Neutral Citation Number: [2022] EWHC 1445 (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: 14/06/2022

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**	**Defendant**

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Tim Akkouh QC and **Christopher Lloyd** (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Michael Bools QC and **Geoffrey Kuehne** (instructed by **Fieldfisher LLP**) for the **First Defendant**

Hearing date: 8th June 2022

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Approved Judgment

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THE HONOURABLE MR JUSTICE TROWER

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 10.30 am on 14 June 2022

Mr Justice Trower :

Introduction

1. In this application the claimant seeks relief ancillary to a freezing order originally made by Nugee J on 19 December 2017, and subsequently varied by orders of Snowden J, Roth J, Fancourt J and the Court of Appeal. By that freezing order, Nugee J restrained the first defendant from in any way disposing of, dealing with or diminishing the value of any of his assets outside England and Wales unless the total unencumbered value of all of his assets in England and Wales exceeded US$2.6 billion. Similar relief was granted against the other defendants.

2. Nugee J also ordered the first defendant to the best of his ability to inform the claimant's solicitors in writing of all his assets worldwide exceeding £25,000 in value, giving the value location and details of all such assets. This figure was subsequently increased by Roth J to £1 million.

3. On the lengthy list of assets disclosed by the first defendant on 18 January 2018 was a right to consideration valued at US$463,427,000. It was listed as asset number 112 and was described as follows:

> "Right to receive consideration in the amount of US$926,854,000 for the transfer to a third party of 100% interest in Kadis Holding Ltd, a Nevis company, which holds a 50% interest in Starmill Ltd, a Cypriot company, which in turn holds a 99.8% interest in PJSC Kryvyi Rih Iron Ore Combine (KZhRK), in the form of a right to receive dividends and other distributions. Mr Kolomoisky is under an obligation to transfer to Mr Bogolyubov 50% of such consideration pursuant to an agreement with Mr Bogolyubov dated 23 January 2013".

4. In the materials in support of this application, asset number 112 was described as the KZhRK receivable, a description I shall adopt for the purposes of this judgment. The claimant's application is put on the basis that the relief it seeks is required to assist in the preservation of the KZhRK receivable as an asset the characteristics of which means that its value and realisability are particularly precarious.

The claims made in the proceedings

5. An outline of the case advanced by the claimant in support of which the freezing order was granted is given in the judgment of the Court of Appeal on a series of jurisdiction challenges made by the defendants (*PJSC Commercial Bank Privatbank v Kolomoisky and others* [2020] Ch 783 at paragraphs [15] to [22]). For the purposes of this application, I can summarise the position very much more shortly.

6. 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.

7. 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 three 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 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.

8. 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. The claimant relies on the fact that the first and second defendants have never explained the commercial rationale for these supply agreements.

9. 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. They also deny that they were aware of the loans or the supply agreements at the time they were made.

10. 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 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 and 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.

11. 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).

12. 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"."

13. While the defendants strongly contest the allegations that are made against them, and the first defendant's solicitor has pointed out that what the Court of Appeal had to say was only for the purposes of the applications to set aside the freezing orders, it remains the case that they have never sought to contend that the Court of Appeal was wrong to proceed on the basis that the claimant has a good arguable case for fraud on an epic scale as a result of which the claimant suffered losses of many hundreds of millions of dollars.

The KZhRK receivable

14. Turning to the subject matter of the current application, the claimant's solicitors, Hogan Lovells International LLP ("HL"), first raised questions in relation to the KZhRK receivable in October 2020. This was more than 2½ years after it had first been disclosed as asset 112, a delay on which the first defendant relies and to which I will return. HL asked the first defendant's solicitors, Fieldfisher LLP ("FF"), to confirm whether their client had now received the consideration referred to in the description of the KZhRK receivable (i.e. US$926,854,000) and if so where it was being held.

15. When FF responded to the effect that the position was unchanged, HL made a more detailed request for information introduced by an expression of concern that, even though almost three years had passed since the KZhRK receivable had been identified as "right to receive" c.US$936 million, the consideration had still not been received. HL asked eight questions the answers to which they said were required as part of the process of policing the freezing order. These questions included a request for information as to the nature and details of the first defendant's interest in Kadis Holding Limited ("Kadis"), his right to consideration for the transfer, and the agreement under which the right to consideration arose. They also asked whether the right was secured, the identity of the party with the obligation to pay the consideration, whether the first defendant retained an interest in Kadis after the transfer and whether any dividends or other distributions have been paid by Kadis, Starmill and/or KZhRK since the time that the KZhRK receivable had been disclosed on the first defendant's list of assets.

16. These questions were not answered straightaway, but after some chasing FF responded in a letter dated 5 February 2021, some two weeks after the claimant had issued an application for an order that the first defendant be cross examined in relation to his assets. This application was primarily concerned with another asset disclosed by the first defendant in his January 2018 list, a receivable arising out of a Bitcoin mining venture. However, in its evidence in support of that application, the claimant also relied on the first defendant's failure to disclose further information in relation to the KZhRK receivable as another example of the first defendant's reluctance to provide timely or sufficient information in relation to disclosed assets.

