Approved Judgment

Neutral Citation Number: [2018] EWHC 3471 (Comm)

Case No: CL-2018-000498

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 14/12/2018

Before :

PETER MACDONALD EGGERS QC
(sitting as a deputy judge of the High Court)

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Between :

ALEXANDER TUGUSHEV	**Claimant**
- and -	
(1) VITALY ORLOV	
(2) MAGNUS ROTH	
(3) ANDREY PETRIK	**Defendants**

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- -

Helen Davies QC and Richard Blakeley (instructed by **Peters and Peters Solicitors LLP**) for the **Claimant**
Christopher Pymont QC, Benjamin John and James Kinman (instructed by **Macfarlanes LLP**) for the **First Defendant**
The Second and Third Defendants were not represented

Hearing dates: 7th December 2018

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Judgment Approved

Peter MacDonald Eggers QC:

Introduction

1. The application before me is one made by the First Defendant, Mr Vitaly Orlov, for an order for the provision of security for costs by the Claimant, Mr Alexander Tugushev, pursuant to CPR rule 25.12. The security sought concerns the costs of applications relating to the continuation of a worldwide freezing order made against Mr Orlov on Mr Tugushev's application. Mr Tugushev has agreed in principle to provide security for costs in this respect, but without prejudice to his right to argue at a later date (if the worldwide freezing order is continued and if the proceedings continue) that Mr Orlov is not entitled to security for costs. It is also agreed that such security will be provided by way of a payment into Court. The issue between the parties is the amount of that security. The level of security sought by Mr Orlov is substantial. The level of security offered by Mr Tugushev is also substantial. I have to decide what is the appropriate amount of security for costs to be ordered, and in addition by what date such security must be provided.

The proceedings

2. In order to decide these matters, I must delve into the nature of the action for which security for costs is sought. On 23rd July 2018, Mr Tugushev commenced these proceedings against Mr Orlov and the other Defendants, Mr Magnus Roth and Mr Andrey Petrik, relating to the ownership and operation of a very substantial Russian fishing concern (the Norebo group) and a smaller fishing concern (the Three Towns Capital or "TTC" group) in Hong Kong. Mr Tugushev claims that he is entitled to one third of the ownership of these concerns or, alternatively, US$350 million, by reason of an alleged conspiracy perpetrated by the Defendants against him. Mr Orlov denies these claims. The proceedings in England are but one action amongst litigation carried out also in the Isle of Man, Guernsey, Hong Kong, Norway and Russia.

3. The proceedings were commenced by two applications made without notice by Mr Tugushev for a worldwide freezing order and for permission to undertake alternative service of the proceedings within the jurisdiction. Bryan, J granted these applications on 23rd July 2018 on the basis of a cross-undertaking as to damages by Mr Tugushev. During the hearing of those application, the Court was informed that Mr Tugushev is a gentleman without substantial assets and is relying on the financial support of a third party funder (in saying "*funder*", I do not know if there is one or more than one funder). By reason of this information, the Court was prepared to grant the application provided that Mr Tugushev's cross-undertaking was fortified by the third party funder up to £500,000.

4. On 30th July 2018, being the return date identified on the Court's order made on 23rd July 2018, a hearing was held before Teare, J. At that hearing, Mr Orlov was ordered to indicate whether he intended to oppose the continuation of the worldwide freezing order and/or challenge the jurisdiction of the Court by 10th September 2018.

5. Mr Orlov's position is that the worldwide freezing order was wrongly granted and that the English Court does not have jurisdiction over the dispute. Accordingly, on 10th September 2018, Mr Orlov indicated that he intended to oppose the continuation of the worldwide freezing order and to challenge the jurisdiction of the Court.

6. On 16th October 2018, Mr Orlov filed his application challenging the Court's jurisdiction and his evidence in support of that application and also filed his evidence opposing the continuation of the worldwide freezing order.

7. Mr Tugushev is due to file his evidence in support of the continuation of the worldwide freezing order and opposing Mr Orlov's jurisdiction challenge by 14th December 2018. Mr Orlov's evidence in response is due to be served by 18th January 2019 and the hearing of the applications is scheduled to start on 29th January 2019. I understand that the estimated duration of the hearing of these applications is 2 days, perhaps 3 days.

