Neutral Citation Number: [2020] EWHC 239 (Comm)

Case No: CL 2019 000208

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH
DIVISION COMMERCIAL
COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2020

Before :

MR. JUSTICE TEARE

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Between :

EVISON HOLDINGS LIMITED	**Claimant**
- and -	
(1) INTERNATIONAL COMPANY FINVISION HOLDINGS LLC (also known as FINVISION HOLDINGS LIMITED Reg No. HE 6824 of CYPRUS) **(2) ARTEM DAVYDOVICH AVETISYAN** **(3) SHERZOD ISKANDAROVICH YUSUPOV**	**Defendants**

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Vernon Flynn QC and Ruth den Besten (instructed by **Bryan Cavr Leighton Paisner LLP**) for the **Claimant**
Paul Lowenstein QC and Mark Tushingham (instructed by **Peters & Peters Solicitors LLP**) for the **Second Defendant**
Andrew Bird (instructed by **Bivonas Law LLP**) for the **Third Defendant**
The **First Defendant** was not represented

Hearing dates: 28-29 January 2020

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Approved Judgment

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

Mr. Justice Teare :

1. The application before the court arises in the context of a dispute between two companies, Evison and Finvision, as to the controlling ownership of a Russian bank, JSC Orient Express Bank ("OEB"). Evison and Finvision were parties to several agreements, one of which was a First Call Option Agreement ("FCOA"). Evison granted Finvision a call option, upon the exercise of which Evison was required to sell 10% of its shareholding in OEB to Finvision thereby enabling Finvision to obtain majority control over OEB. The FCOA provided for disputes to be resolved in London by LCIA arbitration.

2. The application before the court seeks the setting aside of an order granted by Phillips J. (as he then was) on 18 October 2019 to Evison for permission to serve contempt proceedings out of the jurisdiction on two Russian nationals, Mr. Artem Avetisyan ("Mr. A.") and Mr. Sherzod Yusupov ("Mr. Y."), and for permission to serve by alternative means. The alleged contempt is the pursuit of proceedings in Russia in breach of an anti-suit injunction granted by this Court on 29 March 2019 in support of the agreement to arbitrate. Neither Mr. A nor Mr. Y were named defendants in the action in which the anti-suit injunction was granted. The named defendant was Finvision. Mr. A is said to be the owner and controller of Finvision and Mr. Y is said to be a further controller or de facto director of Finvision and both are said to have caused Finvision to breach the anti-suit injunction.

3. The case of Mr. A and Mr. Y is that Evison, by arguing the merits of the disputes arising out of the FCOA before the Russian Courts, has waived any breach of the anti-suit injunction by submitting to the jurisdiction of the Russian Courts. Evison denies that it has submitted to the jurisdiction or that it has waived the alleged breaches of the anti-suit injunction. Evison says that it protested that the Russian court had no jurisdiction and, the Russian court having rejected that protest, the Claimant had in reality no alternative but to contest the claims brought against it.

4. The order of Phillips J. records that he made the order having read an affidavit dated 7 October 2019 from Mr. Khodykin (a partner in the firm of solicitors acting for the Claimant), a witness statement from Mr. Khodykin dated 15 October 2019 and the evidence in Part C of the application notice which was signed by Mr. Khodykin. The order was granted by Phillips J. without a hearing.

5. Although the challenge to the order of Phillips J. was said to be based upon three grounds, there were in reality two grounds. The first was an alleged failure to disclose material matters (in essence, the extent of Evison's participation in the Russian proceedings and the need for "exceptional circumstances" when seeking service by alternative means in a country which is a party to the Hague Service Convention) and the second was the absence of exceptional circumstances justifying permission for service by alternative means. (The third ground was that there was no "gateway" allowing service out of the jurisdiction. But that required the court to conclude that Evison had in fact waived any breach of the anti-suit injunction by submitting to the jurisdiction of the Russian courts. It was, I think, accepted that the court could not reach a view on that issue in this application.)

6. I shall begin by summarising the factual case against Mr. A and Mr. Y, describing the most material events in Russia and London and then noting what was disclosed about Evison's participation in the Russian proceedings when the order under challenge was sought.

The case against Mr. A and Mr. Y

7. This case was addressed by Mr. Khodykin between paragraphs 55 and 73 of his affidavit dated 7 October 2019.

8. So far as Mr. A is concerned it is alleged that he is "a directing mind and a de facto director" of Finvision. That case is supported by Mr. A's own evidence in the arbitration (paragraphs 56-57), correspondence from Mr. Y in 2016 (paragraph 58), the note of a meeting in 2018 (paragraph 59) and Mr. A's involvement in discussions with the Central Bank of Russia concerning OEB in the autumn of 2018 (paragraph 60). By contrast the de jure director of Finvision, Mr. Gusev, has had little involvement in the events (paragraph 61). Finally, reliance was placed on what Mr. A had himself said in media interviews in 2019 (paragraphs 62-63). In the witness statement of Mr. Woodland served on behalf of Mr. A there was no detailed or any challenge to these matters although I was told by counsel that the allegations concerning Mr. A's role were denied.