17. The FF letter of 5 February 2021 enclosed a written agreement dated 23 February 2016 ("the KZhRK agreement") between the first defendant and a Mr Mikhail Voevodin ("Mr Voevodin"), pursuant to which the first defendant agreed to transfer his 100% indirect interest in Kadis to Mr Voevodin for US$926 million to be paid from dividends, distributed profits or other payments from the KZhRK business. The way this was expressed was that Mr Voevodin:

> "agrees and facilitates that [the first defendant] receives as dividends, distributed profits or other payments from the KZhRK business, acceptable to the first defendant, the amount of … USD 926.854 million."

18. There were a number of aspects to the KZhRK agreement which Mr Tim Akkouh QC, who appeared on this application for the claimant, described as oddities. Thus, it was sufficiently abbreviated to use initials to describe the parties without giving their names, there was no long stop date as to the obligation to pay, no formal security to secure payment of the KZhRK receivable was provided for and, although it appeared from the top of the document that the KZhRK agreement was made in Geneva, it contained no jurisdiction or governing law clause.

19. Under clause 4 of the KZhRK agreement, the first defendant retained the right "to manage the business in relation to KZhRK, including through the management of shares in Kadis Holding Ltd and to receive any economic interest in these shares (during distribution of profits as well is in case of a sale)". Mr Voevodin also agreed to restrictions on his right to dispose of or charge the shares in Kadis pending receipt by the first defendant of the amounts owed to him.

20. The KZhRK agreement is remarkable for its informality, a characteristic which in my view would be obvious to any reasonable commercially minded person, whatever its governing law. While I accept that this is not, of itself, an indication that it does not reflect a genuine enforceable contract between Mr Voevodin and the first defendant, it is surprising that an agreement recording an obligation to make payment of almost US$1 billion on the satisfaction of certain conditions should take this form.

21. These considerations show, so Mr Akkouh submitted, that I should at the very least approach my consideration of the questions that arise on this application on the basis that the KZhRK agreement manifested the existence of a close relationship and a high degree of trust between the first defendant and Mr Voevodin. I agree with that submission. Its form and nature were such that the parties are likely to have proceeded on the basis that they themselves knew what the incidents of the deal were and trusted each other as to the way in which their obligations would be carried into effect. The way these obligations were recorded were likely to have been of secondary significance and the form of the agreement means that it is possible that the nature of the relationship between the parties with regard to the KZhRK receivable is not as recorded in it.

22. It is also relevant that the form and nature of the KZhRK agreement were such that there remain clear opportunities for the first defendant to continue to exercise control and influence over KZhRK and its business, notwithstanding the first defendant's disposition of his direct or indirect interest in the shares in Kadis in exchange for the KZhRK receivable. This is corroborated by evidence to the effect that a KZhRK trade union representative was reported as saying in September 2020 that it is well known

that the companies which now own KZhRK "are no more than a cover story. They are still managed as before by the persons who report to Mr Kolomoisky".

23. It follows from this that, although the asset on which the claimant founds its application is the KZhRK receivable, it is possible that the first defendant may also have a continuing indirect interest either in the shares which appear to have been transferred to Mr Voevodin or otherwise in the underlying KZhRK business. This is said to be one of the reasons why the KZhRK receivable is inherently uncertain as to its true nature, more particularly as the commercial rationale behind the KZhRK agreement has never been explained.

24. At this stage I should also say something about Mr Voevodin, although the evidence about him is somewhat opaque. He is believed by the claimant to be a citizen of Slovakia and it seems from the evidence that there are other businesses (the Ferroalloy Holding group of companies) in which he and the first defendant are both interested. There is also evidence of a Russian-requested Interpol green notice dating from 2019 in which he is described as "a member of an organised criminal group involved in extortions and money laundering both in Russia and abroad". These factors, together with the unusual form of the KZhRK agreement, are said to support the claimant's concern that permitting the KZhRK receivable to remain uncollected in the form of a chose in action against Mr Voevodin means that its realisation for enforcement purposes in due course is particularly precarious.

25. It appears that the first defendant did not comply with his transfer obligations under the KZhRK agreement for c.16 months until, on 30 June 2017, he transferred his beneficial interest in the shares in a Belize company called Newsteel Holding Ltd which itself was the 100% shareholder of Kadis to Mr Voevodin and his wife, Ms Natalia Selivanova. The legal owner of the shares in Newsteel is a Cypriot citizen, Mr Michael Tsitsekkos, who has now declared that he holds all the shares in Newsteel on trust for Mr Voevodin and Ms Selivanova. It appears from the first defendant's own asset disclosure that Mr Tsitsekkos is a long-standing associate of his, holding interests in 16 assets for the first defendant with a cumulative value of c.US$ 500 million.

26. No payment has yet been made by Mr Voevodin in consideration for the transfer. It is said that he still has no obligation to do so because he has not yet received any dividends, distributed profits or other payments from the KZhRK business. The period of time for which the liability to pay for the transfer (contingent though it is on the declaration of dividends or other distributions) has remained outstanding is another reason why the ultimate realisability of the KZhRK receivable is said to be so precarious.

