Neutral Citation Number: [2021] EWHC 1910 (Ch)

Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 July 2021

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

JSC COMMERCIAL BANK PRIVATBANK

Claimant

- and –

(1) IGOR VALERYEVICH KOLOMOISKY
(2) GENNADIY BORISOVICH BOGOLYUBOV
(3) TEAMTREND LIMITED
(4) TRADE POINT AGRO LIMITED
(5) COLLYER LIMITED
(6) ROSSYN INVESTING CORP
(7) MILBERT VENTURES INC
(8) ZAO UKRTRANSITSERVICE LTD

Defendants

Andrew Hunter QC and **Celia Rooney** (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Charles Hollander QC and **Ben Woolgar** (instructed by **Fieldfisher LLP**) for the **First Defendant**
Matthew Parker QC and Richard Eschwege (instructed by **Enyo Law LLP**) for the **Second Defendant**

Hearing dated 25 June 2021

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 10am on 8 July 2021

Mr Justice Trower:

Introduction: the freezing and confidentiality club orders

1. On 19 December 2017, the claimant sought and obtained from Nugee J a worldwide freezing order (the "WFO") against the defendants. The WFO contained provision for the disclosure by the defendants of all of their assets worldwide exceeding £25,000 in value, giving the value, location and details of all such assets.

2. On 8 January 2018, the first and second defendants each applied for an order to vary paragraph 8 of the WFO so as to stay their obligations to disclose their assets located in Ukraine and/or Russia. The evidence the first defendant adduced in support of this application made clear that the relief was sought in the first instance pending determination of his challenge to the WFO.

3. In summary it was said that these proceedings formed part of a campaign of persecution orchestrated by the then president of Ukraine, Petro Poroshenko. It was said that there was a very significant risk that asset disclosure given to the claimant would find its way to the National Bank of Ukraine and Mr Poroshenko, and thereafter be used by him to take steps to expropriate, seize or otherwise damage the first defendant's assets and business. The second defendant's evidence explained that his assets too were vulnerable for the same reasons and because of the perceived alignment and proximity of his business interests to those of the first defendant.

4. The first defendant also contended that he is a political enemy of Vladimir Putin and the Russian state as a result of his activities defending the Crimea in 2014 whilst acting as the governor of Dnepropetrovsk. He said that he was further concerned that any asset disclosure would make its way to the Russian state and thereafter be used to seize his assets there.

5. The WFO as it applied to the first and second defendants was varied by Snowden J on 9 January 2018. He increased the minimum value of assets to be disclosed to £1 million and inserted special provision for the means by which each of them was to disclose assets (a) located in Ukraine and/or Russia and (b) in the form of shares in companies or entities which own or whose subsidiaries own assets in Ukraine and/or Russia (together the "U/R Assets"). This special provision required the first and second defendants to produce what was called the U/R List to be prepared and verified, but then held by their respective solicitors to the order of the court.

6. The Snowden order was itself varied by order of Roth J on 15 January 2018 in a manner that is not relevant for present purposes. On the same day the claimant cross-applied for a confidentiality club order pursuant to which circulation of the first and second defendants' U/R Assets disclosure would be limited to partners and employees at the claimant's English solicitors, Hogan Lovells, and would not be shared with their client. In the correspondence which preceded this application, Hogan Lovells made clear that this proposal was to deal with the position on an interim basis and that it was Hogan Lovells' intention that the U/R Assets disclosure would not be shared with their clients "at this time".

7. Four days later on 19 January 2018, Nugee J made a further order (the “confidentiality club order”). Paragraph 1 of this order provided that:

> “Until the sealing of any order following the determination of the First and Second Defendants’ applications to set aside the WFO, any document or information disclosed by the First Defendant or Second Defendant pursuant to the WFO and/or this order which relates to an asset (i) located in Ukraine and/or Russia or (ii) shares in companies or entities which own, or whose subsidiaries own, assets in Ukraine and/or Russia shall not be disclosed to any person other than:
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> a. The qualified solicitors of England and Wales at the London office of Hogan Lovells International LLP (“Hogan Lovells”) directly engaged in the conduct of these proceedings on behalf of the claimant and
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> b. counsel retained by the claimant in connection with these proceedings (the “confidentiality club”).”

8. The confidentiality club order also made provision for the names of individuals entitled to receive the information to be provided in advance to the first and second defendants’ solicitors and gave further directions for the way in which the confidentiality club was to be operated and enforced. It was expressly recorded on the face of the order that the claimant agreed through its counsel that CPR rule 31.22(1) applies to the information disclosed by the defendants pursuant to the WFO as varied.

9. It follows that the effect of the confidentiality club order was to prevent the claimant (including its in-house lawyers and other instructing officers and employees) from seeing any documents or information relating to the U/R Assets disclosed as part of the first and second defendants’ compliance with the WFO. The definition of U/R Assets was quite wide in its impact because it extended to any entity, and the shares in any entity, which itself held any assets in Ukraine or Russia. This type of order is what has been called in the authorities an external eyes only order.

10. It appears from the judgment that Nugee J gave at the time he made the confidentiality club order that he intended that the regime would “last for a limited period, until the discharge application can be determined”. This reference to a discharge application was a reference to the first and second defendants’ applications to set aside the WFO referred to in the opening lines of paragraph 1 of the confidentiality club order. He also said in the course of his judgment, albeit in relation to the different question of disclosure of assets worth less than £1 million, that “Everything may change after the discharge application, because either the proceedings will come to a halt or the freezing order will be discharged or matters will proceed with a view to a trial, at which point matters can be revisited.”

11. On 4 December 2018, the first and second defendants’ applications to set aside the WFO succeeded before Fancourt J ([2018] EWHC 3308 (Ch)). He also set aside service and stayed the proceedings on jurisdiction grounds. Fancourt J’s decision was overturned by the Court of Appeal on 15 October 2019 (*PJSC Commercial Bank Privatbank v Kolomoisky and others* [2020] Ch 783, [2019] EWCA Civ 1708). Permission to appeal to the Supreme Court was refused on 6 April 2020. The

claimant contends that paragraph 1 of the confidentiality club order terminated by no later than the refusal by the Supreme Court of permission to appeal.

The claims in these proceedings

12. An outline of the case advanced by the claimant in support of which the WFO was granted is given in the judgment of the Court of Appeal ([2020] Ch 783 at paragraphs [15] to [22]). For the purposes of this application, I can summarise the position more shortly, drawing on that judgment and the current versions of the parties' case summary and list of common grounds and contested issues.

13. The first and second defendants were amongst the founders of the claimant, a bank incorporated in Ukraine in 1992. Prior to the nationalisation of the claimant in December 2016, they were the ultimate beneficial owners of more than 80% of its shares. The extent of their control over any material decisions made by the claimant is an issue in the proceedings.