9. So far as Mr. Y was concerned it was alleged that he too was a de facto director in "close co-operation" with Mr. A. That case is supported by Mr. Y's evidence in the arbitration that from June 2016 he (and another) entered into merger negotiations on behalf of Finvision (paragraph 66), that he was a representative of Finvision in the LCIA proceedings (paragraph 67), that, as explained with regard to Mr. A, Mr. Y's correspondence showed him acting in concert with Mr. A (paragraph 69), that in an interview in February 2019 he demonstrated knowledge and involvement in the actions of Finvision (paragraph 70) and that in February 2019 he had filed a criminal complaint in the interests of Finvision which led to the arrest and detention of Evison-appointed directors of OEB (paragraph 71). This case was challenged by counsel for Mr. Y. I shall return to that challenge later in this judgment.

The most material events

10. These can be taken, in the main but not entirely, from the Agreed Chronology.

11. In April 2018 Evison commenced arbitration proceedings in London under the FCOA against Finvison (and also against Mr. Y and another Russian). Finvision challenged the jurisdiction of the LCIA tribunal. In May 2018 the parties agreed a stay of the arbitration proceedings pending a determination of Finvision's challenge to the jurisdiction of the tribunal. From October 2018 until January 2019 the parties agreed a stay of the arbitration pending settlement discussions.

12. On 7 February 2019 Mr. Y filed a criminal complaint in Russia in relation to matters which Evison alleges are the subject of the arbitration. That complaint led to the arrest of Evison's executives.

13. On 19 March 2019 Finvision commenced proceedings against Evison in Russia, seeking specific performance of Evison's obligation under the FCOA to transfer the

Option Shares to Finvision. On 20 March Finvision applied for injunctive relief from the Russian Court preventing Evison from disposing of the Option Shares. On 21 March Evison applied to the LCIA arbitral tribunal for an anti-suit injunction to restrain Finvision from pursuing the Russian proceedings on the basis that the parties had agreed to refer the matters in dispute to arbitration. That injunction was granted on 24 March and the tribunal "exceptionally" granted Evison permission to apply to the High Court for further relief. On 25 March Evison filed a jurisdictional objection to the Russian Court and Finvision presented submissions to the Russian Court in support of its injunction application. (This appears to have been a breach of the injunction issued by the LCIA tribunal.) On 28 March Evison commenced proceedings against Finvision before this court and on 29 March this court issued an Anti-Suit injunction restraining Finvision from pursuing the Russian proceedings until the return date on 5 April. The order was served on Finvision but was also posted to Mr. A and Mr. Y at their known addresses in Russia and provided to them by email.

14. On 1 April 2019 Evison filed supplemental submissions explaining why the jurisdiction of the Russian Court was precluded and Finvision presented submissions in favour of its injunction application. On the same day the Russian Court rejected the jurisdictional challenge. On 4 April the anti-suit injunction was served on Finvision by post and on 5 April the injunction was continued by this Court. On 10 April 2019 the LCIA tribunal expanded the scope of a hearing scheduled for 13-16 May 2019 to resolve not only the question of jurisdiction but also certain substantive issues concerning the Option ("the FCOA Issues"). On 18 April 2019 Evison applied for the Russian proceedings to be stayed pending the LCIA's jurisdictional award. That application was rejected.

15. On 8 May 2019 Finvision filed written pleadings on the merits in the Russian proceedings. (This appears to have been the first breach of the anti-suit injunction after service of the same on Finvision.) On 13 May 2019 Evison served the Anti-Suit injunction on Mr. Avetisyan and Mr. Yusupov in a hotel in Moscow. (I was shown photographs of this event.) Between 13 and 16 May the LCIA tribunal heard not only the issue as to jurisdiction but also the FCOA Issues. Between 14 and 17 May the Russian Court considered the merits of the proceedings in a hearing in which Evison participated. Evison maintained its jurisdiction objection orally but that objection was dismissed. The same objection was made on 15 May. During that hearing Evison filed a Statement of Defence raising substantive defences to the claim, some of which overlapped with the issues being considered by the LCIA tribunal. A further jurisdictional objection was filed by Evison before the Russian Court. On 24 May 2019 the Russian Court issued a judgment which upheld the claim of Finvision and ordered Evison to transfer the Option Shares to Finvision.