27. However, after the hearing at which I refused the claimant's application for an order to cross examine the first defendant on his assets, there were further developments relating to the realisation of part of the KZhRK receivable. On 1 April 2021, FF informed HL that the first defendant had made further enquiries of Mr Voevodin and understood that Kadis had recently taken steps to convene a shareholders meeting of KZhRK at which the question of distribution of dividends would be on the agenda. FF then later clarified that the meeting was scheduled for 28 May 2021, that the consideration under the KZhRK agreement would be paid in cash (which was acceptable to the first defendant) and that the first defendant would seek the claimant's consent to any necessary transactions in accordance with the terms of the freezing order. In that same letter FF

informed HL that they were instructed that Mr Voevodin had refused to consent to his contact details being shared with HL or the claimant.

28. On 28 May 2021, KZhRK's shareholders approved the declaration of a dividend based on KZhRK's 2013-2020 results. As a result of the declaration, UAH (Ukrainian Hryvnia) 8.84 billion, (the US$ equivalent of which was then c.US$326 million) became payable to its shareholder Starmill. Of this amount, 50% became available for payment on to its 50% shareholder, Kadis, and from there to Newsteel, Mr Voevodin (and Ms Selivanova), who were then both able and required to discharge in part their obligations under the KZhRK agreement. Under Ukrainian law, a dividend must be paid within 6 months of the declaration.

29. The passing of the resolution and its effect was not volunteered by the first defendant but was picked up by the claimant from the press. When it did so, HL sought confirmation from FF of the date by which the first defendant expected to receive the US$163 million to which he would be entitled under the KZhRK agreement and when he expected to receive the balance. On 5 July 2021, FF responded to the effect that the first defendant was unable to confirm when he could expect to receive payment, but set out details of the payment flow which would be necessary through Starmill, Kadis, Newsteel and ultimately Mr Voevodin and his wife before the proceeds of the dividend would be received by the first defendant.

30. There was then further correspondence between HL and FF in relation to the dividend. Mr Akkouh described this as reflecting a generally obstructive attitude by the first defendant and I think he was right to this extent: there was a slow drip-feed of further information as to the proceeds of the dividend, but it fell someway short of being full or expansive and in a number of respects left unanswered more questions than it answered. Thus, as Mr Akkouh submitted, one of the striking points to be drawn from this correspondence was that there was no explanation as to why it was that the dividend declared in May was not paid straightaway through the corporate structure so that it was then received by Mr Voevodin within a matter of days.

31. The reason this is so striking is that the companies involved in the chain were simply holding companies and the evidence is that previous dividends paid out of KZhRK prior to the time of the KZhRK agreement had found their way through the corporate structure very much more quickly. True it is that, at that stage, the shares in Newsteel were held by Mr Tsitsekkos on trust for the first defendant rather than Mr Voevodin and his wife, but the corporate structures beneath Newsteel remained the same. Given the amount of money at stake, it is difficult to understand why it was that the first defendant was not more assertive than he appears to have been in his efforts to procure the payment by Mr Voevodin and the receipt by him of the proceeds of the dividend. In particular there is no evidence as to the steps if any that the first defendant took to enforce Mr Voevodin's obligation under the KZhRK agreement to facilitate the receipt by the first defendant of the dividends that had already been declared.

32. On 7 December 2021, FF disclosed to HL that the first defendant understood that Starmill had paid US$60 million of the dividend declared in May 2021 to Kadis, although when that occurred is not apparent. It was later disclosed that this amount was held in Kadis' US$ bank account with JSC Bank Credit Dnipro and that a further US$5 million had also been paid and was held in Kadis' account with PIN Bank, but was to be transferred to Credit Dnipro in due course. However, despite the claimant's efforts

to obtain more details, the first defendant did not explain (and has still not explained) what steps he had taken to identify the whereabouts of the balance of the dividend declared by KZhRK in May 2021, i.e., c.US$100 million or its UAH equivalent. In my view, it was legitimate for the claimant to ask the first defendant to disclose this information, given the share management rights the first defendant had retained under clause 4 of the KZhRK agreement.

33. More generally, the claimant submitted that the first defendant's disclosures in response to its reasonable inquiries as to the security and realisability of the KZhRK receivable were reluctant and incomplete. In my view this submission was justified. While the first defendant was entitled to submit that no term of the freezing order was breached by the attitude he took in correspondence, that does not mean to say that his responses were open and full or that further ancillary relief is not justified.

The current application

34. In the absence of what they regarded as a proper response to the concerns expressed by HL in their correspondence with FF, the claimant issued this application on 28 January 2022. In his witness statement made in support of the application, Mr Richard Lewis, a partner in HL, summarised the claimant's concerns in the following terms:

> "In circumstances where a creditor in an amount of almost US$1 billion would normally be expected to be extremely proactive in seeking the payment of those monies (especially where such creditor does not have the benefit of any security), the Bank is extremely concerned that the First Defendant is apparently so ambivalent as to when (or even whether) he receives payment of the monies he is owed. One explanation for that apparent ambivalence is that the First Defendant is well aware that any cash sums paid to him would be much easier for the Bank to enforce against than an unsecured contractual right against an individual under a flimsy one-page agreement. In the absence of any contrary explanation being provided by the First Defendant, despite being offered numerous opportunities to do so, that appears to the Bank to be the most likely explanation, and it is, needless to say, a troubling one."