Mr Orlov's security for costs application

8. Mr Orlov made an application on 26th October 2018 for the provision of information relating to the third party funder and the terms of the funding agreement. That application was not pursued, at least for the time being, because Mr Tugushev has agreed to provide security for costs with the support of that third party funder. Indeed, Mr Orlov accepts that if security for costs is provided, there is no immediate need for the Court to order disclosure of the information relating to the identity of the third party funder and the terms of the funding arrangement.

9. The quantum of the security for costs sought by Mr Orlov is £2,711,440.22, for the period from 10th September 2018 up until the disposal of the applications, calculated as being the total of Mr Orlov's incurred and estimated future costs of the applications relating to the worldwide freezing order and the challenge to the Court's jurisdiction, less a 20% discount representing the "*vagaries of assessment*". No security is currently sought in respect of Mr Orlov's costs before 10th September 2018, although Mr Orlov reserves his right to seek the recovery of the costs incurred before that date if the worldwide freezing order is discharged.

10. The total costs incurred and estimated to be incurred by Mr Orlov are said by Mr Orlov to be £3,389,300.27 for the period from 10th September 2018 to the date of the disposal of the applications. This sum is broken down in the sixth witness statement dated 30th November 2018 of Mr James Popperwell of Macfarlanes LLP, Mr Orlov's solicitors. In that witness statement, Mr Popperwell explained that, by letter dated 2nd October 2018, an estimate of Mr Orlov's incurred and future costs had been provided to Mr Tugushev in the total sum of £2,275,212. However, that costs estimate was revised upwards by Mr Popperwell by the time of his sixth witness statement made on 30th November 2018. Mr Popperwell also stated that this costs calculation has been carried out "*on a careful and conservative basis*" (paragraph 10.2).

11. In a schedule exhibited to Mr Popperwell's witness statement, the figure of £3,389.300.27 is broken down as follows, although these figures in fact total £3,456,105.27:

	Incurred Fees 10/09/18-26/11/18	**Estimated Fees 27/11/18-Hearing (inclusive)**
Macfarlanes LLP	£903,907.00	£668,050.00

Counsel team	£361,900.00	£769,500.00
Russian lawyers	£348,000.00	£298,000.00
Expert witnesses	£46,748.27	£30,000.00
Totals	£1,660,555.27	£1,765,550.00
Grand total	£3,359.300.27 plus £30,000 disbursements (copying, reprographic and bundling costs)	

12. The 20% discount proposed by Mr Popperwell in his witness statement reflects the "*significant likelihood*", or at least a "*real possibility*", that if the worldwide freezing order is discharged, Mr Tugushev will have to pay costs on an indemnity basis (paragraph 11). In other words, in that event, it is said, Mr Orlov would be entitled to recover 80% of his costs of the applications.

13. Mr Orlov reserves his rights in respect of any application for further security for costs which might be made.

The parties' submissions

14. Mr Christopher Pymont QC, Mr Benjamin John and Mr James Kinman, on behalf of Mr Orlov, submitted as follows in support of the security for costs figure that Mr Orlov relies on:

    (1) Although it is a large sum, the costs estimate has been calculated by Mr Popperwell conservatively, taking into account costs incurred from 10th September 2018 and ignoring costs incurred by Mr Orlov before that date. The breakdown of incurred and estimated future costs provided by Mr Popperwell is adequate to the task and does not need to descend to the specificity required, for example, for a detailed assessment of costs.

    (2) This sum is neither disproportionate nor unreasonable, having regard to the facts that:

        (a) This is large scale litigation relating to one of the largest fishing concerns in the world, which Mr Tugushev says has a value of over US$1 billion. Mr Pymont QC also emphasised that this was "*hard-fought*" litigation between the parties.

        (b) The allegations in the litigation are of fraud and dishonesty over a considerable period of time (decades).

        (c) There are complex issues of both English and Russian law involved in the proceedings.