14. The claimant alleges that the first and second defendants orchestrated the fraudulent misappropriation of over US$1.9 billion. The misappropriation is said to have been achieved through loans made by the claimant to 47 Ukrainian and 3 Cypriot borrowers between April 2013 and August 2014. These borrowers then entered into supply agreements with supplier companies including the third to eighth defendants (the "corporate defendants"). The supply agreements, said by the claimant to be shams, were for the supply of quantities of commodities and industrial equipment and provided for the pre-payment of the entire purchase price before the time for delivery of the commodities or equipment had arrived.

15. The claimant alleges that, in respect of pre-payments totalling US$1.9 billion, no goods or commodities were supplied, and the pre-payments were not repaid by the suppliers to the borrowers. It also claims that loans in that amount have not been repaid to it by the borrowers and claims US$1.9 billion as loss from the first and second defendants.

16. The claimant contends that the misappropriation was disguised by, amongst other things, the grant of sham security for the loans, including over both shares in companies owned by the first and second defendants and the borrowers' rights under the supply agreements. It is said that they were also disguised by the entering into of further sham supply agreements which purported to provide for payment after delivery. The claimant relies on the fact that the first and second defendants have never explained the commercial rationale for these supply agreements.

17. Three of the corporate defendants assert that they entered into the supply agreements as agent for undisclosed principals and say that they have no knowledge of their commercial purpose. The other three assert that the transactions were genuine and entered into at arm's length. They accept that they remain obliged to repay the counterparty borrowers the amounts of the prepayments. The corporate defendants, the undisclosed principals and all of the borrowers are said by the claimant to have been controlled by the first and second defendants. This is denied by the defendants,

save that the first defendant admits that he had an interest in 9 of the borrowers and the second defendant admits that he had an interest in 14 of them.

18. The first and second defendant deny that they caused the loans to be made by the claimant or that they caused the supply agreements to be entered into by the borrowers or the suppliers. It is also denied by the first and second defendants that they were aware of the loans or the supply agreements at the time they were made.

19. The first and second defendants also contend that the loans have been repaid by cash and asset transfers. A large number of other companies were involved in these transfers and the claimant says:

    i) that the cash repayments were themselves funded by further intermediary loans to companies it says were owned or controlled by the first and second defendants;

    ii) that while it received ownership and control of certain assets, the transfer of those assets to it did not result in a valid reduction of the relevant loans.

20. The claimant also alleges that new loans for amounts in excess of US$5 billion were made shortly before nationalisation in a process called the Transformation. Those amounts were then used to repay the original loans (together with a large number of other loans made by the claimant to other borrowers).

21. The Court of Appeal's conclusion on the arguability of the claimant's case was explained as follows ([2020] Ch 783 at paragraphs [21] and [22]):

> 21. The defendants, including Mr Kolomoisky and Mr Bogolyubov, accept, for the purposes of this appeal, that there is a good arguable case that the bank lost approximately US$515m through these transactions and that they were orchestrated by Mr Kolomoisky and Mr Bogolyubov, using the borrowers and suppliers in the manner generally alleged by the bank. Mr Kolomoisky and Mr Bogolyubov have not themselves to date proffered any explanation for the transactions in question or sought to explain their commercial rationale, if any.
>
> 22. The judge observed in his judgment at para 25 that there was no difficulty with the bank proving a good arguable case of a fraudulent scheme. The evidence was "strongly indicative of an elaborate fraud perpetrated by someone, allied to an attempt to conceal from any auditor or regulator the existence of bad debts on the bank's books, and money-laundering on a vast scale. The borrowers had no commercial track record or any substantial assets. The documentary evidence clearly demonstrated that the supply agreements were shams, and "were used as a deceptive basis on which to justify very large sums of money owing out of the bank". The artificial complexity of the recycling of funds was itself indicative of a fraudulent scheme. At para 104, the judge noted that Mr Kolomoisky and Mr Bogolyubov had admitted "a good arguable case of fraud on an epic scale".

22. It is now clear from the disclosure that has been given that there are several hundred separate entities incorporated in a number of different jurisdictions, which were involved in the events said by the claimant to form part of the scheme by which the misappropriations were achieved by the first and second defendants. They include the

47 Ukrainian and three Cypriot borrowers, the suppliers (and more particularly the 6 corporate defendants), the three undisclosed principals, the share pledge companies, the intermediary borrowers and a large number of companies involved in the asset transfers.

23. It is at the heart of the claimant's case that all or many of these entities were controlled by the first and second defendants. Their interest in and control of these entities is an important aspect of the way in which the claimant will seek to prove that the first and second defendants were tied into what is alleged to be the fraudulent scheme. For the most part this is denied by the first and second defendants. It follows that issues relating to the first and second defendants' ownership and control of these entities will have to be explored in the documentary evidence, the witness statements and the cross-examination at trial. It is said in the claimant's skeleton argument for this application that a very significant part of the examination of the first and second defendants at trial will be concerned with their ownership and control of these entities. I can see why that is likely to be the case.

The operation of the confidentiality club

24. Since its original creation, I have made consent orders expanding the confidentiality club to include a number of named trainee solicitors at Hogan Lovells, together with individuals from the claimant's cost lawyers. These expansions of the confidentiality club occurred after permission to appeal to the Supreme Court was refused. At the times the orders to that effect were made, the claimant reserved its rights to contend that the confidentiality club had already automatically ceased to have effect.

25. Apart from the addition of certain named English-based individuals, there has been no change to the structure of the confidentiality club since its creation in January 2018. It remains the case therefore that officers or employees of the claimant, including its in-house lawyers and those from whom Hogan Lovells take instructions, are excluded from the confidentiality club.

26. Since the original disclosures made pursuant to the WFO, there have been a number of further asset disclosures by the first and second defendant. These have included the disclosure of additional information in relation to U/R Assets, and as I shall explain shortly have also been made as part of the process of extended disclosure ordered by Mann J at the first CMC held in June 2020. It is the claimant's case that the operation of the confidentiality club, which has now been in place for more than 3 years, has severely hampered the ability of the claimant and its solicitors efficiently to conduct the proceedings.

The applications and the proposed CRO

27. There are three applications with which this judgment is concerned. The first two were issued by the first and second defendants in February 2021 and seek declarations to the effect that the operative provisions of the confidentiality club order continue in full force and effect, alternatively that they should be reinstated retroactively to 6

April 2020. The third application was issued by the claimant in April 2021 and seeks a declaration that the operative provisions of the confidentiality club order ceased to have effect on either 15 October 2019 or 6 April 2020, alternatively that they should be discharged.

28. There are therefore two essential questions. The first is concerned with the true construction of the confidentiality club order itself. Did its operative terms automatically cease no later than 6 April 2020 or has it continued in effect? The second is the more substantive question of whether, irrespective of the continuing effectiveness of the confidentiality club order, I should make provision in the same or varied form, for a confidentiality club to continue in respect of the first and second defendants' U/R Assets.