35. The relief sought by the claimant's application notice in relation to the KZhRK receivable is an order that the first defendant shall make a written demand of Mr Voevodin requiring him to pay to the first defendant within 14 days the sum of US$65 million and such further sums as have been paid to him or companies controlled by him (including Kadis and Newsteel) in respect of dividends declared and distributed by KZhRK between 19 December 2017 and the date of the demand. The claimant also seeks the provision by the first defendant of a witness statement identifying contact details for Mr Voevodin, exhibiting correspondence relating to the KZhRK agreement and exhibiting documents relating to the financial position of KZhRK.

36. As to the remaining amounts payable to the first defendant under the terms of the KZhRK agreement, the claimant seeks an order that the first defendant shall use reasonable endeavours to seek payment of the sums due under it and sets out a number of positive steps that it contends he should take. The claimant submitted that they are all designed to preserve the value of the KZhRK receivable.

37. The current application was issued before Russia's invasion of Ukraine. It was initially listed to be heard in early March 2022 but, in light of the invasion, was adjourned by consent to the PTR on 28 and 29 March 2022, at which stage it was further adjourned until the first available date in June. For some time, it was contended by the first defendant that one of the reasons why relief should not be granted was the impact of the war on his ability to comply with the orders sought. To this end, the first defendant initially adduced evidence on the impact of the war, which I took into account when concluding that it was no longer possible to have a fair trial of the action which was then listed to commence at the beginning of June 2022. Since then, there has been some stabilisation of the situation in Ukraine, and the first defendant no longer contends that it would now be wholly impossible for him to comply with orders of the type sought by the claimant.

The Law

38. There was not much debate about the applicable principles. The claimant submitted that the court has jurisdiction under section 37 of the Senior Courts Act 1981 to grant an injunction requiring the first defendant to take active steps of the type sought by their application if it is "just and convenient to do so". As Lord Leggatt said in *Broad Idea Ltd v Convoy Collateral Ltd* [2021] UKPC 24, the nature of freezing orders and ancillary relief has and will continue to develop with changing financial and commercial practices (see at [59]). The jurisdiction is based on the principle that freezing orders are required for the preservation of assets to enable and facilitate the enforcement of a prospective money judgment ([84ff]), a principle which, as he explained at [110]:

> "...justifies the grant of a freezing injunction where it is needed to ensure that assets against which a judgment could be enforced remain available to satisfy the judgment. It has been pointed out that this principle can in an expanded form apply to any conduct which would diminish the value of assets against which a judgment could potentially be enforced, even if that conduct does not involve dealing with those assets directly…."

39. In support of the submission that orders to take positive steps ancillary to a freezing order may also be appropriate where it is just and convenient for such relief to be granted, the claimant relied on the statement of principle expressed by Lewison LJ in *JSC Mezprom Bank v Pugachev* [2016] 1 WLR 160 at [47]:

> "So far as judicial precedent is concerned, we can say with some confidence that the jurisdiction to make a freezing order also carries with it the power to make whatever ancillary orders are necessary to make the freezing order effective: *AJ Bekhor v Bilton* [1981] QB 923. This power also extends to the making of mandatory orders requiring a defendant to exercise powers, such as a power to revoke trusts: *Tasarruf v Merrill Lynch* [2012] 1 WLR 1721. We were not shown any authority which places explicit limits on that power."

40. Essentially the same point had been made by Evans LJ said in *United Norwest Co-operatives Ltd v Johnstone* (CA, unrep, 6.12.94) where he said:

> "I have no doubt that the Court's jurisdiction to order a Mareva injunction extends to ordering that a specific asset, which might otherwise be dissipated, should be safeguarded in a particular way including, if it is money, payment into Court. The order should not be made, of course, if depriving the defendant of the immediate use of the asset would work unfairly or unjustly for him; that and other relevant matters will affect the exercise of the Court's discretion in the particular case."

41. Mr Akkouh also submitted that there are many instances in which the court has been prepared to make orders which were significantly more onerous and intrusive than the relief sought against the first defendant by the present application. He pointed to the power to appoint receivers over a defendant's assets pre-judgment, a jurisdiction that is typically coupled with orders requiring him to provide information and to deliver up assets: *JSC BTA Bank v Ablyazov* [2010] EWCA Civ 1141 and *Masri v Consolidated Contractors (No 2)* [2009] QB 450. As Maurice Kay LJ explained in *Ablyazov* at [14], if the method by which a defendant beneficially holds its assets is transparent, a receivership order may well not be necessary, but if it is opaque and there is a reasonable suspicion that such opacity will be used to act in breach of a freezing order, it may well be the case that a receivership is appropriate.

42. In their essence, these principles were not challenged by the first defendant, although Mr Michael Bools QC who appeared on his behalf submitted that mandatory relief requiring a defendant to take positive steps is exceptional. As to that, while I agree that the court must be satisfied that the grant of the relief sought is just and equitable, I do not think that any test based on exceptionality is helpful (or indeed justified by any authority to which my attention was drawn). As Lord Hoffmann said in *National Commercial Bank of Jamaica v Olint* [2009] 1 WLR 1405 at [19]-[20]:

> "arguments over whether the injunction should be classified as prohibitory or mandatory are barren … what matters is what the practical consequences of the actual injunction are likely to be."