        (d) The weight of the evidence reflects the scale of the litigation and the variety and complexity of the issues between the parties in that Mr Tugushev has filed evidence in support of the applications made without

notice comprising five separate affidavits (running to 150 pages) dealing with disputed events back to 1997 and before that, over 1,750 pages of transcripts of illicitly recorded conversations, in translation and their original Russian, over a thousand pages of other exhibits, including extensive travel data relating to Mr Orlov, which appear to have been illegally obtained from the Russian border service, and an expert's report from Professor Bowring. In response to this, Mr Orlov has filed 110 pages of witness statement evidence from two witnesses and three experts' reports concerning the unencumbered value of Mr Orlov's shareholding in the Norebo group, the effect of certain Russian legislation on Mr Orlov's ability to dissipate his assets, and other elements of Russian law. It is envisaged that Mr Tugushev's evidence in reply will be substantial.

(e) The day to day operation of the worldwide freezing order and the manner in which it interacts with the ongoing business of the Norebo group and the TTC group gives rise to considerable work and cost, which is reflected in *inter alia* the considerable correspondence between the parties' solicitors.

(f) There is no suggestion that Mr Tugushev's costs of the applications will be substantially lower. No estimate of Mr Tugushev's own costs of the applications has been adduced in evidence, but Mr Tugushev's costs of an interlocutory application relating to Mr Orlov's alleged entitlement to rely on the privilege against self-incrimination was substantial (in the approximate sum of £430,000).

(3) Security for costs applications involve balancing the potential prejudice between the parties, but the relative weight of the prejudice to the applicant for security for costs, given the risk of being unable to recover costs awarded to that party in the absence of security, is such that any doubts about the security for costs application should be resolved in favour of the applicant.

(4) The discount of 20% suggested by Mr Orlov is appropriate, given that there is a reasonable possibility, at the least, that Mr Tugushev will be required to pay costs on the indemnity basis in the event that the worldwide freezing order is discharged, having regard to the fact - according to Mr Orlov - that Mr Tugushev failed in his duty of fair presentation or disclosure at the hearing of the "without notice" applications on 23rd July 2018, and the oppressive nature of the worldwide freezing order insofar as it operates pending its discharge.

15. Ms Helen Davies QC and Mr Richard Blakeley on behalf of Mr Tugushev submitted that:

(1) Although not accepting that Mr Tugushev is obliged to provide security for costs, Mr Tugushev is prepared to do so and has proposed the provision of security for costs in the sum of £1,000,000, which offer was made in correspondence by Mr Tugushev's solicitors, Peters & Peters Solicitors LLP, by letter dated 22nd November 2018.

(2) The total costs figure of £3,389,300.27, on the basis of which security is sought, is more than £1.1 million more than the original estimate put forward by Mr Orlov on 2nd October 2018. There has been no detailed explanation justifying the increase. Ms Davies QC also produced a schedule analysing the comparative increase in Mr Orlov's estimates in order to demonstrate that Mr Orlov's headline figure is too high.

(3) Mr Orlov has produced no detailed breakdown of costs, whether costs incurred or estimated future costs. Accordingly, the proper scrutiny of the costs estimates provided by Mr Orlov is very difficult. There is no evidence for this lack of transparency, especially in respect of incurred costs. This "*deliberate opacity*" must count against Mr Orlov because, without a proper breakdown, it is impossible to assess the appropriateness of the costs figure with any accuracy, for example having regard to the possibility of duplication, or the allocation of excessive time or unduly senior personnel to particular tasks, or the application of excessive rates.

(4) It is not possible to know whether or not the costs included in the breakdown include costs which have been incurred by Mr Orlov and which have already been the subject of costs orders in Mr Tugushev's favour. In this respect, Ms Davies QC referred to the costs incurred in respect of the privilege against self-incrimination issue. However, Mr Pymont QC said, on instructions, and I am prepared to accept, that such costs are not included in Mr Orlov's security for costs breakdown.

(5) The costs figure put forward by Mr Orlov is extremely high and is both unreasonable and disproportionate. Ms Davies QC said that the headline figure was "*eye-wateringly*" high. Insofar as costs which are unreasonably or disproportionately high are irrecoverable, so too they cannot be taken into account in assessing the quantum of any security to be provided. In this respect, Ms Davies QC pointed to the fact that the worldwide freezing order, at paragraph 11(1), permits Mr Orlov to spend "*a reasonable sum on legal advice and representation*".