16. On 14 June 2019 the LCIA tribunal issued its award. It decided the jurisdictional issue in favour of Evison but decided the FCOA issues in favour of Finvision. On 24 June 2019 Evison filed an appeal against the judgment of the Russian Court ("the First Tier appeal"). Grounds 1-4 concerned the merits. Ground 5 related to jurisdiction. On 27 June 2019 Evison filed a separate appeal objecting to an order for immediate execution of the Russian judgment. No reference was made to jurisdiction.

17. On 26 July 2019 Evison filed further submissions in support of Ground 4 of its appeal. No reference was made to jurisdiction.

18. On 5 August 2019 Evison filed further submissions in support of ground 1 of its appeal. No reference was made to jurisdiction. On 21 August the execution appeal was dismissed. On 26 August Evison filed further submissions in support of ground 1 of its appeal. No reference was made to jurisdiction.

19. On 3 September 2019 Evison filed further submissions in support of ground 1 of its appeal. No reference was made to jurisdiction. On 5 September a hearing of the appeal took place. On 12 September the appeal court issued its judgment dismissing the First Tier appeal. On 20 September Evison commenced further proceedings in this court against OEB and Finvision. On 24 September Evison filed a further appeal by way of cassation objecting to immediate execution. No mention was made of jurisdiction.

20. On 1 October 2019 the LCIA tribunal stayed the arbitration until February 2020 because executives of Evison had been detained in Russia as a result of the criminal complaint. On 7 October Evison issued contempt proceedings in this court against Finvison, Mr. A and Mr. Y. On 18 October Phillips J. granted permission to serve those proceedings out of the jurisdiction on Mr. A and Mr. Y by alternative means.

Events after the order of Phillips J. on 18 October 2019

21. On 6 November 2019 the Cassation Appeal against execution was dismissed. On 12 November Evison filed a Cassation Appeal against the lower appeal court's decision dismissing the First Tier Appeal. No reference was made to jurisdiction.

22. I was told on the first day of the hearing that the Cassation Appeal had been determined that day in favour of Finvision, that Evison were now appealing to the Russian Supreme Court and that such appeal will include an appeal against the jurisdiction ruling.

What was disclosed

23. In the affidavit of Mr. Khodykin which was the principal evidence placed before Phillips J. on this application, reference was made in paragraph 7 to Finvision's continued participation in the Russian proceedings from 1 April to 12 September 2019. The only reference to Evison's involvement was the lodging of an appeal on 9 July 2019. I am not sure what that appeal was because no such appeal is mentioned in the Agreed Chronology on that date. At paragraph 46 and following Mr. Khodykin gave a fuller account of the Russian proceedings, entitled "The Finvision proceedings". The steps taken by Finvision were summarised but the steps taken by Evison were not, save that in paragraph 46.2 (in a box) mention was made of Finvision making brief and full-text objections to "Evison's statement of defence" and in paragraph 46.8 mention is made of Finvision, on 5 August, opposing "Evison's appeal against the Russian judgment.".

24. In his witness statement dated 15 October 2019 Mr. Khodykin informed the court (at paragraph 4.2) that the Russian Court considered that it had jurisdiction and had been made aware of both the tribunal's anti-suit order and this court's anti-suit injunction.

25. It is thus apparent that, when making its application before Phillips J., Evison did not give any account of the steps taken by Evison in the Russian proceedings. In particular, Mr. Khodykin did not make clear that Evison had participated in the proceedings and had advanced all its arguments on the merits against the claim advanced in Russia by

Finvision. (In his skeleton argument for this application counsel identified "seven principal facts and matters" which had not been disclosed but it is unnecessary to recite them.) It appears to me that Mr. Khodykin was concerned to adduce evidence of Finvision's steps in those proceedings which he said were breaches of the anti-suit injunction. In his witness statement replying to the application to set aside the order of Phillips J. Mr. Khodykin has said that he did his best to draw to the attention of the court all matters relevant to the issues relating to service and that where he did not mention a particular fact it was because he "genuinely believed that they were not material to the Service Application". I accept this evidence. If he had had in mind that Evison's involvement in the Russian proceedings might be regarded as a submission to the jurisdiction of the Russian Court and hence a reason for not granting permission for service out of the contempt proceedings he would have informed the court that on several occasions Evison had objected to the jurisdiction of the Russian Court. Yet he did not so inform the Court.

26. However, the question of materiality is a matter for the court to determine.

Materiality

27. What is material are facts which could reasonably have a bearing on the decision which the judge has to make or which might reasonably have caused the judge to have any doubt whether he should grant permission for service out; see *MRG (Japan) Limited v Engelhard Metals Japan Limited* [2003] EWHC 3418 (Comm) per Toulson J. at paragraphs 24 and 29.