43. In his skeleton argument, Mr Bools also relied on *Standard Chartered Bank v Walker* [1992] 1 WLR 561, 566 in support of a submission that it is only in an extreme case that the court would interfere (at the suit of a creditor) with a defendant debtor's entitlement to exercise rights over his own property (in that case a shareholding). That may be correct as far as it goes, but it is important to appreciate what Vinelott J regarded as an extreme case. It was one where there was no commercial justification for the debtor shareholder to act in the way that was sought to be enjoined. In effect, in the absence of any proper explanation for his desire to do so, Vinelott J was prepared to infer that the debtor's conduct was deliberately destructive of the assets to which the creditor was entitled to resort to enforce any judgment he might obtain. In my view Vinelott J's approach was entirely consistent with and illustrative of the underlying principle that a freezing order is not intended to interfere with the normal conduct of a defendant's business, so long as that conduct is legitimate.

The claimant's submissions

44. In support of its case that the relief sought was required in order to assist in the preservation of assets which might otherwise be dissipated notwithstanding the freezing

order, the claimant said that I should proceed on the basis that it has already been established that there is a real risk of dissipation and that there is a good arguable case of fraud on an epic scale. I agree that nothing which has occurred since the previous occasions on which courts have made those findings has served to undermine them in any way. Mr Akkouh went on to make what he described in his skeleton argument as five overriding points.

45. First, he said that the KZhRK receivable is a wasting and precarious asset, which does not bear interest and which is therefore now worth significantly less than it was in 2016. It was said that the greater the delay in payment the greater the risk that there will be difficulties in recovery. He pointed out that, once the KZhRK receivable has been received, the first defendant will be able to earn interest on it, but until it is received the credit risk relating to non-payment by Mr Voevodin is material. This is significant because very little is known about Mr Voevodin, while the first defendant, with whom Mr Voevodin appears to have a reasonably close relationship, has declined the opportunity to furnish any further information about him.

46. Secondly, Mr Akkouh relied on the fact that there is no proper explanation as to why the first defendant has not sought payment of the substantial sums due to him notwithstanding the declaration of the dividend by KZhRK as long ago as May 2021. He submitted (correctly) that there is no evidence as to why the first defendant has been unwilling to call for payment of the very significant sums that he is owed.

47. The claimant placed considerable emphasis on this consideration. It said that it is very striking that no commercially sensible reason has been given as to what might have been done to effect recovery, either of the US$65 million already distributed to Kadis or the balance of c.US$100 million in respect of which a dividend has been declared but (so far as the first defendant is aware or has disclosed) has not been paid to Kadis. It was said that this was all the more striking in circumstances in which the first defendant had retained the business and share management rights granted under clause 4 of the KZhRK agreement and Mr Voevodin was under a contractual obligation to facilitate payment on to the first defendant once a dividend had been declared.

48. It was submitted that, in the absence of any explanation (let alone a good commercial reason) as to why the first defendant has not taken the obvious step of establishing what has happened to the process of realising this very valuable asset, the court should infer that the first defendant prefers to leave the proceeds of realisation in the hands of Mr Voevodin, rather than procure that they are paid into his own bank account or one belonging to him, against which it will then become easier to enforce. I do not consider that it is appropriate for me to draw that inference on the balance of probabilities at this stage of the proceedings. However, I accept that there is a real risk that this is at least one of the underlying reasons as to why the proceeds of a dividend, which was declared over a year ago, have not yet found their way to the first defendant, whilst the location of the major part of those proceeds has still not been identified or disclosed.

49. Thirdly, the claimant submitted that the court should have regard to the ease with which the first defendant could deal with or diminish the value of the KZhRK receivable without its knowledge. The possibility that this may occur is said to be supported by the nature of the relationship that the first defendant has with Mr Voevodin, the form and in particular the brevity of the KZhRK agreement, the inherent difficulty for the claimant in taking steps to preserve the KZhRK receivable and the fact that the claimant

has a good arguable case arising out of the first defendant's involvement in an elaborate fraud.

50. Fourthly, the claimant submitted that the first defendant's present intention is to participate in the English proceedings and defend the claim, as a consequence of which it is currently in his interests to comply with the orders of the English court. The claimant contended that this may no longer be the case if he is found to be liable following the trial.

51. This point is given some force as a relevant factor by the judgment of Males J in *Arcadia Petroleum Limited v Bosworth* [2015] EWHC 3700 (Comm) at [71], but some caution is required in giving it too much weight anyway as a freestanding consideration. It will be present in nearly every case in which questions of asset preservation for freezing order purposes arise, particularly where the defendant is domiciled abroad. To that extent (as Mr Akkouh accepted) it is a point which has to be coupled with all the circumstances of the case. So far as concerns the KZhRK receivable, he pointed to the nature of the asset and the oddities of its inherent incidents as being a reason why the first defendant may regard the benefits of compliance with an English order very differently as time goes by from the way that he does now.

52. Fifthly, the claimant said that there is no question of disproportionality in the present case. The asset in question is worth almost US$1 billion and the claimant's claim with interest is presently for over US$4 billion. In my view, there is force in this point. The amount of money at stake, and the complexity of enforcing any judgment that might be obtained in due course mean that the essence of the relief sought is not disproportionate.

The first defendant's submissions

53. The first defendant disagreed. He said that this is an extraordinary application. Although he no longer relies on the impossibility of compliance with the relief sought by reason of Russia's invasion of Ukraine, he submitted that the relief sought is unnecessary, disproportionate and will bring no practical benefits. He said that there is no reason to think that the KZhRK receivable might be at risk and said that the application should be dismissed.

