Neutral Citation Number: [2020] EWHC 204 (Comm)

Case No: CL-2019-000412

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

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

Date: 6 February 2020

**Before** :

**MRS JUSTICE COCKERILL DBE**

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**Between :**

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| **(1) PJSC National Bank Trust**<br>**(2) PJSC Bank Otkritie Financial Corporation** | **Claimants** |
| **- and -** | |
| **(1) Boris Mints**<br>**(2) Dmitry Mints**<br>**(3) Alexander Mints**<br>**(4) Igor Mints** | **Defendants** |

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**Nathan Pillow Q.C. and Anton Dudnikov** (instructed by **Steptoe and Johnson UK LLP**) for the **Claimants**
**Duncan Matthews Q.C. and Richard Greenberg** (instructed by **Stephenson Harwood LLP**) for the **Fourth Defendant**

Hearing dates: 18 December 2019
Draft Judgment sent to parties: 20 January 2020

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# Approved Judgment

**Mrs Justice Cockerill :**

1. This is an application made by the Fourth Defendant, Igor Mints ("IM"), to be released from the Return Date Undertakings, as set out in Schedule 1 to the Order of the Honourable Mr Justice Jacobs dated 11 July 2019. Those undertakings were given in substitution for a worldwide freezing order ("WFO") granted on 27 June 2019 by Moulder J against IM and the three other Defendants to these proceedings, who are IM's father and brothers.

2. The issue to be decided is whether it is open to IM to seek the release of the Return Date Undertakings, and if it is, whether it is just and convenient in all of the circumstances to maintain the undertakings against IM.

3. IM's case is that that question should be answered no, essentially for four reasons:

   i) There is no good arguable case against IM and/or the evidence against him is extremely thin;

   ii) There is no (or no sufficient) evidence of a real risk of dissipation;

   iii) The Return Date Undertakings against IM serve little practical purpose and are disproportionate; and at the same time the Return Date Undertakings are doing significant, disproportionate and irremediable harm to IM's business (and associated third party interests), namely those of EG Capital Advisors Cayman Islands ("EGCA") and its group of companies ("EGCA Group"), including in particular EGCA UK Limited ("EGCA UK");

   iv) The Claimants failed to comply with their duty of full and frank disclosure at the *ex parte* hearing before Moulder J.

**Background**

4. In broad outline, the Claimants' case in this action, and which underpinned the relief sought, is that "*the Defendants were involved, on behalf of the relevant O1 Group entities, in the negotiation and implementation of the fraudulent transactions…"*. However, a little more detail is needed to make sense of the arguments which arose before me.

5. The Claimants are Russian banks. They, or their predecessors in title, lent very large sums to companies in or connected to a group of companies known as the O1 Group. The Claimants' case is that the O1 Group, including the borrowers from the Banks, was ultimately owned by the First Defendant, Mr. Boris Mints. He is the father of the 2nd - 4th Defendants.

6. The position at the beginning of August 2017 was that the Second Claimant, Bank Otkritie, had outstanding loans to companies in or connected to the O1 Group ("O1 Companies") of around US$500 million (the "Otkritie Loans"). Separately, another Russian bank JSC Rost Bank ("Rost Bank") was owed some US$350 million by O1 Companies. These loans ("the O1 Loans") were on commercial terms, in large part

secured, performing, and were due to be repaid in the relatively short term: from late 2017 through to 2020.

7. Both Bank Otkritie and Rost Bank were in severe financial difficulties. However, the Banks had and retained valuable security for the O1 Loans. In particular, Bank Otkritie held security in the form of pledges of shares in one of the companies within the O1 Group, namely O1 Properties Ltd. of Cyprus ("O1 Properties"). These shares had been pledged by Centimila Services Ltd. ("Centimila"), Nori Holding Ltd ("Nori") and Coniston Management Ltd. ("Coniston"). Two of these companies, Centimila and Nori, were within the O1 Group. The third, Coniston, was beneficially owned and controlled by a Mr Alexander Nesis, who was associated with the Defendants. In addition to these pledges, some security had been provided directly on real property. This security was of real substance and value. Rost Bank also held valuable security, including a charge over real estate and a pledge of share in another O1 company.

8. It appears that it was known to the Defendants, in August 2017, that both Banks were in financial difficulties, and that the Central Bank of Russia ("CBR") would shortly be taking over at least one of the Banks. This would be potentially damaging to the O1 Group and thereby to the Defendants' interests. At the same time, the Claimants' evidence was that the O1 Group itself had its own financial difficulties, was looking to restructure its facilities and that the restructuring of the Banks would leave the O1 Group exposed at a very difficult time.

9. In the event the Defendants regained control of the valuable securities which had been pledged or otherwise provided to the Banks. The securities held by the Claimants were replaced by bonds ("O1 Bonds") issued by a company within the O1 Group ("the Replacement Transactions"). They fall into two categories: the "Otkritie Replacement Transaction" and the "Rost Bank Replacement Transaction".

10. These bonds had a number of features which the Claimants say make them a highly surprising replacement for the good security previously held. They describe them as illiquid and uncommercial corporate bonds, worth a small fraction of the price the Claimants paid for them and of the value of the loans that they replaced.

11. The Claimants contend that this change was accomplished with the dishonest or corrupt assistance of the two individuals who occupied the position equivalent to CEO at Bank Otkritie (Mr. Dankevich) and at Rost Bank (Mr. Shishkhanov), whose tenure at the Banks would come to an end as a result of the imminent takeover by CBR. The Claimants therefore contend that there was an unjustified, dishonest and unlawful dissipation of the security held for the Banks. There was, they say, no honest explanation for swapping loans which were secured, and producing income, for these bonds.

12. The present application is not concerned with the broader underlying merits of the case or as to the character of the transactions themselves. Before Jacobs J it was accepted on behalf of the First to Third Defendants (and temporarily by those acting for IM) that "*if the replacement transactions were the only evidence relied upon as solid evidence of a risk of dissipation, they would be sufficient to justify the grant of a WFO. The Defendants accept that the evidence is sufficient to meet the required standard of a good arguable case. That means that there is a good arguable case that the replacement transactions were dishonest and indeed corrupt.*"

13. This hearing does not deal with this question. Rather, it is concerned with what is said to be the absence of a case implicating IM specifically.

14. Many (but not all) of the factual allegations underlying the alleged fraud made by the Claimants in these proceedings will be determined in arbitration proceedings initiated by Nori, Centimila and Coniston against the Second Claimant in early 2018 before an LCIA Tribunal (the "LCIA Proceedings"). IM is not a party to the LCIA Proceedings and has had no role in those proceedings.

15. The without notice hearing of the Claimants' application for the WFO against the Defendants took place before Moulder J on 27 June 2019. The Claimants' without notice application was supported by *inter alia* the affidavit of Andrey Tseshinskiy dated 21 June 2019 (100 pages long) and an affidavit of Neil Dooley. Mr Tseshinskiy is a senior employee of the First Claimant and an advisor to the Second Claimant. Mr Dooley is a partner of the Claimants' solicitors, Steptoe & Johnson UK LLP ("Steptoe"). The exhibits to Mr Dooley's affidavit included, amongst other things, an opinion from a Russian lawyer, Alan Bayramkulov ("Mr Bayramkulov") dated 17 June 2019 (the "First Bayramkulov Opinion"), since the Bank's claims are advanced in Russian law. There was also a 49 page skeleton argument signed by leading and junior counsel. Moulder J granted the WFO on 27 June 2019 against each of the Defendants to the value of US$572million.

16. As regards IM, Moulder J had a keen eye on the need to establish the requirements of a freezing injunction against each Defendant separately and questioned Mr Pillow QC on the position of IM specifically. In the course of these exchanges reference was made orally to a passage in Mr Tseshinskiy's statement where he referred to evidence obtained via a meeting with Ms Olga Tartakovskaya ("Ms Tartakovskaya") during the course of which she said that IM was one of the "*ultimate decision-makers on behalf of the O1 Group*".

17. The injunction was granted to a return date on 11 July, in conformity with the usual practice in this court. The Claimants issued their Claim Form on 28 June 2019. The same day the WFO was personally served on IM.