29. On 10 June 2021, the first defendant's solicitors Fieldfisher LLP made a proposal for a new confidentiality ring order ("CRO"), a proposal which has also been adopted by the second defendant. The CRO contemplated an inner and an outer tier. The members of the inner tier would be comprised of the claimant's external legal advisers and experts. The members of the outer tier would be comprised of the claimant's in-house counsel and other officers from whom it was necessary to take instructions.

30. The description of the categories of information falling within the inner tier and the outer tier was relatively involved. In summary the starting point would continue to be that information on the U/R List would fall within the inner tier subject to certain limited exceptions. The core distinction between inner ring and outer ring information is whether or not the first defendant's interest in the relevant U/R Asset is ascertainable from a public register (in which event it will not be confidential at all) or has otherwise been reported publicly, in which event it will be outer ring information. It is proposed that the first and second defendants will themselves determine whether the information is properly to be characterised as inner tier or outer tier information, but that designation can then be challenged by the claimant and if necessary, reviewed by the court.

31. It is also important to note that the first and second defendants have recently made clear that, although they had originally sought a continuation of the confidentiality club until trial, they now accept that it should be reviewed at the pre-trial review due to be held in March 2022. It is said that by that stage it will be more possible to assess the significance of the issues to which information relating to the U/R Assets may be of relevance at trial.

Confidentiality clubs: the law

32. Documents disclosed in the course of litigation may only be used by an opposing party for the purposes of that litigation, unless they are read or referred to at a public hearing or the court gives permission: CPR 31.22(1). As Floyd LJ explained in *Oneplus Technology (Shenzhen) Co, Ltd v Mitsubishi Electric Corp* [2021] FSR 13 ("*OnePlus*") at [1] (the most recent decision of the Court of Appeal in this area to which I was referred), in the vast majority of cases this rule gives adequate protection against misuse of confidential disclosure documents. There is therefore no need for

any further measures to be taken to preserve the confidentiality of the information they contain.

33. In the present case, the undertaking listed in schedule A paragraph (6) of the WFO (in the form of order continued by Roth J) also explicitly prohibited one particular form of misuse of information. It provided in terms that "the [claimant] will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings, either in England and Wales or in any other jurisdiction, other than this claim".

34. However, it is well established that CPR 31.22 and the types of undertaking to which I have just referred will not always be sufficient protection for a party. The paradigm of when that may be the case is a patent claim, where it can be very difficult if not impossible to police the misuse of trade secrets, more particularly where those to whom the process is disclosed during the course of the litigation are not within the jurisdiction of the court.

35. There are other contexts as well. Thus, in *The Libyan Investment Authority v Société Générale SA* [2015] EWHC 550 (QB), a confidentiality club was sought because of what was said to be an increased risk to life, limb and property. In that context Hamblen J explained the general legal position as follows:

> "20. The starting point is that each party should be allowed unrestricted access to inspect the other party's disclosure subject to the implied undertaking that the disclosure will not be used for collateral purpose- see CPR 31.22; *Church of Scientology of California the Department of Health* [1979] 1 WLR 723 per Brandon LJ at 743F.
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> 21. It is for the person seeking the imposition of a confidentiality club to justify any departure from the norm. In order to do so, the proponent of the confidentiality club must establish that there is a real risk, either deliberate or inadvertent of a party using his right of inspection for a collateral purpose - see the *Church of Scientology* case at 743G.
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> 22. Where it is demonstrated that there is such a risk, any restriction imposed should go no further than is necessary for the protection of the right in question. As the Court of Appeal stated in *Roussel UCLAF v ICI* [1990] RPC 45 at 54:
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> > "the object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with the adequate protection of the (right)."
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> 23. The provision of protection by the use of confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognised: see, for example, *Al Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [64] per Lord Dyson."

36. Thus, although the most usual context in which a confidentiality club is employed is anti-trust or intellectual property litigation in order to protect commercial confidences, the *LIA* case demonstrates that they are capable of being used in other situations as

well. They may also be appropriate in the more specific context of disclosures made pursuant to a freezing order (for a recent example see *Abu Dhabi Commercial Bank PJSC v B R Shetty* [2020] EWHC 3692 (Comm)), more especially at the early stage of proceedings where asset disclosure might otherwise give rise to a real risk of a defendant incriminating himself in the context of actual or threatened prosecutions abroad (*JSC BTA Bank v Ablyasov and Khrapunov* [2016] EWHC 289 (Comm) and the earlier decision of the Court in proceedings between the same parties *JSC BTA Bank v Ablyasov* [2010] 1 All ER (Comm) 1029).

37. However, it is clear from the authorities that real caution is needed in their use, because of the obvious potential for an interference with the principles of both open justice and natural justice. The way in which this was put in *Al Rawi* (see Lord Dyson at paragraph [64]) was that, where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile.

38. In my view, Hamblen J's reference to "at least during the interlocutory stage of litigation" is also important. As Lord Dyson made clear in the paragraph of his judgment in *Al Rawi* referred to by Hamblen J, the nature of intellectual property proceedings is that they raise special problems which require (and he emphasise the word 'require') exceptional solutions, but even in that context those exceptional solutions may only be appropriate in the initial stages of the litigation. Lord Dyson said that he was aware of no case in which the court had approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other.

39. The reason for this is illustrated by *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 1158 (Ch). Those proceedings involved a battle between the claimant and the Barclay brothers (amongst others), the aim of which was control of Coroin Limited, the ultimate owner of three well known London hotels, Claridge's, the Connaught and the Berkeley. David Richards J was concerned with an application for the continuation during the trial of a confidentiality regime originally imposed for the purposes of disclosure. The restricted documents related to the ability of the claimant to raise finance which was an important issue in the proceedings. This itself involved the disclosure of confidential information about his own personal affairs, which the claimant was concerned might have been used by the Barclay brothers in negotiations with his bankers to purchase the loans which he had taken from them. If continued, the regime would have restricted the disclosure of a substantial number of documents to the defendants' solicitors and counsel only and would have required part of the trial to be held in private.

40. David Richards J's judgment was given at a time at which it was clear that the regime would interfere with the conduct of the trial itself. To that extent, the confidentiality regime had a more direct impact on the overarching principles of open justice and natural justice discussed in *Al Rawi* than would occur at this stage of the present case. This distinction is reflected in the fact that the first and second defendants now accept that the confidentiality club order should be reviewed at the pre-trial review to be held in March, two or three months before the start of the trial.

41. Nonetheless, it seems to me that the specific points considered by David Richards J at paragraphs [31] to [33] are of general application, albeit tempered by a recognition

that the balance may be struck differently depending on the stage of the proceedings at which the imposition or continuation of a confidentiality club order is sought. The reason for this is that David Richards J treated the continuation of a confidentiality club as an interference with the overarching principle of open justice, partly because the relief sought in those proceedings was concerned with the question of whether certain parts of the trial should be heard in private but also because it might involve a situation in which lawyers for one party would have access to the evidence but would not be able to have fully informed discussions with or take comprehensive instructions from their own client.