54. In support of the first defendant's case, Mr Bools relied on the fact that the KZhRK receivable was disclosed by the first defendant early on in the proceedings in mid-January 2018 when it was listed in his asset disclosure document. He pointed out that the KZhRK agreement was concluded two years before the proceedings commenced and that the first defendant had made no attempt to conceal its terms. Mr Akkouh said that little credit should be given for the lack of concealment, because the first defendant's interest in KZhRK was well known as a result of other high-profile commercial litigation (the *Pinchuk* case in the Commercial Court which I was told related to the first and second defendants' interests in KZhRK and which settled the month before the KZhRK agreement was entered into). He was therefore bound to have had to explain what had happened to that interest if it had not been disclosed.

55. Mr Bools also relied on the fact that, despite knowing of its existence, the claimant took no interest in this asset for two years. Mr Akkouh said that this was unsurprising and

ultimately immaterial because the parties' focus was all directed in the early stages of the proceedings at litigating the defendants' jurisdiction challenge.

56. Mr Bools also submitted that once the claimant began asking questions about the KZhRK receivable, the first defendant had been entirely open and straightforward in what he had to say about it. He also submitted that the claimant has misrepresented the first defendant's position by contending that he is ambivalent about its recovery. Mr Bools submitted that the evidence does not justify such a conclusion. He took me through the correspondence since the time at which HL first started to ask about the KZhRK receivable and said that it appeared from this that the first defendant has answered all relevant enquiries made of him by the claimant.

57. Mr Bools said that the true position is that the claimant does not like the asset that is subject to the freezing order and would like it to be something else. He also said that the claimant does not like the way in which the first defendant is dealing with the asset, but nonetheless proceeds without regard to the basic principle that a freezing order should not be used for the purpose of interfering with the steps that he has been taking. He submitted that the relief sought is not concerned with the preservation of an asset (i.e., the KZhRK receivable), but is directed at requiring the first defendant to convert the asset into a different form (i.e., a credit balance on a bank account). In short, he said that there is no justification for the court to grant mandatory relief. It was also said that the first defendant is under no obligation to provide running updates and commentary on the status of what remains his chose in action and that he should not be criticised for not answering questions from the claimant which went beyond the bounds of proper enquiry.

58. In short, Mr Bools submitted that the relief sought runs contrary to the purpose of a freezing order which is to prevent dissipation of assets above a certain value otherwise than in the ordinary course of business. He said that, keeping firmly in mind that the asset the value of which requires to be preserved is the chose in action against Mr Voevodin, there is no risk to that asset. In particular, he said that there is no question that, if uncollected, it might be vulnerable to (e.g.) the effect of a contractual restriction on enforcement or the expiry of a statutory limitation period. He also submitted that the claimant has failed to establish that, even if there were to be preservation issues, the relief sought by the claimant would have the desired effect.

59. Quite apart from these general points, the first defendant has said in correspondence from FF exchanged shortly before the hearing that one of the difficulties so far as the US$65 million is concerned is that payment of US$ cannot be made from Kadis' account with Credit Dnipro, because it would have to be paid to Newsteel, a Belize company, which has no bank account, and that any such payment would be in breach of the currency control regulations introduced as a result of the Russian invasion.

60. As a consequence of this the first defendant said that he has taken steps to see whether an alternative means of facilitating payment was available. He has discussed with Mr Voevodin whether it would be possible for Kadis to make the payment direct to the first defendant by an assignment to him of the right to receive dividends from Kadis. The first defendant has also approached Credit Dnipro to establish whether that would be possible. The claimant does not dispute that these steps were taken on the initiative of the first defendant, although it points out that the timing is such that the approach was

almost certainly made under pressure of the present application, and the first defendant has not said that it was not.

61. In the event, that particular approach has not borne fruit because, in a response dated 27 May 2022, Credit Dnipro has said that "given the above, we, unfortunately, inform that it is not possible to transfer foreign currency on the territory of Ukraine from the account of a non-resident legal entity in favour of a resident individual in accordance with applicable law". Credit Dnipro also said that Ukrainian banks are under an obligation to prevent their clients from conducting transactions that do not meet the requirements of the legislation. It follows, so it is said by the first defendant, that Kadis is unable to make a dividend payment to Newsteel and it is not possible to circumvent these restrictions by an agreement that Kadis should pay the US$65 million direct to the first defendant.

62. Two alternative options to ensure that the first defendant gains control of the dividend proceeds from Kadis and Mr Voevodin have now been suggested by the claimant.

63. The first option is that the benefit of Kadis' payment obligation could be assigned to the first defendant and it could then be discharged by payment in UAH. The first defendant has indicated that he is unwilling to receive payment in UAH because of the volatility of the Ukrainian currency as a result of the Russian invasion. The claimant has said that this does not withstand scrutiny because the first defendant is domiciled in Ukraine, has most of his business interests in Ukraine and the official exchange rate is now, and has been since the beginning of the war, fixed. Furthermore, the dividend was originally declared in UAH and, if the US$65 million were to be converted back into UAH at today's exchange rate, the first defendant would receive 7% more in UAH than the original UAH value of the part of the dividend he was entitled to receive pursuant to the terms of the KZhRK agreement.