18. On 3 July 2019, IM's solicitors, Stephenson Harwood LLP ("SH"), wrote to Steptoe enclosing IM's Schedule of Assets pursuant to paragraph 9(1) of the WFO.

19. Following an application by the First to Third Defendants, the WFO was varied on 4 July 2019 so as not to affect the operation of the bank accounts set out in Schedule D to the Order of Moulder J dated 4 July 2019.

20. On 8 July 2019, IM served his First Affirmation, which verified and made certain clarifications in relation to his Schedule of Assets.

21. Unusually, the substantive return date hearing took place 14 days after the *ex parte* WFO on 11 July 2019 before Jacobs J. It is more usually the case in this court, because of the complications involved in assembling evidence in large and complex cases, that the first return date involves an adjournment by consent and the setting of a timetable to a substantive hearing.

22. The events of the return date hearing are dealt with in the judgment of Jacobs J ([2019] EWHC 2061 (Comm)), but in essence the hearing was certainly substantive as between the Claimants and the First to Third Defendants. As already noted, those Defendants conceded the existence of a good arguable case in fraud, but took issue with the question of risk of dissipation.

23. As regards IM:

    i) The written submissions served on behalf of the First to Third Defendants were adopted by those then acting for IM;

    ii) His legal team initially participated in that substantive hearing – including making concessions through counsel as to good arguable case and advancing arguments on risk of dissipation;

    iii) During the course of submissions, they "*suggested that if the WFO was not immediately discharged, the Fourth Defendant would then prepare a "full discharge application with evidence"; something which would occupy a month.*"

    iv) That prompted a debate about whether this course was open to IM, given that the hearing was the return date hearing and there had been no request for an adjournment;

    v) The Judge "*enquired whether the Fourth Defendant wished to press his opposition to the continuation of the injunction, or by contrast wished to reserve the possibility of making the foreshadowed full-scale discharge application in due course*";

    vi) On reflection IM's team then withdrew opposition to the continuation because they wished to preserve the possibility of making a fuller discharge application at a later date.

24. These circumstances give rise to the abuse of process argument with which I will deal shortly. I should however note that in withdrawing IM expressly reserved his right to bring a discharge application with evidence in due course; and the Claimants for their part expressly reserved the right to assert that in the circumstances any such application would amount to an abuse of process.

25. A further feature of the Return Date hearing is worth noting at this stage. In the early hours of the morning of the return date hearing, Stewarts Law LLP ("Stewarts") served a Witness Statement from Ms Tartakovskaya dated 10 July 2019. The key points from her evidence for present purposes are that she said that: (i) at the meeting she attended on 7 June 2019, Steptoe promised her that, "*any information received from [her] would only be used once it had been presented to [her] in written form and [she] had approved it*"; (ii) in a later meeting on the same day with Mr Tseshinskiy alone, Mr Tseshinskiy intimidated her; and (iii) on 19 June 2019, she asked Steptoe whether she could see a note of the meeting but was told no "*note of interview*" was created. She says that these events caused her "great concern". Her statement concludes, "*given what has happened to me and the threats made to me by representatives of Otkritie, the account given may not represent a fair and accurate summary of my evidence*".

26. IM says that he was not in a position to deal with the various issues arising from Ms Tartakovskaya's evidence at the Return Date hearing itself, and this is one of the main reasons why the decision was taken to preserve the possibility of further challenge.

27. Following the Return Date hearing, the challenge of the First to Third Defendants did not succeed. Jacobs J decided to maintain the WFO until the sealing of the Return Date Order, whereupon the WFO would cease to have effect and would be replaced by the Return Date Undertakings set out in Schedule 1 to the Return Date Order. The WFO was varied pursuant to the Order of Jacobs J dated 12 July 2019 in order to add further bank accounts to Schedule D. This was a separate order to the Return Date Order itself.

28. The Return Date Order was sealed on 16 July 2019. Pursuant to paragraph 1 of the Return Date Order, the WFO ceased to have effect and was replaced by the Return Date Undertakings set out in Schedule 1 to the Return Date Order.

29. On 16 July 2019, IM served his Second Affirmation, which explained the results of his further enquiries regarding the assets held in discretionary trusts in which IM is one of a class of beneficiaries and enclosed his "*Supplemented Asset Schedule*".

30. IM brought this Release Application on 4 October 2019. This was supported by a Third Affirmation, the First Witness Statement of Alan Bercow, a partner at SH, and the Witness Statement of Robert Suss, an experienced investment professional who serves as the Non-Executive Chairman and a non-executive director at EGCA UK.

31. The Claimants' evidence in response to the Release Application included a Witness Statement of Mr Tseshinskiy and the Second Witness Statement of Mr Dooley.

32. IM served his Defence on 15 November 2019.The Second and Third Defendants served their Defence on 29 November 2019. The First Defendant served his Defence and Counterclaim on the same day.

33. On 4 December 2019, IM served his evidence in reply to the Claimants' evidence in relation to the Release Application. This included the Fourth Affirmation of IM and the Second Witness Statement of Mr Bercow.

34. On 11 December 2019, the Claimants served a Third Witness Statement of Mr Dooley. IM objected to this. There has since been a yet further round of evidence in the form of a third statement of Mr Bercow and IM served a replacement skeleton.

35. As matters stand therefore this is not an application to discharge a WFO, but an application to release IM from undertakings which he gave following the Return Date hearing.

36. Two points flow from this. The first is the point made by the Claimants that, as such, the burden of proof on the application is on IM, and not, as it would have been at the Return Date, on the Claimants.

37. The second - and logically the point which falls to be dealt with first - is the abuse of process argument relied on by the Claimants.

**The abuse of process argument**

38. The Claimants point to the authorities which say that a Defendant can only apply to Court to be released from his undertaking by showing "*some significant change of circumstances*" or that he "*has become aware of facts which* [*he*] *could not reasonably have known or found out*" at the time of the interlocutory hearing.

39. This test derives from the case of *Chanel v Woolworth* [1981] 1 WLR 485 at 493 *per* Buckley LJ. In that case Chanel sought an injunction restraining the Defendants from infringing Chanel's trademark. At an *inter partes* hearing the Defendants gave an undertaking until trial or further order not to infringe the trademark. However later a favourable decision of the Court of Appeal in a different case was published and one of the Defendants applied to be discharged from its undertaking upon the grounds that in view of the decision of the Court of Appeal Chanel had no prospect of obtaining the final relief it sought at trial. The Court of Appeal held that the right to be discharged had been compromised by the terms of the undertaking.

40. The Claimants also point to authorities which indicate that the principle applies even where there is an express liberty to discharge or vary the Order, such as *Esal Commodities Ltd v Pujara* [1989] 2 Lloyd's Rep 479 at 484 *per* Slade LJ. On this basis they submit that the application is an abuse of process and falls to be dismissed without much hesitation.

41. Both parties refer to the judgment of Teare J. in *Emailgen Systems Corp v Exclaimer Ltd* [2013] EWHC 167 (Comm) between [17] and [32]. In particular reference was made to the passage at [32] where the judge considered the concept of "good cause":

> "The phrase "*good cause*" was used in *Pet Plan Limited* by Nicholls LJ at p.41. Nicholls LJ said that what are "*good grounds*" will depend upon all the circumstances of the case; see p.40. Although Buckley LJ in *Chanel v Woolworth* had not put the matter as broadly as this, instead saying (at p.492-3) that there had to be a significant change of circumstances or the discovery of some new facts which could not reasonably have been known about when the undertaking was given, I accept, following *Pet Plan Limited*, that what is "good cause" will depend upon all the circumstances of the case, though typically a change of circumstances or the discovery of some new fact will be required. In Secretary of State for *Trade and Industry v Bell Davies Trading* [2005] 1 AER 324 at §104 the Court of Appeal put the matter this way:
>
> "The normal procedure would be for the party, who had given the undertaking, to apply to the court, to which he had given the undertaking, on a specific ground, usually changed circumstances making the continuation of the undertaking unnecessary, oppressive or unjust."

