Neutral Citation Number: [2020] EWHC 3253 (Comm)

Claim Nos: CL-2019-000412 & CL-2020-000432

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 25 November 2020

Before:

THE HON. MR JUSTICE BRYAN

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Between:

(1) PJSC NATIONAL BANK TRUST
(2) PJSC BANK OTKRITIE FINANCIAL CORPORATION **Claimants**

- and -
(1) BORIS MINTS
(2) DMITRY MINTS
(3) ALEXANDER MINTS
(4) IGOR MINTS **Defendants**

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MR NATHAN PILLOW QC (instructed by Steptoe & Johnson UK) for the Claimants

MS TETYANA NESTERCHUK (instructed by Quinn Emanuel Urquhart & Sullivan LLP) for the First Defendant

MR CHARLES BEAR QC and SIMON PAUL (instructed by Simmons & Simmons LLP) for the Second and Third Defendants

MR DUNCAN MATTHEWS QC and MATTHEW McGHEE (instructed by Stephenson Harwood LLP) for the Fourth Defendant

25 November 2020

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APPROVED JUDGMENT

MR JUSTICE BRYAN :

A INTRODUCTION

1. The parties appear before me this afternoon, and now this evening at 6.30pm by the time of the start of this judgment, so some four and a half hours after this application began, on a short notice application by the Claimants for permission to enable them to comply with an order of the Russian criminal Court (the "Russian Order"), empowering the Russian criminal Investigator ("the Investigator") to seize and said to require Bank Otkritie to provide to the Investigator asset disclosure documents including affidavits (the "Asset Disclosure Documents") served and/or filed in these proceedings by the First to Third Defendants pursuant to a Worldwide Freezing Order ("WFO") granted against them by Moulder J in June 2019.

2. The application is said by the Claimants to be urgent and is made on short notice to the defendant Bank Otkritie. The evidence before me is that it is presently expected that the Investigator will attend at Bank Otkritie's premises in Russia to execute the Russian Order this Thursday, i.e. tomorrow 26 November. It is said that unless the application was heard and permission sought granted before the Investigator does so, Bank Otkritie and its officers will be faced with the invidious dilemma of risking either (i) a breach of the Russian Order and, as a consequence, potential criminal liability and risk of severe sanctions, both for Bank Otkritie itself and those of its individual officers with notice of the Russian Order; or (ii), a breach of the undertaking given by the Claimants to this Court not to use, without the Court's permission any information obtained as a result of the Worldwide Freezing Order for the purpose of any civil or criminal

proceedings other than this claim (the "Relevant Undertaking"). It is said that the purpose of this application is to avoid this Catch-22 situation which it is said the authorities recognise would give rise to a *"grave injustice"* of "*a person who has been granted relief to redress the wrong done [finding] himself compelled to choose between breaking the undertaking or breaking the law where he resides or carries on business, and suffering a penalty abroad because of this" (*see *Gee on Commercial Injunctions 6th edn.* at para 25-008).

3. I was satisfied that it was appropriate to hear this application on short notice because of the identified urgency, it being urgent because of the contemplation that an Investigator will attend at the premises of the Claimant tomorrow, 26 November. I was therefore satisfied that it was appropriate within the CPR to effectively abridge time and hear the application this afternoon.

4. It is, in one sense, on more than notice to the other parties because in fact the Order sought is opposed today (both in writing and orally) on behalf of the First Defendant Mr Boris Mints, who is represented by Tetyana Nesterchuk, by the Second and Third Defendants, Dmitry Mints and Alexander Mints, represented by Mr Charles Béar QC and it is opposed by Mr Igor Mints, the Fourth Defendant, who is represented by Duncan Matthews QC.

5. There is before me quite a large volume of evidence which includes the Seventh and Eighth witness statements of Mr Dooley, also a witness statement on behalf of the Second and Third Defendant from a Mr Stephen Moses. There is also a legal opinion on Russian law from a Mr Korshunov on behalf of the Claimants. There is also an opinion on Russian law from a Dmitry Andreev on behalf of the Second and Third Defendants.

6. The Russian law evidence goes to the nature of the order that has been obtained in Russia by the Investigator and what the consequences of not complying with the Russian Order are. Regrettably, the two Russian law experts are not *ad idem* as to what those consequences are.

7. In addition to appearing before me today, I have skeleton arguments not only from the Claimants represented by Mr Nathan Pillow but also skeleton arguments from Ms Nesterchuk on behalf of D1, a skeleton argument from Mr Béar on behalf of D2 and D3, and a skeleton from Mr Duncan Matthews on behalf of D4. I have given careful consideration to the contents of all the matters addressed in those skeleton arguments, and the evidence before in the witness statements and the exhibits thereto.

8. There was an issue between the parties as to whether the nature of this application was an *ex parte* application which would carry with it a duty of full and frank disclosure. That would be the case if this were a short notice application in relation to an injunction, but I am satisfied that Mr Pillow is right in his submissions that if I am satisfied -- and I am -- that it is appropriate for this hearing to go ahead on a short notice basis to vary the existing order, that this is not a without notice application but is to be treated as an *inter partes* application, so there is no duty of full and frank disclosure. Mr Pillow made clear to me that he has not sought to comply with the obligation of full and frank disclosure, although obviously he has complied with his duties to the Court as counsel.

9. I am satisfied that all parties have had a fair opportunity to address this Court and indeed have done so both in writing and orally at some length. Whilst the

Claimants gave an estimate for listing this hearing of two hours which proved to be an underestimate, Mr Matthews on behalf of the Fourth Defendant identified in his Skeleton that four hours would be required. I imposed no time limitations on the parties, and in the event the oral hearing took four hours thirty minutes, so I was able to accommodate the Defendants' time requirements.

B THE LEGAL PRINCIPLES

B.1 RELEASE OF UNDERTAKINGS

10. As I say, the application is to release undertakings given to the Court. Those undertakings gave the Court control of the documents and information obtained by the Claimants *"in support of due administration of justice"* see *Marlwood Commercial v Kozeny* [2015] 1 WLR 104 at [56] per Rix LJ.

11. In terms of the approach to taken by the Court, the leading case remains *Crest Homes plc v Marks* [1987] AC 829 at 859G to 860C. In that case, Lord Oliver formulated the general principle that while each case will turn on its facts, the Court will not release or modify the implied undertaking given on disclosure as now found in CPR Rule 31.22, save in special circumstances and where the release or modification will not occasion injustice to the person giving disclosure. Case law on releasing express undertakings have treated analogous principles as applying to such a situation (see, for example the Skatt litigation currently proceeding before the Commercial Court, including at [2019] EWHC 2807 (Comm)).

12. In *Cobra Golf Inc v Rata* [1996] FSR 819, Laddie J stated at 830 as follows:

> "The case law I have reviewed above illustrates the variety of considerations which have been taken into account by Courts in the past. They emphasise the importance of preserving the undertaking but not blindly. In the end the interests of justice must prevail and that will sometimes mean that documents must be released for collateral use. In deciding how to exercise discretion the Court must also bear in mind, as Lord Denning MR said in *Riddick v Thames Board Mills Limited* [1977] QB 881 that
>
> > 'The reason for compelling discovery of document lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest in discovering the truth, i.e. in making full disclosure'.
>
> That principle operates in favour of releasing relevant documents from hub into satellite proceeds as long as no significant injustice is done to the disclosing party."

13. In the *Bank of Crete SA v Koskotas (No 2)* [1992] WLR 919:

(1) At 924H Millett J (as he then was) said as follows:

> "That was the basis on which I extended paragraph 5 of Morritt J's original order to permit material to be used in civil proceedings brought anywhere in the world for the recovery of the Bank's misappropriated funds. Civil proceedings are not an end in themselves. In the present case the purpose of the English proceedings was to obtain the restoration of funds alleged to have been misappropriated from the Bank. For that purpose, it may be necessary to bring proceedings in many different jurisdictions. The use of material obtained in the course of English proceedings for the purpose of similar proceedings in other jurisdictions would not infringe the general principle, and accordingly I gave leave."

(2) At page 925G, he continued:

> "There are of course wide policy considerations in the present case. **There is a need for international co-operation between the Courts of different jurisdictions in order to deal with multi-national frauds**. Ferris J recognised the pressing need to prevent a foreign Court from wrongly convicting an accused on the basis of allegations which the English Court had material to disprove. The Court granted leave for the use of the material to prevent an injustice."

(emphasis added)

14. There is also the open justice principle in relation to material which has been referred to in open court being in the public domain and readily available to anyone, as most recently set out in the decision of the Supreme Court in *Cape Intermediate Holdings v Dring* [2019] UKSC at [38] which emphasises the importance of open justice and approves the principles identified in *R v Guardian News & Media Limited in the City of Westminster Magistrate's Court, Article 19 intervening* [2012] EWCA (Civ) 420, 2013 QB, at 618.

> "The purpose of open justice is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the Courts are the administrators."

15. Explaining the second of these purposes Lady Hale went on to say at paragraph 43:

> "The purpose is "to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases ... It is difficult, if not impossible, in many cases especially complicated civil cases to know what is going on unless you have access to the written material."

16. I will need to return to the question of what documentation has already been considered in the context of CPR 31.22 and the undertaking given to the Court in the light of material that was before the Court both on the return date before Jacobs J, his decision being reported in a reserved judgment at [2019] EWHC 2061 (Comm), and also to note that there was an application to discharge the

freezing injunction by the fourth defendant which came before Cockerill J, the neutral citation of her judgment being [2020] EWHC 204 (Comm).