(6) This over-spending approach on the part of Mr Orlov is reflected in the application relating to the invocation by Mr Orlov of the privilege against self-incrimination in that Mr Orlov served ten witness statements and seven experts' reports and in the process incurred £666,900.23, before abandoning the application. This was more than £230,000 than the costs incurred by Mr Tugushev. Mr Richard Salter QC, sitting as a deputy judge of the High Court, awarded Mr Tugushev 80% of his costs of that application, but remarked that both parties' costs were "*disproportionate*".

(7) Given that Mr Orlov has already produced his evidence in relation to the applications, the estimated costs yet to be incurred should not be higher than the costs already incurred, but should be substantially lower.

(8) The amount of £646,000 requested in respect of the cost of Russian lawyers, which are distinct from experts' costs, is extremely high and lacks any adequate justification or explanation. Mr Pymont QC, and Mr Popperwell in his sixth witness statement, refer to the fact that these fees relate to "*input and assistance*

from Mr Orlov's Russian lawyers in connection with applications relating to events and property in Russia, about a Russian business, involving Russian parties and Russian lay and expert witnesses, in which many of the documents are in Russian" (paragraph 13.4.1.4). Ms Davies QC says that this is not sufficient. By contrast, Mr Tugushev takes no issue with the experts' fees which appear reasonable.

The principles applying to quantification of the security to be provided

16. The order for security for costs is to be made under CPR rule 25.12, which provides that:

> "*(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings.*
>
> *(Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this Section of this Part to apply to Part 20 claims)*
>
> *(2) An application for security for costs must be supported by written evidence.*
>
> *(3) Where the court makes an order for security for costs, it will –*
>
> *(a) determine the amount of security; and*
>
> *(b) direct –*
>
> *(i) the manner in which; and*
>
> *(ii) the time within which the security must be given*."

17. Given that Mr Tugushev is prepared to submit to an order for security for costs, it is CPR rule 25.12(3)(a) and (b)(ii) with which I am concerned; in other words, the amount of the security and the date by which it is to be provided.

18. As to the amount of the security, in *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm); (2015) 158 Con LR 253, Leggatt, J explained the approach he took in assessing the amount which is the subject of a payment on account of costs pursuant to CPR rule 44.2(8). Of course, the approach to assessing the amount of a payment on account is inherently conservative, with a view to identifying the minimum recoverable figure, or to use the words of Leggatt, J "*the lowest amount*". Although the principles governing the calculation of a payment on account may be different from those governing the quantum of security for costs in certain key respects, the general approach offered by Leggatt, J provides some guidance. At para. 12-15, Leggatt, J said:

> "*12 As may be apparent from what I have said so far, these proceedings are an instance of what is often euphemistically described as "hard fought litigation" in which neither side shows any sense of moderation. The claims are based on allegations of dishonesty and the amounts of money involved are very large. Some of the allegedly fraudulent transactions in issue are of considerable complexity.*

Both sides have many lawyers working on the case. At the hearing on 20-21 January 2015 the claimants were represented by two senior leading counsel, as well as junior counsel. So were the main group of defendants. The first defendant, Mr Zhunus, was separately represented by leading and junior counsel.

13 In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants.

14 Where, as here, the court is not actually assessing the amount of costs to be recovered and has nothing like the level of information that could be required on a detailed assessment, there is additional reason to be conservative. The fact that the total costs claimed are very high cannot by itself be allowed to increase the sum awarded as an interim payment. I am sure that the costs claimed by the main group of defendants are neither reasonable nor proportionate. By what factor they should be discounted, however, to arrive at a reasonable and proportionate amount can only properly be determined by a detailed assessment.

15 For present purposes the approach that I intend to follow is a necessarily approximate one of estimating the recoverable amount in broad terms based on my knowledge of this case and of the issues raised by the applications and also drawing on such experience as I have of the costs of commercial litigation from summarily assessing and awarding payments on account of costs in other cases. I will then discount this figure to reflect the margin of error in my estimate and the principle that an interim payment should err on the side of awarding less than is ultimately likely to be recovered."

19. Leggatt, LJ later revisited his judgment in this case in *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2018] EWHC 332 (Comm); [2018] 2 Costs LO 189, at para. 9, and commented to the same effect.

