his defence to the Abyzov Parties’ claims be struck out;
- (ii) in similar form against RHL;
- (iii) that Mr. Vekselberg ensures that RHL complies with its disclosure obligations; and
- (iv) that unless Mr. Vekselberg “fully and properly complies with” the asset disclosure order in the freezing order of 31st December 2018, again his defence to the Abyzov Parties’ claims be struck out.

(c) The B&T application

[13] It is convenient to begin with (c), the B&T application. It will be recalled that Wallbank J was asked to make *Chabra* orders against B&T and also against ABC and Liwet: see **TSB Private Bank International Bank SA v Chabra**.¹ He granted permission to serve B&T and Liwet out of the jurisdiction under two gateways, CPR rule 7.3(2)(a) (necessary and proper party) and rule 7.3(4) (claim in tort where damage sustained within the jurisdiction).

¹ [1992] 1 WLR 231

[14] This application has some similarity to the application made by ABC in respect of the freezing order. There are, however, a number of differences. In particular, ABC were already parties to the claim (albeit in a limited form as defendants to what is known as the Third Ancillary Claim). Although it was argued before me that Emmerson nonetheless needed leave to serve the amended claim outside the jurisdiction, I held against ABC on that point and held that ABC could be served via their BVI lawyers of record. I therefore did not need to consider whether Emmerson got through any gateway for service under CPR rule 7.3. I gave an oral judgment on the ABC application on 9th May 2019 with the perfected written judgment handed down on 27th May 2019.

[15] What I said about *Chabra* order was this:

“[24] A *Chabra* order is a specialized form of freezing injunction. The object of the order is to freeze assets which may become available for enforcement against a future judgment debtor. In particular, the respondent to a *Chabra* order is in the jargon a non-cause of action defendant or NCAD. In other words, the applicant for a *Chabra* order has no direct claim against the *Chabra* respondent. His hope is that in the fullness of time, he will be able to issue execution against the assets held by the *Chabra* respondent on behalf of the putative judgment debtor... That is not to say that it is not possible to have an ordinary *Mareva* and a *Chabra* order against the same defendant where the defendant holds assets, both as trustee for a putative judgment debtor, and assets beneficially for himself which are answerable for a separate direct cause of action against him, but the bases of the two types of injunctions must not be confused and such cases are likely to be unusual.

[25] The application for a *Chabra* order against [Liwet and B&T] and ABC was issued on the 3rd of December 2019. It sought, first of all, a freezing order against the Respondents, that is Mr. Vekselberg himself, ABC and [Liwet and B&T].

[26] Paragraph 2, asked for an Order pursuant to CPR rule 17.1(1)(e) requiring the Respondents to provide information about relevant property or assets.

[27] Paragraph 3 said:

‘Permission to amend the counterclaim and ancillary claims herein as appropriate to join the third parties as defendants and

seek declarations that ABC and the third parties each hold certain assets as nominee for Mr. Vekselberg and/or Renova Holdings.'

[28] And then there is a request for permission to serve outside the jurisdiction....

[31] So far as service is concerned, Emmerson sought leave to serve outside the jurisdiction on [Liwet and B&T]. It relied on CPR rule 7.3(2)(a) (that [Liwet and B&T] are necessary and proper parties to a real issue which it was reasonable for the Court to try) and rule 7.3(10) (a claim under an enactment which confers jurisdiction on the Court). The enactment relied on for rule 7.3(10) purposes was section 24 of the West Indies Supreme Court Act, 1961, but in the event Emmerson placed no reliance on it either before Justice Wallbank or before me."

Pausing there, that is the same position as was adopted before me by Mr. Marshall QC.

[16] In fact, however, in the course of the hearing on 31st December 2018, the judge suggested that perhaps the gateway under CPR rule 7.3(4) (the tort gateway) might be available. Mr. Marshall adopted that suggestion and the judge granted permission to serve outside the jurisdiction on the two bases "necessary and proper party" and "tortious conduct causing damage within the jurisdiction".

[17] In my judgment, the tort gateway faces insurmountable difficulties. The relief sought against B&T was *Chabra* relief. That form of relief is posited on the applicant having *no* cause of action against the *Chabra* respondent. Therefore, the gateway can have no application. Further, (even supposing it were relevant) it must be at least questionable whether on the facts of this case a BVI company like Emmerson can say it suffers loss within the jurisdiction every time a tort is committed against it outside the jurisdiction. Emmerson suffer no physical harm from Mr. Vekselberg's alleged overseas malfeasances. If the tort gateway allows claims to be brought within the jurisdiction based solely on economic loss sustained elsewhere, that would mean a BVI company would always suffer a loss within the jurisdiction in all cases of economic torts committed abroad. I did not, however, hear argument on the point, so I shall not determine it.

- [18] Reliance on the tort gateway also faced fatal procedural defects. CPR rule 7.5(1) requires an application for permission to serve outside the jurisdiction to identify the grounds, in other words the gateways relied upon, and the evidence for the application. The evidence for the application was focused solely on the *Chabra* relief sought. There was simply no evidence to support a tort claim against B&T.
- [19] Nonetheless, on the strength of the judge's approval of the tort gateway, Emmerson purported to amend its pleadings so as to make a personal claim against B&T for conspiracy and causing harm by unlawful means. In my judgment on the ABC application at paras [61]ff, for the reasons set out, I disallowed the amendments. Although that was on ABC's application, the disallowance of the amendments necessarily applies to the case against B&T. I did not understand Mr. Marshall QC to argue to the contrary.
- [20] Accordingly, I hold that Emmerson cannot rely on the tort gateway to serve B&T outside the jurisdiction.
- [21] Emmerson must therefore rely on another ground. In the current case, they seek a free-standing injunction against B&T in aid of domestic proceedings. They rely on the "necessary or proper" gateway in CPR rule 7.3. This gateway provides:
- “(2) A claim form may be served out of the jurisdiction if a claim is made--
 (a) against someone whom the claim form has been or will be served, and
 (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
 (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to claim.”
- [22] In **Black Swan Investment ISA v Harvest View Ltd**,² Bannister J held that this Court had the power to grant an injunction in support of *foreign* proceedings against a person or company over whom this Court had territorial or personal

² BVIHCV 2009/399

jurisdiction. In **Convoy Collateral Ltd v (1) Broad Idea International Ltd and (2) Cho Kwai Cee**,³ Adderley J held, with a full citation of authority, that the Court had no jurisdiction to grant such an injunction in support of a foreign court (in that case Hong Kong) hearing the substantive dispute where this Court had no territorial or personal jurisdiction over the respondent to the injunction, even when (as was the case in that matter) the party against whom the injunction was sought had substantial assets within the jurisdiction.

[23] On the “necessary or proper” head he said:

“[50] In *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2... Lord Collins at [11] speaking for the Board (Lords Mance, Sumption, Carnwath and Toulson) in summarizing the principles relating to service out set out in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, cautioned:

‘(1) the necessary and proper party was anomalous, in that, by contrast with the other heads, it was not founded upon any territorial connection between the claim, the subject matter or the relevant action and the jurisdiction of the English courts

(2) Caution must always be exercised in bringing foreign defendants within the jurisdiction under that head, and in particular it should never become the practice to bring in foreign defendants as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.’

[51] The Applicant argued that in order to make the injunction against Broad Idea effective Mr Cho is a necessary party to stop the shares from being dissipated. In response the Second Respondent stated that there is no issue between the Applicant and Broad Idea. The substance of the case is in Hong Kong (Case HCA 2922/2017) where the Conway Group is suing Mr Cho, as first defendant, and 27 others in a 93 page statement of claim for, among other things, breach of fiduciary duty, damages or equitable compensation and interest but no part of it seeks an injunction concerning acts or omissions of Mr Cho within the territorial jurisdiction of the BVI as part of its substantive relief. If the Applicant wished to obtain an injunction against Mr Cho personally it was free to apply in the Hong Kong proceedings for a worldwide freezing injunction against Mr Cho. It is common ground between the parties that worldwide freezing injunctions

³ BVIHC (COM) 0019/2018

are obtainable in Hong Kong. Indeed the Court of Appeal in *Yukos* [*Yukos Ltd v Yukos Hydrocarbons Investments Ltd* HCVAP 2010/0028] approved the procedure of seeking an injunction in the main action first. I accept the submission of the Second Respondent that there is therefore not a jurisdictional gateway available to the Applicant under this head in the BVI by which to serve Dr Cho outside the jurisdiction.”

[24] I respectfully agree with Adderley J. Moreover, the current case is *a fortiori* in terms of its lack of connection with this jurisdiction. In *Convoy Collateral* the respondent, Dr Cho, had assets within the jurisdiction. In the current case, not only do B&T have no territorial or personal connection with the jurisdiction, they have no assets here either. It would be an extreme exercise of the Court’s jurisdiction to drag such a defendant before the Court.

[25] In the current case, unlike *Convoy Collateral*, there are substantive proceedings in this Territory. However, B&T are not “necessary” parties to those substantive proceedings. No cause of action is alleged against them. The case can and will proceed against the Vekselberg Parties without any need for B&T or either of them to be involved. Likewise, in my judgment, they are not “proper” parties within rule 7.3(2)(a)(ii). They have no connection with the jurisdiction. If they had assets within the jurisdiction, the existence of an anchor defendant might (and I emphasize *might*) afford a ground on which to distinguish *Convoy Collateral*, but they do not. Were the Court to accept Emmerson’s submission, it is difficult to see any bounds which would be set to the jurisdiction. In effect this Court would be setting itself up as an enforcer of its judgments world-wide. Yet enforcement against foreigners and foreign assets is in principle a matter for the local jurisdictions where the asset-holders and their assets are situated.

[26] Further there is in my judgment no issue between Emmerson and B&T which it is reasonable for this Court to try. Any *lis* between them would only arise once a judgment was obtained against the Vekselberg Parties. There is no reason why, post-judgment, the Court should be trying a separate issue between Emmerson

and B&T relating solely to enforcement. Thus, Emmerson does not satisfy rule 7.3(2)(a)(i) either.

[27] My holdings on rule 7.3(2)(a)(i) and (ii) mean that I do not have to exercise any discretion, but even if I did have a discretion to exercise, the factors which I have outlined are strongly against granting permission to serve outside the jurisdiction and I would refuse permission on discretionary grounds as well.

[28] Accordingly, in my judgment, Emmerson cannot rely on the “necessary or proper party” gateway to obtain leave to proceed against B&T.

[29] That is sufficient to resolve the claims against B&T, but in case the matter goes further, I should deal with an argument based on the fact that B&T have lodged an acknowledgement of service with the Court. Mr. Marshall submits that this debars them from asserting that they have not been served with the proceedings.

[30] The facts on service fall within a small compass. Emmerson served the injunction and the proceedings (in the form which I have since disallowed) on Agon Litigation. Agon Litigation are the legal practitioners acting on behalf of all the Vekselberg Parties who are participating the litigation. They were not, however, nominated to accept service on behalf of B&T or either of them and had no authority to do so.

[31] After this form of “service” was affected, B&T lodged an acknowledgement of service form with the Court and issued the current application for, *inter alia*, a declaration that they had not been served. Emmerson (paraphrasing para 235.1 of their skeleton) say: “Aha! They cannot say they have not been served when they have filed an *acknowledgement* that they have been served. They have therefore debarred themselves from asserting that they have not been served.”

[32] I am afraid I find this argument a nonsense. By CPR rule 9.6 a “defendant who files an acknowledge of service does not by doing so lose any right to dispute the court’s jurisdiction.” Rule 9.7 provides:

“(1) A defendant who disputes the Court’s jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.”

- [33] A party who claims not to have been served is entitled to dispute the jurisdiction of the Court on that ground. Filing an acknowledgement of service is a *mandatory* precursor to the party disputing the jurisdiction on that ground. Despite the name of the document, it is obvious that the party applying for a declaration of non-service is not at the same time acknowledging service.
- [34] The service in this case on Agon Litigation was defective. Agon had no instructions to accept service. Emmerson needed to serve B&T abroad; they did not. B&T are entitled to a declaration of non-service.
- [35] I should also add that, if I was wrong to disallow the amendments and thus in consequence to disallow the bringing of the tort claim, that would not alter my decision in relation to the appropriateness of the Court assuming jurisdiction over the *Chabra* claim. As I held at para [38] in my *ABC* judgment, the Court has to look at the gateway for each separate claim separately. Even if the Court were minded to grant permission to serve the tort claim outside the jurisdiction, that would not afford a ground for permitting the *Chabra* claim to be served outside the jurisdiction. The *Chabra* claim would need to be considered separately.
- [36] Accordingly, B&T are entitled to a declaration that they have not been served and that the Court has no jurisdiction over them. They are also entitled to have the *Chabra* freezing order made against them discharged. I will hear the parties on whether B&T are entitled to any consequential relief.

RHL's alleged abuse of process by not submitting to the jurisdiction

[37] Emmerson criticize RHL's position in relation to this Court's jurisdiction. They say RHL are refusing to submit to the jurisdiction, but at the same time making an application to discharge the freezing order made against it. This amounts, they submit, to an abuse of the process of the Court.

[38] RHL's position is set out in the first affidavit of Mr. Michaelides, who is a director of RHL. RHL was only joined to the proceedings on 21st February 2018 when it became a "Schedule 4" defendant. (Schedule 4 is a discrete part of the Counterclaim and First Ancillary Claim in the action. The Schedule 4 claims are in part an alternative claim to the primary case brought against the Vekselberg Parties.) Mr. Michaelides says that RHL could not see a justifiable basis on which it had been brought into the proceedings and he gives reasons for this. He points out that there are numerous other Vekselberg Parties to keep up the Vekselberg end of the proceedings and says:

"18. ...RHL therefore decided that it would play no active part [in the proceedings] and instead rely on the participation of other co-defendants to the Counterclaim... to defeat those claims (which RHL considers to be completely unmeritorious). RHL did not, and does not, intend any disrespect to the Court in this regards.

19. RHL's non-participation in these proceedings is entirely justified; it maintains that it is not a proper party to these proceedings. However, given the draconian and extra-territorial nature of the interim remedies provided to the Abyzov Parties against RHL in the Freezing Order as currently drafted, RHL is left with little choice but to challenge the Freezing Order by way of this application. That does not mean that RHL submits to the jurisdiction of this Court for the purpose of the substantive underlying proceedings: it does not."