17. The present application is not one made by the Claimants to use the material subject to the undertaking on the Worldwide Freezing Order for use in litigation elsewhere to be brought by the Claimants, such as in Russia, but is brought because the Russian criminal proceedings have resulted in the Russian Order in relation to the Investigator attending at the Bank's offices tomorrow. Mr Pillow referred me, in particular, to what has been said by the English courts where a party is faced with an invidious situation such as that which Mr Pillow identifies as being the case here.

18. In this regard he refers me to what is said in *Gee on Commercial Injunctions* about the fact that the "special circumstances" test will be readily met where the person subject to the undertaking is obliged, under applicable foreign law, to disclose the material in question, e.g. to a foreign criminal authority. Thus the editor of *Gees* state at paragraph 25-008:

> "A party who was subject to an undertaking (express or implied) to keep disclosed documents confidential and not to use them except for certain purposes (e.g. the purposes of the action) could find himself being required to disclose the information to the foreign authorities, who are pursuing the criminal inquiries, under threat of a penalty if he does not comply. **In such circumstances the Court would give leave for the information to be disclosed to the foreign authorities because it would be a grave injustice for a person who has been granted relief to redress the wrong done to him to find himself compelled to choose between breaking the undertaking or breaking the law where he resides or carries on business and suffering a penalty abroad because of this. <u>Furthermore disclosure would further international co-operation in combating fraud</u>."** (emphasis added)

19. Mr Pillow referred to the facts in the *Bank of Crete* case that I have already referred to. In that case, permission was sought by a Greek bank to use information obtained under orders of the English Courts from banks in London about its missing funds. The claimant proposed to use the information to comply properly with its obligations under Greek law to compile audit reports about its foreign exchange transactions which would in due course go to the Bank of Greece and an examining market (an official of the Greek judicial system appointed to investigate criminal aspects of the fraud alleged to have been perpetrated on the bank). Permission was granted by Millett J. He stated, in particular, at pp. 926-927:

> "...However, voluntary disclosure is one thing; disclosure under compulsion of law is another. By enabling the bank to obtain information which it needs for the successful prosecution of its civil remedies, the Court should not place the bank in an impossible position in which it must either infringe its undertaking to this Court or find itself in breach of its duties under Greek law. The fact that a party which seeks the assistance of the English Court to obtain material for the purpose of an English action may find itself under a legally enforceable obligation in another jurisdiction to disclose the material for some other purpose is no doubt a factor to be taken into account by the Court when considering whether to give such assistance, but unless the material is of only marginal relevance to the English action it ought not normally to preclude the Court from assisting the applicant to obtain the material it needs for the successful prosecution of the action.
>
> … It is frequently the case that material obtained by a party to English civil proceedings may be required to be produced in criminal proceedings in England. By a parity of reasoning, **I see no reason why the English Court should be astute to prevent a party who has obtained material in this country by the use of the coercive powers of the English Court from producing such material in a foreign jurisdiction if compellable to do so.**" (emphasis added)

20. I have already referred to the fact that the Court was influenced, *inter alia*, by the "*wide policy considerations",* in particular the *"need for international co-operation between the Courts of different jurisdictions in order to deal with multinational frauds"* (p. 925).

21. It was pointed out by Mr Pillow that, although permission to use the material in question was required so as to comply properly with the claimant's reporting obligations, there was no suggestion in that case in the judgment of Millett J that the bank or any of its representatives would have been subject to any real (still less, severe) penalties in the event that they could not use the material covered by the undertaking.

22. As to the form of the order made by Millett J, I was referred to p. 927:

> "Accordingly the order which I propose to make is to add a proviso to the existing order to the effect that nothing in the order shall prevent the plaintiff, its servants or agents from using any information or documents disclosed pursuant to the order for the purpose of producing, in such form as it may think appropriate, audit reports or from supplying such audit reports or any information or documents disclosed pursuant to the order to any person to whom the plaintiff is under a duty under the law of any other jurisdiction to supply such audit reports, information or documents, or from informing any such person that such audit reports have been prepared."

23. Mr Pillow also draws my attention to the decision in the *Attorney-General for Gibraltar v May* [1991] WLR 998, an authority for the proposition that although the test for the relaxation of the undertaking would be more readily met where the applicant is under a foreign law duty to disclose the protected information, this is not a prerequisite to the exercise of the Court's discretion. He refers to that case where permission was granted for the claimant to use the first

defendant's asset disclosure, given pursuant to a freezing order granted by the English Court, for the purpose of prosecuting that defendant in Gibraltar for alleged criminal offences. It was said that the material in question would *"form an important part of the prosecutor's case"* (p. 1003), but there was no suggestion that the local law imposed any obligation on the claim to disclose, or make use of, that material.

24. Mr Pillow also draws my attention to a situation which he submits is closely analogous where the relevant documents are requested by domestic criminal authorities and he refers me to a passage in Hollander *Documentary Evidence* (13th ed) at 49:

> **"The Court will usually release a collateral undertaking in response to a request from the criminal authorities.** In *Marlwood Commercial Inc v Kozeny* the Court of Appeal held that because the public interest in the investigation or prosecution of a specific offence took precedence over the concern of the Court to control the collateral use of disclosed documents, the Court would usually exercise its discretion in favour of compliance with a statutory notice requiring production to the criminal authorities."
>
> (emphasis added)

25. For the Defendants' part Mr Béar, supported by Ms Nesterchuk and Mr Matthews, draws my attention to the decision of Hildyard J in the case of *ACL Netherlands v Michael Richard Lynch* (No. 2) [2019] EWHC 249 (Ch) ("ACL"). That was a situation where there was an application to be released in circumstances where there was a US subpoena. During the course of that judgment, starting at paragraph 30, Hildyard, J reviewed the various authorities including after making reference to *Crest Homes plc v Marks,* and at [30] said as follows:

> "That case made clear that the Court will only release or modify the restrictions where (a) there are special circumstances which constitute cogent and persuasive reasons for permitting collateral use; and (b) the release or modification will not occasion injustice to the person giving disclosure: *ibid.* at 859G and 860 per Lord Oliver. Further, the burden is on an applicant to persuade the Court to lift the restrictions (see 860 again per Lord Oliver). In a later case, *Bibby Bulk Carriers v Consulex Limited* [1989] QB 155 Hirst J (at 163C to D) drew on another case in the House of Lords, namely *Home Office v Harman* [1983] 1 AC at 326 in stating that the burden is a particularly heavy one where the permission is sought by or for the benefit of a person who is not a party to the action in which the documents sought were disclosed."

26. There is reference in ensuing paragraphs to other cases including a decision of Colman J in *Hollywood Realisation Trust v Lexington* [2003] WHC 996 at §8, what was said by Hobhouse J in *Prudential Assurance v Fountain Page* [1991] 1 WLR 756 at 775, as well as reference to *Marlwood v Kozeny,* which I have already referred to, with Hildyard J expressly referring to what was said by the Court of Appeal.

27. Reference was then made to what said in a purely domestic context in *Sita UK GROUP Holdings Ltd v Serruys & Ors [2009] EWHC 869 (QB),* before referring at [42] to *Bank of Crete v Koskotas (No. 2)* case, which I have already referred to.

28. In particular, my attention was drawn to [43] and following of Hildyard J's judgment. At [43] he recounted the submission of the applicant in that case that similar sentiments applied as were identified in *Marlwood* by Millett J in 926C to 927B and the skeleton argument of the applicant which said as follows:

> "Unless the Court grants permission, the Relevant Claimants will be placed in an invidious position, as they will be unable comply with their US law obligations and will face the very real prospect of sanction in the United States. It would be wholly unjust to place the Relevant Claimants who are what Millett J

> recognises was in an "impossible position" between a rock and a hard place with competing obligations owed to the English Court and under US law. That is all the more so when the obligation arises in the United States as a result of a criminal investigation by the state authorities."

29. Then at [44], Hildyard J identified what he considered were features of that case which he considered crucial elements in the balance required to be struck. The first one was that the fact that the special investigator was under an obligation under Greek law to provide an audit report to the Bank of Greece and that without the material the audit report would be *"worthless and even misleading"* (see p. 921G) and, secondly, the fact that the use of the information and documentation obtained pursuant to the order of Morritt J for the purposes of civil proceedings in Greece by the Bank of Crete had already been permitted by further orders of Morritt J and Millett J, see pp. 921 B and H. He sets out at sub-paragraphs (3), (4), (5) and (6) other reasons as well.

30. And at [45] he said as follows:

> "Put shortly, the circumstances were such as to present an overwhelming case for permission to be granted, with little, if anything, left in the balance to support the public policy objectives underlying the prohibition against collateral use, except the infringement and right of privacy, which none of the counter holders had sought to assert."

31. Then he went on to consider the *Bank of Crete* case in more detail at [46] and said, amongst other matters:

> "The case does not in my view qualify the principle established by *Crest Homes* and echoed in such cases as *Marlwood*, that all the circumstances are always relevant, and for permission to be granted the Court must be satisfied that the tests of cogency, persuasive reasons and necessity, and of there being no material prejudice to the person giving disclosure, must be satisfied."

32. At [47] he said amongst other matters:

> "I agree, that latter consideration (prejudice to the person giving disclosure) is not an afterthought but a vital factor, based on the rationale of the rules as I have explained, which may of itself preclude permission."

33. He also referred to *Attorney-General for Gibraltar v May* and then at [49] he said as follows:

> "What *Attorney General for Gibraltar v May* affirms, as it seems to me, is that in every case the Court must be concerned to weigh the balance of public interest, which requires it to take all the circumstances of the case, including the justification and present necessity of having the documents made available, and any prejudice which would thereby be caused and cannot otherwise be prevented or remedied. The first and second limbs of the test are cumulative and neither trumps the other. I think it also important to note that in that case, there was no suggestion of any specific prejudice to the first defendant otherwise in relation to the privilege against self-incrimination, which the Court was entirely satisfied could fully be protected in Gibraltar as well as in England, no irremediable or irreducible prejudice was suggested either to the first defendant himself or to any third parties."