20. In *Vald Nielsen Holding A/S v Baldorino* [2017] EWHC 1033 (Comm); [2017] 3 Costs LO 309, Mr Robin Dicker QC, sitting as a deputy judge of the High Court, considered an application for additional security for costs and said, at para. 13:

> "*Under CPR 25.13(1)(a), the court has a discretion to award security in an amount which it considers just having regard to all the circumstances of the case. The appropriate amount will generally be the sum which the court considers that the applicant would be likely to recover in a detailed assessment if awarded costs on a standard basis following the trial, having regard to the factors set out in CPR 44.5(3).*"

21. In *Danilina v Chernukhin* [2018] EWHC 2503 (Comm), at para. 14-17, Teare, J commented as follows in connection with an application for security for costs, in particular as to the possibility of indemnity costs eventually being ordered when costs come to be determined by the Court:

> "*14 The question on this application is whether an order for costs on the indemnity basis is a reasonable, not a speculative, possibility such that it is appropriate that the security ordered by the court should reflect that possibility. That does not involve a consideration of the merits of the claims. On the contrary it assumes that the Claimant loses her claims.*
>
> *15 Upon that assumption it appears to me to be unlikely that the Claimant's TGM claim, if it fails, would have been dismissed because it was founded upon a mistaken recollection by her that she was the beneficial owner of a very valuable asset. It is more likely that if she loses her claim it would be because her evidence was dishonest. Similarly, if she loses her Family Assets claim it is unlikely that that would have been because she had a mistaken recollection of agreeing that assets acquired during the Claimant's and First Defendant's relationship were to be divided between them. There thus appears to me to be a reasonable possibility that costs will be ordered to be assessed on an indemnity basis in the event that the Claimant loses her claims.*
>
> *16 … That conclusion does not involve an assessment of the merits of the claims but simply an appreciation of the nature of the claims. I do not say that indemnity costs will be ordered, only that there is a reasonable possibility that they will be.*
>
> *17 Where there is no possibility of costs being assessed on an indemnity basis or where such possibility is no more than speculative the courts generally make orders for security for costs by reference to 60-70% of the incurred and expected costs. Cases noted by Mr. Crow suggest a range of 60-75% but my experience suggests that 60-70% is more usual. It appears to me that where there is a reasonable possibility of indemnity costs the order should be made (at any rate in this case where very substantial costs are involved) by reference to about 75% of the incurred and expected* costs …"

22. Most recently, in *Mayr v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3093 (Comm), the defendant applied for further security for costs in respect of a professional negligence claim against the defendant, in addition to the security voluntarily provided by the claimant in the sum of £2 million. The defendant sought an additional £2.4 million by way of security and the claimant offered an additional £305,000. Moulder, J in the event ordered additional security in the sum of £1.3 million. Although the judge was concerned with the principles applicable to awarding additional security, Moulder, J explained her approach to the quantification of such security:

> "*24. … The overall purpose of giving security for costs is to protect the defendant and that purpose can only be achieved if the court considers the overall figures on the basis of the up to date estimate before the court.*
>
> *25. However, at this stage it is, of necessity, a broad-brush approach and the court has in mind the degree of prejudice to the parties if the defendant is under-secured and over-secured and it has regard to guidance in the Commercial Court Guide that any doubts would usually be resolved in favour of the defendant …*
>
> *27. The claimant's case therefore can only be considered on the basis that they say it would not be just to order the amount sought because the figures cannot be justified as being reasonably and proportionately incurred or reasonable and proportionate in amount, having regard to the factors set out in CPR 44. However, as already noted, the court cannot and does not descend into the level of detail which would be examined on a detailed assessment and does not have before it the level of details which would be before a court on a detailed assessment. The court on an application for security for costs must of necessity adopt a broad-brush approach and in this regard, I do not accept the submissions of the claimant that the breakdown provided by [the defendant] was inadequate …*
>
> *38. For the claimant the number of hours which it is estimated to be spent on the experts was challenged as well as the costs of the expert reports. In my view any issue as to whether or not the proposed costs of the experts and the time spent reviewing the reports has, of necessity, to be dealt with in a broad-brush way. The court has no really basis [sic] at this stage to challenge the estimate of hours to be spent. The claimants sought to take issue with the total number of hours on the basis of an average hourly rate for lawyers, but this seems to be to be an impossible exercise without descending into an inappropriate level of detail and the estimate has been produced with regard to the actual hourly rate which it is estimated will be spent.*
>
> *39. The protection ultimately for the claimants is that if the hours spent are disproportionate this can be challenged with a detailed assessment. Again, for the purpose of the security for costs application, the correct approach, it seems to me, is to apply a conservative approach and apply an overall discount to the costs on the basis that on detail[ed] assessment only a percentage recovery will be achieved …*
>
> *47. This [broad-brush] approach is consistent with the principle that in the case of doubt the issue should be resolved in favour of the defendant given that the prejudice to the defendant of taking the risk of being unable to recover its costs outweighs the prejudice to the claimants …*"