28. When an application is made for permission to serve out the applicant must depose that the claim has a "reasonable prospect of success"; see CPR 6.37(1)(b). In the above mentioned case at paragraph 27 Toulson J. noted the approach of Kerr J. in *BP Exploration v Hunt* [1976] 3 AER 879 where he said, at p.893, that a failure to refer to arguments on the merits which the defendant may seek to raise should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule.

29. Thus it was that Toulson J. said at paragraph 26 that "the court needs to be satisfied that there is a dispute properly to be heard (ie that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case."

30. The notes to the CPR at 6.37.4 refer to these authorities and advise that "a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the claimant's claim at the trial should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in dealing with the application." The authorities in question were also noted by Bryan J. in *The Libyan Investment Authority v JP Morgan Markets Limited and others* [2019] EWHC 1452 (Comm) at paragraphs 94-97.

31. In the context of applications for anti-suit injunctions it has been stated that the Court must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation. That is required in order that the Court may exercise its

discretion to grant an anti-suit injunction reliably and rationally; see *Donohue v Armco* [2002] 1 Lloyd's Reports 425 at paragraph 16 per Lord Bingham. Indeed, counsel for Evison accepted that at the ex parte hearing and on the return date for an anti-suit injunction it was necessary for the court to be fully informed as to the course of the litigation abroad but he submitted (orally) that that was not the case where the anti-suit injunction had been granted and the claimant was seeking to take proceedings for contempt.

32. This submission was not developed. I was not persuaded that it was correct, at any rate in the bald terms in which it was made orally. In his written submissions it had been said that it was wrong to equate the duty of full and frank disclosure when seeking an order for service out of the jurisdiction with that applicable when seeking an injunction. There seems to be force in that submission. Where, as in the present case, an application is made for service out of the jurisdiction of contempt proceedings against persons not yet party to the proceedings, the claimant must, as I have noted above, show that the claim has a reasonable prospect of success. The application for service out is made ex parte and so there must be a duty of full and frank or fair disclosure. For example in a case where a claimant wishes to obtain permission to serve out of the jurisdiction a claim to enforce a debt the fact that the claimant has commenced proceedings abroad in support of the same claim will be relevant to the question whether England is the most appropriate forum and so should be disclosed; see *Punjab National Bank v Ravi Srinivasan and others* [2019] EWHC 3495 (Ch) at paragraphs 37, 41, 71 and 73 per Sir Geoffrey Vos.

33. The content of the duty to make full and fair disclosure depends upon the nature of the decision which the court is being asked to take. Accordingly, where service out of the jurisdiction of proceedings alleging contempt of an anti-suit injunction is sought, the circumstances in which the claimant has participated in the foreign proceedings ought to be disclosed if they have a bearing on the question whether the merits test has been satisfied (a "reasonable prospect of success") so long as the argument stemming from that participation is of such weight that a failure to mention it may mislead the court when concluding that the claim has a reasonable prospect of success. But if any such argument lacks such weight the duty of full and frank and fair disclosure will not require an account of the claimant's participation in the proceedings abroad.

Non-disclosure- the Russian proceedings

34. Mr. Khodykin, having given in his affidavit an account of the LCIA arbitration proceedings (see paragraphs 19-35), an account of the High Court proceedings (see paragraphs 36-45), and an account of the Finvision (Russian) proceedings (see paragraphs 46-52) and having explained why Finvision, Mr. A and Mr. Y had acted in contempt of court (see paragraphs 53-73) deposed that "there can be no doubt" that each had acted in breach of the anti-suit injunction and in contempt of court.

35. The question which the court must resolve is whether the manner in which Evison participated in the Russian proceedings might reasonably be regarded as indicating that Evison had waived the breaches of the anti-suit injunction by reason of having submitted to the jurisdiction of the Russian court and, if so, whether such argument was of sufficient weight that if it were not brought to the attention of the court, it might be misled in its consideration of the question whether the allegation of contempt had a reasonable prospect of success.

36. In considering this question it is necessary to have in mind the guidance given by the Supreme Court in *Rubin v Eurofinance and others* [2013] 1 AC 236 by Lord Collins as to how an English court determines whether a party has submitted to the jurisdiction of a foreign court. The enquiry is whether a party has taken some step which is only necessary or useful if an objection to the jurisdiction has actually been waived (see paragraphs 159-160). Although the answer to the question depends upon English law the international context requires a broader approach than simply considering whether the steps in question would have amounted to a submission in English proceedings. The question can only be answered by the drawing of an inference from all the facts including how the foreign court would have regarded the matter (see paragraphs 161-163).