42. Where, as in the present case, a blanket approach is taken to the exclusion of access by one of the parties to the relevant parts of key documents there are real dangers that this will be incompatible with article 6 of ECHR and with basic principles of natural justice at common law. As Henry Carr J explained in *TQ Delta LLC v Zyxel Communications UK Ltd* [2018] Bus LR 1544 at [24], such an exclusion will also cut across the obligations of lawyers to their clients, obliged as they are to share with them all relevant information of which they are aware. Although Floyd LJ in *One Plus* at [34] and [35] qualified this statement of principle by explaining that staged or progressive disclosure of confidential information is permissible and agreed that the position may be different with documents of peripheral relevance, he agreed that exclusion of access by one of the parties to the relevant parts of key documents should not be the result of an external eyes-only confidentiality club.

43. In *OnePlus* at [39] Floyd LJ also gave a helpful summary of the law as it applies in intellectual property litigation:

> "Drawing all this together, I would identify the following non-exhaustive list of points of importance from the authorities:
>
> (i) In managing the disclosure of highly confidential information in intellectual property litigation, the court must balance the interests of the receiving party in having the fullest possible access to relevant documents against the interests of the disclosing party, or third parties, in the preservation of their confidential commercial and technical information.
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> (ii) An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all.
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> (iii) There is no universal form of order suitable for use in every case, or even at every stage of the same case.
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> (iv) The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional.
>
> (v) If an external eyes-only tier is created for initial disclosure, the court should remember that the *onus* remains on the disclosing party throughout to justify that designation for the documents so designated.
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> (vi) Different types of information may require different degrees of protection, according to their value and potential for misuse. The protection to be afforded to

a secret process may be greater than the protection to be afforded to commercial licences where the potential for misuse is less obvious.

(vii) Difficulties of policing misuse are also relevant.

(viii) The extent to which a party may be expected to contribute to the case based on a document is relevant.

(ix) The role which the documents will play in the action is also a material consideration.

(x) The structure and organisation of the receiving party is a factor which feeds into the way the confidential information has to be handled.

44. It seems to me that many of the same factors will apply in any other context in which a confidentiality club is sought to be introduced or maintained. In particular, it is clear that a restriction on disclosure to external eyes only at any stage of the litigation is exceptional and the burden remains on the disclosing party throughout to justify the continuation of any such restrictions for each document or class of documents so designated. Restrictions are capable of being an infringement of basic principles of fairness, including a level playing field, and will therefore only be permitted where necessary in the interests of justice. Any departure from the principle must be supported by clear and cogent evidence which will be subject to careful scrutiny by the court.

Construction of the confidentiality club order

45. The claimant contended that the wording of the confidentiality club order (see paragraph 7 above) is clear as matter of language. The order referred to in the first line of paragraph 1 can only have been the order made on determination of the set aside application. It submitted that it follows that the restriction on disclosure of documents or information to persons other than members of the confidentiality club is qualified in time by reference to the moment at which the order made on the determination of the first and second defendant's application to set aside the WFO is sealed. It further submitted that the latest time at which that occurred was the dismissal by the Supreme Court of the first and second defendants' applications for permission to appeal, which occurred on 6 April 2020. That was the final determination of their applications to set aside the WFO.

46. In support of this construction the claimant relied on the fact that it is clear that the confidentiality club order was only intended to last for a limited period of time. That limited period was fixed by reference to the determination of the discharge or set aside applications and has long expired. There were a number of statements in the evidence, in the submissions made on behalf of the first and second defendants and by Nugee J in his judgment that the intention was that the confidentiality club regime should be revisited once the discharge applications had been determined.

47. The first and second defendants submitted that the claimant's construction made no logical sense. They said that the reference to the sealing of any order had to be

construed as a reference to a further order to be made once the application to set aside the WFO had been determined. The reason for this was that the asset disclosure did not become any less confidential as a consequence of the determination of the set-aside applications. In other words, it was said that the word "following" simply introduced a chronological condition, not an automatic causal one. Once the first and second defendants' applications to set aside the WFO had been finally determined, the confidentiality club would continue thereafter until such time as an order dealing specifically with the continuation of the confidentiality club was sealed.

48. The first and second defendants also pointed out that the claimant's construction meant that the same consequence would flow (i.e. the confidentiality club would fall away) irrespective of the outcome of the set aside applications. This would lead to peculiar and paradoxical consequences if the first and second defendants were to succeed, because the claimant's employees would have access to the U/R Assets disclosure at the very time at which the WFO which required the disclosure in the first place was set aside. Indeed, this would have been the case when the order made by Fancourt J was sealed. They also relied on the fact that the claimant proceeded as if the confidentiality club was still in existence for some time after their application for permission to appeal to the Supreme Court had been dismissed.

49. This is a short point of construction, the answer to which depends on setting the order in its proper context. In light of the fact that both parties also submitted that the court should reconsider whether or not the continuation of a confidentiality club is appropriate in any event, the answer is largely of historic interest. Nonetheless, I need to reach a conclusion if only because questions may arise in the future as to whether the confidentiality club continued to be operational in accordance with the terms of the order between 15 October 2019 or 6 April 2020 and the time of this decision.

50. I agree that the confidentiality club order was intended to be of limited duration. This is apparent both from the way in which the order itself was drafted and from the way in which the judge expressed himself in his judgment (as cited above). I do not think that this helps very much, however, because the real question is whether the intended limited duration meant that it would expire automatically on the occurrence of an identified event or whether its terms would then be reviewed. Both eventualities are equally consistent with what Nugee J said in his judgment.

51. I agree that the relevant information and documents became no less confidential as a consequence of the determination of the set aside applications. This does not of itself mean that the club should be maintained, because the appropriateness of a confidentiality club is not determined merely by the fact that the information is confidential or even by the extent or quality of the confidentiality. Such considerations are no more than a necessary pre-requisite to its imposition or continuation. Whether a confidentiality club continues to be appropriate (and if so its terms) will, as I have already explained, depend on a number of factors, including the stage at which the proceedings have reached and the significance of the information to the issues in dispute. It does, however, point to an intention to revisit the position once the set aside application has been determined.

52. It is also relevant that the confidentiality club order was concerned with the disclosure of documents and information relating to the U/R Assets pursuant to the WFO and/or the confidentiality club order themselves. The use of the phrase "pursuant to the

WFO and/or this order" makes clear that it was not concerned with the disclosure of documents or information relating to the U/R Assets pursuant to any other obligation, whether by way of extended disclosure or otherwise. In these circumstances, there is some logic in paragraph 1 of the confidentiality club order making prospective provision for what should happen once the question of whether or not to set aside the WFO, being the order pursuant to which the first and second defendants were required to make disclosure, had been determined.