[39] I will consider first the relevance of RHL submitting or not submitting to the jurisdiction of this Court. As a matter of BVI law, the question whether a party has made a voluntary submission to the jurisdiction after service of the claim form abroad arises only in very circumscribed circumstances. The basic rule is that in

allowing service outside the jurisdiction this Court decides first whether or not to assume jurisdiction over the foreigner. This involves passing one of the CPR rule 7.3 gateways. If the Court is so satisfied, then permission to serve outside the jurisdiction is granted. After this, if the Court decides to assume jurisdiction, the foreigner is entitled to challenge that decision under CPR rule 9.7. Making such a challenge does not amount to a submission to the jurisdiction, even if the challenge fails. The Court with one exception decides jurisdiction without regard to whether the foreign defendant submits to the jurisdiction or not.

- [40] The exception for the purposes of domestic law is this. Where the foreign defendant makes a rule 9.7 challenge, but, before the Court determines that application, the foreigner makes declarations or does acts which amount to a submission to the jurisdiction, then the Court will treat his application under rule 9.7 as waived and assume jurisdiction. This is regardless of whether the foreigner might or might not have successfully challenged the gateway relied on by the claimant.
- [41] The position is quite different as regards foreign courts' treatment of BVI judgments. Suppose this Court assumes jurisdiction over the defendant resident abroad. The foreigner either does not challenge this Court's jurisdiction or makes an unsuccessful attempt to challenge the jurisdiction. Thereafter he takes no part in the action. This Court gives judgment against him. The claimant then seeks to enforce the judgment abroad.
- [42] One question for the foreign court which is asked to enforce the BVI judgment will invariably be whether, *as a matter of that foreign court's law*, the BVI had jurisdiction over the case. Only if it does, can the BVI judgment be recognized as a matter of that foreign law (at least in so far as it follows English law). English law takes a restrictive approach when considering whether a judgment given in a foreign court can be enforced. One requirement for bringing an action on a foreign judgment is, as I have said, that the foreign court had jurisdiction. Rule 43 in *Dicey, Morris and Collins on the Conflict of Laws* (15th Ed, 2018) provides that

there are only four cases where the foreign court is treated as having jurisdiction: (1) if the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country; (2) if the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court; (3) if the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; and (4) if the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

[43] This is very much narrower than the gateways to jurisdiction given by this Court's CPR rule 7.3 (or by the English CPR Part 6 Practice Direction B). What this means in practice can be seen in the concrete case of RHL. If a money judgment is eventually given against RHL, then Emmerson may seek to enforce it in the Bahamas. Neither party has adduced evidence about the law of any relevant foreign jurisdiction, but let us assume that the Bahamas apply the English approach. As described in Rule 43 of *Dicey*, in deciding whether (as a matter of Bahamian law) the BVI court had jurisdiction, none of the (Eastern Caribbean) CPR rule 7.3 gateways will (again as a matter of Bahamian law) give the BVI court jurisdiction. Instead Emmerson will have to rely on *Dicey's* Rule 43 case (3), the voluntary submission to the jurisdiction head. (Emmerson also say the effect of a letter dated 2nd March 2018, written before the joinder of RHL to the action, is to bring the case within case (4), but that is not relevant to the present discussion. Again, the letter's effect is a matter for Bahamian law.)

[44] In the current case, voluntary submission is thus of critical practical importance to RHL. If they do submit or are treated as having submitted to the jurisdiction of this Territory, then any judgment given against them by this Court may be (or is more likely to be) enforceable in the Bahamas. If they do not or have not, then they may have good arguments for saying that the judgment of this Court is not enforceable in the Bahamas.

- [45] By contrast, from this Court's perspective, the question whether RHL have submitted to the jurisdiction is a non-issue. It is juridically uninteresting as a matter of BVI law. This Court has assumed jurisdiction. No challenge, still less any successful challenge, has been made to this Court's jurisdiction. Accordingly, it is legally irrelevant whether RHL have submitted to this Court's jurisdiction or not. This Court has and retains jurisdiction as a matter of BVI law. The relevance of voluntary submission to the jurisdiction in Bahamian law is a matter for the Courts of the Bahamas, not this Court.
- [46] Emmerson submit in their skeleton that it would be "an abuse of process for [RHL] to contest jurisdiction and therefore... [RHL] should be regarded as having voluntarily submitted to the jurisdiction." This is, with respect, a *non sequitur*. Emmerson may well be right that it would be an abuse for RHL now to seek to challenge this Court's jurisdiction in the light of its considered decision not to do so. It does not, however, follow that they thereby submit to the jurisdiction. Emmerson commit the fallacy of the excluded middle.
- [47] *Dicey's* Rule 43 is an important safeguard against oppression. Were Rule 43 not to apply, a foreign court, like the Courts of the Bahamas, would be bound by this Court's own view of its jurisdiction. People of modest means in the Bahamas might (assuming this Court found one of its own gateways to be satisfied) be sued in this Territory. Despite the fact that such folk might be unable to afford legal representation here or otherwise prevented from defending themselves adequately, the Courts of the Bahamas would still be obliged to enforce any BVI judgment given. This consideration does not apply to RHL, which is well able to afford to defend itself, but the same rule must apply to all. RHL are behaving properly in refusing voluntarily to submit to the jurisdiction of this Court.
- [48] Accordingly, in my judgment, RHL are not abusing the process of this Court by not accepting that they have submitted to this Court's jurisdiction.

Emmerson's alternative case on abuse of process by RHL

- [49] Emmerson submit that in any event RHL are abusing the process of the Court by virtue of their approach to orders of this Court. They say in their skeleton:

“This abuse of process takes the form of refusing to comply with existing orders of this Court (accompanied by a penal notice); taking the position that it will not comply with any future order or judgment that this Court may make against it; but nevertheless seeking relief in the proceedings as and when it suits Renova (such as by making an application [for] variations to the freezing order against [it] and now seeking its discharge). Such conduct cannot be permitted because it undermines the administration of justice.”

- [50] There are three elements of abuse identified here. The first is breach of existing orders, comprising (a) an alleged failure by RHL to comply with the asset disclosure order of 29th October 2018; and (b) an alleged failure to provide full disclosure as required by the freezing order of 19th November 2018. The second is a refusal to agree to comply with future orders of this Court. The third is applying to vary or discharge that freezing order, against the background of that refusal and the breaches of orders.

- [51] The second point is really just another way of restating the submission that RHL's refusal to submit to the jurisdiction is an abuse of process. For the same reasons, I reject it.

- [52] As regards the breach of the asset disclosure order, Emmerson's primary submission is that RHL have not complied with the order at all. RHL, they submit, cannot rely on Mr. Vekselberg having complied, or at least purportedly having complied, with the order. RHL was personally ordered to provide disclosure. RHL are in deliberate contempt of this Court's order. This is an issue of construction of the asset disclosure order and I deal with this in the next section.

- [53] Emmerson's secondary submission, and their submission in relation to the alleged breach of the freezing order disclosure provisions, are that the disclosures

provided are obviously defective. This and the last point on RHL's seeking to vary or discharge the freezing order overlap with the points made on Mr. Vekselberg's behalf and I consider them together below when considering the "unless" order sought by Emmerson. Emmerson say both RHL and Mr. Vekselberg are in contempt, so as to debar any application to vary or discharge the freezing order.

The true construction of the asset disclosure order

[54] The asset disclosure order provides:

"1. The First Respondent, Mr. Victor Vekselberg and the Fourth Respondent, Renova Holding Limited, shall produce and/or cause Renova Innovation Technologies Limited and Liwet Holding AG to produce to the Applicant all documents relating to the transfer of shares in Liwet Holding AG or persons or entitled associated with the First Respondent made since 6 April 2018.

2. 'Documents' shall include any correspondence by email or otherwise, memoranda, agreements, resolutions, statements, registers, custody account records, certificates, incentive program terms and conditions or any other thing on or in which information of any description is recorded whether created before or after 6 April 2018.

3. 'Transfer of shares' shall include but not be limited to the terms and conditions upon which such transfer has been made including but not limited to any options and any rights of pre-emption or revocation.

4. 'Persons or entities associated with the First Respondent' shall include but not be limited to Evgeny Olkhovik, Vladimir Kremer and any person or entities associated with them, and any person employed by or otherwise connected whether directly or indirectly with the First Respondent.

5. The said documents shall be produced within 7 calendar days of the date of the making of this Order, being by 5 November 2018.

6. The said documents shall be disclosed together with an affidavit or affirmation confirming their authenticity and completeness."

[55] CPR rule 17.1(1)(e) gives the Court the power to make:

“an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order.”

When I come to discuss Emmerson’s application for an “unless” order in respect of the asset disclosure order, it will be seen that there is a tension between: on the one hand a party’s duty to “provide information”, on its face an absolute duty; and on the other hand a party’s duty when required to provide disclosure, which is usually a duty to carry out reasonable searches, rather than an absolute duty to produce documents.

[56] As regards the current issue, the question is whether RHL are entitled to rely on the disclosure given by Mr. Vekselberg, as Mr. McGrath QC submits, or whether RHL and Mr. Vekselberg are each required to produce documents, as submitted by Mr. Marshall QC. The starting point in my judgment is to look at the first part of order which provides that “[Mr. Vekselberg] and [RHL] shall produce... to [Emmerson] all documents [as described].” On its face, this is a joint obligation on the parts of Mr. Vekselberg and RHL. If the order said: “Mr. Vekselberg and RHL shall pay Emmerson \$1,000”, then the joint nature of the obligation would be clear. It would be good compliance with the order for either Mr. Vekselberg or RHL to pay the \$1,000. There would be no duty on *each* of them to pay \$1,000.

[57] Is there anything to suggest that a different construction should be placed on the actual order? The second part of the order allows Mr. Vekselberg and RHL to comply by “caus[ing] Renova Innovation Technologies Limited and Liwet Holding AG to produce” the documents. If Mr. Vekselberg and RHL decided to go down this route of complying with the order, it is likely in practice to be either Mr. Vekselberg or RHL who ordered RIT or Liwet to comply. Yet on Mr. Marshall QC’s construction, an instruction given by only one of the two respondents to RIT and Liwet would be a breach of the order. That is an improbable construction of the order. By contrast, the fact that production of the documents could be provided by third parties undermines Emmerson’s preferred construction that RHL had to

produce documents. It supports the argument that under the order what mattered was that the documents be produced, not who produced the documents.

[58] If there was an obligation under the order to carry out searches, then that might be a contra-indication to their being a joint obligation on the part of the RHL and Mr. Vekselberg. However, the only reference to “disclosing documents” is in para 6 of the order. This reference is clearly not to “disclosure” as the term is used in CPR Part 28. The obligation in para 6 of the order is to produce physical or electronic copies of documents, whereas “disclosure” in CPR rule 28 is the “revealing that [a] document exists or has existed”: rule 28.1(3). Inspection of documents disclosed under Part 28 is governed by CPR rule 28.11. Inspection is not disclosure under the CPR.

[59] In my judgment, compliance with the order by Mr. Vekselberg would relieve RHL from its duty of compliance. So long as the documents are produced, the order is indifferent as to who produces them.

[60] There was a technical breach by RHL of the asset disclosure order, in that RHL did not seek the fortnight’s extension for compliance which Mr. Vekselberg successfully obtained. This, however, is a minor breach and does not constitute a contempt. The breach can be ignored for practical purposes.

[61] In my judgment, there was not, contrary to Emmerson’s case, a complete failure to comply with the asset disclosure order on the part of RHL. Whether there has been full compliance with the order, I discuss below when considering Emmerson’s complaints against Mr. Vekselberg’s disclosure under the asset disclosure order.

The background facts

[62] Before dealing with the remaining applications, it is necessary to set out some more of the facts. Although I set out a summary of the background facts in my

ABC judgment at paras [3] to [17], Wallbank J in his judgment of 29th October 2018 gives a more detailed account, which I gratefully adopt. He said:

“[8] The following summary is a simplified overview. Most of the facts are unfortunately in dispute between the parties, so the account that follows should not be treated as reflecting any findings, even preliminary.

[9] Mr. Vekselberg and Mr. Abyzov are successful Russian businessmen. In 2006 they reached an oral understanding that they would enter into some form of commercial cooperation. What it was exactly is in dispute but for present purposes we can call it a joint venture. A business manager associated with Mr. Vekselberg, a Mr. Slobodin, was also a party to this joint venture for his own account. The idea was that the joint venture partners would together manage and grow a pool of assets within the Russian and/or Commonwealth of Independent States energy sector. These gentlemen would act personally and/or through various companies associated with them.

[10] By the end of 2006, the V/RPs incorporated a company in Belize to act as holding company for the joint venture assets. This was IES Belize. The asset pool, or a large part of it, was transferred to IES Belize.

[11] The APs contributed cash to the joint venture. The contributions were recorded on paper as made pursuant to five written loan agreements. By the end of 2011, the APs had contributed around US\$500 million in cash. They believed, they say, that the V/RPs had invested around US\$800 million. They allege that this was not in fact the case and that they had been deceived as to the nature and extent of the V/RPs' contributions. The significance of this is that the size of the joint venture partners' respective contributions determined the size of their respective share in it, and with that, potentially at least, the proportion of their eventual distributions.

[12] During 2011 a document headed 'Principal Terms' was drawn up. The V/RPs (but not the APs) treat this as the constitutive document for the joint venture. This appears to have been executed on or about 21st October 2011 by the APs and V/RPs. The effect of this document, as a legally binding and enforceable contract, or not, is also disputed.

[13] Disagreements have arisen between the parties and the APs claim their money back, with interest, through these proceedings. They were commenced in 2013.

[14] The APs' first claim is a contractual claim in debt and/or damages. They have added proprietary claims and claims in fraud. They claim

recovery from Mr. Vekselberg and Renova Bahamas of a sum which currently stands at approximately US\$900 million, with interest accruing at a daily rate of about US\$115,000. The APs further claim a percentage share (41.65%) of the value of each distribution the V/RPs received from the joint venture.

[15] The V/RPs vigorously defend the APs' claims. The parties dispute the effect of all their contractual arrangements. In particular, there is a dispute whether the APs' contributions are to be treated as loans or capital contributions. Both sides accuse the other of switching positions and they argue whether or not they really did so. The APs say that the V/RPs initially maintained that the APs' contributions were capital contributions, not loans. The APs say the V/RPs then performed a volte-face, to allege the opposite. The APs suggest this change of case was purely tactical. If the contributions were loans, the V/RPs would potentially only be liable in debt or damages for breach of contract. If a judgment debtor were no longer to have any assets, the APs would stand to recover nothing. If the contributions were capital contributions, on the other hand, proprietary remedies might be available to the APs, enabling them to trace assets in the hands of third parties.