42. Further reference was made to this warning from *Bean, Injunctions*, 11th ed (2012), paragraph 6-25 quoted at [26]:

> "Care must be taken if a defendant consents to give undertakings but wishes to preserve his right to apply to be released from them

> at a later date. Where a defendant chooses not to seek an adjournment of an application for an interim injunction, but instead accepts that it should be dealt with there and then by his offering undertakings until trial or further order, there must be good grounds before he can apply to modify or change them."

43. Reference was also made, principally by IM, to *Butt v Butt* [1987] 1 WLR 1351 at 1353 *per* Nourse LJ. That case concerned a matrimonial injunction concerning the proceeds of sale of the family home. At an *inter partes* hearing, the motion seeking the injunction was adjourned generally on the Defendant's undertaking, *inter alia*, not to sell his former matrimonial home save at a fair market price. The Order contained an express liberty to apply. The Court of Appeal concluded that the judge had been wrong to apply *Chanel v Woolworth*.

44. While IM says that this case is akin to *Butt v Butt*, the Claimants submit that it is some distance from that case, in that in this case IM did not ask for an adjournment either before or at the Return Date. He actively opposed the continuation of the WFO, including on the grounds advanced by the First to Third Defendants (whose submissions he expressly adopted). His last-minute *volte face* does not avail him: Claimants' application for the continuation of the WFO was "*dealt with there and then*", albeit in the end without his active opposition.

45. On this basis the Claimants say that the *Chanel v Woolworth* principle is therefore squarely engaged in the present case, and the only question is whether any of the grounds now relied upon by IM amounts to a "good cause".

46. The Claimants therefore say that IM is unable to show "good cause" and has not identified any material change of circumstances.

47. IM for his part points to *Butt v Butt*, noting that context is all in these cases and that like that case, in this case it was clear to all concerned that IM was likely to wish to discharge the undertaking at a later date. He also points to the terms of the undertaking which he gave in the context of the Return Date Order as a whole. Paragraph 6(B) provides:

> "the Fourth Respondent may make any application to modify or release the Return Date Undertakings without showing good cause for making any such application, without prejudice to the Applicants' right, as expressly reserved at the hearing, to assert that any such application would be an abuse of process."

48. He submits that in those circumstances the terms of the Order made clear that the Defendant is entitled to apply to be released from his undertaking on the grounds that the *ex parte* Order ought never to have been granted – and specifically referenced the "good cause" test as not applying. It follows that *Chanel v Woolworth* is to be distinguished and it is unnecessary to show "good cause" to bring such an application. It follows that it is not an abuse of process for IM to make this application.

*Conclusions*

49. I am unable to accept IM's argument. It is clear from the relevant authorities (in particular *Emailgen* at [22]) that the guiding principle is that it is necessary to "*construe the undertaking given by the defendant in the context of the order as a whole*".

50. Here the surrounding circumstances are less clear than they might be. The Order does contain the provision upon which IM relies – but it also contains the apparently conflicting provision that the Claimants reserved their right to argue that any such application was an abuse of process.

51. Against this background I was initially attracted by IM's argument, but on further consideration have concluded that that approach denudes this latter provision of meaning. In the end it seems tolerably clear that in fact the Order simply sets out the assertions of both parties as to their position. On his side IM put down a marker that he was going to make this application and say that he could do so without having to show a change of circumstances. On their side the Claimants made clear that they would contend that the application was abusive and good cause would need to be shown (and would not be shown). It is not therefore (as IM submitted) a case such as *Butt v Butt*, where it was made plain and understood by all concerned that *"the defendant did not accept that the plaintiff was entitled to the injunction, and that he intended to apply for it to be discharged"* when his evidence was in order.

52. IM naturally also relied on both paragraph 8 of the judgment of Jacobs J, which indicates that the withdrawal was to preserve the ability to make such an application and put IM on a different footing to the First to Third Defendants and on Jacobs J's indication as to the "*correct approach*" as well as his tentative view: "*if I had to express a view on it I think in the light of what I have heard I think it is open to Mr. Igor Mints to make an application in due course that he did not cross the point of no return* ".

53. However, those are tentative views and cannot be determinative, in circumstances where the matter arose very much "on the hoof" in the context of a very fluid hearing. No-one has suggested that my hands are tied by these indications. It is down to me to make a decision about whether IM had so acted as to render it abusive for a discharge/release application now to be made.

54. I conclude that the bottom line here is that while IM did put down his marker, and made plain that he might wish to apply to discharge the undertaking, it was not a case where it was clear that he was going to do so; such an application remained a possibility. Further there was no consent to his being allowed to do so (indeed, very much the reverse) and against that background he did also consent to giving undertakings, expressed to be until trial or further order. He did not seek to adjourn the hearing as against him, which would have been the natural and normal way of standing the matter over until his evidence was in order (perhaps because it was not clear at that time whether he would indeed wish to make that application).

55. On this basis I conclude that the *Chanel v Woolworth* principle does apply. I am also persuaded that there is no significant change of circumstances or other good grounds which could give rise to the release of the undertakings.

**The substantive arguments**

56. Accordingly, technically the substance of the application does not arise. However, it is plainly appropriate that I deal with it – not least because the conclusion to which I come is quite clearly that it would not have been appropriate to release the Undertakings, and that the abuse of process argument makes no difference to the outcome.

57. The substance of the argument breaks down into four issues:

i) No good arguable case against IM;

ii) No risk of dissipation against IM;

iii) The Undertakings are not of value and are causing disproportionate prejudice;

iv) There was a failure to make a fair presentation of the application at the without notice hearing.

**No Good Arguable Case Against IM**

**"Thin evidence"**

58. The essence of this point is that the Claimants needed to demonstrate a good arguable case against each of the Defendants separately. The focus is therefore on whether the Claimants can establish a good arguable case against IM in particular against the background of the need to have "*reasonably credible*" material that justifies making an allegation of fraud: *Medcalf v Mardell* [2003] 1 AC 120 *per* Lord Bingham at [22]. What is said is in essence that fraud needs more not rather less evidence than normal allegations; and it is submitted that such evidence against IM himself was signally lacking.

59. IM's submission is that:

i) The Claimants' case against him was extremely thin to begin with, noting issues that Moulder J had with the alleged good arguable case against IM at the without notice hearing;

ii) Mr Matthews QC for IM draws attention in particular to the fact that there are other closely related people who are more demonstrably involved, whereas IM's role appears different and lesser than theirs;

iii) The central pillar of the Claimants' case against IM, namely the hearsay evidence of Ms Tartakovskaya (on which the Claimants relied heavily at the *ex parte* hearing), was then undermined by Ms Tartakovskaya's own evidence as to the circumstances in which it was obtained;

iv) In support of his Release Application, IM has now been able to provide his own evidence in answer to the Claimants' case against him, which deals fully with the evidence on which the Claimants have relied; and

v) The Claimants' evidence in reply has almost nothing to say in response to the explanations IM has provided as to why the allegations advanced by the Claimants against him do not pass the threshold for a good arguable case.

60. IM also contends that the Claimants' pleaded case contains very few specific allegations against IM and there are only two specific allegations against IM in the Particulars of Claim. In particular it is not suggested he was an officer of any relevant company or had a role in relation to the original loan arrangement or the inception of the replacement transactions. Nor does IM in any way appear to be the "eminence grise" of this fraud – the evidence clearly indicates a driving role performed by the Second and Third Defendants, without significant covering of tracks.

61. The first pleading against him alleges that *"the best particulars the Claimants are able to give"* are that the details of the Rost Replacement Transaction were arranged principally between Alexander Lukin of Rost Bank with AM and IM. The second alleges that, during the material period, IM was party to numerous emails and telephone communications (supported in the Claimants' evidence by reference to only 1 telephone call and around 5 emails) with representatives of Bank Otkritie (and, it is to be inferred, of Rost Bank) in relation to the negotiation and implementation of the Replacement Transactions.

62. IM says that this evidence is far too slight a foundation upon which to make the inference which is pleaded to follow from it – that the Defendants (including IM) instigated and caused or procured the fraud. This is the more so when he has, he says, now produced an innocent explanation, and the burden passes to the Claimants to show that it is wrong or contrived.