34. After considering the submissions of Mr Goodhall at [50] and [51], he stated as follows:

> "I do not accept that the discretion of the Court is so limited or its exercise so mechanistic, whether in the context of a foreign subpoena or otherwise. I do not think it is the message of the authorities, for the reasons I have sought to draw out in my analysis of them. Most particularly, I do not think that the fact of compulsion of itself establishes a 'cogent and persuasive reason' for giving permission. The test is whether the use for which permission is sought justifies any exception to or erosion of the public interest which lies behind the rules."

35. He then applied the required approach to the facts of the present case. At [77] he said:

> "Returning to the first limb of the *Crest Homes* test in the round (and see paragraph [59] above), I have already noted (see paragraph 56/7 above), and the Applicants were careful to emphasise (especially in their submissions in reply) that 'independently of compulsion' there is a strong public policy

> factor in favour of permission being the public interest in the investigation and (if appropriate) prosecution of fraud, both in domestic cases and also in cross-border cases (where general principles in favour of mutual international assistance are also in play). Mr Goodall, in his reply, submitted that the weight to be given to this would be sufficient "even in a voluntary situation'."

At [78] he continued:

> "I accept of course the importance of that public policy in both these aspects (domestic and international): and see the *Marlwood* case, especially at [46]. However, in this case the fact is that the justification can only be that the documents in question are really needed to enable the Grant Jury to perfect a course already set (by amending or replacing an indictment they have already caused to be issued or to investigate whether other persons and those thus far identified as (in its view) the main culprits should also be brought to trial."

36. And on the facts of that case, applying the approach that he had identified, there were discrete aspects within the *ratio decidendi* of that decision, as Mr Béar accepted before me, which included firstly, that the subpoena was not addressed in fact to the parties to the English proceedings who were making the application and, secondly, there was a carve-out provision in the subpoena which would mean, or at least arguably mean, that they were not obliged to comply because of the existence of the existing English Order.

37. One can well see why therefore, on the specific facts of that case, he did not consider that it was appropriate to release the party from the undertaking given that they were not even party to the subpoena, and there was a carve out whereby they were not required to comply by reason of the English Order.

38. I was also referred to the fact that in the case of *National Bank Trust v Yurov (Consequential Proceedings*) [2020] EWHC (Comm) 757 (in the context of

releasing the claimants from undertakings that were in place in the context of a worldwide freezing order) I referred to the principles set out in ACL at [44].

B.2 CPR 31.22

39. Those then are the principal authorities to which I was referred to by both the Claimants and on behalf of the Defendants in relation to the release of undertakings.

40. The other aspect of applicable principles relate to CPR 31.22, which comes into play, as will become apparent, when I deal with the chronology in particular what occurred before Jacobs J (and Cockerill J) and how that fits in to the application to vary the terms of the existing express undertaking.

41. CPR 31.22 provides as follows:

> "-(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) **the document has been read to or by the Court, or referred to, at a hearing which has been held in public;**
>
> (b) the Court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The Court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the Court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs."
>
> (emphasis added)

42. In the notes in the White Book 2020 paragraph 31.22.1, it is noted as follows:

> "Documents read by the judge out of Court before the hearing on which the judge based their decision and to which they made compendious reference in their judgment were documents referred to at a hearing held in public; see *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1994] 4 All E.R. 498, CA (a case under the former RSC, Ord.24 r.14A).

43. Mr Béar also drew my attention in the closing stages of his oral submissions to what he described as a decision of Leggatt J (as he then was) in a decision he referred to as *Blue*, which he told me was concerning the issue about witness statements referred to at the CMC and an argument later about whether or not those documents came into the public domain and on the facts of that case and the references to those witness statements in the CMC, that was not said to be the purpose of 31.22 and those documents were not in the public domain.

44. Mr Pillow, for his part, says this is a very different case because the documents that one is concerned with here were produced in the context of the standard policing provisions of the Worldwide Freezing Order and involved a Schedule of Assets which was then verified by Affidavit which was before the Court in the context of the return date of the freezing injunction. That is the hearing before Jacobs J which I shall come on to.

45. In this regard express reference was made by Mr Pillow at that hearing in relation to the Schedule and Affidavit of D1, and it is also clear, as I shall come on to, that when it came to his judgment Jacobs J made express reference to all the Affidavits which he had clearly read in the meantime. Mr Pillow says that that is within not only the letter but also the spirit of CPR 31.22, and what he says (consistent with authority) is the equivalent and analogous position in relation to an express undertaking to the Court.

46. Indeed, as shall become apparent, Mr Pillow says that, but for the fact that there is an express undertaking and he needs the permission of the Court to vary that undertaking, the vast majority of material in relation to which a release is sought in relation to the first to third defendants is indeed that scheduled material and that affidavit material which was before Jacobs J at the return date of the injunction and which has already entered the public domain.

47. There is also a significant body of associated case law in relation to the interaction of CPR 31.22 and its relevance in the context of release of undertakings in relation to undertakings given, for example either in Norwich Pharmacal proceedings or in relation to Worldwide Freezing Orders. One line of cases where that has had to be considered on a number of occasions is in what is known as the SKAT litigation which is currently proceeding in the Commercial Court.

48. There have in that context, in the context of alleged fraud against the Danish tax administration been commenced very substantial proceedings in the Commercial Court that have resulted in a series of applications made to Commercial Court judges to release the Claimants from associated undertakings in Norwich Pharmacal and World Wide Freezing Injunctions that have been obtained (including before Philipps J (as he then was), Cockerill J, Andrew Baker J (the designated judge) and myself (as co-designated judge until 2020)).

49. In those applications, the Court has had regard to the principles arising under CPR Rule 31.22 and has considered in a series of judgments that similar principles i.e. the *Crest Home v Marks* principles, apply equally in the context of release from an express undertaking. The decisions include a decision of

Phillips J on 18 June either in 2018 or 2019, I am not sure which, when he permitted use in connection for and obtaining attachment orders in Germany and Dubai. This was following both worldwide freezing orders and Norwich Pharmacal relief resulting in an order for the appointment in Dubai of a court officer. Then an order and judgment of Cockerill J of 25 June permitting the use of freezing and search orders in the DIFC, and to bring substantive proceedings against two defendants in Dubai. Those proceedings had been initiated because the Norwich Pharmacal material showed that those potential defendants had received the proceeds of the fraud on SKAT.

50. There was a further hearing and order of Cockerill J on 12 October permitting SKAT to use a report by Deloittes which had been exhibited and been prepared and used documents for the purpose of the Norwich Pharmacal orders as well as an affidavit which referred to that report for the purposes of pursuing related claims in the USA, Dubai, the DIFC and Malaysia.

51. There was a subsequent application before me reported at [2019] EWHC 2807 (Comm) in which SKAT sought to be released from the undertakings given in both the Norwich Pharmacal orders and the worldwide freeing orders to be released so as to use the statements of case in the proceedings and certain related civil proceedings in other foreign jurisdictions.

52. As I say, one of those applications was before Cockerill J. Her reasoning, which was summarised in a witness statement of Mr Fortnam (cited before me [2019] EWHC 2807 (Comm)) was, firstly, that much of the material in question had come into the public domain by being read in advance of a hearing by her, which was primarily concerned with the worldwide freezing orders.

53. She gave five reasons for giving permission, and one of those reasons for giving permission was that the material had come in the public domain (having been read by her), which illustrates the interaction not only between CPR 31.22, and any express undertaking, but the relevance of whether the material has already come into the public domain when applying the relevant considerations and legal principles that I have already identified.

54. I also believe, but I have not been taken to today, that there have been subsequent such applications before Andrew Baker J as the lead designated judge in relation to the SKAT litigation. I will need to return to the factual position in the present case, and how the principles I have identified are to be applied on the facts of the present case.

C CHRONOLOGY OF EVENTS AND FACTUAL BACKGROUND

55. I take much of this from Mr Dooley's Seventh witness statement. These proceedings were commenced on 28 June 2019 in relation, *inter alia*, to what has been known as "the replacement transaction". In very broad terms, the Claimants allege in these proceeding that in August 2017 as Bank Otkritie stood on what was said to be the brink of collapse in Russia what is said to be a patently uncommercial transaction took place between Bank Otkritie and companies belonging to the Mints family and part of their group of companies known as the O1 Group, whereby short-term largely secured interest-bearing and performing loans with a value of around US $500 million were "repaid" using the proceedings of what are said to be uncommercial and off-market bonds issued by a Mints family company worth it is said at best a fraction of the value of the loans they replaced. Those bonds were long term (initially 15 years)

although subject to a bondholders' meeting it had been intended to reduce the term to ten years unsecured and with all the interest deferred until maturity (i.e. they yielded no income to the bank for at least ten years. The Claimants say that knowing Bank Otkritie were about to collapse and the inevitable problems that this would cause the Mints family, Bank Otkritie's senior management agreed the replacement transaction to help out their old friends the Mints family and their O1 Group. Bank Otkritie collapsed on 29 August 2017 and came under the control of the Central Bank of Russia (the CBR) which appointed a temporary administration to manage the bank. As part of the rehabilitation the Central Bank of Russia had to bail out Bank Otkritie with around US $8 billion of public funds. Although Bank Otkritie has now been rehabilitated and is now under new management, Mr Dooley's evidence is that the CBR remains the ultimate 100% shareholder.