23. The principles discussed in these authorities provide some assistance. However, at best, they provide guidance in what I believe both parties accepted was a "*broad-brush*" approach to assessing the quantum of security for costs. Nevertheless, I would venture the following principles which I shall take into account in undertaking this general quantification exercise:

(1) The purpose of an order for security for costs is to provide protection to a defendant who is being sued by a claimant who may well not be in a position to satisfy a costs order made against the claimant at the conclusion of the action or of a particular stage of an action.

(2) That protection must be suited for the purpose and therefore cannot exceed any sum which goes beyond what may reasonably be expected to be recovered by the defendant in the event that the claimant is ordered to pay the defendant's costs.

(3) In determining what may reasonably be expected to be recovered by way of a costs order, the Court should take into account the nature of the litigation, or the stage of the litigation, to which the proposed security relates, what that litigation entails in terms of the provision of legal services by both counsel and solicitors, the production of factual and expert evidence, and other associated costs and disbursements.

(4) The costs associated with such litigation, or the relevant stage of the litigation, and for which security is sought should be costs which, as an estimate, can be considered by the Court to be both reasonably and proportionately incurred and reasonable and proportionate in amount. Costs which are unreasonably incurred or are unreasonable in amount should not be included in a security for costs order.

(5) By CPR rule 44.3(5), costs incurred are proportionate if they bear a reasonable relationship to (a) the sums in issue in the proceedings, (b) the value of any non-monetary relief in issue in the proceedings, (c) the complexity of the litigation, (d) any additional work generated by the conduct of the paying party, and (e) any wider factors involved in the proceedings, such as reputation or public importance.

(6) In determining a security for costs application, the Court should exclude from any security amount costs which the Court is not satisfied can be justified on any view as reasonable and proportionate. That is, the exercise of assessing the quantum of a security for costs order should not be influenced by any costs which a party chooses to incur over and above what is reasonable and proportionate in the circumstances.

(7) The quantification of security is an objective assessment to be carried out by the Court as best it can based on the available evidence and information.

(8) Although I accept that the quantification of an order for security for costs is necessarily a "*broad-brush*" exercise of assessment, bearing in mind the possible prejudice to the respondent of too much security being ordered, the Court must interrogate the estimates of incurred and future costs provided by the applicant. This exercise will of course not nearly approximate a detailed assessment of costs, but it will be similar to a summary assessment or a costs budgeting exercise. To this end, it is incumbent on the applicant to provide a sufficiently detailed breakdown of costs in support of its application to satisfy the Court that the amount of security which will be ordered will provide the necessary protection to the applicant and avoid any unnecessary prejudice to the

respondent. In the event that a sufficiently detailed breakdown is before the Court, in order to ensure that the security ordered provides the necessary protection to the applicant, the Court should resolve any doubt in favour of the applicant. However, if there is no sufficiently detailed breakdown of costs before the Court, any uncertainty arising from the inadequate breakdown should be resolved in favour of the respondent.

(9) An allowance should be made for any reduction of costs which would be made in an eventual assessment of costs. In the ordinary course, costs will be assessed on the standard basis. However, it is relevant to consider whether or not there is a real possibility, whether probable or not, that an order for indemnity costs might be made against the claimant. That does not mean that the Court must decide whether the assessment of costs on an indemnity basis is likely to be appropriate. It is the realistic possibility of such an assessment being ordered which justifies the Court taking this into account in determining the quantum of any security to be provided.