63. IM says that his involvement in the Replacement Transactions was extremely limited and there is no evidence of his involvement at the early period to which one would naturally look for any conspiracy. He prays in aid the case advanced in the Defence of the Second and Third Defendants that the Claimants have launched an indiscriminate campaign against the O1 Group and the Mints family.

64. As for the emails that IM was copied into or were sent to him, IM notes that Moulder J observed, "*The fact that Igor is on an email ... query, whether it establishes an arguable case that he was orchestrating this scheme*". He also flags that the Claimants are unable to point to him sending any emails, and that there is no reference to his contribution to the process. So far as concerns the 4-9 August email chain on which reliance was placed in seeking the injunction, he was not initially part of this exchange and only came into it because covenants come into the picture. After that his role was very limited and limited to covenants. His case is that his role throughout was as a Managing Director of O1 Group Oveseas Limited ("O1 GOL") and as an employee acting as such.

65. As for the conference call on 9 August 2017 IM submits that it can be seen from the transcript itself that there is no basis for concluding that participation on the call gives rise to an arguable case of IM orchestrating a fraud. He is overridden by a lawyer, and is best described as "winging it".

66. IM suggests that the case against him lacks credibility when the Claimants are in a muddle about his role; in that in paragraph 83 of the Claimants' skeleton argument for the *ex parte* hearing, they relied on the fact that IM "*occupied a management role at O1*" as evidence of his involvement in the alleged fraud whereas they now say that, "*it is no part of the Claimants' case that, in carrying out the alleged fraud on Bank Otkritie, Mr Mints was acting in his capacity as Managing Director of O1GOL*".

67. IM also suggests that no real weight can be put on the "alleged statement" of Ms Tartakovskaya that IM was one of the "*ultimate decision-makers on behalf of O1 the Group*". IM says that the controversial circumstances surrounding this alleged hearsay statement should prevent it being given weight. Although this is a point which primarily goes to fair presentation, IM submits that at this point also the history of the dealings with Ms Tartakovskaya cloud the value of the evidence, in that (i) she was led to believe she was giving evidence for the LCIA proceedings (ii) she made her statement believing she would get to approve the statement before it was used, and (iii) she probably felt under pressure even if no threats were made before her hearsay statement and she was not prepared to get involved.

68. Even as it stands, IM says, Ms Tartakovskaya's evidence is of no real value – the handwritten notes make clear that IM was simply "lumped together" with his brothers.

69. Looking to the other side – to what evidence does exist, IM says he is notable by his absence. There is no reference to IM regarding the Rost transaction and such evidence as there is tends to suggest DM was the person primarily involved though the evidence is contradictory. Certainly, there is no suggestion that IM led the discussion on this transaction. There is in fact no hard evidence of any decision-making role to be laid at his door - while there is hard evidence of involvement by the others involved.

70. IM also contends that the heart of the case on fraud – the pleas regarding meetings with senior representatives of the Claimants - is completely extraneous to him. He points to the statement by Mr Nazarychev to the Russian authorities, which does not in any way implicate IM as having a role.

*Conclusions*

71. Despite the careful and detailed submissions on this point I am persuaded that the hurdle of good arguable case is surmounted.

72. The burden of proof on an application to discharge an injunction (or, as here, to release undertakings) is on the Defendant. It is not enough to point to a number of issues which are capable of being argued about. It is for the Defendant to show that the relevant hurdles for the relief are not surmounted or that there has been a significant change of circumstances.

73. As to the evidence, the starting point must be that it is accepted that there is a good arguable case that there was a fraud – for all that, as Mr Matthews made very clear, the fraud allegations are in issue. Moulder J was clear there has very arguably been a fraud. That conclusion was echoed by Jacobs J on the Return Date, who characterised the case on the merits as "*well over the line*".

74. The other Defendants may have pleaded a case that the transactions were valid commercial transactions and not self-evidently contrary to the Bank's interests, but they conceded at the Return Date and IM has effectively had to concede before me that there is a good arguable case that there was a fraud. This is not therefore a case where the person challenging the injunction adduces evidence which goes to the very merits of the case. We are, on any analysis, looking at a situation where there is accepted to be an arguable case that the backdrop is a very substantial fraud.

75. One therefore looks to the evidence linking IM to that fraud. On this, whilst the evidence against him is no doubt thinner than against the other Defendants, it is nonetheless sufficient in my judgment to surmount the hurdle of good arguable case; and the evidence which he adduces does not effectively put the burden back on the Claimants to prove that it is wrong or contrived (as suggested in *Metropolitan Housing Trust Limited v Taylor & Ors per* Warren J at [12]).

76. This question of the shifting burden is a point upon which IM placed particular stress, given the distinction as to the evidence available against the Second and Third Defendants versus that available as regards the Fourth Defendant. However, that point requires sufficient evidence to be adduced to bring about that shift. In short, the *Metropolitan Trust* point may well be a good one in certain circumstances – where there is evidence going to the underlying case, or whether there is some evidence based on clear documentary sources. It is less so in my judgment where the argument is one which is not susceptible of documentary proof and there is a backdrop of a good arguable case of fraud. One must also bear in mind the danger of (and the authorities warning against) turning a return date into a mini-trial.

77. Although it is necessary to show a link to IM, it must be borne in mind that the cause of action in this case is conspiracy, and that ultimately if there was such a conspiracy his role in that need amount to little more than that agreement. It is not necessary to place him at the heart of the transaction - or as involved in the very first meetings - so long as there is a sufficient case that he entered into that agreement, and did something in pursuance of it.

78. In my judgment there is such material available.

79. In the first place there are emails, including the 30 July 2017 agenda, which outlines the mechanics of the proposed transaction at quite an early stage – just days after a key meeting which the First and Second Defendants attended and which resulted in an agreement that matters would be taken forward further by representatives of the O1 Group. Although, as Moulder J noted, IM's name on the document might mean nothing, the context, the absence of any indication that it was sent by mistake, the absence of an explanation for its sending on its face and the fact that there is recent evidence from IM that he did discuss the transaction with his brother, give it some weight. In that context while IM’s explanation may be correct, it is not entirely an easy one

80. Then there is an email of 1 August (the date of issue of the bonds) attaching a spreadsheet which appears to have some relation to the transaction – to give one example, apparently identifying which loans the bonds are going to repay. While IM's explanation is to try to distance himself from this document and suggest his being sent it was a mistake, his claim that it is not related to the transaction is very unimpressive. Although the Claimants did not claim to understand what this email demonstrated at the time of the Without Notice application, they do now claim to have joined up the dots. A careful perusal of the document in the context of this application did seem to me to demonstrate a correlation with the transaction. Further again there is no correspondence which resonates with the suggestion that IM did not know why it was sent. The document also harmonises with item 1 on the agenda sent to IM on 30 July. Finally, if IM's role was (as he says) confined to covenants, there would be no sense in his being sent this document, which has no interrelationship with covenants.

81. There is then a further email of 8 August – sent by Mr Nazarychev to all the Mints brothers (the ones called by Mrs Tartakovskaya the decision-makers), which deals with covenants and hence indicates a considerable degree of familiarity with the transaction (consistently with the previous documents). It appears to be a proposal – which would suggest that those to whom it was addressed have power to accept or reject proposals. IM also accepts he did discuss this aspect with someone involved for EG Capital Partners. It would seem odd if he were familiar with one aspect of the transaction and not others. IM's case is that his involvement was solely with relation to the issue of covenants; however, it seems that he would need considerable understanding of the transaction to assess the suitability of the covenants and so it is not feasible to "ring-fence" the question of covenants.

82. There is then an email chain of 5 emails on 9 August, which again relates to the covenants issue followed by the accepted participation in a 30 minute conference call dealing with the terms of the bonds. The transcript of that call to which I have been taken, and which I have read, certainly does not, as I read it, assist IM in distancing himself from the transaction. While it does not show him orchestrating the fraud, what it does show is that he appears to play a senior and well informed role in a detailed conversation and to have a degree of authority to negotiate and to take the initiative for O1. The transcript shows him interrupting other participants. It shows him pushing them to focus on what he regards as key questions. This is not, as Mr Matthews suggested, redolent of him "winging it". He takes the lead in summing up where the meeting has got to, saying:

> "All this is complex, and we need to write it all up quickly and calmly, we're really tilting at windmills, I think, to be frank. Because, well, I think that there will be no problems overall. Respectively, we have a proposal, that if our terms in the amendments to the offer not the issue are not accepted through no fault of ours, then we will extend for a maximum of 6 months to rectify the problem, and if that does not happen, we will take it back."