[16] There are now three main pleading strands in the litigation (although there are around eighty (80) different pleading documents):

- (1) The 'main claims', which broadly concern the APs' contractual claims;
- (2) the 'Third Ancillary Claim', which broadly concerns claims by the APs for restitution and constructive trust arising out of alleged conduct of the V/RPs in removing assets from companies that were debtors under purported loan agreements; and
- (3) the 'Schedule 4 Claims', which broadly concern claims by the APs in deceit and unlawful means conspiracy. These include claims concerning the alleged deception by the V/RPs as to the extent of their contributions.

The Starlex transfer

[17] For this application the APs place particular significance upon asset transfers pleaded in the Third Ancillary Claim. Briefly, on or about 31st May 2011, the V/RPs caused the assets of IES Belize to be transferred to a Renova group company called Starlex. Those assets included IES Belize's 100% shareholding in a subsidiary holding vehicle, IES Cyprus. The APs say they were not told about these transfers in advance, but found out late in 2011 or in 2012. The V/RPs say Mr. Abyzov was aware of these transfers by around July 2011. The APs also say that they did not know until 2014 that the transfers had been made for no consideration and allegedly resulted in the insolvency of IES Belize. Previously, the APs understood that IES Belize had held assets worth around US\$4.4 billion. The APs believe that IES Belize still holds a number of shares but worth

no more than about US\$20 million. That value is not enough to meet the liability the APs say IES Belize has to pay their money back. The V/RPs dispute the APs' characterization of this transfer and its financial result upon IES Belize.

[18] The APs have interpreted certain emails disclosed, allegedly belatedly, by the V/RPs as showing that senior staff working for the V/RPs had plotted in May 2011 secretly to 'clean up' IES Belize, as they called it, in anticipation of claims by the APs. The APs interpret 'clean up' to mean that the V/RPs wanted to strip assets out of IES Belize. The email trail suggests that the V/RPs planned to give a respectable sounding commercial explanation as their cover story. The changes to IES Belize would be described as a 'purely technical reorganization' to do with a potential transaction involving a well-known energy company. The V/RPs have since indeed proffered such an explanation for the Starlex transfer in their witness statement evidence. They deny any asset stripping plan. They assert that these emails have been taken out of context and do not in fact support the APs' plot theory. The V/RPs have, however, not taken me to documents to support their assertions. Whilst the full meaning and effect of these communications will be a matter for trial, their plain words do suggest that the V/RPs intended to remove assets from IES Belize to frustrate legal action by the APs. There are other communications which can be construed the same way, but they are more ambiguous.

The Renova Bahamas/Sunglet transfer

[19] The APs complain that the V/RPs made a further transfer of IES Cyprus in 2015, again without informing the APs in advance. This transfer was made on or about 30th December 2015 from Starlex to Renova Bahamas (as to 85% of the shares in IES Cyprus) and to another company controlled by the V/RPs called Sunglet (as to the other 15% of those shares). Sunglet is majority owned by Renova Bahamas and minority owned, indirectly, by Mr. Slobodin. Moreover, say the APs, they have only recently discovered a share sale and purchase agreement pertaining to this transaction which records that the purchase price for IES Cyprus, a company with very valuable assets, was a mere US\$2.

The OOO Renova Holding Rus transfer

[20] The V/RPs have disclosed, in their pleadings filed on 8th December 2017, that Renova Bahamas has transferred its 85% shareholding in IES Cyprus to a Russian company called OOO Renova Holding Rus on 13th October 2017. The V/RPs say this was done in response to the Russian Government's policy of promoting the 'de-offshorisation' of businesses with predominantly Russian assets held through offshore corporate structures. They say that the principal asset of the IES business is a stake in a major Russian electricity company, PAO T Plus. This asset transfer ensured that PAO T Plus and other Russian assets owned by IES Cyprus would ultimately be owned by a company incorporated in Russia.

The APs consider this explanation to be ‘nonsense’ for a number of reasons. Rather, say the APs, this transfer was done in response to service of the APs’ claim against Renova Bahamas.

[21] On the APs’ case, a pattern emerges of asset shifting being engineered by the V/RPs, for no valuable consideration, with the APs discovering this only after the event on each occasion.

[22] Starlex, Sunglet, Renova Bahamas and OOO Renova Holding Rus are all (now) parties to these proceedings. The V/RPs argue that these transfers cannot therefore be characterized as dissipation of assets, because they remain within the APs’ reach. They argue these transfers are not evidence of a risk of dissipation in any way. Furthermore, they argue that the years and months of delay that the APs have allowed to elapse since these transactions would doom to failure any attempt by the APs to obtain a freezing order in respect of them now.

[23] The APs disagree. The APs say they may indeed apply for a freezing order. They say these transfers show that the V/RPs are not persons who can be trusted and that they have a propensity to move assets around and have a desire to frustrate the APs’ claims. They argue that the lack of valuable consideration indicates that the transactions were not made in the ordinary or proper course of business. They contend that delay is not fatal, particularly where fraud has been pleaded.

The U.S. Sanctions

[24] The APs also cite a new set of circumstances. Indeed, it is this new turn of events which the APs rely upon to move the Court now. On 6th April this year the government of the United States of America imposed sanctions upon certain Russian individuals, including Mr. Vekselberg and a Russian company associated with him, JSC Renova Group of Companies (‘RGC’). This caused the V/RPs to restructure their affairs on an urgent basis, in order for them – and various third parties - to continue in business. As a result of the sanctions all ‘US persons’ (which term includes any company incorporated within the United States, and any entity with a presence there) have been required to terminate all dealings with Mr. Vekselberg and RGC or their property, and any company in which they directly or indirectly hold an interest of 50% or more. Such persons or entities are referred to as ‘blocked persons’.

[25] The V/RPs say the effect of the sanctions has, in practice, been to freeze all of their assets located outside Russia or to make dealing with them in any meaningful way practically impossible. They say that all their bank accounts, save for Mr. Vekselberg’s personal bank accounts in Russia, have been frozen, either because the sanctions apply directly to the banks holding those accounts, or because those banks are concerned about the risk of being targeted by secondary sanctions. As a result, none

of the respondents, save for Mr. Vekselberg, is able to access or transfer funds held in any of their bank accounts unless and until the sanctions are lifted.

[26] The sanctions have also disrupted the V/RPs' access to United States Dollar-based financial and capital markets. The APs assert that the V/RPs thus appear intent upon depending more upon Russian banking arrangements.

[27] Another effect of the sanctions has been to prevent the V/RPs' on-shore legal adviser, a large United States law firm with branches in London and Moscow, from acting. The V/RPs consequently applied for the trial of this matter, which was listed for twenty-four sitting days in June this year, to be vacated. The APs consented. The V/RPs obtained an order from this Court on 12th April 2018 permitting them to take no further steps in these proceedings until 12th July 2018. The purpose of this stand-still was to enable the V/RPs to reorganize their on-shore legal representation. The APs have launched this application during this stand-still period. The V/RPs accuse them of opportunistically doing so at a particularly vulnerable time."

Wallbank J's judgment of 29th October 2018

[63] Both sides sought to draw support for their submissions from Wallbank J's judgment of 29th October 2018. It was of course a considered judgment given after hearing both sides with full provision of evidence and authority. However, the issue which the judge was addressing was a different one to that which I have to decide with a different standard of proof.

[64] The application he was considering was one for an asset disclosure order under CPR rule 17.1(1)(e). He cited the leading English Court of Appeal authority of **JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev**⁴ and held at para [62] that in deciding whether to grant the order there was a two-stage process:

"(1) First, a jurisdictional threshold needs to be satisfied by the applicant. This is whether there is 'some credible material' on which an application for a freezing order might be based.

⁴ [2015] EWCA Civ 139

(2) Secondly, the court effects a general exercise of discretion aimed at deciding whether it is just and convenient, in all the circumstances, to make the order sought.” (Citations omitted)

[65] Applying this approach, he held (again omitting citations):

“[64] ...[I]n relation to the first stage, the likelihood of an application for a freezing injunction being made is not one that has to be demonstrated to any high degree. It does not amount to a likelihood on the balance of probabilities. A reasonable possibility, based on credible evidence, is sufficient to found the jurisdictional requirement. The freezing application should have a reasonable prospect of success, in the sense that the court need only be satisfied that there are credible grounds for making a freezing application if so advised. The court is not required to form a view whether or not the application will be successful.

[65] In relation to the second limb, once the jurisdictional threshold has been crossed the court has a general discretion to decide whether it is just and convenient in all the circumstances to make the order sought. When exercising the court’s discretion, it must weigh the prejudice to the respective parties.”

[66] This is a very different test to that applicable when considering the grant of a freezing order. The judge goes on to consider whether there was a reasonable prospect of Emmerson obtaining a freezing order against the Vekselberg Parties or some of them. At para [69] he summarized the principles to be applied in making a freezing order as follows:

“(1) [T]he claimant must have a good arguable case against the defendant;
(2) there must be a real risk of the defendant dissipating its assets other than in the ordinary course of business, so as to frustrate any judgment that might be obtained against it in due course; and
(3) it must be just and convenient, in all the circumstances, to freeze the defendant’s assets (or at least a proportion of them).”

[67] The formulation in (2) contains a slight inaccuracy. Whilst in most cases the sole issue on dissipation will be whether assets pass in the ordinary course of

business, the strict test is whether the dissipation is “unjustified”. However, Wallbank J was well aware of the point. The difference is of potential importance in the current case, because much of the more recent movement of assets is said to be a result of the need to escape the effect of US sanctions. Such movements of assets may not be in the ordinary course of business, but they may nonetheless be justifiable. The judge cites **The Nicholas M; Congentra AG v Sixteen Thirteen Marine SA**⁵ for the proposition that the disposals of assets which are to be enjoined are those “other than in the ordinary course of business, *or dealings that cannot be justified for normal and proper business purposes.*” (Wallbank J’s emphasis) At para [115], the judge applies this test when he finds that “reducing shareholdings in Western companies below the sanctioned level, by selling shares back to those companies [was] natural... [T]he circumstances were clearly not ordinary [but it] is a normal and proper purpose.”

[68] The judge dealt with risk of dissipation and delay as follows:

“[75] In the context of a risk of dissipation, the English Commercial Court in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) summarized the principles as follows:

‘As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label “risk of dissipation”... [T]he defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:

- a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant’s assets.
- b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
- c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in

⁵ [2008] EWHC 1615 (Comm), [2008] 2 Lloyd’s Rep 602

question does justify a conclusion that assets are likely to be dissipated.

d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.

e. The nature, location and liquidity of the defendant's assets are important considerations.

f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.

g. So too is the defendant's behaviour in response to the claim or anticipated claim.'

[76] In the context of risk of dissipation, delay on the part of an applicant is a material consideration. Delay suggests that the applicant does not consider there is a sufficiently serious risk of dissipation. It can also suggest that the applicant believes it does not have a strong case on other grounds for seeking a freezing order. Also, the longer the delay the more likely it is that improper disposals will already have occurred.

[77] Learned Queen's Counsel for the applicant urged however that authorities show a developing trend downplaying delay as a countervailing factor. He observes that in *AH Baldwin and Sons Ltd v Sheikh Saud Mohammed Bin Al-Thani* [2012] EWHC 3156 (QB) the material embezzlement was perpetrated in 2005 and the case was heard in 2012. Delay is also not an attractive point for a respondent to take. In *Antonio Gramsci Shipping Corp v Recoletos Ltd* [2011] EWHC 2242 (Comm) Cooke J stated: 'It is no answer for a defendant to come to the court to say that his horse may have bolted before the gate is shut and then to put that forward as a reason for not shutting the gate. That would be to pray in aid his own efforts to make himself judgment proof – if that indeed is what has occurred – and to avoid the effect of any court order which the court might make.'"

[69] The test for assessing whether a real risk of dissipation of assets has been restated by the Court of Appeal in **Holyoake v Candy**.⁶ (Only the judgment of Nugee J at first instance seems to have been cited to the judge: see footnote 46 to Wallbank J's judgment.) *Holyoake* was in fact a case on an order requiring the respondent to give the applicant notice of any disposal of assets he had in

⁶ [2017] EWCA Civ 92, [2018] Ch 297

contemplation, but the English Court of Appeal held at paras [39] and [47] that the same principles applied to applications for freezing order. At para [34] the Court held that in both cases the applicant for the injunction must show a risk of dissipation, which:

“must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. But it is not every risk of a judgment being unsatisfied which can justify freezing order relief. Solid evidence will be required to support a conclusion that relief is justified, although precisely what this entails in any given case will necessarily vary according to the individual circumstances.”

[70] Gloster LJ, giving the only judgment, before turning to look at the facts, considered the approach to be taken. At para [49] she first asked “whether the evidence... demonstrated that there was indeed the requisite risk of dissipation. She pointed to three points:

“50. First, it is critical to remember that the burden is on the applicant to satisfy the threshold. The court will of course decide on the basis of all the evidence before it. However, in practice, if an applicant has not adduced sufficient evidence, the application will fail. The respondent’s evidence will be immaterial — unless, unusually, it lent support to the application.

51. Second, it follows that, unless an applicant has raised a *prima facie* case to support a freezing order, the respondent is not obliged to provide any explanation or answer any questions posed — and nor can a purported failure to do so be held against the respondent. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the respondent will be expected to provide an explanation. Then, in appropriate circumstances, the lack of a satisfactory explanation may give rise to an adverse inference.

52. If authority were needed for this second point, it can be found in [*Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)*] [1981] 1 WLR 1412]. At 1424B-D and 1425D-1426B, the Court of Appeal quoted with broad approval the judgment of Mustill J (as he then was) that:

‘The less impressive [the defendant’s] evidence, the less effective it will be to displace any adverse inferences. *But there must be an inference to be displaced, if the injunction is to stand, and comment*

on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed...

[Defendants] have no obligation to disclose their financial affairs, simply to answer a challenge from the [claimants] which is unsupported by solid evidence.' [Gloster LJ's emphasis]

53. In *Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082, [2003] *The Times*, 5th December, Neuberger J made the same point:

'32. Finally, because the point has been raised, it really should go without saying that it is for the applicant to make out his case to support a freezing order, namely an appropriately strong case against the respondent concerned, and that there is a real risk of dissipation by the respondent. It is not for the respondent to show that a freezing order ought not [to] be granted.'

54. The third and final point of general application is to emphasize that the requisite risk of dissipation must be established against each respondent."

[71] *Holyoake* disapproves the dictum in *Yurov* on the relevance of "stable door" arguments but I discuss this below in a separate section on the effect of delay on the granting of freezing orders. Other than the "stable door" issue, there was no dispute before me as to the principles to be applied in considering the risk of dissipation, as set out above.