56. Mr Dooley summarises the first to third defendants' defence in these terms, that the replacement transaction was a commercial transaction and negotiated at a time when Bank Otkritie had a serious liquidity problem and was taking steps to generate urgent liquidity. They say that the secured loans were not assets that could generate liquidity and that the replacement transaction was therefore agreed because the bonds were an instrument capable of being repo-ed (in effect being lent to other financial institutions as security for short-term cash loans). The Mints family say that, whilst they may have used their commercial leverage to extract a good deal, this was an honest transaction.

57. Mr Dooley says that it is common ground that after Bank Otkritie acquired the bonds, a single repayment transaction took place between 15 and 22 August

2017 involving a party called Veles Capital Limited which generated liquidity for that week of around US $20 million. It is however the claimant's case that the Velez repo was a charade in the sense that the bank's ultimate counterparty in that transaction was a Cyprus company called Adagu Holding Limited, which was in fact at all times owned and controlled by the Mints family themselves. The Claimants say that this was a transaction designed to give the false appearance that the bonds could be used to raise liquidity in the market when this was not the case.

58. There is a second part of the claim that relates to an almost identical transaction that took place a few days later between Rosbank and Mints family companies where partially secured loans were replaced with similar illiquid bonds causing a loss of around US $250 million. Rosbank like Bank Otkritie collapsed shortly after the relevant transaction and was later merged into NBT.

59. Mr Dooley also refers to the fact, as Mr Béar has also referred in submissions before me, to the fact that there are proceedings in the London Court of International Arbitration (the LCIA) that were commenced on 2 January 2018 by companies belonging to the Mints family involved in the replacement transaction. In those proceedings the arbitrators were Sir Christopher Clarke, Sir Stephen Tomlinson and Sir Rupert Jackson. A final hearing took place over five weeks in July and August 2020 and a final award is awaited.

60. I have been told that the explanation for those arbitration proceedings is that some of the relevant documentation included arbitration clauses and the Mints family, therefore relying upon those arbitration clauses, commenced arbitration

which explains why they are proceedings not only before this Court but also arbitration proceedings.

C.1 THE ENGLISH PROCEEDINGS

61. On 28 June 2019, Moulder J made a without notice Worldwide Freezing Order against Boris Mints, Dmitry Mints, Alexander Mints and Igor Mints, that is the First to Fourth Defendants. A return date was fixed for 11 July 2019 (the "Return Date") with each respondent having the right to apply to Court to vary or discharge the Moulder Order.

62. Pursuant to paragraph 9 of the Moulder Order each respondent was required within 96 hours of service of the order to inform the applicant's solicitors of all his assets worldwide exceeding £10,000 each in value, giving the value, location and details of all such assets. The respondent was also entitled to refuse to provide this information if it was likely to incriminate him and fell within any privilege against self-incrimination.

63. Paragraph 10 of the Moulder Order provided in the usual way that the asset disclosure had to be set out in the form of an affidavit and be provided to the applicant's solicitors within five working days after service of the order.

64. The applicants gave the Court a number of undertakings set out at schedule B to the Moulder Order. Paragraph 8 of the Moulder Order states as follows: *"The applicant will not, without the permission of the Court, use any information obtained as a result of this order for the purpose of any civil or criminal proceedings either in England and Wales or in any other jurisdiction other than this claim."*

65. On 4 July 2019, upon application made by the First, Second and Third Defendants the text of Schedule 1 of the Moulder Order was modified to make it clear that the bank accounts of certain operating companies in the UK were not frozen.

66. The solicitor then acting for the defendant, Simmons & Simmons, on 2 July 2019 sought an extension for the deadline for initial asset disclosure until 9 July with affidavits to follow on 12 July and that was agreed by Steptoe, who were the solicitors acting for the Claimants. Consequently on 9 July 2019 Simmons served schedules of assets of the First, Second and Third Defendants and the sworn asset disclosure affidavits followed shortly thereafter (the "Asset Disclosure Affidavits"). Further updated asset disclosure pursuant to the Moulder Order was given by the First Defendant on 5 November 2019 and by the Second and Third Defendants on 20 October 2019. On 11 July 2019, i.e., shortly after the schedules and I believe pretty much simultaneously with receipt of the disclosure affidavits (I say that because the disclosure affidavits were before the judge on the return date) the return date hearing took place.

67. The Claimants were required by the Defendants to apply to continue the worldwide freezing order, with the First to Third Defendants opposing its continuance and/or seeking its discharge, or alternatively, offering voluntary undertake in lieu thereof. The Fourth Defendant during the course of the hearing withdrew his opposition to the continuance of the freezing order and instead likewise offered a voluntary undertaking in lieu thereof.

68. Jacobs J stated at the end the hearing that the freezing order would continue with his written reasons to follow. Consequently. each of the respondents gave

undertakings set out in schedule 1 ("return date undertakings") to the order of Jacobs J dated 16 July 2019 (the "Jacobs Order"). The Claimants also gave undertakings under schedule 2 to that order. Paragraph 3 of schedule 2 to the Jacobs Order included the following undertaking by the Claimants ("the Relevant Undertaking"): *"The Claimants will not without the permission of the Court use any information obtained as a result of the freezing order or this order for the purpose of any civil or criminal proceedings either in England and Wales or in any other jurisdiction other than this claim."*

69. Mr Dooley confirms that the Asset Disclosure Affidavits were indeed in the hearing bundles for the return date hearing (see Dooley 7, paragraph 23).

70. During the course of the hearing before me this afternoon and this evening, and the oral submissions of Mr Béar, a passage from the transcript of that hearing was referred to me at page 42, which I bear well in mind, that led Mr Pillow in his reply submissions to identify in fact that the position in terms of exactly what was referred to during the course of argument before Jacobs J was rather wider than what was referred to at paragraph 42, which was the very lengthy schedule of assets by Mr Mints, that is D4.

71. In reply, Mr Pillow pointed out that if one read pages 42-50 in their entirety, including in particular page 48 and 49, Mr Pillow had made, before Jacobs J, reference to a number of assets revealed by the Schedule and the supporting Affidavits including houses in the jurisdiction owned by offshore companies, mainly Cayman Island companies which are held on trust for a discretionary trust, and therefore the individuals would not have a proprietary interest in those assets. There is reference to a home in Weybridge and there is reference to Mr

Boris Mints's assets. There is reference to vehicles. There is reference to a land plot in France owned by a Cayman Island company. There is reference to a Sunseeker yacht. There is reference to a large watch collection

72. It was fairly drawn to my attention by Mr Pillow that, at least at that stage, from what was said by Jacobs J he had not read the Schedules relating to D2 and D3, although of course there was adduced before him references to assets that applied in relation to the material that had been disclosed. However, it is clear from the judgment itself, which was a reserved judgment of some length and which had clearly been drafted with some considerable care, that the Learned Judge between the oral argument and his judgment had indeed read the Affidavits.

73. Thus:

> "38. The Claimants also relied in this connection upon the fact that there was no evidence showing where this $200 million had gone. However, they were able to point to evidence in the disclosure pursuant to the WFO which showed that at around the time when the reduction in capital was proposed there was a re-organisation of the Mints family discretionary trust.
>
> In his disclosure affidavit, the first defendant refers to the creation of a trust called the MF Trust of which he was the settlor. This trust seems to have acquired assets on and also perhaps after 27th December 2017. The first defendant says that: "In setting the assets on the MF Trust I divested myself of legal ownership in those assets. They are held and controlled by the trustee. The date given for the settlement of the trust is 27th December 2018.
>
> 39. The evidence as to the destination of the $200 million is unclear. It has not been addressed by the defendants in their evidence. It seems to me to be a reasonable possibility that these monies went into this or another family trust. In my judgment, this is further supportive evidence of a risk of dissipation since

> it is important for a judgment in favour of the Claimants against Nori would necessarily be more difficult when Nori's former assets were now within such a trust…" (Emphasis added)

74. It is clear, therefore from paragraph 38 (as is not disputed) that the Learned Judge had expressed not only before him but had expressed regard to and referred to the First Defendant's disclosure affidavit. However it is also clear that he had also had regard before delivering his judgment to **all** the Affidavits.

75. That much is expressly clear from paragraph 45 of his judgment:

> "In a related submission, it was argued on their behalf that the Mints family had brought themselves and their assets to the United Kingdom, and had invested here: this was not the action of people who intended to dissipate their assets. It is true that the evidence indicates that the Mints family now live in England. However, leaving aside a large watch collection, there is no clear evidence that they have brought any personal assets to this country. For example, **the Affidavits produced on disclosure** showed that the houses in which they live were owned by offshore companies, mostly Cayman companies, and were held on trust. There is no evidence of any substantial assets having been brought into this jurisdiction and against which there could be enforcement of any judgment". (emphasis added).

76. It is clear therefore that in addition to the various matters that Mr Pillow referred the judge to during the course of oral argument in the transcript (running to some 114 pages) the judge after that hearing, if not before (and it may be that he had not done before in light of what is said in the transcript), **did** read those affidavits, and it is said by Mr Pillow that this is full-square within the sentiments expressed in the White Book and the decision of the Court of Appeal in *SmithKline* Beecham v Connaught Laboratories, supra.

77. There is additional relevance of the judgment of Jacobs J. In this regard, Ms Nesterchuk, on behalf of the First Defendant (in relation to whom there is no

doubt that there was debate in English proceedings in relation to the Schedules and the Affidavits) submits that this Court should not lose sight of the fact that there is in fact a counterclaim in the action. That is summarised at paragraph 7 and following of her skeleton argument.