83. The fact that IM is not evident on the earlier documentary chain in question is not particularly helpful to him in the context of the facts that (i) the documentary record is far from complete at this stage and (ii) as noted above, it is perfectly possible for a "late joiner" to be a conspirator.

84. As to the question of IM's role – the need for his involvement to have caused the damage – while his defence (that his was a low grade management role and he had no reason to suspect anything untoward) is plainly one which is open to him the facts also support an argument of a more significant role: Mrs Tartakovskaya identifies him as one of the directing minds of the Group, and the email chain and transcript are to my mind at least arguably consistent with that rather different possibility.

85. The other element of the evidence on which reliance was certainly placed by the Claimants, and which is now attacked by IM is the evidence of Ms Tartakovskaya as to IM's decision-making role.

86. As to this, while there are clearly some issues around this statement (for example whether her understanding as to the use of her statement was correct – a point to which

I will revert below), they are not such as to prevent its offering some evidence. The evidence comes from someone who was in a position to know IM's role in that she was one of the main negotiators of the deal. Although the notes underpinning the affidavit summary of the evidence were not originally disclosed they have now been disclosed. They appear and read as what they purport to be – a contemporaneous note of a meeting. They are legible, but not so legible as to suggest later transcription, and written in a somewhat telegraphic style entirely characteristic of contemporaneous note taking. They do indicate that Mrs Tartakovskaya said that IM was a person of influence for the O1 Group – one of the ultimate decision-makers – and indeed he is listed by her before Alexander Mints. This evidence of course chimes with the evidence of the transcript, and to an extent the evidence of the emails. She also gives evidence of WhatsApp/Telegram communication on the deal, which of course is not visible to the court at this stage, but indicates that there is more communication and that that communication was between all the Defendants - including IM. She also indicates that she forwarded emails on this transaction to IM, again suggestive that he was more than a bystander.

87. As for the allegation of intimidation of Mrs Tartakovskaya, this relates to a period after she made that statement. There is no allegation by her that this original evidence was tainted by undue influence. Nor, rather significantly, has she resiled from it. It is not she who says that she did not say this; rather Mr Mints argues that it is improbable that she did. Neither has she said that she "*felt under pressure*" when she gave this interview.

88. Further it might well be thought that the fact Mrs Tartakovskaya did not know and does not seem to have been able to infer the commercial rationale of this deal might give some further ballast to the case that it was a fraud because one would expect someone in her position to be well informed about a genuine transaction.

89. I do not consider that Mrs Tartakovskaya's evidence is effectively counterbalanced, still less overturned, by the absence of mention of him in Mr Nazarychev's statement to the Russian investigating authorities. Again, I deal with this further below in the context of the arguments on fair presentation. It may be that this silence is significant, in the mode of the dog in *The Adventure of Silver Blaze*; but on my reading, that does not appear to be the natural explanation, given the absence of any questions directed to IM within the interview.

90. At the end of the day there is plainly an argument to be had about whether IM was or was not an "*ultimate decision-maker on behalf of the O1 Group*" generally or specifically in relation to the Replacement Transactions, and about the level of his involvement and his understanding. However, there is sufficient material, against the background of an admitted good arguable case on fraud, and the evidence which there is of his specific involvement in the events leading up to their execution, to say that there is a good arguable case against IM. It is not necessary for any of the lines of evidence to be conclusive or close to it. Together, however, they produce sufficient material to give rise to an arguable claim.

91. On this basis I do not need to deal specifically with other issues such as IM's alleged closeness to his father. In my judgment the core material I have referred to surmounts the hurdle, particularly when taken against the background of the fact of the relationship between the family, the fact that their companies benefitted heavily, and that the admittedly arguable fraud was run from same office building where they all worked.

92. I am also not persuaded, given the material which there is, that the evidence as to Rost Bank (the indication that IM was one of the people who negotiated the final terms of the deal) is significant. However, IM's own recent confirmation that there was at least a meeting between him and Mr Lukin at the critical time – when the Rost Bank deal was being put in place - tends to confirm the evidence given by Mr Shishkhanov in relation to this.

93. Of course, the evidence might well, at this stage, be called slight; but that slightness is not fatal. The information available is a factor of what is available to the Claimants and capable of being deployed. And as I have concluded, limited as it is, it is sufficient to surmount the merits hurdle.

**Article 1068 of the Russian Civil Code**

94. The second basis on which IM says there is no good arguable case against IM is that he has a good defence to the claim under Article 1068 of the Russian Civil Code.

95. He points to the conclusions of the Russian law opinion of Alexander Vaneev ("Mr Vaneev") dated 4 December 2019. Mr Vaneev concludes that, even on the basis of the Claimants' own evidence and contemporaneous documents alone (i.e. without IM's evidence), a Russian court would probably conclude that IM was acting in the course of his employment duties for the purposes of Article 1068.

96. The Claimants' evidence on the Russian law position refers to the Russian law opinion of Mr Bayramkulov dated 19 November 2019 (the "Second Bayramkulov Opinion"). Mr Bayramkulov has reached a different conclusion from Mr Vaneev - his view is that Article 1068 does not apply on the facts of the present case.

97. It is submitted for IM that the facts are all consistent with O1 GOL, the company for which it now appears IM worked, having an advisory role for the O1 Group – via an engagement letter. On this basis it would be IM's job as an employee of O1 GOL to give such advisory assistance to the O1 Group – and IM says that there has been no identification of what he was doing other than that. On that basis even if there was a fraud, IM's actions could be within the course of his activities as an employee.

98. In this connection I was referred to the detailed discussion of this Article in *Fiona Trust & Holding Corporation & Ors v Privalov & Ors* [2010] EWHC 3199 (Comm) at [102] and following. That authority indicates that what is embodied in the Article (that any claim should be against the employer and not against the employee, and the employee is not directly liable to the injured person) is a broad concept and extends to many situations - even where the employee is committing a criminal act. It shows that it could even include defrauding a subsidiary of the employing company if instructions could properly be given in the course of the employee's duties. The test for that is whether contracts of this kind could properly be made if the terms were commercial and the circumstances justified; or whether they are acts of a kind expected to be done in relation to such a contract.

99. It was submitted that on the basis of the evidence provided by Mr Vaneev, IM has a good defence to the Claimants' claim. Article 1068 of the Russian Civil Code therefore it is said provides a further reason why there is no good arguable case against IM. In any event, the weight of IM's Article 1068 defence is a relevant matter that goes into

the mix of whether it is just and convenient in all the circumstances to maintain the Return Date Undertakings against IM.

100. This is an area where there is plainly a dispute between the experts and where the factual basis which would lead to Article 1068 being in play is equally in dispute. The legal point is arguable – and even Mr Vaneev does not say that the point is more than a probable or likely result. While there is now some evidence which suggests that IM was an employee, there are still issues both as to the reality of that evidence and as to the role which O1 GOL was playing, particularly in the light of a good arguable case as to the fraudulent nature of the transaction. It remains arguable that Mr Mints was acting for the Mints family and not as an employee. It cannot be said that the new Russian Law evidence, even with the new factual evidence, tips the balance so that the case on good arguable case is no longer made out. On that basis I conclude that there remains a good arguable case on the merits against IM.

**Risk of dissipation**

101. The next heading is the vexed question of risk of dissipation. IM refers me to the summary by Popplewell J in *Fundo Soberano De Angola v Santos* [2018] EWHC 2199 at [86]. Solid evidence of a real risk is required. He also reminds me that in *Holyoake and another v Candy and others* [2018] Ch 297 at [50]-[51], the Court of Appeal emphasised that the burden was on the applicant to satisfy the threshold. If an applicant has not adduced sufficient evidence of risk, the application will fail. Unless the applicant has raised a *prima facie* case to support the Order, the Defendant is not obliged to provide any explanation or answer any questions posed.