[72] The judge then considers the concrete case and asks at para [103] whether there is "solid evidence that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets." He continues (omitting footnotes):

"[104] In the present case the applicant first points to the transfer of assets from IES Belize in 2011 to Starlex, then the onward transfer of assets in 2015 to Renova Bahamas and Sunglet. Both were done without the prior knowledge and consent of the APs. That itself is not objectionable, as there can be a genuine dispute over whether the V/RPs were required to consult the APs beforehand. Then there is the factor that these transfers were allegedly carried out for no substantial consideration. That does suggest that these transfers may not have been made in the ordinary course of business. But without sufficient further evidence as to the context of the transfers the apparent lack of substantial consideration is not of itself sufficient evidence of dissipation. Equally, it may not be

significant that IES Belize was left without sufficient assets to meet eventual liabilities to the APs, as such liabilities are disputed anyway.

[105] The respondents rely upon the fact that these transfers were made to parties to this litigation, such that they are not instances of dissipation at all. However, conduct can demonstrate a risk of dissipation even if it does not itself amount to dissipation.

[106] These two transfers do not on their own, in my view, amount to sufficient evidence of a risk of dissipation. But there is also the documentary evidence which describes a high managerial level plan to 'clean up' IES Belize 'for the purpose of avoiding loss/freezing of assets in relation to the threat of possible legal action from' Mr. Abyzov. Shortly afterwards the transfer to Starlex was effected. This does point to an intention to move assets to prevent the APs reaching them. The V/RPs' protestations to the contrary are generalized and unsubstantiated. The interpretation placed on these communications by the applicant will obviously be a matter for trial, but is so far credible.

[107] Taking the various factors together -- that the transfers were made without prior consultation with the APs, for (apparently) no substantial consideration, with (apparently) a high-level plan to frustrate legal action by the APs, and the existence of a good arguable case of dishonesty on the part of the V/RPs -- there could well be a real risk that judgment for the applicant may not be satisfied as a result of unjustified dealings in the V/RPs' assets.

[108] That said, there has been an unexplained and lengthy delay on the part of the APs in applying for a freezing order based on these transactions. Also, these two transfers did not themselves result in assets being placed beyond the reach of the applicant. I accept the applicant's submission that delay, even lengthy, is not necessarily fatal to an application for a freezing order. But it must be right that it significantly reduces the prospect for obtaining a freezing order on the basis of the transactions concerned.

[109] Nor is the absence of actual dissipation in these transfers fatal. Just because a defendant has not dissipated assets does not mean that there is no risk that he may do so, particularly where there is documentary evidence which suggests a desire and plan to do exactly that.

[110] The court must consider realistically the particular circumstances of the companies involved in the transactions concerned. In the case of IES Belize, the delay in applying for a freezing order would quite probably have allowed the V/RPs to 'clean up' this company long before a freezing order could be made. The fact that the company might still hold assets worth US\$20 million, as the applicant believes, suggests that the V/RPs

have no particular desire, or perhaps ability, to move these also. This suggests that there is no current real risk of dissipation from IES Belize.

[111] The onward transfer of IES Cyprus to Renova Bahamas and Sunglet, and then to OOO Renova Holding Rus is of itself not necessarily objectionable. On the evidence available I cannot tell which side's explanations are more plausible. The latter transfer is an example, though, of a more general migration of the V/RPs assets from western jurisdictions to Russia.

[112] This brings into focus the extent to which transactions effected by the V/RPs to move assets to Russia and following imposition of the sanctions can objectively be said to be in the ordinary course of business.

[113] Applying the criteria set out in *Countrywide Banking Corporation Ltd v Dean* [1998] AC 338 the transactions must be considered in the actual settings in which they took place. The transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. The converse of a transaction in the ordinary course of business is a dealing that cannot be justified for normal and proper business purposes.

[114] I do not find it unnatural that the V/RPs should want to move assets to Russia. Mr. Vekselberg and his senior associates are Russian. So is Mr. Abyzov. This was a joint enterprise between and for the benefit of Russians. Its operating method was to invest in other businesses, which inherently entails that investments should be bought and sold and otherwise dealt with in order to maximize returns. Significant operating assets are also Russian. The purpose of the sanctions is to interdict dealings with Russians. The Russian government has implemented a de-offshorisation programme. It would be surprising if this combination of factors would not prompt the V/RPs to migrate assets and holding structures to Russia, as they were entitled to do.

[115] The immediate response to the sanctions by reducing shareholdings in western companies below the sanctioned level, by selling shares back to those companies, is also natural. There is nothing inherently sinister about this, particularly as the proceeds of sale have to be held in a blocked bank account. Although the circumstances are clearly not ordinary – because sanctions were not hitherto an everyday feature of commerce involving Russian businessmen – the solution adopted here is both perfectly legitimate and ensures the survival at least of the non-Russian company. That is a normal and proper purpose. This type of transaction is not evidence of a risk of dissipation at all.

[116] The transfers in May of this year by Renova Innovation Ltd, a subsidiary of Renova Holding, of shares in Liwet are a different matter.

This was not a case of Liwet reacquiring its own share capital. The shares were transferred to companies in which senior Renova group personnel have an interest as a purported management incentive and to companies and/or trusts in which associates of Mr. Vekselberg, Mr. Evgeny Olkhovik and Mr. Vladimir Kremer (and their families) have interests. These are persons connected with the V/RPs. The alleged high value of the assets transferred puts an objective observer on inquiry as to the genuineness of this transaction. In the background lies also the allegation that the V/RPs have used a nominee holding arrangement in at least one other case. The reference to an incentive begs additional questions. By its nature, an incentive is not a reward for past performance. It is a carrot held out to the incentivized person to inspire some kind of behaviour beneficial to the giver. Implicit is also a stick that if the desired behaviour is not produced the carrot will be withdrawn. The person giving the incentive retains some type and/or degree of control. The true nature of the arrangement depends upon its terms. Furthermore, the respondents themselves assert that these transactions were a “one-off”. That in itself amounts to an admission that they were not ‘normal’ or ‘ordinary’ in the setting of the respondents’ usual business.

[117] Moreover, the V/RPs are no strangers to sophisticated asset holding structures. Mr. Vekselberg himself is the beneficiary of a discretionary trust. That in itself is no criticism, nor suspicious. It is pertinent to note however that in response to increasing international transparency (and professional leaks), high net worth persons are increasingly placing less reliance upon confidentiality and secrecy laws in off-shore jurisdictions to conceal true ultimate beneficial ownership. They try to stay ahead of regulatory changes. They are opting for ostensibly transparent structures, such as discretionary trusts. Such transparency is often more apparent than real. True ownership is often ambiguous, and deliberately made so. A ‘mere hope’ is an elastic concept. The Liwet transfers do not involve a discretionary trust but they beg the question whether they are in reality a nominee arrangement in which the V/RPs retain power to direct how the assets should be dealt with. They are transactions which, in my view, warrant further investigation.”

[73] The judge then deals with some transactions which are not relevant to the current applications and concludes:

“[119] In sum therefore, of the transactions following the imposition of sanctions, it is only the Liwet transfers which in my view raise questions.

[120] The totality of the circumstances, which include the revelation of an apparent plan to ‘clean-up’ IES Belize in anticipation of legal action by the

APs and the alleged use of at least one nominee to hold assets, presents the Court with objective facts from which a risk of dissipation can be inferred.

[121] The totality of the circumstances is important, because the respondents' approach before me was to compartmentalize each transaction, and then explain why that transaction does not disclose a risk of dissipation. They then ask me to conclude that the circumstances, added together, do not disclose a risk of dissipation. It is easy to see why the respondents urge a segmented approach: if they can consign and restrict the IES Belize 'clean-up' evidence to a transaction or period for which delay and lack of actual dissipation would doom a freezing order application, then it would not affect consideration of later questionable transactions. It is right, I think, that I should maintain a view of the circumstances as a whole, including historic instances which give cause to doubt the V/RPs' good faith.

[122] I should say, for the record, that those circumstances do not include any assessment on my part of allegedly 'thin' defences advanced by the V/RPs. Beyond the undisputed point that the applicant has a good arguable case I do not go at this interlocutory stage."

[74] There was some discussion before me as to what approach I should take to the considered views of Wallbank J. Ultimately I discerned no difference between counsel as to the extent to which I am entitled to, or am bound by, the findings in Wallbank J's judgment. Their position, which is my own, is that I must reach my own view on whether the November and December freezing orders should be extended. Wallbank J's views do not give rise to any form of *res judicata* or issue estoppel. They were expressed in the context of an application for an asset disclosure order where the standard of proof required is lower. Further neither side could realistically have appealed against what the judge said in the extended passage I have cited above. Appeals are brought against orders, not judgments. Moreover, this was an interlocutory judgment. In order for some estoppel to arise, there must normally be a final judgment.

[75] That said, Wallbank J, is a very experienced judge with enormous experience of this particular litigation. Both counsel were content that I should put such weight on his judgment as I thought appropriate. That is the approach which I shall take.

Emmerson's case on the risk of dissipation

[76] Emmerson rely on seven points to show that there is a real risk of dissipation of assets:

- (a) the “clean up” emails sent in relation to the 2011 transfer of IES Belize’s business to Starlex;
- (b) the changes in the Vekselberg Parties’ case in the course of the litigation as to whether the contributions made by the Abyzov Parties to the joint venture were legally binding or not legally binding;
- (c) that there is a good arguable case of dishonesty against Mr. Vekselberg;
- (d) the Liwet share transfers;
- (e) that RHL are in contempt of court;
- (f) Mr. Vekselberg’s false case on the control of the Renova group; and
- (g) the September 2018 disposal of shares in T Plus.

This last matter was not a matter considered by Wallbank J in his October judgment.

[77] As to (a), I respectfully agree with Wallbank J’s assessment of the “clean up” emails. The Vekselberg Parties submit that the 2011 transfers were legitimate and that the “clean up” emails need to be read in context. Nonetheless, as Wallbank J found, the emails raise a question, which can only be resolved at trial, as to whether there was a deliberate attempt on the Vekselberg side to skim assets from IES Belize. These transfers are now eight years old, so the weight to be given to this point in the current applications is in my judgment very substantially reduced. I find:

- (a) they form part of the backdrop to the current applications for freezing orders;
- (b) they potentially cast light on what the Vekselberg Parties have been doing more recently; but
- (c) they cannot be determinative of the current applications for freezing orders.

[78] As to (b), the Vekselberg Parties submit (skeleton para 58) that:

“[T]he Renova Parties amended their pleadings in March 2017 in order to clarify that the Abyzov Loans were legally binding when executed. They deny the allegation that those five loan agreements were shams... [T]he Renova Parties have never pleaded (or at least never intended to plead) that the Abyzov Loans were anything other than legally binding when executed. When the Renova Parties pleaded that there was never any ‘intention’ that the loans would be repaid, that merely referred to what the parties anticipated would happen in practice, i.e.... that [the] loan agreements would be replaced in due course by shares issued pursuant to a binding joint venture agreement.”

[79] Wallbank J was skeptical as to this explanation, but he accepted that it was a matter for trial. I share his views. However, the importance of this point to an assessment of the risk of dissipation is small. The forensic strengths and weaknesses of a party’s case is only tangentially relevant to assessing the risk of dissipation. This is especially so, where (as here) the standard for making a summary judgment application is not met. Again, in my judgment this point only forms part of the backdrop. It is not determinative.

[80] As to (c), there are many allegations of dishonesty against Mr. Vekselberg made in the current action. However, these allegations are disputed. Whether Mr. Vekselberg was dishonest or not will be a key issue at trial. Again, the mere fact that Emmerson reach the (low) threshold of showing that they have a good arguable case against Mr. Vekselberg in fraud is in my judgment of negligible weight in assessing the risk of dissipation. Having a good arguable case does not mean that there is “solid evidence” of a real risk of dissipation. The position would be different, if Emmerson were able to establish an overwhelming case in dishonesty against Mr. Vekselberg, but they do not attempt to do so in this application.

[81] Emmerson also seek to rely on what they describe as RHL’s “admission” of fraud. This in my judgment is a mischaracterization of what has occurred. As I have set

out above, RHL have made a deliberate decision not to participate in the current proceedings. As a result, Emmerson have obtained a judgment under CPR rule 18.12 that RHL are “deemed” to have admitted the allegations of fraud alleged against them. This is quite different to a finding that RHL are fraudsters. The “deemed” judgment cannot be used to establish findings of fact against other parties.

[82] As to (e), as explained above and below I hold that RHL are not in contempt of court.

[83] This means that only (d), (f) and (g) need to be considered. To these I turn.

(f) Mr. Vekselberg’s ownership of RHL and Renova Rus

[84] Mr. Vekselberg’s case is that he is not the owner of RHL. The shares in RHL are held by the Columbus Trust. This trust is established in the Cayman Islands. It is a discretionary trust, albeit with him as the main beneficiary. As such he only has a “hope” of obtaining a distribution. He accepts that he is the majority shareholder in Renova Rus.

[85] Emmerson’s case is that the reality is quite different. In his pleadings and in the witness statement which Mr. Vekselberg signed as his evidence for the trial due to be heard in 2018, Mr. Vekselberg accepted that he was the owner of both the Russian and the non-Russian sides of the Renova group. Further, in various declarations made to the Swiss Stock Exchange, SIX, in relation to Oerlikon, S+B and Sulzer, Mr. Vekselberg is described as a “beneficial owner”. For example, Oerlikon’s shares were held by Liwet. In a public announcement of 18th May 2018 Renova Management AG said that “Liwet Holding AG is ultimately held by (A) 44.46% by Columbus Trust, a trust established under the laws of Cayman Islands, whose ultimate beneficiary is Mr. Viktor F. Vekselberg, Moscow, Russian Federation and Zug, Switzerland.” This, Emmerson say, shows that Mr. Vekselberg is in truth the controlling mind of both the Russian and the non-Russian side of Renova. The Columbus Trust is a sham, or at any rate, under it,

Mr. Vekselberg is in fact the sole beneficiary and able to give directions to the Trust.

[86] The Vekselberg Parties say that the position is actually quite clear. RHL and therefore the non-Russian side of the business are held by the Columbus Trust. This is a normal discretionary trust, so Mr. Vekselberg merely has a “hope” of a distribution and has no control over how it exercises its control over RHL. Under Swiss law they were obliged to make the declaration they did in relation to Liwet. Para [5] of Mr Vekselberg’s witness statement for trial is merely a drafting infelicity.