(10) The applicant for security for costs will bear the burden of satisfying the Court that the amount of the security for costs to be ordered is in accord with these considerations.

The quantum of security for costs in this case

24. The quantum of the security for costs to be determined by the Court cannot be higher than Mr Orlov's own estimate. Although it is open to the Court to assess the quantum of security in an amount less than that put forward by Mr Tugushev (£1,000,000), I see no reason to do so in this case.

25. The following factors encourage a more generous assessment of quantum, namely the fact that this is a very high-value dispute, involving complex issues of law and fact and substantial items of evidence, and it is plainly important, potentially having ramifications beyond the parties' personal dispute, given that there are issues of ownership of substantial businesses involved.

26. Although I understand and appreciate that the temperature of the dispute between the parties is high, with the result that the litigation is hard-fought, I do not regard that as a relevant consideration. The purpose of the conduct of litigation by professional legal representatives in this jurisdiction is to lower that temperature and to ensure that the litigation is conducted in a fair, reasonable and proportionate manner.

27. Nevertheless, there are overwhelming factors which militate against a generous assessment of the amount of security for costs to be ordered. In particular,

(1) Although involving substantial claims and important and complex issues, I do not think that a 2-3 day hearing, which to date involves the affidavits and witness statements of 7-8 witnesses of fact, totalling 260 pages (with what appears to be approximately 3,000 pages of exhibits), and four experts' reports, would reasonably and proportionately involve an expenditure in the total sum suggested by Mr Orlov (£3,389,300.27). Although no doubt substantial, I do not consider that the quantity of evidence adduced is especially out of the ordinary

for heavy litigation of this nature. I take into account, however, that there will be additional factual and expert evidence which has not yet been served.

(2) The Court's assessment of quantum is hampered by the lack of an adequately detailed breakdown of incurred costs and estimated future costs. When the Court comes to consider costs budgeting or the summary assessment of costs, the Court is ordinarily provided with a more detailed breakdown than has been provided to the Court for this application and which is quoted above. There is no reason why a similar exercise could not have been undertaken with respect to Mr Orlov's incurred costs in this case at the very least. Further, I would expect a more detailed breakdown than that provided for estimated future costs. Certainly, I am accustomed to seeing more detailed breakdowns for the purposes of security for costs applications.

(3) In the circumstances, the Court is not in a position to assess whether any costs have or have not been too generously estimated or duplicated or whether excessive time or rates have been applied. Mr Pymont QC submitted that the breakdown provided was not inadequate in reliance on Moulder, J's decision in *Mayr v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3093 (Comm), but in that case the judge had before her information concerning hours and rates. Such basic information was missing from the breakdown provided by Mr Orlov. Accordingly, given that the burden rests on the applicant for security to satisfy the Court what level of security ought to be provided, the Court should deal with any uncertainty created by an insufficiently detailed breakdown of costs in a manner which gives the benefit of the doubt to the respondent (Mr Tugushev).

(4) I do not consider that the lack of any estimate of Mr Tugushev's costs allows the Court to give the benefit of the doubt to the applicant (Mr Orlov).

(5) Overall, and as stated above, in my judgment, the total costs figure put forward by Mr Orlov is disproportionately high. I am reinforced in this view by the consideration that Mr Orlov's estimated costs had increased by more than £1.1 million from 2nd October 2018 to 30th November 2018, without any satisfactory detailed explanation for the increase.

(6) Although I have read paragraph 13.4.1.4 of Mr Popperwell's sixth witness statement, I do not consider that the explanation given for the £646,000 costs estimate for the involvement of Russian lawyers (who are not expert witnesses) is adequate to allow the quantum of any security for costs order to include such costs in such a substantial amount. I am prepared to allow £50,000 in respect of such costs incurred for the purposes explained, albeit in very general terms, by Mr Popperwell. After subtracting £596,000 from the total costs estimate provided by Mr Orlov, that leaves £2,793,300.27.

(7) Of that sum, given my concerns about the lack of a sufficiently detailed breakdown and the unreasonably high amount reflected by Mr Orlov's estimate, I consider that a 30% discount should be applied to that figure to reflect the starting point for the security for costs quantum calculation, subject to two exceptions. The exceptions are that this discount should not be applied to the estimated costs of the expert witnesses (in total, £76,748.27) and the copying,

bundling and reprographic disbursements (£30,000). Altogether, this results in a reduced starting figure of £1,987,334.67.