78. I should make clear that what I am recounting now are the allegations of the First Defendant, which are strongly denied, as I understand it, by the Claimants. The First Defendant has a counterclaim in which he is seeking damages for losses conservatively estimated to be between US $650 million and US $950 million. She refers me to paragraph 58.5 of the First Defendant's defence and counterclaim. It is said that these losses are caused to the First Defendant by what is characterised as "an unlawful campaign pursued by the Claimants with the intention of harming the [First Defendant] as well as his family, business and interest." Reference is made to paragraphs 49-51 and 88-122 of the second and third respondent's defence, and that alleges, among other matters, (a) abusive pursuit of various legal proceedings in Russia and Cyprus; (b) reliance on evidence obtained under threat of criminal prosecution in Russia in support of the claimant's application for the freezing order; and (c) preventing payments lawfully due to and dissuading third parties from dealing with certain companies associated with the first respondents. Ms Nesterchuk elaborates on that further at paragraph 8 which I have had regard to.

79. The relevance of all this is not simply that I should be alive to both sides of the story in terms of what is being alleged, but that during the course of oral submissions before me I was addressed, in particular by Mr Matthews in fact, about the merits of the English proceedings and the question that arises as to the

merits of the claims which are being brought in England (as well as the alleged interaction between the English proceedings and events in the context of the Russian criminal proceedings), and in the context of the sentiments expressed in the various legal authorities that I have already referred to about international comity and in the context of civil fraud.

80. One of the submissions that was made on behalf of the defendants was that there are pleaded allegations of civil fraud against the Mints Defendants but that there are two sides to that story, and that was also elaborated upon by Ms Nesterchuk. However, it seems to me the only material that I can look at in terms of any actual judicial decision to date on the merits (whilst of course bearing in mind both what the claims are in the statements of case and also bearing in mind what the defences are and the counterclaim of the First Defendant), are the findings of this Court to date.

81. Because, of course, this matter has come before Jacobs J and indeed also in one aspect before Cockerill J, and the matter came before Jacobs J in the context as to whether or not the freezing injunction could continue. On that application he was satisfied, by the very nature of his continuance of the freezing injunction, that there was a **good arguable case of fraud** which would support, and would be a necessary requirement for the continuation of the injunctions.

82. So I consider it is appropriate for me to take into account that at least one judge of this Court and possibly a second, in the form of Cockerill J in relation to the application before her, have reached conclusions as to a good arguable case on the merits that the First to Third Defendants had perpetrated an actionable fraud against the Claimants (under the Russian Civil Code, the applicable law). I

consider that does come into play when one considers the case law that I have identified in that regard.

83. Returning to the chronology of events, Mr. Dooley's evidence, Dooley 7, paragraph 25, is that the fact of the Worldwide Freezing Orders was widely reported in the Russian press at the time.

84. So far as the English proceedings are concerned, the next relevant event is that the Fourth Defendant, Mr. Igor Mints, later applied to discharge the freezing order and that application was heard by Cockerill J on 18th December 2019. In her refusal of the Fourth Defendant's application in a written judgment of 6th February 2020, to which I have already given the neutral citation, that judgment refers to Igor Mints' asset disclosure at paragraphs 18, 20 and 29. The Fourth Defendant applied for permission to appeal but that was rejected by Males LJ in his written reasons dated 8th June 2020, those reasons being before me in the bundle relied upon by the Claimants.

85. On 10 July 2020, the Claimants issued separate proceedings against Dmitry Mints, Alexander Mints, Vadim Belyaev, Evgeny Dankevich and Mikhail Shishkhanov. In relation to Vadim Belyaev and Evgeny Dankevich this claim was based on the same allegations as those made in the existing proceedings against Boris Mints, Dmitry Mints, Alexander Mints and Igor Mints.

86. Further claims were also made against Dmitry and Alexander Mints relating to other alleged fraudulent transfers in connection with the collapse of Rost Bank in September 2017. The Claimants applied to consolidate the new proceedings with the existing proceedings. That consolidation application was heard by His Honour Judge Mark Pelling, QC on 4 August 2020 approving the

consolidation proceedings adding Mr. Belyaev, Mr. Dankevich and Mr. Shishkhanov who have now been joined as the Fifth, Sixth and Seventh defendants. All those new defendants, I am told, are contesting jurisdiction. Their applications will be heard in March 2021. The first CMC in this action has been fixed for two days on 14th and 15th April 2021

C2 THE RUSSIAN CRIMINAL PROCEEDINGS

87. On 5 September 2018 Mr. Mikhail Zadornov, the chairman of Bank Otkritie, wrote to the Investigator in Russia complaining of the replacement transaction and the alleged harm and losses caused by it. So, Mr Dooley's evidence, paragraph 33 is that letter did not refer to any of the Mints defendants by name.

88. On 17 September 2018, criminal proceedings were opened in Russia in relation to the replacement transaction and Otkritie Banks for its new management has, according to Mr. Dooley, been supportive of those criminal proceedings and has been declared a "Victim" for the purposes of them which gives it certain rights of access to the criminal file.

89. On 29th October 2019 Mr. Siminov, described as "attorney for the sufferer Bank Otkritie" filed a motion addressed to Mr. Saveliev, the Investigator of the main investigation office of the investigation committee of Russia, which provides as follows:

> "Motion. In criminal case no. 11802007703000292 Bank Otkritie FC PJSC has been recognised to be the sufferer as it suffered a damage in the amount of rubles, 34,893,200 as a result of the crime that is being investigated as part of the aforementioned criminal case, namely the purchase on behalf of the bank and on terms unfavourable for the bank of OOR-05 series, and then there is another reference, exchange traded bonds from 01 Group Finance LLC in 2017".

> "For the bank to be able to potentially exercise its right to raise a civil claim for the financial damage recognised in the criminal case pursuant to Article 44 of the Criminal Procedure Code of the (Inaudible) Federation. **Please take whatever steps may be required to preserve the properties [I understand that to mean assets] beneficially owned by the accused EL Dankevich and other persons liable for the said crime"**.
>
> "The bank will later make a decision whether to raise as part of the criminal case a civil claim for the damage suffered" (emphasis added).

90. It is to be noted that this motion was, therefore, some 13 months ago. It is also to be noted that the only known party in the criminal proceedings at that stage was Mr. Dankevich, who was the CEO of the bank. The Mints parties were not charged, nor party to those criminal proceedings at that time, and only became party to those criminal proceedings in December 2019 or January 2020 (see Mr. Dooley's Seventh statement at paragraph 36). Equally, there was no claim against Mr. Dankevich in the English proceedings.

91. The same day, 29 October 2019, there was an order granting the motion that had been lodged by Mr. Siminov. In the light of the way the oral arguments developed, this is an order of some considerable importance as it sheds important light upon subsequent events and also the contemplation of the Investigator.

92. It begins by Mr. Savliev, who is a Lieutenant Colonel of Justice and the Investigator of major crimes at the major investigation's office to whom the motion, of course, was addressed, stating that he found as follows. There then follow a series of findings over two pages.

93. On the second page is the following paragraph which is relied upon with some force by Mr. Pillow and I quote:

> "Pursuant to Article 115 of the Criminal Procedure Code of the Russian Federation for the purpose of securing the execution of a sentence to the extent concerning a civil claim a penalty to be imposed or other financial charges or a potential property confiscation the Investigator shall be authorised to lodge a motion with a Court for seizing the properties of the accused or other persons financially liable under law for their actions subject to the consent of the head of the relevant investigation authority".

94. The order itself then records at the bottom of that page that:

> "In view of the foregoing and pursuant to Article 38, 122 and 159 of the Criminal Procedure Code of the Russian Federation I hereby order: 1. That the motion lodged by AV Siminov asking that whatever steps may be required to preserve the properties beneficially owned by the accused, EL Dankevich and other persons liable for said crimes to be granted, and 2. That AV Siminov be notified of this order and of the procedure for appealing it under Chapter 16 of the Criminal Procedure Code of the Russian Federation".

95. It will be noted, therefore, that in the paragraph that I have quoted above, that in the context of Article 115 of the Criminal Procedure Code of the Russian Federation there are various purposes which are identified. One is for the purpose of securing the execution of a sentence to the extent concerning a civil claim, so that is directed at the civil claim, but also a penalty to be imposed that I understand to be a penalty in the criminal proceedings. Reference is also made to "Or other financial charges" which again would appear to be a reference to other financial charges in those Russian criminal proceedings or a potential property confiscation, and again that would appear to be in the context of the Russian criminal proceedings.

96. So although one of the contemplated purposes is in the context of a civil claim, there are three other identified purposes set out within that order granting the motion on 29 October 2019. As I say, at that stage the defendants were not party to the Russian criminal proceedings.

97. Picking up the chronology of events, Mr. Dooley's evidence at paragraph 35, which is based on enquiries made by a Nikolay Romanov, one of the bank officers responsible for the claim, is that four individuals have so far been charged with criminal offences in Russia relating to the replacement transaction.

98. Firstly, Mr. Dankevich, who was the only defendant to the Russian proceedings at the time of the motions that I have just referred to and three other individuals who are the First to Third Defendants. The evidence that is before me is that Mr. Dankevich is currently in Israel having fled Russia in November 2017, shortly after Bank Otkritie collapsed.

99. So far as the First to Third Defendants are concerned, they are all now resident in England having left Russia in or about February to March 2018. Mr. Dooley's evidence is that they were charged with criminal offence *in absentia*; in fact, on 31 January 2020, arising from their alleged role in the replacement transaction pursuant to Article 160 of the Russian Criminal Code, being offences of dishonesty as a result of embezzlement or misappropriation. Mr. Dooley's evidence is that this has been widely reported in the Russian press.