[87] In my judgment, these are matters for trial. In relation to the Columbus Trust, it may be that Mr. Vekselberg is *de facto* much more in control than the strict legal position would afford him. In relation to the Swiss announcements, more information about Swiss law and practice would be needed to assess the evidential value of the announcements. In particular, it is notorious that civil law systems do not generally recognize trusts. If there are no other beneficiaries of the Columbus Trust (or only a dummy beneficiary like the International Committee of the Red Cross), this may explain why Mr. Vekselberg is described as the ultimate beneficial owner.

[88] As to the point on the witness statement, what Mr. Vekselberg said in para [5] was this:

“Since 2002 I have been one of the beneficiaries of the discretionary trust which holds the shares of [RHL], which from around that time has been the top (or parent) company in the Renova Group. In this witness statement, where I refer to ‘Renova’, the ‘Renova Group’ or ‘Group’, I mean collectively Renova Management AG, [RHL] and (from 2015 onwards) [Renova Rus] and their subsidiaries.”

[89] Although it will be a matter for trial, Mr. Vekselberg cannot in this passage sensibly be saying that Renova Rus is a subsidiary of RHL. That is simply not the case. This tends to support his case that there has been a drafting error in this part of his

witness statement. Likewise, in the Appraisal Agreement, which appears at [D1/5/8], the reference to “the Renova Group” on the face of it would mean the Russian group rather than the group headed by RHL.

- [90] Even put at its highest, Emmerson’s case on the ownership of the non-Russian and Russian entities is of little weight in considering the risk of dissipation. The fact (if such be established) that Mr. Vekselberg has a chameleon approach to the ownership of different parts of the Renova empire does not in my judgment show that he will dissipate assets. It might show a general shadiness — but that is not solid evidence of a real risk of dissipation.

(g) The disposal of T Plus shares

- [91] T Plus is a Russian energy giant with about sixty-one power plants spread over Russia. Emmerson say that in September 2018 the market value of the firm was about US\$670 million. This is not disputed by the Vekselberg Parties. Until 7th September 2018 IES Cyprus held a total of 52.87% of the shares in T Plus. 0.06% of the shares in T Plus it held directly. The balance it held through two wholly-owned subsidiaries: Brookweed, which held 20.47%, and KES, which held 32.34%.
- [92] On 7th September 2018, IES Cyprus transferred 57.7% of the shares in KES to Merol, a Cypriot company owned by Israeli investors. In return, Merol transferred 11.74% of the shares in T Plus to IES Cyprus to be held by IES Cyprus directly.
- [93] This resulted, Emmerson say, in IES Cyprus divesting itself of a controlling interest in KES in return for only an 11.74% direct interest in T Plus. Emmerson say that 5.3% of the shares in T Plus (worth some \$35 million) were disposed of and dissipated by IES Cyprus in this transaction. (I note that the arithmetic seems to be wrong. If one multiplies the 57.7% shareholding in KES by the 34.34% shareholding in T Plus, it is possible to calculate that about \$133 million (57.7% x

34.34% = 19.81% x \$670,000,000) in value was transferred to Merol, in return for \$79 million's worth of T Plus shares (11.74% x \$670,000,000).)

[94] Regardless of the mathematics, the Vekselberg answer is simple. The KES shares in T Plus were encumbered. Mr Cheremikin in his third affidavit says:

“25. Given my rôle within the legal team I was involved at a high level with the legal aspects of the T Plus transaction. From [Renova Rus's] perspective, the T Plus transaction had two main attractions:

a. by divesting itself of 52.7% of the shares in [KES], the Rus Renova Group... no longer had a controlling interest in the 32.34% of T Plus' shares held by [KES]. This reduced the Rus Renova Group's controlling interest in the shares of T Plus from 57.1% to 39.59%. This meant that T Plus could not be treated as a blocked entity for the purposes of the [US] sanctions; and

b. although [KES] held 32.34% of T Plus' shares, those shares were pledged as part of a security package relating to credit facilities to which [KES] was party. The 11.74% of T Plus' shares, which IES Cyprus received in turn, were free from encumbrances. This was particularly important for the Rus Renova Group, as it meant they could be used in dealing with banks for credit facilities or contributed to the potential merger with Gazprom.”

[95] The first point about US sanctions seems to be well-made. In order to avoid the impact of the sanctions, Russian-controlled entities had to divest themselves of majority control of off-shore assets. As regards the second point, it is true that Mr. Cheremikin does not exhibit the share pledge documentation. However, what he says is not inherently implausible. There is no evidence that the transaction between Merol and IES Cyprus/Renova Rus was otherwise than at arm's length. If the T Plus shares were charged, there is no reason to go behind the parties' agreement that the (charged) shares held by KES, which were transferred to Merol, had the same value as the (uncharged) shares transferred to IES Cyprus. Emmerson adduce no evidence to show why Merol and its Israeli backers would be assisting the Vekselberg Parties in dissipating assets. There is no motive shown.

[96] In my judgment, Emmerson have not shown any adequate evidence, still less any solid evidence, that the September 2018 share transfers were a dissipation of assets. The Vekselberg Parties were not obliged to produce the security documentation to establish the share pledge, because there was no sufficient case to answer: see *Holyoake* paras [50] and [51] discussed above.

(d) The Liwet share transfers

[97] I turn then to the last point on the Liwet share transfers. These were Wallbank J's greatest concern. There are in fact two elements to this point:

- (a) whether the Liwet share transfers can reasonably be justified; and
- (b) whether the transfers to the Cypriot trusts are intended to disguise the true ultimate ownership of the shares.

[98] The two points are interlinked. If the value of the shares transferred are so large as to be inexplicable, that would support the inference that the Cypriot trusts are a mere device to conceal the true ownership. However, before looking at the overall picture, it is useful to consider them separately.

[99] The Vekselberg Parties' case (taken from their skeleton para 66) is that the Liwet transfers had two elements:

“First, an asset swap, between (i) Berdwick; and (ii) Mr. Evgeny Olkhovik and Mr. Vladimir Kremer [who] are minority shareholders in certain companies within both the [non-Russian and Russian groups]. Pursuant to an agreement dated 15 May 2018, Berdwick transferred 33.97% of the shares in Liwet (worth around US\$295.2 million) to two Cypriot discretionary trusts (the Polaris Trust and the Olympia Trust), of which Messrs. Olkhovik and Mr. Andrey Lobanov (Mr Kremer's son) are, respectively, the ultimate beneficiaries. In return, Messrs. Olkhovik and Kremer transferred to [Renova Rus] shares of equivalent value in three Russian companies within the Rus Renova Group, namely: (i) LLC Renova Aktiv; (ii) LLC Renova-Holding Rus; and (iii) LLC REM. Both the Liwet shares transferred, and the shares in the three Russian companies within the Rus Renova Group received in exchange were valued by reference to audited accounts [and] financial statements.

Secondly, a transfer on 18 May 2018 of 16.63% of the shares in Liwet (worth around US\$144.5 million) from Berdwick to another Cypriot discretionary trust (the Next Generation Trust), of which six senior executives within the Renova Group... are beneficiaries. This transfer... was executed in order partially to satisfy the pre-existing obligation of the Renova Group to fund a long-term management incentive scheme. Which was established in January 2016. Again, the Liwet shares transferred were valued by reference to audited accounts and financial statements. The pre-existing obligation to fund the LTI Scheme was recorded in RHL's audited consolidated financial statements."

[100] The asset swap agreement is in evidence. On its face, it supports what the Vekselberg Parties say. Further, there is commercial logic to the swap. In the face of the US sanctions and the Russian government's policy of encouraging "de-offshorization", it made sense for Renova to divest itself of non-Russian assets in return for Russian assets. Mr. Olkhovik and Mr. Kremer were business associates of Mr. Vekselberg, but were independent of him.

[101] In order to effect the Liwet transfers, the Vekselberg Parties had to persuade Cr dit Suisse (who were the lead bank for syndicated credit facilities) that the transactions were proper and that there was no risk of Cr dit Suisse falling foul of the US sanctions by assisting a breach. In order to facilitate Cr dit Suisse's due diligence, the Vekselberg Parties prepared a document called "Liwet New Ownership — May 2018" **[C2(2B)/5/303]**. So far as the asset swap is concerned, the document said that the Russian assets transferred were worth US\$295.2 million, based on "an audited evaluation to be recorded in audited financials 2017 and certain expected inter-group transactions" and that the 33.97% interest in Liwet transferred to the Polaris and Olympus Trusts was also worth US\$295.2 million based on "audited Swiss GAAP 2017 with revalued Swiss public companies based on 3mVWAP as of 2 May 2018". I was not shown the "audited evaluation" of the Russian assets or the Swiss audited accounts of Liwet. The audited accounts of S+B and Oerlikon would presumably be matters of public record, so that some assessment of the value of the Liwet shares could be made.

[102] Emmerson do not, either in their skeleton or orally, make any substantive points on the matters set out in the previous two paragraphs. (Emmerson in their response to item 4 in the Scott Schedule of Non-Disclosures suggest a value of US\$1.4 billion for the Liwet shares. They support this with a reference to para 165.2(b) — mistyped as para 164.2(b) — of Mr. Dodonov’s sixth affidavit, but I do not understand Mr. Dodonov there to be making any case for any particular valuation of Liwet’s shares. There is thus no evidence for a different valuation.) Instead, in relation to the asset swap, they focus on the allegedly bogus nature of all three of the Cypriot trusts. They also rely on the points to which I shall come on the alleged “long term incentive programme”. If this programme was bogus, then, Emmerson submit, it can be inferred that the share swap was equally bogus.

[103] I turn then to the long-term incentive plan. The “Liwet New Ownership” document says that the long-term incentive structure has a target for 30th June 2021 of US\$400 million with an amount “fixed” as of 28th December 2017 of US\$242.6 million. The presentation recites that:

“[RHL] undertakes and is committed to remunerate key executive officers of certain holding and/or management companies of the Renva Group for their past achievements with and to the benefit of Renova Group, namely: Cheremikin Igor, Khalikov Rinat, Matveeva Irina, Moskov Alexey, Shtorkh Andrey, Sivoldaev Mikhail. Presently, scheme of remuneration is at an advanced state and the remuneration is to be finalized not later than 30 June 2019... The Company undertakes and is committed to perform remuneration not later than June 20, 2019; the Remuneration amount shall be equal to USD 242,600,000... Following the designation of Viktor Vekselberg as an SDN person by OFAC Renova top managers offered to transfer part of an incentive program to a structure founded in their favor

- Transferred to NEW Generation Trust as of 18/05/18
 - 16.63% of shares in Liwet Holding AG...
 - Valued USD 144.5m
- The structure for the remaining part is UNDER CONSTRUCTION.”

[104] Mr Cheremikin in his second affidavit at para 41(b) says:

“In respect of the [Liwet] Transfer, RHL had already committed (by December 2017) to find the existing long term incentive with assets with a value of US\$242.6 million by 30 June 2019. The Executives of which I am one) — all hardworking people having dedicated significant portions of their lifespans to working for Renova Group on a pre-negotiated compensation basis (including a substantial element of long-term incentives) and, as such relying heavily on their pre-agreed compensation package — found themselves unfairly prejudiced by the collateral damage that might be suffered by them due to the effect brought about by the OFAC designations [the US sanctions], such effect clearly being never genuinely intended by the sanctions authorities. I, and to my knowledge the other Executives, feared that Renova Group’s ability to honour its obligations under the pre-existing executive incentive plan could deteriorate rapidly and progressively. Seeking to protect our legitimate personal interests and preserve the value of the respective long-term investments, we approached Renova Group and requested it to swap the affected benefits for what we assessed to be liquid and relatively risk-insulated assets in Renova’s possession, commensurate in value to the affected benefits pre-designation, namely: shares in Liwet that directly owns marketable assets.”

[105] As to the sums being paid under the alleged long-term incentive plan, Mr. Michaelides, who it will be recalled is a director of RHL, says in his first affidavit at para 38:

“As of 28 December 2017 the remuneration amount was equal to US\$242,600,000 which, whilst a large sum, is in my experience consistent with rates of remuneration in the market for private equity funds of this size. However, as a result of OFAC’s designations, Renova’s economic position worsened rapidly which cast doubt on its ability to honour the obligations to the Executive under the LTIs.”

[106] Emmerson do not adduce evidence to say that US\$242.6 million was out with the size of remuneration for senior executives in this industry. Rather they say that Mr. Michaelides’ evidence is belied by the absence of any of the documentation which one would expect, if there had been any long-term incentive programme. It will be recalled that the asset disclosure order provided for the production of documents including “any correspondence by email or otherwise, memoranda,

agreements, resolutions, statements, registers, custody account records, certificates, incentive program terms and conditions or any other thing on or in which information of any description is recorded whether created before or after 6 April 2018.” No documents showing the terms of the long-term incentive programme have been disclosed, nor any contracts of employment of the senior executives. All of the negotiations between RHL on the one hand and the executives on the other are said to have been conducted orally.

[107] Emmerson say that not one single note of meetings in the period from the hanging of sanctions over Mr. Vekselberg to the transfer of the Liwet shares has been produced. Mr. Cheremikin in his second affidavit at para 74 says various claims to legal professional privilege are made, but it is not clear if any lawyers’ attendance notes of meetings are said to be covered by this claim to privilege.

[108] As to the non-disclosure of the incentive plan and individual executives’ entitlements under it, Mr. Cheremikin in his second affidavit at para 107 asserts that the long-term incentive scheme was launched in January 2016. It was therefore not related to the Liwet share transfers and disclosure under the asset disclosure order was not required.

[109] As to individual’s entitlements, he says in para 108:

“a. Each Executive has their own personalized and highly confidential incentive terms. The Executives do not share the terms of their own incentive plans with each other nor with any other employees (save for the directors of RHL, who have agreed the incentive terms with the Executives).

b. Each Executive’s incentive terms are not committed to paper (either in hard copy or electronically).... In my email to Mr. Ruffieux of Crédit Suisse on 28 May 2018, I explained that the confidential terms of the incentive plans prevented me from providing them to Crédit Suisse. However, I invited a representative from Crédit Suisse to inspect certain hard copy documents at the offices of [Renova Rus] in Moscow. In preparation for the meeting at which these documents were to be inspected, I made a bullet point list of the terms of my own incentive plan terms. Ms. Matveeva made a similar bullet point list. We were the only

two Executives responsible for the communications with Crédit Suisse and the due diligence process, so it seemed natural for Ms. Matveeva and I to be the Executives who made lists of our incentive terms. At a meeting on Tuesday 29 May 2018 both lists were reviewed by a Mr. Alexey Dykan, an in-house lawyer of Crédit Suisse. Owing to the confidential nature of these incentive plan terms, the visit of Mr. Dykan... was subject to a strict non-disclosure agreement.... At that meeting I also showed Mr. Dykan the [Power Point] Presentation... At no point was I shown Ms. Matveeva's list nor did Ms. Matveeva see my list. Ms. Matveeva and I destroyed our lists immediately after the meeting in order to maintain the confidentiality of the terms. These lists were handwritten documents of which no copies were made for which reason they no longer exist."