102. The Claimants for their part refer me to the very recent decision of the Court of Appeal in *Lakatamia Shipping v Morimoto* [2019] EWCA Civ 2203 at [51] per Haddon-Cave LJ dealing the question of the inference of risk of dissipation based on allegations of fraud:

> "(1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation.
>
> (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence."

103. IM contends that for the same reasons that the Claimants are not able to demonstrate a good arguable case against IM, they are not able to demonstrate a *prima facie* case of a real risk of dissipation. In those circumstances, one does not even get on to consideration of IM's evidence on the matter.

104. However, he also submits that his evidence has explained why there is no real risk of any dissipation of his assets. He contends that that evidence demonstrates IM's strong ties (both family and business) to the UK and gives the lie to the Claimants' misplaced arguments about how having interests in foreign companies allegedly evidences a risk

of dissipation (when in reality such structures are driven by economic rationale and tax efficiency).

105. As Mr Matthews QC realistically accepted however, this issue was always likely to stand or fall with the conclusion on good arguable case. I accept the arguments advanced for the Claimants that this is a case which falls within the *Lakatamia Shipping* paradigm (which of course actually summarises the pre-existing law eg. from *VTB v Nutritek* and *Holyoake* and *National Bank Trust v Ilya Yurov & Ors* [2016] EWHC 1913 (Comm)). The very nature of the fraud in this case assists considerably in making out the solid evidence of real risk.

106. This is the conclusion reached by Jacobs J *vis a vis* the other Defendants at the Return Date. I have already quoted his finding at [23]. He also noted an aspect which is not often present – evidence of actual dissipation at [37] but reached his conclusion independently of that evidence. I entirely concur with his conclusion that this (now apparently potentially controversial) evidence is not necessary or determinative. This is a case where, despite the caution appropriate to such a deduction, real risk of dissipation can be inferred from the nature of the fraud.

107. There is nothing in this aspect of the case which really distinguishes the position as regards IM. So far as concerns the submissions now made on the MF Trust (a Mints family trust of which Boris Mints was the settlor, the Trust acquiring assets on, and also perhaps after, 27 December 2017 and of which IM is the "protector") they do not assist in circumstances where the very setting up of the trust occurs at an interesting point in the timeline, shortly after the distribution of shares and just before the capital reduction, leaving Nori assetless and also just after relief was obtained against the Mints family in Russia and days before the commencement of arbitration.

108. That is the more so when that new trust was set up on a basis (absence of power of revocation) which is consistent with an attempt to make enforcement more difficult. As Carr J has recently noted in *Tugushev v Orlov (No 2)* [2019] EWHC 2013 (Comm) at [49] dissipation can cover a situation where "*assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult*" as well as the more conventional dissipation in the sense of disposal.

109. It also seems potentially relevant that IM is the protector of the Trust with power to direct the dispersal of the trust funds to new beneficiaries.

**The Return Date Undertakings**

110. IM's case is that the Return Date Undertakings (i) serve little practical purpose and are disproportionate and (ii) are doing significant, disproportionate and irremediable harm to his business and the business of third parties.

111. The first of these issues can be dealt with fairly briefly. The essence of the point is that it is said that the undertakings serve no practical purpose because his personal assets are worth only US$2m, whereas the assets in the (now frozen) MF Trust are in the region of US$300-400 million. As regards his role in relation to that Trust (of which he is a “protector”) it is said that there is no need for undertakings since he can only do what the Trustees tell him to do, and they are now under restraint by reason of the Order.

112. This however begs two important points. The first is that the claims in this action are for sums in excess of the Trust's funds. Accordingly sums in excess of Trust monies – even so "little" a sum as a few million dollars - are of potential practical significance. The second is that there are issues as to whether enforcement against the Trust will be possible. If it is not, any other assets will assume an even greater importance.

113. The more substantial point, indeed what is billed as IM's primary reason for bringing the Release Application, is the contention that the undertakings which were given are causing his business and that of third parties irremediable harm. The focus is really on EGCA Group.

114. IM's case is that, since the Return Date Undertakings have been in force, EGCA Group has seen its assets under management more than halved; annual income reduced by more than US$2.7m; borrowing increased nearly threefold; long-standing clients redeeming their investments; and an application for independent FCA authorisation withdrawn. Both IM and its independent director Mr Suss have gone on record explaining that in their views releasing IM from the Return Date Undertakings would ease EGCA UK's reputational concerns and promote market and investor confidence in the company's future. It is said that while it had been hoped that the undertakings would not cause further problems or would minimise them, that has not proved to be the case. Mr Suss adds that the removal of IM has been negative for the company.

115. While I do not have any reason to doubt Mr Suss's evidence, I remain unpersuaded that the evidence deployed is such that it would amount to a change of circumstances which would make the release of the undertakings an appropriate course. I consider that there is some force in the arguments made on IM's behalf as to the evidence of Mr Dooley on this point, and I proceed on the basis that Mr Suss is probably right to say that the release of the Undertakings would make some difference to EGCA. However, it must be doubted whether the release of Undertakings against IM alone would have a transformative effect, given the background to the WFO and the fact that the other Defendants (who also are associated with EGCA) have not disputed that there is a good arguable case of fraud and the judgment of Jacobs J has reinforced that concession in fairly round terms, while also reaching an adverse conclusion on risk of dissipation of assets. I also note in reaching this conclusion that the case for IM was not really put higher than this: what is said is that the release of the undertakings would have a real prospect of undoing some of the damage that is being done.

116. At the next step the argument advanced appears to falter further. It is submitted that "*the survival of a business that has nothing to do with the underlying dispute is at stake*" and that is the basis for saying that the hurdle which faces IM is surmounted. However, in the first place, that summary appears to place the evidence as to the difficulties caused too high. But secondly and more significantly the characterisation of EGCA as a business that has nothing to do with the underlying dispute is dubious. EGCA is, it seems, at least closely associated with the Mints family (against some members of whom on any analysis freezing relief is said to be appropriate). IM and Alexander Mints were joint CEOs, and Dmitry Mints has been involved in dealing with the effect of the freezing order on EGCA and he has been posited as a substitute for IM. This degree of connection is perhaps unsurprising given that EGCA appears (i) to be the institution which manages Mints family trust assets and (ii) to have an asset base in which the assets of the Mints family predominate.

117. When one weighs together (i) the background and the reason why this relief was initially granted (ii) the evidence as to the nature of the entity which is said to be affected (iii) the evidence as to the effect of the Undertakings and the amelioration which might result if the Undertakings were discharged, the balance falls fairly clearly in my judgment in favour of maintaining the status quo.

118. In those circumstances I am not persuaded that it would be appropriate to release the Undertakings given.

**Failure to comply with the duty of full and frank disclosure**

119. The legal backdrop to the Discharge Application is not controversial. I was referred in particular to the summary by Popplewell J in *Fundo Soberano* at [50]-[53] and the judgment of Carr J in *The World LLC v Dalal* [2019] EWHC 2993 (Comm) at [53] (which itself sets out [7] of the judgment in *Tugushev v Orlov (No 2)*).

120. The line which those authorities indicate is one as between defences which are material to the application (so a defence to a small part of the claim would be unlikely to qualify) and those defences which a party can reasonably anticipate the other party would wish to make.

121. The line is not always easy to discern, particularly with hindsight, and perhaps particularly elusive in complex international commercial cases where many issues are likely ultimately to be raised, owing to the great abilities and thoroughness of those instructed.

122. Four bases are put forward for saying that there was a failure of full and frank disclosure:

    i) IM's status as an employee of O1 GOL and the corresponding Russian Law defence;

    ii) The circumstances of obtaining Ms Tartakovskaya's evidence;

    iii) The investigative committee material;

    iv) The bank accounts.