100. Mr. Dooley also states on information and belief from Mr. Romanov that Mr. Romanov understands that those defendants are subject to international arrest warrants issued at the behest of Russia. However, the evidence is per Mr. Romanov that he is not aware, and the Claimants are not aware, of any current

extradition proceedings in England or Israel by which Russia is seeking to extradite the alleged wrongdoers to Russia to face a criminal trial. He refers to the fact that lawyers acting for Dmitry and Alexander Mints, i.e. D2 and D3, have asked for permission to disclose 13 documents disclosed by the Claimants in these proceedings to English criminal lawyers to advise in case extradition proceedings are issued but to date the Claimants have not consented to such disclosure because there are no such proceedings.

101. During the course of the oral submissions before me this afternoon and this evening, none of the defendants identified that they are currently subject to any extradition proceedings in favour of Russia in England. Those proceedings, if they exist, of course, would have to go through a magistrate, who would no doubt consider whether or not it was appropriate to order extradition, on which occasion many of the points which have been deployed before me today as to the nature of those Russian proceedings would no doubt be in sharp focus. The current position, however, is that there are no such extradition proceedings.

102. The next relevant event on the evidential material before me today is that on 4 June 2020 Mr. Siminov was interviewed by the investigative committee in Russia in an interview which lasted two hours and 20 minutes and was conducted by the Investigator. The notes of that interview are also before me and were put in evidence by those acting for the Second and Third Defendant.

103. Amongst the questions that were asked to Mr. Siminov Viktorovich and it appears from the face of those notes that he was being asked questions as a representative of the victim, and I will quote the whole of this passage:

> "Question to the representative of the victim:

> In the course of conducting a preliminary investigation there are reports in mass media outlets that a Court proceeding takes place in London in which members of the Mints family disclosed information about assets owned by them on disposal of which the London Court imposed restrictions. Taking into account that PJSC Bank 'FC Otkritie' are parties to the aforementioned Court proceedings, I asked to inform if there is information in the PJSC Bank 'FC Otkritie' about assets owned by Boris, Alexander and Dmitry Mints including situated outside the Russian Federation in foreign countries?'"
>
> Answer of the representative of the victim:
>
> "Yes, it is true that in the Court proceedings in the High Court of London upon a claim by PJSC Bank 'FC Otkritie' members of the Mints family disclosed information about assets owned by them directly or through shareholdings in legal entities located in the territory of the Russian Federation and abroad".
>
> Question to the representative of the victim:
>
> "Are there documents available in PJSC Bank 'FC Otkritie' submitted by the Mints to the High Court of London about assets owned by them in the RF Territory and abroad and if there are, is it possible to provide them to the Investigatory organ?"
>
> Answer of the representative of the victim:
>
> "The above mentioned documents are available in PJSC Bank 'FC Otkritie' at the address Moscow City —" and the address is then set out. "However, information contained is strictly confidential because representatives of PJSC Bank 'FC Otkritie' undertook not to use information that they received without permission of the Court, including for the purposes of a civil or criminal proceeding irrespective of the country of its jurisdiction. In case of a breach of this undertaking the foreign Court may impose appropriate sanctions. Taking into account these circumstances the bank must not provide these documents".

104. It will be seen, therefore, that Mr. Siminov was interviewed by the Investigator as a representative of the victim during the course of which he made clear that there was documentary material available but that it was covered by an order of the foreign court (the English Court), and that therefore was rightly brought to

the express attention of the Russian prosecutor. So that is an example of the Claimants' representative drawing attention to the Investigator the fact that they could not provide the disclosure sought because of the existence of the English order. That was, therefore, a perfectly proper thing to do to draw that to the attention of the Russian prosecutor.

105. I should make clear that my understanding is that the nature of the allegations of fraud in the Russian criminal proceedings are a subset and incorporate the core allegation in the English proceedings in relation to the civil fraud and the transactions that I have already summarised. In other words it is the same alleged wrongdoing (in relation to which Jacobs J, by continuing the injunctions, was satisfied there was a good arguable case of civil fraud).

106. On 11 November 2020 Mr. Savliev agreed a document which is headed: "Order to lodge a motion with the Court for seizure of certain things and documents containing secrets protected by federal law, City of Moscow 11th November 2020" and he then says that he, Mr. Savliev, found as follows.

107. There then follows a reference to the criminal case being opened on 17 September 2018 against Mr. Dankevich. There is a reference to the preliminary investigation that was carried out in July and August 2018:

> "Whereby BI Mints, DB Mints, AB Mints and EL Dankevich, an unidentified beneficiary owner of the bank acting as part of an organised gang, with the use of their official positions made a transaction on behalf of the bank to purchase on terms known to be unfavourable to the bank and for an overstated price 01 Group exchanged traded bonds with a par value of 34,893,200 rubles, thereby wasting the money entrusted to EL Dankevich in the amount of—that amount for the benefit of BI Mints and causing damage to the bank".

108. It then states that the period of the preliminary investigations into the criminal case was repeatedly extended in due course, the last time on 4th September 2020 for three months by the chairman of the Investigation Committee of the Russian Federation for a total of 27 months, i.e. until 17th December 2020.

109. There is then a reference to the fact that given the evidence collected in the case, BI Mints, DB Mints and AB Mints were on 11 December 2019 accused of the crime criminalised by Article 160 sub-section (4) of the Criminal Code. It then records that:

> "Since the accused, BI Mints, DB Mints and AB Mints are currently hiding from investigation and judicial authorities they were put on the international wanted list and ordered to be put in the pre-trial detention as a preventative measure by the Basmanny District Court of Moscow".

Then it records that:

> "BI Mints, DB Mints and AB Mints are accused of a grave crime committed against property as part of an organised gang. Said crime caused the bank to suffer financial damage in an especially large amount —" and that amount is then set out, which I have just referred to: "It is said that this crime is punished by up to ten years in prison and up to 1 million rubles in fines under the Russian criminal laws".

Then it is stated and I quote:

> "According to Article 611 of the Criminal Procedure Code of the Russian Federation, criminal judicial proceedings are intended to protect the rights and legitimate interests of individuals and legal entities suffering from crimes".

It then continues:

> "During the preliminary investigation the Principal Investigation Office received and duly considered and granted a motion from Mr. Siminov, an attorney acting for the sufferer Bank Otkritie a motion asking that the investigation authorities take whatever steps may be required to preserve the assets owned by the

> persons liable for the waste of the bank's money". I interject that that motion was indeed granted the same day, as we know.

110. This document then continues in a paragraph which has been relied on heavily, I think it is fair to say, by all the defendants in opposition to the application but is shed further light on by the document that I have already referred to which I will return to in due course. It provides as follows:

> "Given the facts stated above and the purpose of securing **the civil** and **other financial claims** the preliminary investigation authority should immediately take steps pursuant to Article 160.1 of the Criminal Procedure Code of the Russian Federation to find out and seize any assets owned by the suspected and accused persons or those persons liable for the damage caused by the suspected and accused persons under Russian laws so that the value of those assets could secure the indemnification of the financial damage".
>
> (emphasis added)

111. The point relied on in particular by the defendants are the words: "For the purpose of securing the civil…claim…" because it is said that this motion and the consequent order that was made on 12 November (that I am going to come on to in a moment) was, it is said, for the purpose of securing effectively and furthering the civil rights of the Claimants, essentially to seize assets ultimately for the benefit of the Claimants in circumstances where there is of course the existing freezing injunction in England and the undertakings given by the Claimants not to commence any other proceedings.

112. I should say that there are no Russian civil proceedings issued by the Claimants and no present intention, according to Mr. Pillow on behalf of the Claimants to commence such proceedings, but of course they are party to the criminal proceedings as a victim, and Mr. Bear confirmed to me that there is no suggestion there was anything wrong in the Claimants being party in that sense.

113. Mr. Pillow for his part, in his reply submissions, referred in particular to the "other financial claims". He said with some considerable force, and in my view rightly, based on the evidential material before me at the moment, that when one refers back to the order granting the motion of 29 October 2019 it can be seen that the purposes chime very much with the contents of the documents I have just been referred to because the purposes extend not just to a civil claim but also to a penalty to be imposed or other financial charges or a potential property confiscation which can be authorised all as part of criminal proceedings and nothing to do with any civil claim.

114. Mr. Pillow submits, and I am satisfied based on the information before me that that explains, what the words: "Other financial claims" mean. It clearly cannot mean any civil claim of the claimant because the preceding word is the "Civil" and the words: "And other financial claims" amount to something different and additional. I am satisfied on the basis of the material before me that it would appear to be the sort of matters contemplated by Article 115 of the Criminal Procedure Code of the Russian Federation such as penalties, that is criminal penalties, or other financial charges, that is criminal financial charges, or property confiscation. All of those would appear to be, in the context of criminal proceedings, legitimate forms of relief or penalty or punishment (or however you want to look at it) in the criminal proceedings, quite apart from any civil rights of the claimant.

115. The 11 November document carries on and makes reference to the judicial proceedings before the High Court of Justice in London on the statement of claim filed by Bank Otkritie against the four defendants and that there was

disclosed information on the assets they owned directly and indirectly via ownership interests held in various legal entities in the Russian Federation.

116. Then there is reference to the fact as found by the Investigators, the offices of Bank Otkritie contained certain confidential information on the assets of the accused including the bank accounts that were disclosed in the course of judicial proceedings before the High Court of Justice in London on the statement of claim filed by Bank Otkritie, *"which information is relevant to this **criminal case**"* (emphasis added) i.e. it is being said the documents are relevant to the criminal case.