- [110] Emmerson submit that this is just preposterous. You do not have executives with supposed entitlements to tens of millions of dollars in an incentive package without some paper trail. Moreover, they draw my attention to what Mr. Vekselberg said in his witness statement prepared for trial. At para 17 he spoke of wanting "western-style corporate structuring and corporate governance" for Renova. He proceeds to give details of how the group is run: even arguing at para 39 that he was in effect a mere cog (albeit a big cog) in the group's machinery. Mr. Marshall QC accurately summarized Mr. Vekselberg's witness statement as showing the group being "quite bureaucratic". An organization like that must, he submitted, have documentation of individual employee's entitlements to incentives.
- [111] There are also entries in the consolidated accounts of RHL to 30th June 2018 which suggest that "related parties at the level of the Group's subsidiaries" were owed US\$32.7 million and that "key management personnel of the Group" were also owed US\$32.7 million. These accounts were originally subject to the "confidentiality club" regime in the order of 12th December 2018, but immediately prior to the hearing of the current applications, I released these pages from the confidentiality obligation. Mr. Marshall had said that this was the most important document in the confidentiality club which Emmerson needed in order to present its case in opposition to the Vekselberg Parties' applications.

- [112] In the event, there is little evidential gain from these accounts. The combined sum of US\$65.4 million does not relate well to the US\$98.1 million supposedly still owed of the US\$242.6 million remuneration package after the US\$144.5 million transfer of Liwet shares. Mr. Marshall QC was constrained to say that these accounting entries may be completely unrelated to the Liwet share transfers. Mr. Marshall QC said that expert accounting evidence might assist in understanding these accounts and what evidence auditors would expect to see to justify them. However, this document seems very peripheral to the issues for me to decide.
- [113] The difficulty with Emmerson's argument on the existence of relevant documents is this. Their primary case is that all this talk of "western-style corporate governance" was merely a façade. Their case is that Mr. Vekselberg was in overall control; he was the boss; he was making all the decisions. If they establish this case, then two consequences flow. Firstly, it would account for the absence of a paper trail for the executive's entitlements. Secondly, and by contrast, it may strengthen Emmerson's argument that the Liwet transfers were not genuinely for the benefit of the executives.
- [114] On Friday 14th June 2019 Emmerson made an application to adduce expert evidence in relation to these accounts from Paul Doxey. The Vekselberg Parties strongly oppose the late admission of this evidence, but I have read Mr. Doxey's report *de bene esse*. His view in relation to the documents which I ordered released from the confidentiality club is that "the accounting treatment described in the... document is inconsistent with LTIP Liability being a genuine liability." This supports Emmerson's primary case that there was no long-term incentive programme (with the corollary that there is no paper trail showing such a programme). Mr. Doxey says that an auditor of the 2017 accounts would have required some evidence of the programme, but is somewhat vague as to precisely what would be required. Although he does not approve of an auditor relying solely on "a letter from the board of directors confirming the amounts or oral evidence", he seems to accept that an auditor might be prepared to rely on such an oral assurance, which again would be consistent with there being no paper trail.

- [115] It can be seen that, even if I admitted Mr. Doxey's evidence, it would not change my conclusions in this matter.
- [116] The Vekselberg Parties lay some stress on the fact that Crédit Suisse carried out due diligence and were satisfied as to the *bona fides* of the Liwet share transfers. However, there must be serious doubts as to the effectiveness of the bank's due diligence. Mr. Dykan, on Mr. Cheremikin's evidence, was satisfied with handwritten bullet points to evidence two executives' entitlements to tens of millions of dollars of incentive payments. That hardly speaks to any rigour on Crédit Suisse's part.
- [117] Indeed at the conclusion of the due diligence exercise, Mr. Vasiliev, a senior executive in the Renova Rus group, on 30th May 2018 sent Ms. Matveeva a congratulatory email. Now there is an issue between Mr. Vasiliev and Mr. Dodonov as to how the email should be translated into English from the Russian. However, at least on one reading of the email, Mr. Vasiliev was congratulating Ms. Matveeva for pulling the wool over the eyes of Crédit Suisse.
- [118] Before I reach my own view on the long-term incentive scheme, I need to consider the nature of the three Cypriot trusts. Each of them are in a virtually identical form. They are completely typical of discretionary trusts in off-shore (or quasi-off-shore) jurisdictions with an English law ancestry. Indeed Mr. Kyriakides, a Cypriot lawyer, confirms that there is nothing out of the ordinary in the wording of the trusts. (The Court would have been able to reach the same conclusion without his help, since Cypriot law is presumed to be the same as BVI law unless the contrary is proven.)
- [119] That is not the end of the matter. Emmerson make two points. The first is that, just on the wording of the trust deeds, Mr. Vekselberg can take control of the trust assets. The second is that it is a fair inference that he does have control. As to the first point, the deeds contain standard provisions allowing further beneficiaries to be appointed of the trust and for the removal of beneficiaries. These are subject

to the advice and consent of the protector, but so long as the protector consents, the trustee can simply remove the executives who are currently beneficiaries and could appoint Mr. Vekselberg or his nominee in their place. As to the second point, the protectors are people who have worked closely with Mr. Vekselberg, so they are subject to his influence. The remuneration for the trustee, ABC, is only €15,000 per annum, which is suspiciously low and suggests that the trustee is not truly independent. In the alternative, Emmerson argue that the trusts are shams.

[120] There is no direct evidence that the trusts are shams or a device for concealing Mr. Vekselberg's ownership. On the face of the documents, this is a properly established discretionary trust with perfectly normal terms for such trusts. The remuneration of the trustee is low, but all it is doing is holding the shares in Liwet. The amount of administration involved is small. As to the protectors being stooges of Mr. Vekselberg, one (Mr. Moskov) is a beneficiary himself and is thus likely to want to preserve the trust assets for himself and his fellow beneficiaries, the other (Mr. Ivanov) no longer works for Mr. Vekselberg and is thus no longer subject to his direct influence.

[121] The wording of the trusts and the way they are operated in my judgment give no support to Emmerson's case. Further, I accept Mr. McGrath's submission that to hold that the trusts are shams, I would need to find dishonesty on the part of all those involved, including ABC. There is no evidence of dishonesty by ABC, so Emmerson's case on sham goes.

[122] I therefore stand back and consider whether the Liwet transfers show solid evidence of dissipation. The absence of documentation is highly suspicious. The underlying explanation for the Liwet transactions is, however, reasonably convincing. Once the US sanctions were imposed on Mr. Vekselberg, there was a very real danger that RHL and the non-Russian business would collapse with a probable knock-on effect on the Russian business. Whether or not Mr. Vekselberg exercised more or less hands-on control of the business, the size of the business (RHL was worth US\$10 billion, although it may be less now) meant he needed

executives for the day-to-day running of the myriad of companies in the group. Ensuring that they stayed with him during the hard times immediately after the imposition of sanctions would have been a necessity. The sums involved were, on the uncontradicted evidence of Mr. Michaelides, “consistent with rates of remuneration in the market for private equity funds of this size”. The Vekselberg Parties have in my judgment established a legitimate reason for making the Liwet transfers.

[123] The matter is finely balanced, as Wallbank J recognized. An important difference in the evidence before me and before him is the first affidavit of Mr. Michaelides, which explains the need for, and the size of, the remuneration package effected by the Liwet transfers. There is no evidence that the Cypriot trusts are not genuine. Even taking the background of the “clean-up” emails and the changes in the Vekselberg Parties’ case in the course of the litigation, I find that Emmerson have not established a risk of dissipation from the Liwet transactions.

[124] Even if I am wrong about this, as I shall explain in the next section, the delay in Emmerson seeking the freezing orders, would tip the balance against continuing the orders.

Freezing orders and delay

[125] Mr. McGrath QC submits that delay should in any event debar Emmerson from obtaining a freezing order. The application for an asset disclosure order was issued on 16th May 2018. It was argued over 4th and 5th June with judgment handed down on 29th October. The freezing order against RHL was made on 19th November and against Mr. Vekselberg on 31st December. Between 16th May and October, there was, he submitted, ample opportunity for RHL and Mr. Vekselberg to dissipate assets, if they were going to. By early November, they must have been well aware that an application for a freezing order was on the cards. After the 19th November order against RHL, Mr. Vekselberg again, Mr. McGrath

submits, can have been in little doubt that he might be the next recipient of a freezing order.

[126] In *Holyoake* the Court of Appeal held that delay was a very material factor.

“62. The fifth evidential factor, (namely the ‘stable door’ point) was in my view (and contrary to the judge’s view) a powerful factor militating *against* any conclusion of a real risk of dissipation. If there had been a real risk of the appellants unjustifiably dissipating their assets, it would have materialised by the time of the application. The first intimation of what became the present proceedings occurred in May 2014. There was then a detailed letter of claim, with draft particulars of claim, in December 2014. A revised claim was ultimately issued in August 2015. The respondents repeatedly threatened to seek a freezing order (or similar relief) from September 2015. The application for an initial notification was made in February 2016, resulting in the 7-8 April hearing. In my view it was inherently unlikely that the appellants would unjustifiably dissipate their assets in the future, having not done so by this point.

63. The reasons given by the judge as to why this factor did not rule out a risk of dissipation are unsatisfactory. The judge had already concluded — with good reason — that the evidence suggested that the appellants would be able to dissipate assets quickly, despite the fact that many of the assets were in the form of real property. Even if it would take time to dissipate assets, by any metric the above time frame had afforded the appellants ample opportunity to do so, if they were so minded. The judge placed undue reliance on being unable to rule out the dissipation risk.”

[127] In my judgment, the same applies here. The Vekselberg Parties were aware since May 2018 when the application for an asset disclosure order was made that an application for a freezing order was under active consideration by the Abyzov Parties. In October 2018 they had Wallbank J’s judgment expressly raises the point. Yet the Vekselberg Parties did nothing to try and hide assets during that time. Even if Emmerson had established a risk of dissipation from the Liwet transfers, delay would render the granting of a freezing order inappropriate.

[128] I am comforted that Wallbank J too considered in para [108] of his October judgment that delay was a potential problem for Emmerson’s obtaining of freezing

orders. If he had had the Court of Appeal's decision in *Holyoake* available, he may have thought the delay argument was even stronger.

Alleged non-disclosure

[129] A party making an *ex parte* application owes a duty of disclosure to the Court. Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe**⁷ classically explained the duty at pp1356-7, as follows:

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see *Rex v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 KB 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v Kensington Income Tax Commissioners*, per Lord Cozens-Hardy MR, at p 504, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231, 238, and Browne-Wilkinson J in *Thermax Ltd v Schott Industrial Glass Ltd.* [1981] FSR 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an *Anton Piller* order in *Columbia Picture*

⁷ [1988] 1 WLR 1350

Industries Inc v Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade LJ in *Bank Mellat v Nikpour* [1985] FSR 87, 92-93.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an *ex parte* injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty': see *per* Donaldson LJ in *Bank Mellat v Nikpour*, at p 91, citing Warrington LJ in the *Kensington Income Tax Commissioners' case* [1917] 1 KB 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded:' *per* Lord Denning MR in *Bank Mellat v. Nikpour* [1985] FSR 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms:

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.' *per* Glidewell LJ in *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc*, [1988] 1 WLR 1337, 1343H-1344A."

[130] In **Fundo Soberano de Angola v Dos Santos**,⁸ Popplewell J said:

⁸ [2018] EWHC 2199 (Comm)

[51] Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

[52] The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in *Memory Corporation v Sidhu (No 2)* [2000] 1 WLR 1433, citing formulations from, amongst others, Slade LJ in *Bank Mellat v Nikpour* [1985] FSR 87, 92, Bingham J in *Siporex Trade v Comdel Commodities* [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in *Marc Rich & Co Holding v Krasner* (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

[53] Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly

with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents (see CPR Part 31 Practice Direction A and *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905)."

[131] The Vekselberg Parties make a general complaint that the style of advocacy on the *ex parte* applications was unnecessarily aggressive and that this was incompatible with a fair presentation of the absent parties' case. With hindsight it would have been much better if Mr. Marshall had split the advocacy with his first junior, so that Mr. Weekes could have presented the points which the Vekselberg Parties and ABC would have wished to make, had they been present. However, if there was a fair and even-handed presentation of the substantive points which should have been drawn to the Court's attention on the *ex parte* applications, the fact that the case for the applicants for the freezing orders was presented aggressively would not in my judgment be a free-standing ground for setting aside the *ex parte* orders. The Court is not well-placed to make, effectively artistic, judgments on whether an advocate is "aggressive" rather than merely "firm" or "doughty" or "persistent". Every judge will have his or her own view on the style of advocates. By contrast, it can assess whether there has been a fair presentation of the absent side's case reasonably easily.

[132] The Vekselberg Parties also complain that the applications for the freezing orders should have been heard *inter partes*. This I consider in the next section. They also raise fourteen discrete points which they say should have been drawn to the judge's attention. I consider these below.

Applying *ex parte* for the freezing orders

- [133] RHL and Mr. Vekselberg complain that Emmerson applied for the November and December freezing orders *ex parte*. When I first saw this submission in their skeleton, I was surprised. It is almost hard-wired into advocates' psyches that *Marevas* are done *ex parte*. If you fear dissipation, then you do not want to tip off your opponent and give him a last chance to sweep the assets away.
- [134] Mr. McGrath QC has, however, shown me that the law is not so straightforward. In **Cherney v Neuman**,⁹ His Honour Judge Waksman QC (as he then was), sitting as a High Court judge, held at para [77(4)] that a delay after proceedings have been served:

"is obviously much more significant because on any view the defendant by then knows of the claim against him. If in truth his assets are at risk of dissipation or secretion so that an eventual judgment is likely to go unsatisfied, the risk may well have crystallised before the (delayed) application is made. And if it is made at this late stage it is almost inevitable that it will have to be made on notice. Any argument that it should still be without notice so as to preserve secrecy is likely to fail. The making of a claim against the defendant is, by definition, no longer a secret. That being so, if the defendant needed further notice of the claimant's intentions, as an encouragement to dissipate, he will have had it before the application is heard."