**Article 1068**

123. IM says that the Claimants failed to comply with their duty of full and frank disclosure in relation to IM's defence under Article 1068 of the Russian Civil Code. The way this works is as follows.

    i) The Claimants' claims are governed by Russian law and they had access to and obtained Russian law advice. IM says that the Claimants relied on IM's role as a Managing Director of O1 GOL in their evidence and skeleton in support of the WFO where he was referred to as a "*Managing Director in Moscow of the representative office of O1 Group Overseas…*". He is also pleaded as having a "*senior executive management role*" in the O1 Group, which could only be a reference to his role as a Managing Director of the Moscow representative office of O1 GOL.

ii) From this it follows that the Claimants knew that IM worked in Moscow for the Moscow representative office of O1 GOL. Mr Matthews also showed me documents which appear to demonstrate that one of the Claimants was itself paying IM's salary (from a bank account held by O1 GOL).

124. It is therefore said that it was wrong to rely on IM's role as an employed person without also making clear that as an employed person he had a defence under Article 1068. The case is said to be akin to the position in *Yurov* where a failure to deal with issues related to Article 1068 was said to be a failure of full and frank disclosure. So too was that the case in another case, *OJSC TNK-BP Holding v Beppler v Jacobson Limited (in provisional liquidation) & Ors* [2012] EWHC 3286 (Ch).

125. It is contended that if reasonable enquiries had been made into IM's defences, the Claimants would have identified that IM has a good (or at least for present purposes a very strongly arguable) defence to the claim under Article 1068 of the Russian Civil Code.

126. IM also submits that this failure arose because of a defect in the instructions given to the Claimants' expert in that the First Bayramkulov Opinion sets out the questions Mr Bayramkulov was asked to consider:

> "2. What arguable causes of action arise against the Mints family as a matter of Russian civil law and what are the ingredients for establishing those causes of action?[…]"

127. The point here is that although Mr Bayramkulov was asked to address the arguable causes of action as a matter of Russian civil law, he was not asked to address the arguable defences more generally.

128. IM draws a parallel (in part arising out of the Claimants' involvement and the involvement of the Claimants' legal team) with the case of *Yurov*. This case, IM says, puts that issue squarely in play – even without the right question having been asked of Mr Bayramkulov. He says that it is inconceivable that any lawyer who was involved in the *Yurov* case would (or should) have been unaware of the points of Russian employment law, including Article 1068, that arose in *Fiona Trust* (which was cited at length in that case).

129. The second part of this argument – which tacitly alleges knowledge and deliberate withholding of the point by the legal team - I dismiss relatively easily. IM personally doubtless does not appreciate the wide variety of cases and the huge range of detailed factual and legal issues with which all the lawyers involved have had to deal since 2010 - and even since 2016. I reject unhesitatingly the suggestion that this issue of foreign law would or should necessarily have been present to the lawyers' minds.

130. What is of more significance is whether (i) the point is actually a material point based on the facts known to and which ought reasonably to have been available to the Claimants and (ii) whether it should have been appreciated to be material in those circumstances.

131. There are potentially within this some very interesting arguments – for example whether the Claimants were or should have been fully aware of IM's employment status

because the Claimants would or should have been aware that there are mandatory provisions of Russian law that require an employee to have an employment contract governed by Russian law where the principal place of employment is in Russia.

132. There may also be issues about what material was necessary for the Claimants to appreciate that IM was an employee – for example whether it was necessary for the Claimants to have sight of IM's bank statements or payroll agreement or the engagement letter.

133. However, in the end I do not consider that these issues require to be dealt with. The whole question arises out of what is now said to be IM's status as an employee; however, it was not necessarily the case that IM was an employee. Certainly, the claim against him was not predicated on that basis and the issue as to his status related to his position as a managing director – which might or might not import an employment contract. While Mr Tseshinskiy referred to IM being "employed" within the "family business" that should not necessarily be read as a technical designation, but rather a broad description relevant to the business as a whole not a particular company. This is not a case such as *Yurov* where there was no issue as to there being an employment contract, and the issue was rather whether the significance of the employment contract and issues arising from it should have been appreciated and disclosed.

134. Here at the time that the application was made the Claimants had no knowledge of O1 GOL and what relationship existed between IM and that (BVI) company; and had they done so, a Russian Law resonance was not something which would naturally raise itself as a question.

135. Further against a background where Dmitry Mints previously had a power of attorney over the company there would not, in my judgment, be anything to suggest that IM was an employee at all. Further, given that the company was a BVI company, still less was there reason to infer that IM was an employee subject to a Russian law contract – the Claimants would not naturally assume that whatever relationship he had with O1 GOL was operating under Russian law.

136. Secondly the nature of the argument was one which was certainly not in play in *Yurov*, and the report of that case as well as the evidence on the issue so far here indicates that the ambit of Article 1068 is not entirely simple.

137. Thirdly the basis of the claim here is one which is not dependent on establishing that IM was acting for the company by which he is apparently employed, O1 GOL, so as to make the Article 1068 defence a factor. The claim involves him acting as an individual, essentially independently of his role for O1 GOL. The central allegation of wrongdoing against IM (and his father and brothers) is that they conspired together to cause other relevant O1 Group entities (by which IM was not employed), not O1 GOL, to enter the Replacement Transactions with the Banks.

138. The Claimants refer by way of contrast to *OJSC TNK-BP Holding v Beppler & Jacobson Ltd*, one of the cases where Article 1068 was held to have been a material factor to disclose. I accept the submission that that was a very different case. That was a case where (i) the Claimant knew that the relevant Defendant (Mr Lazurenko) was employed under a Russian law contract of employment; (ii) the bribery case against him was "*precisely that Mr Lazurenko caused harm in performing his employment*

*functions*" ([143]) and he was "*alleged to have had authority in the course of his employment by Management to cause Holding to enter into contracts with suppliers*".

139. True it is that IM's senior role at O1 GOL has been relied on, but that is not as a limb of the cause of action, but rather as evidence of his seniority within the group of businesses. Therefore, wrongdoing is not alleged "*in the course of employment*" so as to engage Article 1068. Rather what is alleged is or is akin to the proverbial frolic of his own.

140. I therefore reach a clear conclusion on this ground that this is a good example of the type of issue which may well be raised in due course, once the full weight of legal analysis has been brought to bear by a Defendant's legal team, but it is not a point which was material to be drawn to the judge's attention, or one which should have been reasonably live to the Claimants at the time. The factual scenario surrounding the case reinforces this on two fronts. Firstly, despite what I have concluded above about whether the Russian law resonances should have been "live" to the legal teams, as it happens Mr Dooley did think about the potential for the operation of Article 1068 and did not come up with the analysis which is now advanced. Secondly this approach is one which has only been deployed on behalf of IM in reply, indicating that it hardly sprang to his mind or the mind of the legal team acting for him.

141. I would however add that the approach adopted in instructing the Russian Law expert does appear to be one which might have led to a material non-disclosure. In circumstances where it was necessary to consider foreign law for the purposes of the claim, it would follow that if a without notice application was anticipated, defences too should be considered. While Steptoe may have intended that the expert consider defences also, the wording adopted in the instructions might have led to that aspect being overlooked.

**The Tartakovskaya evidence point**

142. The second point concerns the circumstances surrounding the acquisition of the evidence of Ms Tartakovskaya. The thrust of that evidence has been discussed above, in the context of whether the Claimants are able to demonstrate a good arguable case against IM. For present purposes, the focus was rather on how that evidence came to be given.

143. IM points principally to what are said to be material non-disclosures arising out of what Steptoe told Ms Tartakovskaya at the meeting on 7 June 2019 meeting, including: (i) the promise that she says she received from Steptoe, namely that "*any information received from me would only be used once it had been presented to me in written form and I had approved it*"; and (ii) the fact that Ms Tartakovskaya was deliberately not told that what she said would be used in the High Court proceedings against the Mints family and it is said was deliberately misled into believing it would be used in the LCIA Proceedings only.

144. In addition IM relies on what is said to be an incorrect answer given in subsequent correspondence with Steptoe on 19 June 2019, in which she asked whether it was possible for her to see a "*Note of Interview*" (i.e. a written record of her meeting with Steptoe on 7 June 2019) but was told by Steptoe (incorrectly) that none had been created and was ultimately not provided with any written record of the meeting, despite her

request; and also Ms Tartakovskaya's evidence that she was intimidated by Mr Tseshinskiy in a second meeting with Mr Tseshinskiy alone on 7 June 2019.