37. Having considered the submissions made in reply by counsel for Mr. A and Mr. Y I accept that the fact that Evison, after the Russian Court had rejected its objection to the jurisdiction on 1 April 2019, took part in a hearing between 14 and 17 May 2019 on the merits of the FCOA dispute and filed a defence on the merits, gives rise to a question whether Evison took a step or steps which were only necessary or only useful if their earlier objection to jurisdiction had actually been waived. I also accept that the fact that Evison's First Tier Appeal on 24 June 2019 contained 5 grounds of appeal and only ground 5 related to jurisdiction gives rise to a question whether "the primary purpose of the appeal was to challenge jurisdiction" (see *AES v UST* [2011] 2 Lloyds Reports 233 at paragraph 174 per Rix LJ).

38. However, there are cogent arguments, also arising from the chronology of the totality of the events, that suggest that it is unlikely (to say the least) that Evison submitted to the jurisdiction of the Russian Courts and thereby waived what would otherwise have been breaches of the anti-suit injunction. First, at the very same time as Evison was participating in the hearing before the Russian Court between 14 and 17 May 2019, it was also participating in the hearing before the LCIA Tribunal on the question of jurisdiction and the FCOA issues. That strongly suggests that Evison had not waived its objection to the jurisdiction of the Russian Court by arguing the merits in the Russian Court. Second, when the Russian Court issued its ruling on 24 May 2019 it held that Evison's objection did not succeed because the arbitration agreement related to a corporate dispute and so was unenforceable; see hearing Bundle 5 Tab 17 pp.935-938. It did not say that Evison, by arguing the merits, had waived its objection to the jurisdiction. Third, when the First-Tier appeal court dismissed the appeal from the first instance Russian Court it stated that "by virtue of the stated facts, the cited terms and conditions of the agreements of the parties and the norms of law, the Arbitrazh Court of Amur Region justifiably held that it was competent to consider this dispute"; see hearing Bundle 1 tab 6 p.363. It did not say that Evison, by arguing the merits, had waived its objection to the jurisdiction. Fourth, the fact that Evison commenced separate proceedings against OEB and Finvision in September 2019 also suggests strongly that Evison had not waived its objection to the jurisdiction of the Russian Court. Fifth, that is also suggested by the fact that Evison obtained a stay of the LCIA arbitration on 1 October 2019 on the grounds that Evison could not pursue its claim whilst its executives were under arrest as result of the criminal complaint in Russia. Sixth, I was not referred to any evidence that at any time before 7 October 2019 (when the Contempt Application was issued) Finvision had suggested to Evison, the Russian Court, the LCIA tribunal or this court that Evison had waived its objection to the jurisdiction of the Russian Court. Seventh, it was said that the court must (on this

hearing) also bear in mind that the appeal by way of cassation issued on 12 November did not mention the jurisdiction objection. But at that time Evison was pursuing its contempt application which is inconsistent with having waived the alleged breached of the anti-suit injunction. If, as suggested by *Dicey on The Conflict of Laws* 15th.ed. at paragraph 14-073, "the real question for the English court should not be whether the defendant has taken a step in proceedings which prepare for the trial of the merits, but whether he has chosen to abandon his challenge to the jurisdiction" it would be very difficult to say, looking at the arbitration and litigation in England and the litigation in Russia, that Evison had chosen to abandon its challenge to the Russian jurisdiction. (Both counsel initially accepted that that was the appropriate question but counsel for Mr. A and Mr. Y in their reply suggested that it was not the test because it had not been mentioned in *Rubin v Eurofinance*.)

39. It is in that context that I must ask myself whether the suggested argument of waiver is of sufficient weight that if it were not brought to the attention of the court, the court might be misled in its consideration of the question whether the allegation of contempt had a reasonable prospect of success.

40. In answering that question I must make use, inevitably, of my experience of dealing with many applications in this court for service out of the jurisdiction on documents alone. I have reached the conclusion that the suggested argument of waiver was not of sufficient weight to give rise to a risk that the court might have been misled into thinking that Evison's allegation of contempt had a reasonable prospect of success. That is because there appears to be very clear evidence indeed of a contempt and whilst it may be (just) arguable from the chronology that Evison had waived its objection to the jurisdiction of the Russian Court a review of the chronology as a whole, noting events not only in the Russian Court but also in the LCIA arbitration and in this court, shows that that argument could not reasonably be supposed to have such strength that the Judge hearing the Service Application might have been in doubt, had he been informed of Evison's involvement in the Russian proceedings, as to whether permission to serve out of the jurisdiction should be granted. Evison's case on contempt plainly had reasonable prospects of success. As Toulson J. said in *MRG* (see above), so long as the Court is satisfied that there is a serious issue to be tried, "the court is not concerned with the merits of the case".

41. For these reasons I have concluded that the duty of full and frank or fair disclosure did not oblige Evison to provide the Court with a full account of Evison's participation in the Russian proceedings.