64. The second suggestion is that it may be possible for a foreign currency payment to be made to the Ukrainian foreign currency account of a non-resident company nominated by the first defendant. The claimant has identified a company which is wholly owned and controlled by the first and second defendants which could fulfil that function. I understand that this is being explored with Credit Dnipro and Mr Voevodin, but because these exchange control issues were only first ventilated by the first defendant shortly before the hearing, it has not been possible to ascertain whether or not they might be acceptable.

Conclusions

65. I do not agree with the first defendant's submission that there is an objection in principle to an order that interferes with his own ability to determine whether or not the KZhRK receivable remains outstanding. I accept that it remains his asset and is not an asset of the claimant's, and I also accept that a freezing order is not an appropriate means by which a claimant can obtain security over a defendant's assets or interfere with the ordinary conduct of his business so long as legitimately carried out. That is not, however, an answer in circumstances in which there is a real risk that, if further steps are not taken, the proper and appropriate preservation of that asset for the purposes of any future enforcement may be jeopardised. It seems to me that this is more particularly

the case where the asset concerned is not being used in the course of a going concern business, but rather is the contingent right to the receipt of money for the transfer of an indirect interest in a going concern business in respect of which the defendant has chosen not to exercise such management control rights as he may continue to retain.

66. I am satisfied that the circumstances of this case, including in particular the first three of the claimant's overriding points as described above, are such that to leave the sum of US$65 million sitting in Kadis' bank account without taking all reasonable steps to demand and/or procure its onwards transmission in partial realisation of the KZhRK receivable, means that the realisation of that KZhRK receivable is itself jeopardised. Once a dividend has been declared and paid by KZhRK, it is in the plain interests of the first defendant for the amount of the dividends so declared to be preserved and protected by flowing through the corporate structures as rapidly as practicable. In my judgment, no good or commercially sound reason has been advanced as to why that should not happen, and no proper explanation has been put forward as to why the first defendant has not taken steps before now to ensure that it did and to enforce the facilitation obligation against Mr Voevodin.

67. The face value of the KZhRK receivable means that it is (or at least has the potential to be) a very valuable asset. However, there is sufficient uncertainty flowing from the length of time it has taken to realise, the identity of the counterparty and the terms and characteristics of the KZhRK agreement itself, that it is right to describe the receivable as a precarious asset. In my judgement, and in particular in light of what has occurred since the dividend was declared in May 2021, it is now necessary to take more active steps for its preservation as an asset available for enforcement should the claimant succeed in its claim in due course. Indeed, by exploring some of the alternative options for achieving a realisation of the part of the KZhRK receivable that has already been received by Kadis, the first defendant recognises that from a commercial perspective, it is in his interests for the protection and preservation of the asset to be achieved as well.

68. It seems to me that in principle the same approach should apply not just in relation to the US$65 million that is now held by Kadis (although so far as that US$65 million is concerned I do not think that in the light of the present correspondence any further steps to demand its payment are required), but also to the balance of the dividend proceeds which have already been declared and as to the whereabouts of which little evidence has been adduced.

69. In my view, given the period of time for which the KZhRK receivable has been contingently payable (the KZhRK agreement was entered into over 6 years ago) and the other considerations I have already identified, the consideration payable under the KZhRK agreement contingent on the declarations of future dividends or the making of future distributions by KZhRK also requires proportionate additional protection. As and when KZhRK declares dividends or makes any other form of shareholder distribution at any stage in the future, it remains necessary for the preservation of the value of the KZhRK receivable for the monies so distributed to be passed through to the first defendant via Mr Voevodin's indirect 50% interest in Starmill as KZhRK's shareholder, without the kind of delays which have arisen in relation to the dividend that was declared in May 2021.

70. I also do not agree that the fact that the first defendant is considering taking steps in an attempt to overcome the exchange control difficulties shows that any jeopardy to the asset is not caused by him or that he has in the past been doing the best he can to preserve and protect it, such that no further relief is justified. The two options I have already referred to seem to me to be solutions which can and should be fully explored and would have been fully explored some time ago if the first defendant were to be taking all reasonable steps to preserve what I accept is a precarious asset. In particular for the reasons given by the claimant I do not agree with the first defendant that it is necessarily reasonable for him to refuse to receive the proceeds of the dividend distribution in UAH or that by refusing to do so he would be acting in a manner that amounted to reasonable endeavours to obtain payment of sums due under the KZhRK agreement. That may prove to be the case, but I am not satisfied that it is. For that reason, as I indicated during the course of argument, I do not think that it is appropriate to make specific provision which determines at this stage that the first defendant must receive the proceeds in UAH in order to overcome the exchange control difficulties I have described.

71. None of this of itself justifies a conclusion that the relief the claimant actually seeks is appropriate. As to that, I agree with the first defendant's submission that the claimant must demonstrate that it is now necessary for the purposes of policing the freezing order and protecting the asset against unwarranted dissipation or diminishment in value, that the particular relief sought is granted. I also agree that any order must be crafted in a manner which is of practical utility for that purpose.

72. However, having regard to all of these considerations, I am satisfied that the stage has now been reached at which it is necessary for the proper preservation of the KZhRK receivable for further relief to be ordered and directed. In my judgment, the following relief is just and convenient, identified by reference to the paragraphs of the claimant's draft order.