145. As regards the first of these allegations I do not regard this as particularly significant. It might have a makeweight relevance if another non-disclosure were established, but it is hard to see how by itself it would be considered material to the exercise of discretion by the judge considering the application. While IM contends that the Court would have been deprived of the opportunity to consider the extent to which the circumstances of such a broken promise to Ms Tartakovskaya had an impact on the weight of Mr Tseshinskiy's evidence, it is not explained how that broken promise could have any such impact. The point goes more to what is effectively a "moral hazard" argument, which hinges primarily on the next allegation, as to the reason for seeking the evidence.

146. Far more weight was placed on what was said before me to be actively misleading Ms Tartakovskaya about the purpose (i.e. the proceedings) for which her evidence was being investigated. As to this, it does not seem to be controversial that Steptoe made it clear that they wanted Ms Tartakovskaya's recollections, that mention was made of the LCIA proceedings only and that the natural and obvious inference was that Steptoe might in due course want a written statement from her in the LCIA Proceedings. It also appears to be accepted that they did not reveal that they were at that time also interested to obtain evidence for use against the Mints family in these proceedings.

147. This was characterised by those acting for IM as "*knowingly and intentionally getting her to give evidence on a basis which was thought to be and known to be incomplete*" and as "*deliberate trickery*". Mention was made of the Solicitors' Code of Conduct and it was submitted that it would doubtless be "*of interest to the profession*" if I were to conclude that such a course was acceptable. It was submitted that the proper course would have been to be open with the Court about what had been done; the Judge would then have had the opportunity to ask questions about it; and the Claimants would have had to justify it. The failure to disclose the matter meant that that exchange did not take place; if it did, it would have had a material impact on the Judge's consideration of Ms Tartakovskaya's evidence and the Claimants' approach to it (particularly on an application for discretionary relief).

148. I am unable to accept these submissions. The question for me is not whether the approach taken by Steptoe was morally unimpeachable – or indeed susceptible of exposing the persons involved to a complaint to their professional body. The question for me is whether a material fact or facts was/were not disclosed to the judge at the Without Notice hearing. It would be material to disclose if information being placed before the Court were inadmissible for some reason. It might be material, at least in part for that reason, to disclose if evidence placed before the court had been obtained illegally.

149. However even in the context of illegally obtained evidence, the Court has not taken the view that the fact of the evidence being obtained illegally is a matter which necessarily falls to be disclosed as a material fact. So, in *Memory Corporation v Sidhu* [2000] 1 W.L.R. 1443 at 1458 where after referring to the dictum of Rix LJ in the *Al Alawi* case, Robert Walker LJ said:

> "Rix J. was careful to limit his remarks to legal professional privilege and it is far from obvious that these concerns should be added to the heavy responsibilities already undertaken by lawyers who are making a without notice application, except perhaps in circumstances where the evidence in question is of central importance to the application. Even when the evidence is of central importance (for example, evidence as to the sale of contraband goods in a case of piracy of intellectual property rights) "trap orders" and other conduct involving impersonation or deception have been commonplace in the Chancery Division for a century or more, and do not seem to have attracted censure."

150. Although Henderson J took a different view on this point in *Frances v Al Assad* [2007] EWHC 2442 (Ch), that was in the context of an injunction which was failing on the basis of other breaches already. In relation even to illegally obtained evidence there appears to be a need to ask a question as to why the fact of the circumstances in which the evidence was obtained is material. It may be so because (as Gee notes in *Commercial Injunctions* at paragraph 8-010) it goes to the reliability or weight of the evidence, or the probity of the applicant or his sources. This appears to have been the case in the *St Merryn Meat* case where Geoffrey Vos QC discharged an injunction when the fact that critical evidence had been obtained by bugging a home phone was deliberately not disclosed.

151. Here we are some way off from illegality. Further it is not explained why (other than for reasons of moral disapproval) the facts here should impact on the Without Notice judge's consideration (in the context of what are routinely very hard fought cases where substantial frauds are alleged). The fact does not go to the weight of the evidence. It does not go to the reliability of Ms Tartakovskaya as a source. As a complaint about the moral scruples of the Claimants' lawyers it does not go to the Claimants' own probity. I conclude therefore that this was not a material fact, which should in pursuance of the obligation of full and frank disclosure have been disclosed.

152. IM then relies on what is said to be a misleading response to Ms Tartakovskaya when she asked to see a note of the interview she had with Steptoe on 7 June 2019. She was told, "*the Note of your interview has not been drawn up.*" It is said that Steptoe's response suggested no notes of the interview existed and was misleading because notes had been created. It is also said that whether or not it was misleading, it was material that Ms Tartakovskaya was in fact misled in that she asked, "*Does this mean that the interview was not recorded on paper?*" and that the Claimants then had failed to provide her with a written record, despite her requests.

153. Again, I am not persuaded that these were material non-disclosures. I do not consider that they would have had a material impact on the Judge's weighing of Ms Tartakovskaya's alleged hearsay evidence, and it is not clear to me, even after hearing the oral argument, why it is said that they would have done so. Nothing which was said as to the existence or otherwise of the note or notes has any impact on the weight of what she had said. It would of course be a different matter if she had said "*I'd like to check the note because I think I may have said something which was wrong, and I want to check that*." I would add it also seems highly unlikely to me that Ms Tartakovskaya was in fact misled, in that the taking of a note at the meeting will have been perfectly

visible to her – and indeed there is evidence that she was aware of it. She therefore knew the answer to this question and was unlikely to be misled by the absence of response.

154. The next topic relied on is Ms Tartakovskaya's evidence on the threats and intimidation she is said to have received from Mr Tseshinskiy. Of course, those allegations are disputed and I cannot decide them in this hearing. But in any event, the fact that threats were made would only give rise to an absence of full and frank disclosure if they were known about at the time of the application. The evidence to establish this is lacking.

155. It follows that I do not accept that there were material non-disclosures regarding Ms Tartakovskaya's evidence and the circumstances in which it was obtained which would have justified the discharge of the WFO, and now justify IM's release from the Return Date Undertakings.

**The Investigative Committee material**

156. The third area of non-disclosure alleged relates to IM's case on the non-disclosure of minutes of Mr Nazarychev's meeting with the Investigative Committee. The ground on this point seemed to have shifted somewhat between evidence and argument, and it is fair to say that the point was not forcefully pressed. To the extent it was relied on, the point appeared to be that these minutes did not implicate IM (in contrast to some other members of the Mints family) and that absence of implication was itself a material fact which should have been disclosed.

157. This document was one item of evidence among many. It was referred to only in summary form, and the summary which was given of it was not said to be unfair. It appears that the position is not that Mr Nazarychev specifically exculpated IM, but rather that he was not asked about him, and did not volunteer anything which incriminated him.

158. In my firm view this is an example of attempting to raise the bar for disclosure too high. The obligation to give full and frank disclosure does not oblige a party making an application to make every submission in favour of the absent party which arises out of every document relied on. That is not what the authorities say is required.

**IM's bank accounts – the error**

159. The final point related to IM's bank accounts at Bank Otkritie. In the evidence in support of the Claimants' *ex parte* application, Mr Tseshinskiy alleged that he was, "*aware that in the days immediately before the Otkritie Bank transaction, Alexander and Igor Mints closed various bank accounts held at Bank Otkritie*"

160. This was, it is now accepted, not correct; all operational accounts that IM held at Bank Otkritie at the time of the Replacement Transactions are still open.

161. IM characterises this as a material non-disclosure and one for which there is no excuse, particularly given that the information in question was readily available to the Claimants.

162. However, I am not persuaded that the non-disclosure was material, in circumstances where the true facts were that while Alexander Mints closed his account, IM emptied

his shortly before the relevant transaction. The erroneous allegation was relied on as a part of the evidence as to risk of dissipation. If the true facts had been disclosed a very similar (and perhaps better) point about dissipation would have been open to the Claimants. Further it would appear that this point was something of a minor submission on risk of dissipation in that while it was made in the (very full) evidence, it was not referred to in the skeleton for the Without Notice hearing or orally to the judge. For this reason too, I would take the view that the non-disclosure was not material.

163. It follows that IM's application to be released from the undertakings entered into after the last hearing is dismissed.