53. What would be more surprising is if the answer to what should happen once the set aside application is determined should be preordained in circumstances in which there is no attempt to distinguish on the face of the order between the circumstance in which the set aside application was successful and the circumstance in which it failed. I can see no sensible reason why the success or failure of the set-aside application, whatever the grounds for the result, should predetermine the fate of the confidentiality club.

54. One possible answer to this consideration as a matter of language may flow from the fact that the confidentiality club order refers to the sealing of any order as being the moment of cessation rather than the actual determination of the set aside application itself. It might be thought that this form of words reflected an intention that the gap between the determination of the set aside application and the sealing of the order which gives effect to that determination would enable the future of the confidentiality club to be planned and then reflected in the final order once sealed. It would then follow that the confidentiality club would fall away if nothing was done.

55. I am not persuaded that this is the correct construction. In my view, there are two other linked aspects of the language which point towards the construction contended for by the first and second defendants. The first is that paragraph 4 of the confidentiality club order gives the claimant a specific liberty to apply to vary or discharge the terms of paragraph 1. It was therefore explicitly contemplated that the claimant might wish to apply for a review of the relief which it itself had considered to be an appropriate (but only interim) solution to the problem of confidentiality. The most obvious circumstance in which that liberty to apply might be exercised would be once the set aside applications had been determined.

56. The second is the use of the word "any" when qualifying the word "order". It seems to me that this contemplates an order other than the order made on the determination of the set aside applications. If the contrary had been intended, it would have been a much more natural use of language to describe the order recording the determination of the set aside application with the definite article rather than the word "any", because while it is inevitable that there would have been an order sealed following the determination of the set aside application, the same cannot be said about an order made on any application to vary or discharge under paragraph 4. The word "any" makes more sense in that context for the obvious reason that an order would only be sealed on such an application if an application was made in the first place.

57. In my judgment it follows that both language and commercial sense point towards the construction favoured by the first and second defendants. Paragraph 1 provided that the restrictions on disclosure outside the confidentiality club continued to subsist until the moment at which an order dealing with its continued operation was sealed following the determination of the set aside applications. It was not inevitable that

any such order would be made, but it was always open to the claimant to ensure that one was by exercising the express liberty to apply granted by paragraph 4.

The application to set aside the confidentiality club order

58. In light of my conclusion on the construction of the confidentiality club order the next question is whether it should be set aside. As I have already explained, the confidentiality club applies to documents and information relating to U/R Assets disclosed pursuant to the WFO or the confidentiality club order. It does not (anyway explicitly) apply to documents which were only disclosed pursuant to the first and second defendants' extended disclosure obligations and which were not disclosed as part of the original disclosure under the WFO.

59. As to that, the first and second defendants' first disclosure certificates were served on 9 April 2021. They served supplemental disclosure certificates on 28 May 2021 and 4 June 2021 respectively. Both of their first disclosure certificates and the first defendant's supplemental disclosure certificate contained schedules and annexes describing information that was said to be subject to the confidentiality club order. Over 1,000 out of the 4,000 odd documents that have been disclosed by the first defendant as part of his disclosure are said to be subject to the confidentiality club restrictions. The proportion is even higher so far as the second defendants' documents are concerned – over 50% of the 1,000 documents he has so far disclosed are said to be restricted by the confidentiality club order.

60. This issue arises, because the extent and nature of the first and second defendants' holdings of U/R Assets is not just relevant to the policing of the WFO, they are also relevant to substantive issues in the proceedings in respect of which extended disclosure has been ordered. Furthermore, it seems that there are many documents relating to the U/R Assets which have been disclosed pursuant to the first and second defendants' general disclosure obligations, but which were not disclosed as part of the process of complying with the WFO or the confidentiality club order. The U/R Lists and the U/R Assets disclosure required by the WFO were both concerned with identified information relating to the assets rather than all of the documents that were disclosable in light of the issues in the proceedings.

61. The first and second defendants' applications do not seek a specific extension of the confidentiality club to that category of documents, and the reasons they have not done so were not explored in argument. For present purposes I shall assume that one of the reasons for this may be that information relating to any U/R Asset that has been disclosed pursuant to the WFO is thought to be caught by paragraph 1 of the confidentiality club order and that, although the body of U/R Assets documents now disclosed pursuant to the first and second defendants' extended disclosure obligations is more extensive, to a greater or lesser extent they all still relate to and contain that information.

62. For these reasons I approach this application on the basis that the substance of the first and second defendants' application to extend the confidentiality club extends to all of the documents which relate to the U/R Assets. Likewise, I shall treat the claimant's application to set aside the confidentiality club order as being applicable both to the

original WFO disclosure and to the extended disclosure on the substantive issues in the proceedings.

63. Initially, the first and second defendants sought the CRO until trial, which is listed to commence at the beginning of June 2022. In his oral submissions, Mr Hollander QC said that their application had now been modified so as to extend only to the pre-trial review, which is likely to be held in March 2022. He submitted that the position could be reconsidered at that stage, when a more informed approach could be taken to the balance of prejudice to the claimant if disclosure were to continue to be restricted as against prejudice to the first and second defendants if it were not.

64. Mr Hunter QC said that even the revised proposal for a CRO, limited to a period up to the pre-trial review, was a highly unsatisfactory solution. It would still be the case that the claimant would be restricted in its preparation of evidence for the trial in circumstances in which a central question in the proceedings is the extent to which the first and second defendants control, or have controlled, asset-holding companies which are at the centre of the scheme pursuant to which the claimant alleges that its assets were misappropriated. He explained (and his explanation was supported by the evidence) that much of the documentation and information relating to the U/R Assets casts light on the complex interrelationships between individuals and companies acting as nominees in the operation of the scheme.

65. Thus, by way of illustration, I was shown tables which illustrated the links between (a) those alleged by the defendants to be the ultimate beneficial owners of the corporate defendants and (b) the U/R Assets in respect of which the same persons are also alleged to be nominees. This is said to support the claimant's case that many of these nominees were acting on behalf of or at the instruction of the first and second defendants.

66. He also submitted that many of the documents which relate to the U/R Assets, and which are said to be subject to the confidentiality club order, can properly be characterised as key documents in the case, because they evidence the interconnectivity and entity control. Questions of control are agreed issues in the case and were at least part of the reason why model E disclosure was ordered at the first CMC. I can understand why these documents may prove to be important, both as individual documents and as groups of documents in order to establish the overall picture.

67. The claimant's solicitor, Ms Rebecca Wales, gave evidence as to the significant difficulties which the existing confidentiality club order caused in the pleading and disclosure phases of the proceedings. She explained how separate pleadings (10 from the claimant and 3 from the defendants) have had to be prepared in order to ensure that the defendants do not have sight of information deriving from each other's U/R Assets disclosure. It has also meant that separate evidence and annexes to skeleton arguments have had to be prepared to deal with these aspects of the proceedings. All of this causes complexity and further expense and, more importantly, makes it much more difficult for the case to be presented in a systematically coherent manner.