42. I have reached this conclusion without any need to rehearse the expert evidence on Russian law (on the question of submission to the jurisdiction in Russian law). There was, for example, a dispute as to whether the notion of a submission was known to Russian law, as to whether Evison, having had its protest to the jurisdiction dismissed, had no realistic alternative but to dispute Finvision's claim on the merits because otherwise it would be deemed to have admitted Finvision's claim and as to the significance of Evison's ground of appeal at the first tier appeal. The expert evidence was, by the end of the hearing, relied upon by both counsel but the disputes could not possibly be resolved on this application.

Non-disclosure – the test for service by alternative means

43. The other head of non-disclosure relied upon was Evison's failure to advise the Court that before an order could be made for alternative service in Russia (which was a signatory to the Hague Service Convention and had made a reservation pursuant to Article 10 of the Convention) there had to be special circumstances such that the case was exceptional and so justified service by means other than those permitted by the Hague Service Convention.

44. It is accepted by Evison that no mention was made of the relevant test. It was suggested that it did not need to be mentioned because any Judge of the Commercial Court can be expected to know the test. However, that does not justify a failure to mention the test when making an application on documents for an order for alternative service in a case to which the Hague Service Convention applies. Applications on documents on CE file are considered by Judges of the Commercial Court on a rota basis. When on this rota duty (for a week) a judge may have to deal with up to 20 or so applications each day, in addition to his or her usual work. Thus the applications have to be considered in the morning before court or in the late afternoon after court or possibly during the short adjournment. Time is limited and so it is essential, where an application requires a particular test to be applied, that the applicant draws the attention of the court to that test.

45. In the present case Evison not only failed to draw the attention of the Court to the relevant test but the reasons given for alternative service were minimal. Indeed the reasons relied upon did not suggest that Mr. Khodykin had the relevant test in mind. Thus the affidavit dated 7 October 2019 did not, I think, mention the application for alternative service and the witness statement dated 15 October 2019 mentioned alternative service but only in the context of service by alternative means not being illegal in Russia. Part C to the Application Notice did mention the application for service by alternative means but merely said that the orders sought against Mr. A and Mr. Y were consistent with orders made against Finvision and that in the related proceedings against OEB an order had been made for service on OEB by alternative means. There was therefore not only a failure to identify the relevant test but also a failure to identify matters which showed that the relevant test was satisfied. Mr. Khodykin said at the end of his affidavit that the question of jurisdiction "will be developed further as required by Counsel in submissions." But no written submissions by counsel were provided to the judge as they sometimes are when the judge is asked to consider an application on documents alone. I should add that Mr. Khodykin has apologised to the court for his omission to mention the applicable test.

The case against Mr. Y

46. Counsel for Mr. Y developed a further case of misrepresentation and non-disclosure. It concerned Evison's case that Mr. Y was a de facto director of Finvision.

47. Counsel for Mr. Y submitted that Mr. Khodykin had stated, incorrectly, in paragraph 17 of his affidavit that the transaction documents in relation to OEB were dated 26 August 2019. This was an error but the correct date was stated two paragraphs later in paragraph 19. It is unlikely that the reader would think that the transaction documents were in fact dated 26 August 2019 when the anti-suit injunction had been granted in March 2019.

48. In the witness statement of Mr. Litovchenko provided on behalf of Mr. Y in support of Mr. Y's application before this court it was stated (and I understood this not to be challenged) that from September 2015 until September 2016 Mr. Y was a de jure director of Finvision. Although the witness statement contained no detailed or any challenge to the matters relied upon in support of the allegation that Mr. Y was a de facto director of Finvision in 2019, counsel on behalf of Mr. Y sought to explain those matters by reference to Mr. Y's formal role as director up to September 2016 and said that Evison had failed to disclose that Mr. Y had ceased to be a de jure director in September 2016. That fact might explain some or indeed all of the matters dating from 2016 but there remained other reasons for Evison's case that in 2019 Mr. Y remained a de facto director of Finvision. I have therefore asked myself whether the fact that Mr. Y had ceased to be a de jure director in 2016 was a material matter which ought to have been disclosed. It is arguable that it was not because the evidence from 2019 showed that there was a reasonable prospect that Evison would succeed in showing that Mr. Y was a de facto director of Finvision in 2019 when it acted in breach of the anti-suit injunction. Indeed it was submitted that it was "inconceivable" that Finvision acted in breach of the anti-suit injunction without Mr. Y knowing that and failing to prevent such breach. However, in circumstances where Evison chose to rely upon events in 2016, the fact that Mr. Y had been a de jure director in 2016 but had then ceased to be was a material matter which should have been disclosed. It would have caused the judge to doubt (at the very least) that reliance could be placed on events in 2016. It was not suggested that Evison did not know of that fact. (I was shown a witness statement from Mr. Y in the arbitration proceedings in which he referred to having been "a former director" of Finvision.) Thus this was a further respect in which Evison failed to give full disclosure.