Form of Order

73. As to the proposed demand on Mr Voevodin (paragraph 1.1 of the draft order), Mr Akkouh did not in his oral submissions press the point in relation to the US$65 million given the recent correspondence. I think that was an appropriate course for him to adopt, but I am satisfied that it is just and convenient for the first defendant to be ordered to make a demand in relation to the remaining amounts representing dividends already declared since the obligation under the KZhRK agreement was incurred. But the form of demand must derive from the terms of the KZhRK agreement and must reflect the facilitation obligation in relation to the dividends already declared.

74. I do not accept that this would be likely to be counterproductive. In my view it is more likely to flush out whether there are any legitimate grounds on which the obligation to pay might be defended, in consequence of which it will then be open to the claimant to seek any further protective relief that might be justified. There is no reason that this cannot be done within 14 days.

75. As to contact with Mr Voevodin (paragraph 1.2.1 of the draft order), the claimant seeks an order that the first defendant provide up-to-date contact details for him to enable it

to contact him to provide him with a copy of the freezing order, to ask him to confirm the truth of the first defendant's account of the KZhRK receivable and if appropriate to bring proceedings against him in order to preserve the KZhRK receivable or enforce the KZhRK agreement.

76. In my view, relief to this effect would assist in the preservation of what I have held to be a precarious asset for the reasons given by the claimant. I can see no good reason why the information as to Mr Voevodin's whereabouts should not be disclosed for the limited purposes identified by the claimant. Strictly speaking Mr Voevodin's contact details are confidential information but that is not of itself a ground for not ordering their disclosure. I am satisfied that in this context, their disclosure to the claimant is necessary for the proper preservation of the KZhRK receivable and there is no reason to think that they are so sensitive that protection of Mr Voevodin's confidential information outweighs the need for it to be disclosed to the claimant on the usual terms for that purpose.

77. This information, like the correspondence to which I shall come should be confirmed by a witness statement made by the first defendant. As matters stand there is no reason why this cannot be done within 14 days.

78. As to correspondence (paragraph 1.2.2 of the draft order), the claimant seeks an order that the first defendant disclose all communications which he or his agents have had with Mr Voevodin, Ms Selivanova or anyone on their behalf in relation to the sums payable under the KZhRK agreement. I think that this relief is also now necessary for the purposes of policing the original freezing order. I also agree that in principle there should be a continuing obligation (as contemplated by paragraph 2.2.1 of the draft order), although the time within which compliance is sought is in my view too tight. 14 days is also the right time period.

79. As to paragraph 1.2.3 of the draft order, I am satisfied that it is also necessary and proportionate for the disclosure to extend to information relating to the financial position of KZhRK. On the face of the existing draft this is expressed too widely, although in principle some information should be disclosed going as it does to the likelihood and value of dividends being declared which itself underpins the value of the KZhRK receivable. I discussed the point with Mr Akkouh during the course of the hearing and I am satisfied that the right order is to link the obligation to the information that the first defendant has received as identified in paragraph numbered 7 of FF's letter of 5 February 2021. I think that this information should continue to be provided until such time as the consideration payable to the first defendant under the KZhRK agreement has been discharged and that an order in the form identified in paragraph 2.2.3 of the draft order is just and convenient. The only amendment is that 14 days, not the 7 days suggested by the claimant, is to be allowed.

80. As to the application by the claimant for an order that the first defendant use reasonable endeavours to obtain payment of sums due under the KZhRK agreement (para 2.2 of the draft minute of order), I agree that in principle that is something to which it is entitled. I do not consider that it is inappropriate as lacking sufficient certainty. Orders requiring reasonable endeavours to be used are commonly made and are capable of enforcement where it appears to the appropriate standard that reasonable endeavours have not been used.

81. I also agree with the claimant that such an order does not require ongoing supervision of the kind which is normally regarded by the court as objectionable. Of course it remains possible that, notwithstanding the first defendant's reasonable endeavours, the KZhRK receivable remains outstanding, vulnerable to the ability to enforce against Mr Voevodin and unrealised. That does not however mean that a reasonable endeavours order should not be made.

82. As to the specifics of what is required to be done to ensure that reasonable endeavours are used, I agree that it should extend to requiring the first defendant to seek to agree timetables for payment on of dividends declared, but it should not extend to requiring him to use his management powers under clause 4 of the KZhRK agreement to procure that they be declared in the first place. In short, it should be limited to using reasonable endeavours to procure that once dividends have been declared they are passed through the payment chain as rapidly as practicable. Nor as I have already indicated do I consider that it is right for me at this stage to direct that the use of reasonable endeavours necessarily requires the first defendant to accept payment in UAH in circumstances in which the contractual right is to receive payment in US$.

83. As to paragraph 2.2.2 of the draft order, I think that, even if the payments are said to be in the ordinary course of business (which may or may not be the case), notification is probably required under the original freezing order in any event. The payment in partial discharge of the KZhRK receivable will amount to a dealing with part of that asset, albeit one which converts a chose of action into a credit balance on a bank account. In those circumstances, and in any event to avoid any uncertainty as to the position, I think that it is appropriate for an order in this form to be made.

84. This section of my judgment should give the parties sufficient information to agree the form of order to be made. If there are any difficulties in reaching agreement, I will (anyway in the first instance) deal with them on the papers.