68. There is also evidence of the difficulties which have arisen in policing the WFO itself. Thus, one example is given by Ms Wales of an instance in which the claimant's consent was sought for the restructuring of an energy group on which it was necessary

for Hogan Lovells to take instructions. In fact, it transpired that the first defendant's interest in the asset was in the public domain, but the existence of the confidentiality club made the process of taking instructions from the claimant as part of the process of obtaining its consent to deal with assets caught by the WFO, significantly more complex.

69. I agree that all of this is inconvenient, expensive and in some respects disruptive. For that reason alone, it would be quite wrong for a process to be continued which leads to this level of disruption to normal trial preparation unless there are strong reasons to do so. Nonetheless, such inconvenience and expense may be an unavoidable consequence of measures that are required to preserve a proper balance when considering the respective interests of (and potential for prejudice to) the claimant and the defendants. Where that is the case, inconvenience and expense alone may not be determinative, more particularly if it is capable in principle of being ameliorated by variations in the way in which the confidentiality club is structured to operate.

70. But there are other significant adverse consequences of the "external eyes only" aspect of the confidentiality club, which become increasingly difficult to mitigate as the case gets closer to trial. Disclosure by the first and second defendants is (or should be) largely complete and witness statements and expert reports are now being prepared against the background of what has become a relatively tight timetable. After recent extensions of time, witness statements are now to be exchanged in a little over 3 months' time, with exchange of expert evidence to take place shortly thereafter. It is clear to me that any decisions as to how the case can best be prepared and presented will have to be taken by the claimant on an increasingly regular basis from now until the commencement of the trial.

71. The claimant also submitted that the problem is exacerbated by the fact that the U/R Assets disclosure by the first and second defendants cannot be disclosed to the corporate defendants which may have an impact on the ability of the corporate defendants properly to appreciate the relevance of documentation within their possession to the links with information contained in documents disclosed by the first and second defendants. This may have a direct effect on the efficacy and reliability of the compliance by the corporate defendants with their disclosure obligations, in respect of which there has already been considerable delay. This in itself may increase the prospects that the integrity of the extended disclosure which the court has already decided is necessary for a fair trial of the proceedings, will be compromised.

72. In answer to these submissions, it was said by the first and second defendants that in practice the litigation was being conducted by the lawyers and they were making all of the operative decisions. It was also said that the asset control issues were likely to be dealt with by forensic expert evidence and document analysis, not by evidence from witnesses of fact. It could not therefore be said that there was any very significant prejudice to the claimant's trial preparation if that continued to be the case. It was therefore akin to the situation envisaged by Floyd LJ's factor (viii) where he said that the extent to which a party may be expected to contribute to the case based on a document is relevant. It therefore continues to be the first and second defendants' position that nobody apart from the claimant's external lawyers should have access to the documents and information to be included in the inner ring of their proposed new CRO.

73. I do not agree with the first and second defendants' submission on this point. As matters presently stand, Hogan Lovells are unable to take instructions from the officers of their own client on the significance and relevance of some of the critical interconnections between material U/R and non-U/R entities and assets and between material U/R entities and assets inter se. This interconnectivity is very important to a central part of the claimant's case, and the continuing existence of the club means that no one within the organisation is able to give their input on the issue or develop an understanding of how the documentary evidence relating to interest and control fits together for the purpose of giving proper and informed instructions. It will also hamper further lines of enquiry, which ought to be available to the claimant as part of the process of building the full picture. This will affect not just the ability of the claimant to take decisions about how to advance its own case to best advantage, it will also make it more difficult and complex for the case to be managed more generally in a manner that is both efficient and fair.

74. I accept Mr Hunter QC's submission that it is necessary for the fair trial of these proceedings that the relationship between the existence and nature of the U/R Assets and the other evidence which the claimant may wish to prepare and adduce for the purpose of proving its case is fully investigated and explored. In my view, the evidence adduced by the claimant establishes to a high degree of assurance that the effect of the confidentiality club order is that individuals outside the existing confidentiality club (or the proposed new CRO inner ring) will gain only a partial picture of the available information in relation to substantial issues which are at the heart of the case. This is a case in which an elaborate fraud is alleged, involving a vast multiplicity of transactions. I am satisfied that, if the confidentiality club were to be continued, it would be a significant interference with the claimant's right to participate in the conduct of its own case (an essential aspect of dealing with a case justly: CPR 1.1(2)(a)) and its preparation for trial.

75. I am also satisfied that the nature of the issues to which the relevant information and documentation goes means that this interference is capable of making it materially more difficult for the claimant's legal team to conduct the case on its behalf in a manner that is fair to the claimant. Hogan Lovells and counsel would have to construct arguments and put together evidence without proper input from their clients and the claimant would not be able to see let alone approve all of the arguments being advanced by their lawyers or the evidence being put together by their experts.

76. These are the kinds of problem to which an external eyes-only confidentiality club will very often give rise (see e.g. *TQ Delta LLC v Zyxel Communications UK Ltd* [2018] Bus LR 1544 at [22]) and is why the relief will only be granted in exceptional circumstances at any stage in proceedings. It is self-evident that the closer the case gets to trial, the more likely it is that justice will only be achievable by permitting the relevant party (in this case the claimant) access to the documents which have been disclosed. I am satisfied that these considerations are strong factors in the balancing exercise that the court now has to carry out in the present case. While not incapable of being outweighed (anyway early in the proceedings) by evidence of a real risk of harm to the first and second defendants, the stage has now been reached at which the keenest scrutiny of the evidence they have adduced is required before concluding that a continuation of a confidentiality club, whether in the form of the proposed CRO or otherwise, is justified.

77. Against that background, the claimant submitted that the context in which the balance has to be struck is now very different from the position in 2018 when the confidentiality club was first introduced at its suggestion. There are three reasons for this, the first and second of which are self-evidently correct. The third requires a little more analysis.

78. First, while the original confidentiality club had been introduced on the claimant's own application, this does not have any significance for present purposes. It was made clear from the outset that the suggestion for a confidentiality club had been made to deal with particular difficulties in the early interlocutory stages of the litigation, and to hold the ring on an interim basis. Now that the case is in the early process of pre-trial preparation, that stage has passed.

79. Secondly, the balance was being struck in 2018 in the context of disclosure made for the purpose of policing the WFO. That is a very different context to the question I now have to consider, i.e., a continuation of the restrictions on disclosure where the documents concerned are relevant (and capable of being of very significant relevance) to the substantive issues in the proceedings.