(8) That leaves the question of what discount should be applied to reflect that level of costs which would be excluded from recovery on an assessment. I consider that there is a real possibility that costs might be ordered against Mr Tugushev on an indemnity basis if the worldwide freezing order is discharged, having regard to (a) the fact that it is alleged that the worldwide freezing order was procured by a non-disclosure, (b) the serious nature of the allegations in the proceedings, and (c) the potentially oppressive effect of a worldwide freezing order which is granted without justification. In saying this, I do not mean to suggest, nor could I suggest, that the worldwide freezing order will or will not be discharged or that the Court will order costs to be assessed on a standard or indemnity basis. Nevertheless, the order for security should take account of the possibility of an indemnity costs order. For this purpose, I will apply a discount of 25% (relying on Teare, J's approach in *Danilina v Chernukhin* [2018] EWHC 2503 (Comm), para. 17). Applying this discount, the resulting costs figure is £1,490,501.00.

(9) I am prepared to round this figure up to £1,500,000. Looking at this figure in the round, and having regard to the nature and subject-matter of the proceedings from 10th September 2018 to the date of the hearing currently scheduled to start on 29th January 2019, this figure is at the uppermost end of the range of what I consider to be the appropriate amount for an order for security for costs in this case. I am prepared to order security in this amount for the purposes of providing the protection required by Mr Orlov as an applicant for security for costs.

28. In these circumstances, in my judgment, security for costs should be ordered in the sum of £1,500,000.

Date by which security should be provided

29. Mr Orlov requires security to be provided by 21st December 2018, principally for the reason that the security needs to be provided in good time prior to the hearing currently scheduled to start on 29th January 2019, principally for the reason that if Mr Tugushev fails to provide such security in accordance with the Court's order, there is little time available to allow the operation of the default provision of the Court's order for security for costs (the precise terms of which will be determined when this judgment is handed down).

30. Mr Tugushev is agreeable to providing security of £1,000,000 by 21st December 2018 but requests the Court to order that the balance of any security, in this case £500,000, should be provided no later than 15th January 2019. Ms Davies QC, on behalf of Mr Tugushev, informed me during the hearing, on instructions, that the third party funder - and therefore Mr Tugushev - is unable to provide security in excess of £1,000,000 by 21st December 2018.

31. I direct that security for costs should be provided by Mr Tugushev by the dates proposed by Mr Tugushev for the following reasons.

(1) The application for security for costs was made only on 30th November 2018. I understand that the application follows on from an earlier and undetermined application for disclosure of information relating to the third party funder and funding arrangement, but still the application for security was made late in the day. By this, I am not so concerned with the question whether or not the application should have been made earlier, but merely with the consideration that there are less than eight weeks before the hearing.

(2) The hearing of the application took place on 7th December 2018, only 14 days prior to the date on which Mr Orlov proposed for the provision of security of costs. Given the lack of available time at the hearing on 7th December 2018, I was not in a position to give judgment at that date and reserved judgment to the following week. This was not the fault of either party, but it does mean that there will be even less time for Mr Tugushev or the third party funder to arrange the security. Given that Mr Tugushev has proposed security in the sum of £1,000,000 and proposed to provide that level of security by 21st December 2018 in any event, I do not consider that this short period of time prejudices Mr Tugushev in respect of that part of the order for security.

(3) The majority of the security ordered to be provided will be provided by 21st December 2018. I do not consider that Mr Orlov will be unfairly prejudiced by the provision of the balance of the security by 15th January 2019.

(4) I accept Ms Davies QC's submission made on instructions that Mr Tugushev is not in a position to arrange for the provision of security for costs in respect of the balance of £500,000 by 21st December 2018.

Conclusion

32. For the reasons explained above, I order that Mr Tugushev provide security for costs incurred or to be incurred from 10th September 2018 to the date of the disposal of the applications relating to the worldwide freezing order and jurisdiction, in the sum of £1,500,000 by way of a payment into Court. Security for the first £1,000,000 will be provided by 21st December 2018 and the balance of the security of £500,000 will be provided by 15th January 2019.