117. There is then reference to Article 26 of the Federal Law on Banks and Banking Business and Article 857(1) of the Civil Code of the Russian Federation. Then there is reference to a case of the Constitutional Court of the Russian Federation, it is ruling no. 10/0 dated 19th January 2005:

> "Any of the aforementioned documents to be seized shall belong to the category of documents containing the information on accounts and deposits with as well as other information designated by banks and other lending institutions unless that contradicts federal laws and shall be seized pursuant to Article 29(2)(7) of the Criminal Procedure Code of the Russian Federation by a Court order to be issued pursuant to Article 165 of the Criminal Procedure Code of the Russian Federation".

It provides:

> "In view of the foregoing, pursuant to Articles 29(2)(7), 38(2)(3), 165(1)(1) and (3)(1) through 183(3) of the Criminal Procedure Code of the Russian Federation I hereby order that the motion be lodged with the Basmanny District Court of Moscow to permit the investigation authorities to seize from the office of Bank Otkritie information on the assets directly and indirectly via ownership interests held in various legal entities owned by BI Mints, DB Mints and AB Mints and the Russian Federation abroad including their bank accounts and deposits that they disclosed in the course of the judicial proceedings before the

> High Court of Justice in London on the statement of claim filed by Bank Otkritie, which information is relevant to this criminal case".

118. Which is then agreed to and signed at the top of the first page by Mr. Levashova, Major General of Justice, Deputy Head of the main investigation office of the Investigation Committee of the Russian Federation.

119. The consequence of all of that was an order made in the Russian criminal proceedings on 12 November 2020, i.e. the following day, what has been defined as "The Russian Order", the effect of which is (per the Claimant's expert) indeed to require Bank Otkritie to disclose the Assets Disclosure Documents including Affidavits to the Investigator who is empowered to seize them. That document has been exhibited and referred to before me.

120. Now the timing of this is said to be important and the evidence of Mr. Dooley is that the Russian order per the evidence of Mr. Romanov came to Mr. Romanov's attention during the evening of Thursday, 19 November but Mr. Dooley became aware of it during the morning of Friday the 20th. It is Mr. Dooley's evidence, as a solicitor of the Senior Courts, at paragraph 40, based on information from Mr. Romanov, who is the person responsible for these proceedings on behalf of the Claimants, and also by Mr. Siminov, that the Claimants have not in any way encouraged Investigators to seek an order of this kind, that they were unaware that the Investigators had sought such an order and that the Russian order came completely out of the blue when received on 19th November 2020. Such evidence of a solicitor of the Senior Courts, absent clear contradictory evidence, is to be taken to represent the factual position. Any

suggestion that such evidence was not truthful, or did not represent the position, would be a serious one.

121. The evidence of Mr. Dooley is that Mr. Romanov believes that it has been made now because the Investigator has to complete his investigation in December 2020. Mr. Dooley's evidence, without waiving privilege, is that following receipt of a copy of the Russian order urgent enquiries were made by Mr. Romanov of a criminal advocate in Russia as to the bank's obligations and as to the consequences if it or its officers failed voluntarily to comply with it.

122. That is the report of Mr. Andre Korshunov which I have already foreshadowed and which I will now turn to. I should confirm that I have had sight of and have read carefully that legal opinion and therefore in what follows, which is actually set out in Mr. Dooley's summary, is just used as shorthand for what is said by Mr. Korshunov, in circumstances where I have had regard to the detail of what he actually says.

123. However, in summary, and this is Mr. Dooley's summary of the evidence, Mr. Korshunov states as follows: Firstly, (a) the Russian order complies with all the procedural and administrative requirements of Russian law, (b) pursuant to Article 392 of the Russian Criminal Code, the Russian order has entered into legal force and is binding upon the bank. (c), the Investigator is authorised at any time to attend the premises of the bank to execute the Russian order and if there is a failure to comply, the Investigator may seize the items forcibly and thereafter petition the Court to impose a financial penalty on the bank for non-compliance.

124. (d), pursuant to Article 315 of the Russian Criminal Code, if the bank fails to comply with the Russian order by not allowing the Investigator to seize the relevant documents or by creating other obstacles, those officers on notice of the Russian order may be subject to criminal sanction including (1) a fine of rubles 200,000 or 18 months' salary; (2) a prohibition on holding certain positions; (3) imprisonment for up to two years, and indeed, and this is not said by Mr. Dooley but is said by Mr. Korshunov; (4) compulsory labour for a term of up to 480 hours or (5) forced labour for up to two years, or (6) arrest for up to six months.

125. (e), in those circumstances, the bank itself may also face sanction including a fine or suspension of its banking licence; (f) the restrictions imposed on the bank by orders made or undertakings given in the English proceedings are not a defence to compliance with the Russian order, and (g), whilst the bank may appeal the Russian order the prospects of overturning it are remote and in any event, an appeal does not stay the execution of the Russian order.

126. Unfortunately, those matters which are set out in Mr. Korshunov's legal opinion and which are summarised by Mr. Dooley at paragraph 41, are not common ground as representing the position under Russian law. Very much to the contrary, in fact, because amongst the evidence relied upon in opposition to the current application, and as I have already foreshadowed, is an opinion in the form of a letter from a Mr. Dmitry Andreev, who is a Russian advocate and member of the Moscow Bar with ten years' experience of courtroom cases before the Russian Courts, who in material respects disagrees with what is said by Mr. Korshunov in his legal opinion amongst other matters, and I should say

that I have read and given careful consideration to the entirety of that legal opinion letter.

127. At paragraph 9 he explains under Article 183(1) of the RCPC "a seizure is an investigative procedure, that the Investigator conducts (i) when it is necessary to seize specific items of documents relevant to a crime, (ii) makes known precisely where and with whom they are located". He makes various points about that and he makes the point that Investigators seek to seize the asset documents solely in order to identify and touch the defendant's assets in his view.

128. He addresses what was said to be the sanctions for failure to surrender and under Article 183(5) of the RCPC before the Investigator conducts the seizure he or she should first suggest the person surrender the items voluntarily. In a case of refusal to surrender voluntarily then conduct the seizure forcibly. He says that Mr. Dooley and also Mr. Korshunov wrongly state that Bank Otkritie and its officials will be subject to criminal sanctions if they refuse to surrender the assets documents and he gives reasons for that.

129. The first one is that neither the Russian Criminal Code nor the Russian Code of Ministry of Offences provides any penalty for refusal to surrender the items and documents to the Investigator voluntarily. Secondly, it says that Article 315 in his view does not apply because that article concerns only "gross non-compliance with a Court decision" and would not apply in his opinion for two reasons: firstly, that the illegal effects of the Russian Order permits the Investigator to carry out the seizure of the asset documents in Bank Otkritie's premises; the order does not require the Investigator to carry out the seizure and

does not compel Bank Otkritie nor any other person to participate in the seizure and surrender documents to the Investigator. He says that the Russian order merely makes lawful a seizure of confidential documents that would otherwise be unlawful, and he opines that the Investigator has a complete discretion when, if ever, he/she decides to conduct a seizure in Bank Otkritie's premises and whether he or she decides to seize all of the asset documents mentioned in the Russian order, or just some of them. Secondly, he says, even if the Russian order was to compel Bank Otkritie to surrender the asset documents to the Investigator, which he does not consider it to be, non-compliance needs to be gross to be punishable by Article 315, that is only if a Court bailiff, rather than an Investigator, has instructed Bank Otkritie's officers to comply with the Russian order and informed them of the sanctions for non-compliance on more than one occasion, but they have refused to comply nonetheless. Then he gives a reason why Article 117 of the RCP does not apply and the reason why he does not consider Article 17.7 applies, and that leads to his conclusion at paragraph 20, that his opinion as to the position as to Russian law is that Bank Otkritie and its employees will not face any sanctions if they refuse to surrender the asset documents voluntarily to the Investigator or otherwise fail to offer positive co-operation to the Investigator. He says that Bank Otkritie will not face any sanctions if, for example, it declines to tell the Investigator where the documents in question can be found. The only information provided to the Investigator is the statement that the documents are at the bank's offices, 2 Letnikovskaya Street. He points out that this is the headquarters of the bank, one of the largest in Russia, it has eleven floors and houses a very large number of members of staff in normal conditions. It is said that, absent active co-operation from the

bank, it would be almost impossible for an Investigator to locate any particular documents.

130. He also addresses whether there are grounds for appeal against the Russian order, and he is of the view that there were at least three serious irregularities by way of which the Basmanny Court made the Russian order, and again I bear those well in mind, but in the interests of brevity, if that is possible to say that in the context of how long this judgment is, I will not repeat them here but I bear them well in mind.

131. Returning to the chronology of events, Mr. Dooley's evidence at paragraph 42 is that he has been informed from Mr. Romanov that Mr. Siminov has been in contact by telephone with the office of the Investigator to ascertain when he intends to attend the bank's premises in Moscow to execute the Russian order, and although he had said that he would be attending on the 24th Mr. Dooley had been informed by Mr. Romanov that he had asked it be physically deferred to 26th, hence why it is said to be urgent before tomorrow, although in fact the Investigator did not tell Mr. Siminov if he agreed that, but no one has suggested that the Investigator has attended today.

132. Bringing that all together so far as the Claimants are concerned, Mr. Dooley submits that the bank and its officers are in an impossible position, absent the consent of this Court, if the bank fails to comply with the Russian order its officers, at least per the evidence of its expert on Russian law, with knowledge of that Russian order, are at risk of serious criminal sanctions, including imprisonment, hard labour and the like, should they seek to fail to refuse entry or create other obstacles to the Investigator seizing the documents. Whereas, if

the asset disclosure documents are provided to the Investigator for use in the Russian criminal proceedings without the release of the undertaking of this Court then, of course, the bank and its officers would be at risk of being held in contempt of Court.