80. Thirdly, it is submitted by the claimant that the evidence of real risk of harm is now much weaker than it was at inception. It was submitted that the evidence now relied on by the first and second defendants comes nowhere near justifying the continuation of the existing confidentiality club order in its original form or the introduction of the newly proposed CRO. It was submitted that the evidence of a real risk of harm to the first and second defendants was no more than speculative and certainly did not provide the cogent evidence contemplated by David Richards J in *McKillen*.

81. As to this third submission, in 2018 the first defendant had relied on the threats of criminal prosecutions by Mr Poroshenko and the wrongful nationalisation and expropriation of the claimant without compensation. He also relied on attempts to obtain control of the 1+1 Media group as an example of earlier instances in which Mr Poroshenko had acted unlawfully in an attempt to seize the first defendant's assets, although the claimant pointed out that this happened some time ago and the attempts were unsuccessful. The first defendant had also explained how Mr Poroshenko had forced his resignation as governor of Dnepropetrovsk in March 2015 and threatened to prosecute him if he did not cooperate. At the time the confidentiality club order was first made, the principal threat was said to arise from the ability of Mr Poroshenko to make unlawful use of state power in Ukraine to expropriate, seize or damage the first and second defendants' assets in Ukraine.

82. However, that can no longer be a consideration in the form in which it was originally advanced, because Mr Poroshenko is no longer in power, and he therefore has no continuing access to the organs of the state through which he might otherwise be able to abuse that power. The first and second defendants maintain that, nonetheless, Mr Poroshenko is exceptionally wealthy, continues to hold residual power in Ukraine to a much greater extent than is accepted by the claimant, has allies who remain in powerful positions and may yet be re-elected in the future. Evidence adduced on behalf of the first and second defendants was to the effect that Mr Poroshenko might in the future come to wield what he described as considerable power and that his re-election remains "a real possibility". The first defendant explained why Mr

Poroshenko and others connected to him continued to pose a risk to his U/R Assets in the following terms:

> "Poroshenko remains an influential and powerful figure in Ukrainian politics and individuals within his circle and loyal to him continue to hold positions from which they could receive and pass on information about my U/R Assets to Poroshenko or other individuals involved in the nationalisation of [the claimant] or who are otherwise ill-disposed to me and in a position to take steps to attack, interfere with or expropriate my assets.
>
> It is not the case that Poroshenko's allies in government all left office when his term ended."

83. The first defendant then identified a number of those allies and said that the individuals concerned "may still misuse information about my U/R Assets to exercise their powers" at the Ukrainian public authorities at which they still hold office (the National Bank of Ukraine, the Ministry of Finance and the Deposit Guarantee Fund). Mr Hollander QC submitted that the first defendant is the only person with proper first-hand knowledge of the risks that this may occur, and appropriate weight should be given to his evidence accordingly.

84. One of the points that the claimant made in response to this evidence was that the position is now very different because the first defendant is close to the current president of Ukraine, Mr Vladimir Zelenskiy, who has come to power since the confidentiality club order was made. This evidence is particularised in some detail in a witness statement made by Ms Wales.

85. While the picture has undoubtedly changed, it is my view that this evidence does not fully substantiate a continuing close relationship between the current president and the first defendant and is not of any real weight in striking the balance. Indeed, it is difficult to form any very clear-cut view about the extent to which the first defendant is or is not close to the organs of political power in Ukraine. The evidence is in some respect contradictory, and I accept that there are some grounds for thinking that President Zelenskiy is antipathetic to the first defendant and the oligarch status that he appears to have more generally. I do, however, accept that such evidence as there is does not support a conclusion that the current president is hostile to the first defendant in the way that the first defendant says that Mr Poroshenko has been.

86. It is also said by the claimant that, although it is of course possible that Mr Poroshenko might be re-elected, the next Ukrainian election is not scheduled to take place until 2024, almost two years after the trial in these proceedings is due to take place. On this aspect of the dispute, I was shown a good deal of further evidence by all parties, which not surprisingly was wholly inconclusive, on the prospects that Mr Poroshenko might return to power in due course. It is impossible for me to make any form of assessment as to the likelihood that that will occur. It seems to me that the only basis on which I can properly proceed is that it remains possible that the political situation may develop in Ukraine in such a manner that the levers of power will revert to individuals who have in the past shown greater hostility to the first and second defendants than may now be the case.

87. As to the position in respect of the first and second defendants' Russian assets, they rely on the enmity between the first defendant and President Putin, which they both say remains as real and serious today as when they first explained the position in 2018. The first defendant relied on the fact that he had already had assets in the Crimea expropriated by the Russian government, although I understand it to be accepted that he was not the only oligarch treated in this way. He also says that this enmity is capable of extending the risk of Russian expropriation to his assets in the Ukraine if any pro-Russian leader were to come to power in the Ukraine in the future. The first defendant expressed particular concern that if information about his U/R Assets were to be stored on servers in Ukraine, that information would be at real risk of access from Russian backed hackers and passed to the Russian authorities for use against him.

88. It is right to say that the Russian assets disclosed as part of the first and second defendants' U/R Asset disclosures are significantly more limited than those located in Ukraine. Nonetheless, they are assets of value, and it is right to have regard to the extent to which there is sufficient evidence of a real risk of damage to them if the confidentiality club order, or the proposed new CRO, is not in place.

89. Mr Parker QC for the second defendant placed particular emphasis on the risk to his client's Russian asset (and I think that there was only one) if the confidentiality club order were to be discharged. He pointed out that the second defendant was subject to sanctions imposed by the Russian Federation pursuant to a decree to which he has only recently been added. He, like the first defendant, also had some of his Crimean assets expropriated by the Russian authorities some years ago. He said that the risk to the second defendant's Russian asset continued to be severe, and he made the point that there was no evidence that this particular asset was of any relevance to the issues in the proceedings and indeed had been described by Mr Hunter QC as irrelevant.

90. It was submitted by the claimant that the evidence adduced by the first and second defendants on any real risk to their U/R Assets was the antithesis of clear and cogent evidence. Only the most general explanation has been given as to the means by which any of the Poroshenko allies could use their position to seize the first or second defendant's Ukrainian U/R Assets now that they do not have such immediate access to the levers of power, and there was no clear evidence that this was something that they were likely to do. Mr Hunter QC described the first and second defendants' evidence on this aspect of the case as little more than speculation.

91. The first and second defendants' evidence as to the means by which their Ukrainian U/R Assets might be seized or damaged by interests hostile to them was only adduced very recently. They said that, while the blunt instrument of state seizure may not be available to Mr Poroshenko and his associates as it was in 2018, the U/R Assets would still be vulnerable to the phenomenon of corporate raiding by third parties, a phenomenon that is prevalent in Ukraine. This evidence was new, because as recently as February 2021 the first defendant did no more than refer to the continuing risk that Mr Poroshenko and his allies might be able to use information relating to the U/R Assets to his prejudice. It was only shortly before this hearing that there was any mention of the concept of corporate raiding when it was dealt with in a witness statement made by the partner at Fieldfisher with the conduct of the proceedings on behalf of the first defendant.