- [135] It has to be said that this passage is not widely known. *Cherney v Neuman* is not reported in any series of law reports. It is cited in the *White Book (Civil Procedure 2019)* and in *Gee on Commercial Injunctions* (6th Ed, 2016), but only as to the consequences of delay on the granting of a freezing order, not on whether hearings should be held *inter partes*. The case was reported on Lawtel¹⁰, but the Lawtel headnote again only mentions delay. Counsel would not generally attract blame for not knowing of Judge Waksman's dictum on *inter partes* hearings.

⁹ [2009] EWHC 1743 (Ch)

¹⁰ LTL 28/7/2009, [2009] 7 WLUK 584

[136] In the current case, however, Emmerson’s advisors were on notice of the point. In the Vekselberg Parties’ skeleton for the June hearing of the asset disclosure application, Mr. McGrath QC set out the gobbet above. On 5th June 2018 Mr. McGrath made the point orally: see transcript page 22, line 15. When Emmerson applied for the two freezing orders, counsel should have alerted the judge to this point. It was a matter which the Vekselberg Parties had expressly raised. Whatever Emmerson and their advisors thought of the point, it was their duty to draw points raised by the Vekselberg Parties to Wallbank J’s attention. As it was, the judge can hardly have had at the forefront of his mind a subsidiary point raised in a skeleton argument six months before.

[137] Mr. Marshall QC argues that the question as to whether the hearing of the two freezing orders should have been *inter partes* becomes a non-issue, once the matter comes back before the Court for the discharge application. He cites the decision of His Honour Judge Klein sitting as a High Court judge in **Wild Brain Family International Ltd v Robson**¹¹ who said:

“[10] Although the Defendants’ application is made on three grounds, it seems to me that the second ground (that a without notice application was not justified) is merely part and parcel of the Defendants’ complaint that the Claimant failed to comply with its fair presentation obligation. I will consider the second ground on that basis.

[11] If the Defendants’ contention is that, at the 4 September hearing, Nugee J was wrong to permit the injunction application to be made without notice, that would be a matter for an appeal court to consider. A respondent may apply to have an order made without notice discharged, otherwise than for a failure to comply with a fair presentation obligation, under [English] CPR r.23.10 or under a liberty to apply provision. CPR r.23.10 and a liberty to apply provision provide a mechanism for a court to consider, on a respondent’s request, at an on notice hearing, all those matters which the respondent wishes to raise in opposition to the order previously obtained on its merits. CPR r.23.10 (on its wording) and a liberty to apply provision (on the standard form of wording) are not intended, in my view, to permit one first instance court to reconsider the merits of a subsidiary decision made by a different first instance court;

¹¹ [2018] EWHC 3163 (Ch)

namely, whether to permit an application to be made without notice. An alternative approach, by which the same result is reached, would be to recognise that, because, under CPR r.23.10 or a liberty to apply provision, a court reconsiders an application substantively on its merits, any merits-based grounds for complaining that the application was initially considered without notice inevitably fall away.”

[138] I confess that I have a little difficulty with Judge Klein’s view that the appropriate remedy where a judge has wrongly heard a matter *ex parte* is to appeal. Suppose the aggrieved party does appeal on that ground. What remedy is the Court of Appeal to give? Presumably its only course is to send the matter back to be heard *inter partes*. No sensible litigant will pursue that route, when he can apply directly to the first instance court for an *inter partes* hearing.

[139] Moreover, the whole point of the reconsideration on the return date of an *ex parte* order is so that the judge hearing the matter *inter partes* can reconsider the merits of the judgment given at the *ex parte* stage. It is not apparent why this debars the court second time round from reconsidering “the merits of a *subsidiary* decision” made first time round, given that it can and must reconsider the *substantive* merits of the first decision.

[140] I do not need to determine this issue, because it is possible to distinguish *Wild Brain*. In the current case, the Vekselberg Parties in June expressly raised the question of any application for a freezing injunction being heard *inter partes*. Emmerson had a duty to bring that point to Wallbank J’s attention in November and December. It is not an answer to say that it was a matter for Wallbank J whether to hear Emmerson’s applications *ex parte* or not. Of course, ultimately it was for Wallbank J to decide how he heard the applications, but he should have been told that the Vekselberg Parties wished to argue that any application for a freezing order should be heard *inter partes*. If Emmerson had brought that point to the judge’s attention, he would have considered it. There is no suggestion in *Wild Brain* that the respondent in that case had made any such request in the lead up to the application for (in that case) an order for delivery up of evidence. The

argument was that Nugee J should have taken the point himself. It was thus not a case of non-disclosure, whereas in the current case the Vekselberg Parties can and do complain of non-disclosure.

- [141] The current case is a quintessential example of a case which should have been heard *inter partes*. The litigation had been going on since 2013. There was delay between May and November 2018, when the Vekselberg Parties were well aware that the Abyzov Parties were contemplating applying for freezing orders. Making an application *ex parte* is always an exception to the general rule that all matters must be heard *inter partes*. There was no good reason to go *ex parte*. The failure to draw Wallbank J's attention to the Vekselberg Parties' submission that any application for a freezing order should be heard *inter partes* was a serious non-disclosure in my judgment.

The fourteen points of non-disclosure

- [142] I turn then to the fourteen points of non-disclosure raised by the Vekselberg Parties. The first six relate to the 19th November hearing; the latter eight to the 31st December hearing.

(1) RHL's compliance with the asset disclosure order

- [143] The first concerns the approach taken by Emmerson at the hearing on 19th November 2018 to RHL's and Mr. Vekselberg's compliance with the asset disclosure order. The complaint has two heads. Firstly, the application was made on the last day for compliance by Mr. Vekselberg with the asset disclosure order. Word that Mr. Vekselberg had complied with the order came through actually in the course of the hearing before Wallbank J. Emmerson should have asked for an adjournment so that (as part of their duty of fair disclosure) they could tell the judge what Mr. Vekselberg had disclosed. Secondly, Emmerson put at the forefront of its submissions (see in the 43-page transcript page 2, line 18ff) that RHL were in contumelious breach of the asset disclosure order. They should have

drawn the Court's attention to the argument that RHL could rely on Mr. Vekselberg's compliance with the order to satisfy its own obligations.

[144] In my judgment both these submissions are well-founded. Firstly, there was no particular urgency in having the matter heard on 19th November. The documentation which Mr. Vekselberg produced was likely to be relevant (as indeed proved to be the case). The whole purpose of the asset disclosure order was to obtain evidence supporting or gainsaying the making of a freezing order. The only way a fair presentation of all the relevant material could be made by Emmerson to the judge was if Emmerson's advisors read the Vekselberg disclosure before proceeding with their application.

[145] Secondly, the question of the true construction of the asset disclosure order was not brought to the judge's attention. I accept that on issues of construction two lawyers can reach diametrically opposed views. However, the construction which I have preferred is one which in my judgment it should have been obvious to Emmerson's advisors was at least arguable. The alternative construction of the asset disclosure order should have been brought to the judge's attention. (At the hearing on 31st December 2018, Mr. Marshall did draw RHL's argument on this to the judge's attention: see transcript page 27, line 6ff.)

[146] Both of these matters are in my judgment serious breaches of Emmerson's duties.

(2) and (7) Article 271(1) of the Swiss Criminal Code

[147] The second and seventh points raised are Emmerson's failure to bring the judge's attention to the relevance of Article 271(1) of the Swiss Criminal Code. This provides:

“Any person who carried out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, any persons who carries out such activities for a foreign party or organization, any person who facilitates such activities is liable to a custodial sentence not

exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.”

[148] This Court has the power to make orders against foreigners such as Mr. Vekselberg who lives in Switzerland, even if the effect is to render the foreigner liable to criminal sanctions in the foreign state in which he lives. The English Court of Appeal in **Bank Mellat v HM Treasury**¹² held at [63(iii) and (iv)] that:

“An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e. foreign) criminal law, not least with considerations of comity in mind... This Court is not, however, in any sense precluded from doing so. When exercising its discretion, this Court will take account of the real — in the sense of the actual — risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.”

[149] Maître Ducrest, the Vekselberg Parties’ expert on Swiss law, says that the effect of this provision is to limit the power of foreign courts to order the disclosure of information held in Switzerland. Anyone complying with such a foreign court order would render themselves criminally liable. Such requests by foreign courts “must be made in compliance with the rules for international legal assistance in civil matters.” Maître Zollinger, Emmerson’s expert, draws a distinction between the disclosure of a third party’s information and disclosure of the party’s own documentation. He opines that disclosure of the latter is not a breach of Article 271(1), although the former would be. Both experts agree that, even if there was a potential breach, it would be open to the party against whom the foreign order was made to apply to the relevant Swiss authority, the Federal Office for Justice, for a waiver. The experts disagreed about how easy it would be to obtain such a waiver.

¹² [2019] EWCA Civ 449

[150] I am not going to analyse the differences between the experts. There is a short answer to the Vekselberg Parties' complaint: there was simply nothing to put Emmerson on notice that there might be an issue with Article 271(1). I fully accept that a party seeking an *ex parte* order has a duty to make inquiries before making the application: see sub-paras (3) and (4) in the extract cited above from *Brink's Mat*. However, there has to be something to trigger the need for an inquiry. This point on Article 271(1) is about as *recherché* as it is possible to be. Absolutely no blame in my judgment attaches to Emmerson in not being on notice of the possible relevance of Swiss criminal law to the freezing orders they were seeking. Emmerson are not in breach of their duty to make inquiries.

[151] Even if Emmerson were on inquiry, the experts agree that Mr. Vekselberg could have applied to the Swiss authorities to permit him to comply with the order. I agree with Emmerson's submission that it would be incumbent on Mr. Vekselberg to apply to the Federal Office for Justice for a waiver before he can say he is at any risk of criminal liability. Lastly, I find as a fact that Mr. Vekselberg faces no real risk of being prosecuted. He has not been prosecuted to date, despite his compliance with the asset disclosure order being an arguable breach of Article 271(1).

[152] Accordingly, under this head I find no breach of Emmerson's duties.

(3), (8) and (12) False claims about Mr. Vekselberg's ownership of the group

[153] The Vekselberg Parties' third, eighth and twelfth complaints are that Emmerson misrepresented the ownership of the Russian and non-Russian groups and wrongly used this as evidence of Mr. Vekselberg misleading the Court. This is largely a repetition of the issues which I discuss above under "(f) Mr. Vekselberg's ownership of RHL and Renova Rus". It was reasonable for Emmerson to raise this matter. In my judgment Mr. Vekselberg has brought this on himself by his carelessness in his drafting of his witness statement for trial. I find no breach of Emmerson's duties.

(4) The 19th November presentation of the Liwet transfers

[154] Fourthly, the Vekselberg Parties complain about the presentation made in respect of the Liwet share transfers. They note that in the certificate of urgency filed to obtain the 19th November appointment Emmerson said that the “value of the Liwet transfer was approximately US\$1.4 billion.” In fact, as I have set out above, the share swap was US\$295.2 million and the transfer to the Next Generation Trust was US\$144.5 million.

[155] Emmerson point out that the US\$1.4 billion valuation was not included in Mr. Titarenko’s fifteenth affidavit in support of the freezing orders, nor in their skeleton for that hearing, nor in their oral submissions to Wallbank J. It is unclear if Wallbank J would have had the US\$1.4 billion valuation in mind when deciding to grant the freezing order against RHL, but it is doubtful whether the precise figure would have affected his decision. Whether the value of the Liwet shares transferred was US\$1.4 billion or the lower figure of US\$439.7 million, it was still a very large sum. I do not find that there was a misrepresentation by Emmerson at the hearing, because the certificate of urgency would not normally be referred to. However, even if there was a misrepresentation, it would not have been material to the judge’s reasoning when granting the freezing order. At this hearing, the Vekselberg Parties’ evidence explaining the share swap and the long-term incentive programme was not available to the Court. (It was part of Mr. Vekselberg’s disclosure given during the course of the hearing, but not available to counsel or the Court at the hearing.) Accordingly, there was no breach of Emmerson’s duties under this head.

(5) and (10) The non-standard RHL and Vekselberg freezing orders

[156] The Vekselberg Parties’ fifth and tenth complaints are that the judge was invited to make the RHL and Vekselberg freezing orders without Emmerson drawing to his attention the fact that it was in a non-standard form. In particular, they say, the form of the order differs from the standard English Commercial Court precedent. Emmerson’s response is that the English form has not been adopted in the BVI.

In my judgment, Emmerson are right about that. It may, perhaps, be desirable that this Court adopts the English precedent, so that the practice of drawing a judge's attention to departures from the standard precedent can be introduced. However, this should only be done after consultation with the profession. At present there is no such practice, so Emmerson cannot in my judgment be blamed for not doing so.

[157] It is true that there are various drafting infelicities in the RHL order, none particularly major, but these could be, and on 12th December 2018 were, fixed. Although there is a technical breach of Emmerson's duties in not drawing these errors to the Court's attention, they are in my judgment of a minor nature.

[158] The drafting errors in the Vekselberg freezing order are more serious. The absence of a provision for legal expenses should have been drawn to the judge's attention. There was no good reason for omitting it. This is a middling breach of Emmerson's duties.

[159] Mr. Vekselberg complains that the definition of "specified liabilities" was not drawn to the judge's attention. He is right on that, but the force of the point goes, because at the return date of 6th February 2019, Green J was against him: see transcript pages 131 to 132. The failure to draw the point to Wallbank J's notice is immaterial.

(6) and (13) Non-disclosure of the assignment to Mr. Titarenko

[160] The Vekselberg Parties' sixth and thirteenth complaints say that the judge's attention was not drawn to the fact that a part of Emmerson's claim, valued at US\$53 million, had been assigned to Mr. Titarenko. Emmerson complain that in relation to RHL this is a new matter raised in the skeleton for this hearing for the first time. It was not raised in RHL's application, nor in RHL's evidence. RHL's answer is that it was a matter raised on Mr. Vekselberg's application for discharge and by B+T, so Emmerson were aware of the point.

[161] In my judgment, Emmerson are right. RHL could have amended, but chose not to amend, its application. By not doing so, they cannot pursue the point.

[162] In any event, any breach of duty by Emmerson was venial. At most disclosure of the assignment would have meant that the figure frozen would have been reduced from US\$893,470,360 to US\$840 million. These figures are in effect notional, since no one is proposing to pay such sums into Court. This can be seen from the fact (a) that Emmerson do not bother to ask for interest to be added to the US\$893 million figure and (b) that the Vekselberg Parties are not troubled to ask for the figure frozen to be reduced to the US\$840 figure. (Emmerson also make an argument that Mr. Titarenko's claim is joint with Emmerson's, so there was no error, but this point was not developed before me.) I find there was no breach of duty in relation to the Vekselberg freezing order.