Consequences of the failures to make full disclosure

49. There is no shortage of authority on this question. In *Milhouse Capital UK Ltd and another v Sibir Energy and others* [2008] EWHC 2614 (Ch) Christopher Clarke J. (as he then was) gave this guidance at paragraphs 103-106:

> "103 ..... the question of whether, in the absence of full and fair disclosure, an order should be set aside and if so whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the Court's discretion, to which (as Mr Boyle observes at paragraph 180) the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the Court, like Janus, looks both backwards and forwards.
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> 104. The Court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the Court itself, exists in order to secure the integrity of the Court's process and to protect the interests of those potentially affected by whatever the order the Court is invited to make. The Court's ability to set its order aside, and to refuse to renew it, is the

> sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.
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> 105. As to the future, the Court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the Court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.
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> 106. As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

50. In *Tugushev v Orlov and others* [2019] EWHC 20131 Carr J. gave this guidance at paragraph 7(ix)-(xiii):

> "(ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;
>
> (x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
>
> (xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

> (xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
>
> (xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

51. In *Punjab National Bank v Ravi Srinivsan and others* [2019] EWHC 3495 (Ch) Sir Geoffrey Vos agreed with yet another summary of the relevant principles by Bryan J. in *Libyan Investment Authority v JP Morgan* [2019] EWHC 1452 (Comm) and observed that the discretion to reinstate should be exercised sparingly, taking into account the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure; see paragraph 72.

52. Very recently in *VTB Commodities Trading v Antipinsky Refinery* [2020] EWHC 72 (Comm) Phillips LJ noted the following guidance from the authorities at paragraphs 54-55:

> 54. However, the further question arises as to whether the material non-disclosure should result in the discharge of the injunctions. As explained by Ralph Gibson LJ in *Brink's-MAT Ltd. v Elcombe* [1988] 1 WLR 1350 at 1357:
>
> > "… it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex-parte order, nevertheless to continue the order, or to make a new order on terms."
>
> 55. It has been emphasised in recent decisions of this court that the usual result of a finding of material non-disclosure on an application for a without notice order is that the order will be discharged. As Popplewell J (as he then was) stated in *Banca Turco Romana S.A. v Cortuk* [2018] EWHC 662 (Comm) at [45]:

> "The sanction available to the court to preserve [the integrity of the court process] is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in *Re OJSC ANK Yugraneft v Sibir Energy PLC* [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

53. In the present case the omission to inform the court of the "exceptional circumstances" test in a Hague Service Convention case was not a deliberate omission in the sense that Mr. Khodykin was seeking to avoid mentioning something which he did not wish the Court to know. It appears to have been an omission stemming from a failure to consider what the appropriate test was in a Hague Service Convention case. Similarly, it was not suggested that the failure to mention that Mr. Y had been a de jure director of Finvision in 2016 and had ceased to be such a director that year was deliberate in the sense that Mr. Khodykin was seeking to avoid mentioning something which he did not wish the Court to know. It appears to have escaped Mr. Khodykin's attention. But both failures were culpable. Mr. Khodykhin ought to have considered the relevant test and informed the court of it. Similarly, he ought to have informed the court that Mr. Y had once been a director of Finvision but had ceased to be.

54. It is necessary to consider whether the order for service out of the jurisdiction by alternative means on Mr. A and Mr. Y would have been granted had the court been informed of the "exceptional circumstances" test.

55. Counsel submitted in writing that this was an exceptional case because alternative service had already been directed as against Finvision and "there was a strong case management imperative for the Committal Application to proceed on the same timeline as against all respondents". In oral submissions counsel invited the court to have regard to the following facts and matters and to view them in aggregate: (i) this was a contempt application in which the Court had a particular interest in the outcome; (ii) this application concerned an anti-suit injunction in which proceedings had been brought in breach of an arbitration agreement; (iii) the only remedy for the breach was the contempt application; (iv) no defence to the alleged contempt had been articulated; and (v) the proceedings against Finvision and Mr. A and Mr. Y should be heard both speedily and together.

56. Counsel for Mr. A and Mr. Y did not accept that there were special factors which rendered the case exceptional so as to justify the making of an order for alternative service.