92. Mr Hunter QC subjected this new evidence to significant criticism. He said that on proper analysis, it does little more than describe the existence of the phenomenon. There is no evidential link between the phenomenon and the risk of it being used to the prejudice of the first or second defendant in respect of any single one of their U/R Assets. He pointed out that the first and second defendants did not even attempt to distinguish between the nature of the risk applicable to different categories of asset and adopted an illegitimately generic approach to the problem. He reiterated that what is required is cogent evidence and submitted that the evidence adduced by the first and second defendants fell well short of this.

93. It was also submitted by the claimant that the link between any theoretical leak of information now the subject of the confidentiality club order and any threat to the first and second defendants' U/R Assets is broken by the fact that evidence as to the first and second defendant's U/R Assets is in any event in the public domain. There was detailed evidence to the effect that many of their interests in entities operating in different sectors of the economy are well known. Thus, I was shown details of the first and second defendants' interests in Ukrainian assets which appeared on the claimant's evidence to be worth in excess of US$3 billion and US$2.5 billion respectively.

94. The first and second defendants submitted that this was not the point. What mattered was that confidentiality should be maintained in relation to the way in which their interests in those assets are or were held. The reason for this was said to be that knowledge of corporate entities in the ownership chain, and the way they interrelated with each other, was the information in respect of which it was particularly important to maintain confidentiality to guard against the corporate raiding phenomenon that I have already described. In answer to this submission, the claimant's evidence, again adduced from Ms Wales, gave some examples of the extent of the ownership information that was publicly available in any event.

95. This evidence demonstrated that material parts of the ownership structures relating to the first and second defendants' U/R Assets are in any event in the public domain. I do not accept, however, that this means that there is no retained confidentiality in relation to any of those structures. I accept that the likelihood is that the position will vary according to the asset concerned. However, it is my view that in light of the exceptional nature of the relief which they seek to have continued, the burden falls on the first and second defendants to show in relation to any information relating to a U/R Asset that it has retained its confidentiality. Then but only then is the existence of that confidentiality capable of being weighed in the balance in support of the first and second defendants' case. There has been no attempt to carry out that exercise in a systematic way.

96. But more generally, I accept the claimant's submissions on the real risk of harm to the first and second defendants' interests in the U/R Assets. I agree that the evidence of a risk that corporate raiding may happen in the future is speculative. I take the view that the first and second defendants have not established by cogent evidence that, even if information relating to their U/R Assets were to be leaked by the claimant, there is any real risk that this information would be used either (a) unlawfully by organs of the Ukrainian state in order to seize them or (b) to mount a corporate raid of the type described.

97. In any event, the claimant also submitted that there is no proper basis for any contention that there is a material risk that details of the U/R assets might be leaked by the claimant to any person in a position to make corrupt use of that information to the prejudice of the first or second defendants. The claimant is separate from the government of Ukraine and operates through its own supervisory board, of which only three members are representatives of the state. The evidence is that the remaining six members of the board are persons entirely independent of the government of Ukraine.

98. The first and second defendants submitted that the prospects of both deliberate and inadvertent leakage in Ukraine is materially higher than would be the case with an English litigant because the individuals at the claimant into whose hands the documents may come, are not personally subject to the English court's contempt jurisdiction. There is said to be great hostility to the first defendant in Ukraine, and specifically amongst those individuals who supervise the claimant. The first defendant identified three individuals who participated in the nationalisation of the claimant and who are still in positions of power.

99. The counter argument includes evidence that members of the claimant's supervisory board are principally from outside Ukraine and are foreign individuals with extensive international banking experience. The first and second defendants submitted that this missed the point because what matters is the conduct of the individuals in the Ukraine who are in the claimant's legal department, and otherwise involved in running its business and who will give instructions to external lawyers in relation to these proceedings. They and others involved in the administration of the claimant are said to be the real risk.

100. The difficulty with this submission is that the specific evidence that there is a real risk that individuals will breach the obligations which they undertake on receipt of the relevant documents or information is very thin. In particular there is no hard evidence of a real risk that specific officers or employees of the claimant who might come into possession of information about U/R Assets might breach the ordinary obligations to which the claimant is subject on receipt of confidential information relating to the first and second defendants' affairs. In my judgment, Mr Hunter QC is right to characterise this possibility as unsubstantiated speculation.

101. Indeed, such hard evidence as there is as to the behaviour of officers and employees of the claimant when they come into possession of material that is confidential to the first and second defendant is consistent with them being aware of and observing the obligations which the claimant is under. As the claimant pointed out, asset disclosures in relation to non-U/R Assets were made in January 2018. This information has been available to the claimant's instructing officers since then, but there is no evidence of any instances in which information in relation to the first and second defendants' non-U/R Assets has or might have been leaked by individuals at the claimant.

102. Ms Wales has confirmed in her evidence that the obligations under CPR 31.22 have been or will be explained to any representative of the claimant who has received or will receive disclosed documents, including those that relate to the U/R Assets. The claimant is of course subject to the jurisdiction of this court in these proceedings and serious consequences are likely to follow if there were to be any breach of these

obligations. In my judgment, that is sufficient to guard against deliberate leaking of confidential information relating the U/R Assets.

103. The first and second defendants also submitted that there is a risk of inadvertent disclosure as a result of hacking and there was some evidence of a significant recent data loss which affected the claimant. This was said to point against information being permitted to be held on the claimant's own systems. It is of course the case that the risk of hacking cannot be ruled out, but I do not consider that the evidence establishes that the claimant is any more vulnerable to hacking than many other litigants. While this may cause the court to pause where the relevant data is shown to be of wholly tangential relevance to the issues, in my view the evidence in the present case carries little weight in the balancing exercise where the information relating to U/R Assets will fulfil the significant role that I am satisfied it is likely to fulfil in these proceedings.

Disposition

104. In my judgment the stage has now been reached at which the confidentiality club is liable to operate as a real impediment to the just disposal of the action. Furthermore, I am not satisfied that real risk of harm to the first and second defendants by its continuation has been established on the evidence. The only alternative that has been put forward is the CRO, combined with a delay in the discharge of the confidentiality club until the pre-trial review. In my view, if implemented the CRO will lead to many of the same difficulties as have arisen and will arise under the confidentiality club. But of equal importance, I consider that the first and second defendants have not adduced the cogent evidence required by the authorities as justification for interfering in the normal course of preparation for a trial of this type.

105. It follows that the case should now proceed to trial without the confidentiality club. I reach that conclusion in full recognition of the fact that Hogan Lovells will impress upon the claimant and those of its officers and employees who are granted access to the disclosure documents for the purposes of these proceedings, the obligations to which they are subject. They are not permitted to use the information disclosed to them either pursuant to the WFO or as a result of the first and second defendants' compliance with their extended disclosure obligations for any purpose other than the proper conduct of these proceedings.