(9) The 31st December presentation of the Liwet transfers

[163] The Vekselberg Parties' ninth complaint is that Emmerson did not at the 31st December hearing properly and fairly present the Vekselberg case. They raise specific issues in four bullet points.

[164] The first two bullet points concern the evidence of Mr. Michaelides. Emmerson's 26-page skeleton for that hearing — in the middle of a long para 68 on page 23 — invited the Court to read Mr Michaelides' first affidavit of 6th December 2018. However, it made no attempt to summarise the points made in the affidavit or explain the Vekselberg Parties' case. Now Mr. Michaelides' affidavit is a substantial document comprising 43 pages of dense material. It is not in my judgment reasonable to expect a judge to take on board all the material in such a document on an application listed as urgent without some assistance from the applicant.

[165] In **Petroceltic Resources Ltd v Archer**¹³ Cockerill J held that:

¹³ [2018] EWHC 671 (Comm) at paras [39] to [41]

“the duty to make proper disclosure goes beyond merely including relevant documents in the court bundle. It means specifically identifying all relevant documents for a judge and *taking the judge to particular passages which are material* and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read.” (My emphasis)

This passage summarized the Court of Appeal’s fuller discussion of an *ex parte* applicant’s duties in **R (Mohammad Khan) v Secretary of State for the Home Office**.¹⁴

[166] In my judgment, Emmerson overall fell somewhat short of its duty to draw the Court’s attention to the substance of Mr. Michaelides’ evidence. The skeleton did not tell the Court that Mr. Michaelides dealt with the Liwet transfers at paras 34 to 46 of his affidavit. Nor did it attempt to summarize the points he was making. At the telephone hearing on 31st December, Mr. Marshall QC made no attempt to check that the judge had read Mr. Michaelides’ affidavit. He summarized Mr. Michaelides’ evidence in four points, which he discussed at the transcript page 27, line 3 to page 30, line 15. The summary is acceptable as a short summary, but obviously cannot compare to the actual words which Mr. Michaelides used.

[167] In my judgment there was a breach of the duty of full disclosure, but only a modest breach, which would not of itself (assuming it stood on its own) justify setting aside the *ex parte* order.

[168] The next two bullet points make a complaint that Emmerson did not correct the misleading impression that the value of the Liwet transfers was US\$1.4 billion. I do not accept this. Between transcript page 14, line 20 to page 21, line 15, Mr. Marshall QC takes the judge through the “Liwet New Ownership” document, which the judge clearly has in front of him in Paris. Although the figures are not read out, the judge must have been able to see the amounts of US\$295.2 million for the share swap and US\$242.6 million for the remuneration package. In my judgment

¹⁴ [2016] EWCA Civ 416 at paras [39] to [41]

he cannot have thought the Liwet transfer was worth US\$1.4 billion after seeing the Liwet New Ownership document.

(11) The failure to mention the need for a confidentiality club

[169] Eleventhly, the Vekselberg Parties complain that Emmerson should have drawn the judge's attention to the need for a confidentiality club. It has to be remembered that Wallbank J had been dealing with these applications quite intensively since May 2018. The issue of the confidentiality club for RHL disclosures had come up at the hearing of 12th December 2018. This was the same time as the application for a freezing order against Mr. Vekselberg was issued. I do not believe that the judge would by 31st December, two and a half weeks later, have forgotten that he had ordered a confidentiality club in respect of the RHL disclosure.

[170] A confidentiality club is something only rarely ordered. If the judge had thought there were pressing reasons for imposing one, he would no doubt have ordered that there be one. In the event, Green J on 9th February 2019, in order to achieve consistency pending Emmerson's appeal against the confidentiality club order, imposed a confidentiality club on Mr. Vekselberg's disclosure pursuant to the freezing order, but he was aware that Emmerson were appealing the order for a confidentiality club. There has been no prejudice to Mr. Vekselberg.

(14) The fortifying of the cross-undertaking in the Vekselberg freezing order

[171] Fourteenthly, Mr. Vekselberg complains that Emmerson were not required to provide security to fortify the cross-undertaking in damages which they gave as part of the freezing order against him. There is a short answer to this. Mr. Vekselberg, on his own case, is not the owner of RHL. Any substantial losses will be suffered by RHL. There is therefore no need for fortification of the cross-undertaking given to Mr. Vekselberg. In my judgment there is no relevant breach of duty by Emmerson.

Conclusion on discharging the freezing orders for non-disclosure

- [172] Accordingly, I have found that there were two serious breaches of Emmerson's duties in relation to applying for the freezing order *ex parte* and in relation to allegation (1); one middling breach in relation to allegation (10); and one minor breach in relation to allegation (9).
- [173] Committing serious breaches of the duties of a party on an *ex parte* application will usually result in the order granted being set aside. If I had not already decided to discharge the freezing orders on substantive grounds, that is what I would have done. I would then have had to consider whether to reimpose the orders. The exercise would, however, be wholly hypothetical, since I have held that the freezing orders should be discharged on substantive grounds. I therefore cannot give even a tentative view on what approach I would take to reimposing or refusing to reimpose the freezing orders.
- [174] I have not dealt separately with issues of non-disclosure in respect of the freezing injunctions granted against B&T in view of my determination that they were not properly joined in the action. It will be apparent from the discussion above and my judgment in *ABC* that they too would have had a good case for seeking the discharge of the freezing orders against them on grounds of non-disclosure.

(d) The “unless” order sought against Mr. Vekselberg and RHL

- [175] Emmerson seek orders compelling RHL and Mr. Vekselberg to provide further documentation in accordance with the terms of the asset disclosure order and the freezing orders granted against each of them. The orders sought provide that, unless RHL and Mr. Vekselberg comply, their defences be struck out. (In relation to RHL, this seems an odd sanction: RHL have not served a defence and Emmerson have obtained a judgment under CPR rule 18.12.)
- [176] In the section above on “The true construction of the asset disclosure order” I held that RHL were entitled to rely on Mr. Vekselberg's compliance with the asset

disclosure order. By the same token, Emmerson are entitled to rely on any failures by Mr. Vekselberg in complying with the order to show a breach on RHL's behalf. I shall therefore only consider whether Mr. Vekselberg has complied. If he has not, it automatically means RHL have not either.

[177] The Court's power to make an asset disclosure order is given by CPR rule 17.1(1)(e) which allows the Court to make:

“an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order.”

[178] The primary aim of the power is the disclosure of the whereabouts of assets. Normally a response is fairly simple. The respondent says he has a chalet in Chamonix, a yacht in St Tropez and a large sum of a money in a Swiss bank. However, the Courts have used the power also to direct the production of documents, especially bank statements, or in the *Pugachev* litigation, trust deeds: see **JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev**.¹⁵ What is less clear is the extent to which the duty to provide “information” can include a duty to search for documents, which is normally the province of disclosure. In *Pugachev* the Court of Appeal at para [55] seem to have drawn some analogy with the Court's “wide powers to require third parties to provide evidence or produce documents by means of a witness summons.” It is well-established that a *subpoena duces tecum* must identify the document to be produced. There is no power to order a witness to search for documents based on criteria of relevance; that is a matter for a third party disclosure order (which is not available in the BVI). It may be that an asset disclosure order should be similarly limited.

[179] In the current case, Wallbank J, when he made the asset disclosure order seems to have assumed that the category of document which he ordered should be

¹⁵ [2015] EWCA Civ 139, [2016] 1 WLR 160

produced would be quite limited and easy to produce. In his oral judgment of 5th November 2018 he said, starting at transcript page 29 line 5:

“The type of disclosure exercise here is for a specific type and set of documents to be produced... [T]he person who gave the evidence on behalf of the Renova Parties... displayed an intimate and detailed knowledge of the transfers in question. On the basis of that, it seemed in order for me to assume that the relevant people within Renova do have in front of them the necessary material... It therefore surprises me that such a great effort is involved in localizing the documents. It must surely be the case that somebody in the Renova organization has records of what was sent to the shareholders concerned, whether it is by way of agreements, standard terms and conditions or even e-mails telling them on what terms and conditions they are going to get shares.”

[180] In fact, the exercise involved an electronic data search which identified 32,700 potentially responsive documents. Mr Cheremikin in his second affidavit gives details at para 70 of the searches and key words used by his in-house IT team to identify these documents. The documents were then reviewed by in-house lawyers for privilege and relevance. Eventually some 714 documents were produced, although nearly half of these are duplicates.

[181] Emmerson criticize the fact that these searches were all carried out without in-put from external counsel. There is a risk, they submit, that “smoking guns” like the “clean-up” emails from 2011 would never come to light. In my judgment there is no evidence to support this allegation: it is mere suspicion. If Emmerson had wanted external lawyers to supervise the disclosure process, they should (assuming the Court has the power to make such an order) have sought directions to that effect earlier in the proceedings.

[182] Emmerson’s main point is that documents evidencing the reasons for the Liwet share transfers must exist. This goes back to the issues I discussed in the section “(d) The Liwet share transfers” above. There are effectively four narratives:

(a) Emmerson say that in a well-managed group of company, as Renova purports to be, there will be a documentary trail showing the long-term incentive programme and how it transmogrified into the Liwet transfers.

(b) Emmerson's primary case is, however, that the Cypriot trusts are just shams to conceal Mr. Vekselberg's true ownership — there was no long term incentive plan.

(c) The Vekselberg Parties' case by contrast is that the entitlements to share in the incentive plan were so top-secret that neither the entitlements nor the arrangements for the movement of shares to ABC were put in writing.

(d) Lastly there is a middle path (which is neither side's case) that the Renova executives did have some (possibly not very well defined) expectation of receiving serious money for their services and in the shock and chaos following the imposition of sanctions, the share transfer to ABC was cobbled together to keep the executives on side.

[183] It is only on narrative (a) that there will have been deliberate suppression of documents by the Vekselberg Parties. On the other narratives, at least on their face, the Vekselberg Parties have complied with their obligations. The absence of the documentation now sought by Emmerson supports Emmerson's primary case (b).

[184] The Court's power to make an "unless" order in these circumstances is limited. In **Lexi Holdings plc v Luqman**¹⁶ the claimant had obtained a freezing order against the defendant, but the defendant said he had no assets. Briggs J at first instance considered that in due course the defendant could be cross-examined on his affidavit of means. The Court of Appeal at para [28] disagreed:

"If the court takes the view that the respondent's written evidence about his assets and property is incredible, there is no need for cross-examination to establish that it is incredible."

¹⁶ [2007] EWCA Civ 1501

It proceeded to make an “unless” order against Mr. Lugman.

- [185] I am not asked to make an order for the cross-examination of Mr. Vekselberg (or for that matter a representative of RHL). Even if I were, I would not consider it appropriate in relation to an order for the disclosure of documents. The usual practice in relation to the disclosure of documents is to order specific disclosure under CPR rule 28.5, in other words an order that the party who is to produce the documents conduct a further search in a manner defined in the order. The party must then swear an affidavit stating what he has done. Subject to prosecution for perjury, the affidavit is treated as conclusive on the party’s having complied with the order for specific disclosure. The deponent explaining the compliance with the order for specific disclosure can of course be cross-examined on his affidavit at trial. There is thus a sanction on failure to obey the order.
- [186] There are other examples of the law treating some matters as conclusive. For example, a question may be put at trial to a witness which goes only to the witness’s credit. Subject to certain exceptions such as previous convictions, the questioner is bound by the witness’s answer. Evidence may not be adduced to contradict the witness’s answer. The purpose of these rules is to prevent satellite litigation — a very, very, real danger in the current proceedings.
- [187] Moreover an “unless” order in respect of disclosure of documents will usually be inappropriate, in cases where there has been some compliance with an obligation of disclosure. This is because an “unless” order is a form of sudden-death. It is a common occurrence that disclosable documents come to light at a late stage in litigation, not infrequently at trial. To hold that a party’s failure timeously to produce a single document, possibly of small importance to the ultimate outcome of the case, should result in the automatic striking out of a party’s case will usually be disproportionate. Hence the Court usually only makes “unless” orders so as to require searches to be made.

- [188] I do not find it incredible that Mr. Vekselberg and RHL have no further documents to disclose. In these circumstances, it is not in my judgment open to me to make an “unless” order that they produce documents which may not exist.
- [189] This also means that I cannot find Mr. Vekselberg or RHL in contempt of court in not complying with the disclosure obligations in the freezing orders. Even if I could, however, as a matter of discretion I would still hear their applications to discharge the freezing orders.
- [190] In any event, I would not as a matter of discretion make an “unless” order in respect of the asset disclosure order. The purpose of the order has been fulfilled. Emmerson have made an application for freezing orders (which was the purpose of obtaining the asset disclosure order). They obtained the orders from Wallbank J and they have now been discharged by me. The likelihood is negligible that, in the event that an “unless” order were made, Emmerson would have any better prospect of success in reapplying for freezing orders. The asset disclosure order is spent. In accordance with the overriding objective the Court does not waste its time and the litigants’ money on enforcing orders which have served their purpose. *Cessante ratione legis cessat ipsa lex* (when the reason for a rule goes, the rule goes too).
- [191] For much the same reasons, I refuse to order that Mr. Vekselberg remedy any defects which there might be in his disclosure pursuant to the freezing order against him. I have discharged the freezing order, so the disclosure order within it lapses too.
- [192] Whether it was ever appropriate to make an order such as Emmerson seek “that Mr. Vekselberg ensures that RHL complies with its disclosure obligations” is doubtful. There is a real question whether he does in fact control RHL. However, since the freezing order against RHL is also discharged, this point is moot.

Conclusion

[193] Accordingly:

- (a) I will grant RHL's application made 4th December 2018 to discharge the freezing order made originally on 19th November 2018;
- (b) I will grant Mr. Vekselberg's application made 8th February 2019 to discharge the freezing order made originally on 31st December 2018;
- (c) I will grant B&T's application of the same day (as amended on 22nd February 2019) to discharge the freezing order originally made against them on 31st December 2018, to declare that they have not been served and to declare that the Court has no jurisdiction over them; and
- (d) I will refuse Emmerson's application made 3rd December 2018 (as amended on 6th February 2019) for various reliefs against Mr. Vekselberg and RHL.

[194] I shall hear the parties on costs, on the form of the order and what consequential orders I should make. I put down a marker, however, in case this matter goes further, that I would order Emmerson to pay the costs of the fourth day of the hearing in any event, since it was their deliberate actions which caused the case to overrun.

Adrian Jack
Commercial Court Judge (Ag.)

By the Court

Registrar