57. I have given careful consideration to this question. If there are no exceptional circumstances then there can be no question of the order being re-instated. If there are exceptional circumstances then that is a relevant factor to consider though it is not determinative. My view on this matter is as follows. First, this is a striking case because it appears that very shortly after the anti-suit injunction was issued and served it was breached. No defence to the allegation of an immediate breach has been suggested save that Mr. A and Mr. Y have suggested that Evison has lost its right to complain of that breach. Second, the Russian proceedings have been pursued with such vigour and speed in apparent breach of the anti-suit injunction that Finvision has not only obtained judgment from the Russian Courts but that judgment has been enforced so that Finvision is now the majority owner of OEB. It is to be noted that the LCIA tribunal was so struck by the conduct of Finvision as at March 2019 that it granted permission for Evison to make an application to this court for an anti-suit injunction "because, in the view of the Tribunal, in the light of the steps that Finvision has taken, the present case is truly exceptional." Third, the contempt allegation is due to be tried in June 2020. Directions have already been given for the respondents' evidence to be served by 9 March and for any evidence in reply to be served by 23 March. It is obviously desirable that the case against Finvision and the case against Mr. A and Mr. Y be heard at the same time. If service is not by alternative means Mr. A and Mr. Y will not be party to the hearing because the evidence is that service in accordance with the Hague Service Convention will take about 8 months. So not only would the costs of the contempt application be increased but worse, from the point of view of the orderly conduct of judicial business, there would be a risk of inconsistent findings. There is therefore a very special reason why it is necessary that service be by alternative means so that the trial against all respondents can be heard at the same time. This is, it seems to me, a very cogent example of "litigation prejudice" which would flow from the delay involved in serving by means of the Hague Service Convention; see *Marashen Limited v Kenvett Limited* [2017] EWHC 1706 (Ch) at paragraph 57 per David Foxton QC, as he then was, and *Avonwick Holdings Limited v Azito Holdings Limited and others* [2019] EWHC 1254 (Comm) at paragraph 33 per Moulder J.

58. Delay, unless exceptional, is not enough to make the circumstances exceptional. I have, however, concluded that the circumstances of this case, and in particular the "litigation prejudice" which will be the particular consequence of delay in service in this case, amount to special factors which enable this case to be regarded as an exceptional case and one which therefore passes the test for the making of an order for alternative service, notwithstanding that such service is to be effected in a country which is party to the Hague Service Convention. Comity requires the Court to have regard to that latter fact and to the fact that Russia has stated its objections to service other than in accordance with the Hague Service Convention. But it is because of comity that the court in such a case will only allow service by alternative means in exceptional circumstances.

59. It is also necessary to consider whether an order for service out of the jurisdiction on Mr. Y would have been made had the court been informed that Mr. Y had ceased to be a de jure director of Finvision in 2016. Whilst disclosure of that fact would deprive the events in 2016 of much significance there would remain the matters relied upon to show that in 2019 Mr. Y was a de facto director of Finvision, which matters must be viewed in the light of the fact that Mr. Y had been a de jure director of Finvision and had worked closely with Mr. A, the sole shareholder of Finvision. On 7 February 2019 Mr. Y filed

a criminal complaint in the interests of Finvision. On 28 February 2019 he gave an interview in which he revealed knowledge and involvement in the actions of Finvision and associated himself with Finvision (for example, "option agreement is unconditional, there are no obligations on us pursuant to it……there have been no breaches of any agreement from our side"). Finvision's breach of the LCIA tribunal's anti-suit order began on 25 March 2019 and Finvision's first breach of the court's anti-suit inunction (after service) was on 8 May 2019. These matters, in my judgment, would have revealed that the case against Mr. Y had reasonable prospects of success such that it would be appropriate to permit service out of the jurisdiction.

60. I have well in mind that such is the importance of the duty to give full and frank and fair disclosure that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. The sanction is necessary in order to preserve the integrity of the court's process and to deter others from breaching the duty. The sanction may well be appropriate even if the order in question is likely to have been granted had there been proper disclosure.

61. However, in the present case, in addition to there being no deliberate breach of duty and to the probability that the orders in question would have been made had there been disclosure of the matters in question, there is a particularly cogent reason for re-instating the order, namely, that the contempt hearing has been fixed for June 2020 and there is very good reason for that hearing going ahead against all defendants, not just Finvision. If there were two separate contempt hearings when evidence was given of Russian law there would be a risk that inconsistent findings might be reached. That would not be just a disadvantage to Evison (as would be the increase in costs caused by two trials rather than one) but would bring the administration of justice into disrepute. This factor has to be balanced against the need to ensure the integrity of the court's processes by setting aside and refusing to reinstate orders obtained in breach of the duty of full disclosure. There are, in appropriate cases, other ways of marking the court's disapproval of such breaches, namely, by an order as to costs; see *NML Capital v Republic of Argentina* [2011] 2 AC 495 at paragraph 136 per Lord Collins. In the present case the breaches, though not deliberate, were culpable.

Conclusion

62. In my judgment, having noted the guidance in the authorities and the particular circumstances of this case and having sought to weigh the conflicting public interests, I consider that the appropriate and just order to make is (i) to set aside the order for service by alternative means on Mr. A and Mr. Y and the order for service out of the jurisdiction on Mr. Y, with an appropriate order as to costs but (ii) to re-instate those orders. When handing down judgment I shall hear counsel as to the appropriate costs order.