133. It is also important, I consider, to note that the evidence of Mr. Korshunov has also stated that, whilst the bank may seek to appeal the Russian order and is indeed doing so, any appeal will not stay the execution of the Russian order and he opines therefore that it will therefore not achieve anything in terms of the impossible position in which the bank now finds itself. I should add that I do not recollect the evidence of the defendant's expert to disagree with that, i.e. that any appeal does not act as an automatic stay and will not stop any attendance at the bank tomorrow by the Investigator. So in one sense any appeal is not of immediate relevance to the application that is before me.

134. Taking the chronology of events forward, at 10.54 on Monday 23 November the Claimants wrote to lawyers acting for the first to third defendants asking them to consent to disclose the asset disclosure documents, requesting a response by 10.30 a.m. on 24 November, i.e. yesterday. Those defendants have refused to provide their consent, with Simmons & Simmons, who now act only for the second and third defendants, making various points in their letter of 23rd November: firstly, delay. They criticise the Claimants for not giving notice sooner, but Mr. Dooley opines that he does not believe that is reasonable and that it would have been wholly premature to give notice to the defendants on the Friday without understanding the consequences of failure to comply with the Russian order and that the preliminary legal advice was only received by the

bank at around 1 p.m. on Sunday and he did not get a translation of that advice until 5 p.m. The draft letter to the defendants was prepared on Sunday evening but, due to the time of day in Moscow, it was not possible to obtain instructions until the Monday morning.

135. I was addressed orally about whether or not there had been any delay making this application or whether notice could have been given earlier to the various defendants. Essentially, for the reasons given by Mr. Dooley, I do not consider that there is any substance in that complaint. I am satisfied that the Claimants have acted promptly in bringing this application and, until they knew what the position was and had received advice on Russian law, they were not in a position to know what the consequences were and whether or not they needed to make an application to this Court. I am satisfied they have acted promptly throughout and there has been no delay on their part in the making of this application. Equally, in that context, I was satisfied, as I have already identified, that it was appropriate that this application be heard upon short notice, as I understand was Cockerill J who directed, as Judge in Charge of the Commercial Court, that this application be head at short notice, and with the Defendants providing Skeleton Arguments (and any supporting evidence), in opposition, in advance of that hearing, as has occurred.

136. The second point made in the Simmons & Simmons letter was that the advice of the Claimants' Russian criminal law advisor was incorrect. At the time there was not any back up for that, but of course there is now back up for that in the form of the letter of Mr. Andreev. The difficulty that this Court faces in relation to that respective expert evidence, of course, is that evidence of foreign law is a

matter of fact and I am faced on a short notice urgent application which has to be determined today and on the material that is before me what the position is. That was described, I believe by the Claimants, as an impossible task. It was also described and acknowledged by the Defendants' counsel as an impossible task, but the Defendants' counsel submit that I have to grasp the nettle, as it were, and grapple with that difference and form a view in relation to that.

137. For reasons I am going to come on to, the fact that there is a dispute between the experts in relation to what the position is, firstly, in relation to what the order itself means, and, secondly, in relation to what the consequences of not obeying it are, ultimately it seems to me is not a matter that I do have to resolve or that I could resolve, for a reason that Mr. Pillow identified and which I will come on to in due course. But, just to foreshadow what that point is, that point is essentially that the claimant has received professional legal advice that they face criminal sanctions, including possibly prison and hard labour if they do not provide the documentation when the Investigator attends, and that it is a surreal suggestion, therefore, that the professional advice of their lawyer should be second guessed and they should risk both criminal proceedings against them, six months' detention, possible hard labour, possible fines and revocation of the bank's licence on the basis of the fact that there is a dispute potentially, as a matter of Russian law, as to whether they do or do not have to comply with the order of the Russian Court. That, it is said, comes into play at the time of whether the best interests test is satisfied.

138. The other points that were made by Simmons & Simmons were that Bank Otkritie should appeal the Russian order. Well again, I am not aware of any

suggestion that that acts as an automatic stay. They have in fact, jumping forward in the chronology, appealed, although it is said by the defendants that they have managed to appeal out of time and that that is their fault, but they have appealed, they have also identified in that appeal, as I understand it, the reasons why they have appealed when they have appealed, and in any event, in terms of the immediate future and the application currently before me, it seems to me that, whether or not there are grounds ultimately to challenge the order are beside the point, given that the staff and the Claimants have to make a decision on the evidence tomorrow as to whether or not they should risk being at risk of criminal proceedings.

139. It is also said, and this is to foreshadow matters which were developed at more length by Mr. Bear during the course of his oral submissions and adopted both by Ms Nesterchuk and by Mr. Matthews that, essentially, this current order and the seizure that has been ordered is really, it is said, at the instigation of the Claimants and in order to have a second bite at the cherry of freezing assets in Russia in circumstances when they already have a worldwide freezing order, and by their undertaking, of course, they are not in a position to obtain security over assets elsewhere in the world (absent of course coming back to Court and getting a release or variation of the injunction, as of course is not uncommon if assets are located in other parts of the world which either will not recognise the worldwide freezing order or where special local procedures are needed whereby the English Court often grants release).

140. In any event, this was the beginning of the argument which played a large part of the oral submissions of the Defendants before me today, that essentially,

although it is the criminal prosecutor Investigator bringing the order for the seizure and attending tomorrow, ultimately it is being done because of the intervention of the claimant in the Russian proceedings with a view to a civil claim, hence the reliance on the words "civil claim" in the 11th November document that I have referred to.

141. As I have foreshadowed, in due course the first defendant, Mr. Boris Mints, by his solicitors, Quinn Emanuel, confirmed they adopted the same position as the Second and Third Defendants, and although not party to this application for the variation, Mr. Igor Mints says it affects his interests, and Stephenson Harwood became aware on his behalf of these proceedings, and the application is also opposed not only by the First to Third Defendants but also by, as I have said, the Fourth Defendant represented by Mr. Matthews.

D DISCUSSION AND ANALYSIS

142. I consider that the starting point is indeed CPR 31.22 and the documentation that has been read to or referred to the Court at the hearing, which has been held in public, and documents, as I have noted, which have been read to the judge out of court before the hearing on which the judges based their decisions and to which they made compendious reference in their judgments are documents referred to at a hearing held in public.

143. I consider that the principles which have been identified already in relation to CPR 31.22 apply with equal force in relation to the express undertaking of the Court. If Mr. Pillow is right, absent that express undertaking to the Court, the material which was referred to or was read by Jacobs J is in the public domain and could be given over and referred to without the Claimants being in contempt

of court. I am satisfied, on the applicable principles that I have identified, that the vast majority of the material that we are concerned with is already in the public domain.

144. As I have already identified, the Schedule of the First Defendant was expressly referred to by Jacobs J in his judgment, as were the Affidavits of all the defendants. There was also extensive oral argument advanced by Mr. Pillow in relation to particular aspects of the asset disclosure. In those circumstances, I am satisfied that the vast majority of the material that is now sought is already in the public domain.

145. I should say, and it lies uneasily with the suggestions that are now made about prejudice that will be suffered by the defendants, that at no stage, as I understand it, during the course of the application to the return date of the freezing injunction, or indeed on the application before Cockerill J was there any application to sit in private, or that there was any application made under CPR 31.22(2) that the Court could make an order restricting or prohibiting the use of a document which has been disclosed, even where the document is read to or by the Court, referred to at a hearing which has been held in public (an order, I should add, which I made for the purpose of this hearing). It seems to me that the Defendants were far more sanguine at that time about the possibility that the documentation could come into the public domain than they now say they are. Be that as it may, I am satisfied that the vast majority of the documentation now sought is in the public domain and would be disclosable, subject only to the fact that there is an express undertaking in the present case.

146. The remaining material as I understand it, certainly as I was told by Mr. Pillow, without much in the way of responsive submissions from any of the Defendants, is that the remaining material in subsequent affidavits was limited and the bulk of the material was that which was before Jacobs J and considered by him. I consider that it is a very strong factor that the vast majority of this material is already in the public domain, firstly, because that means, therefore, that that information has lost its confidential status, at least to a certain extent, and secondly, because of the fact that that impacts upon whether the express undertaking still bites where documents are in the public domain, or whether, in any event, the express undertaking should be released.

147. Given that the majority of the documentation is already in the public domain, I turn to the application of the relevant legal principles to the facts of this case. The relevant legal principles, starting with that identified in the leading case *Crest Homes v Marks* show that, whilst every case will turn on its facts the Court will not release or modify the implied undertaking, save in special circumstances and where the release or modification will not occasion injustice to the person giving disclosure.

148. In the present situation the Claimants are faced with an invidious situation in which the Investigator, on the evidence before me, will attend tomorrow. The evidence of their expert is that, if they fail to co-operate and either voluntarily provide the information or in any way obstruct the giving over of that information, is that they potentially face very serious criminal sanctions, including imprisonment, hard labour, fines, and in the case of Otkritie itself the loss of its banking licence, as one of the largest banks in Russia.

149. I consider that it does not assist the Defendants to say that there is competing Russian law evidence as to whether, in fact, they would face such serious criminal sanctions. The fact is that professional legal advice on Russian law has been obtained and that is the advice which has been given by Mr. Korshunov. It is an unrealistic submission, in my view, to suggest that either the Claimants or the directors or employees of the Claimant should second guess the professional advice of their own lawyer which has been obtained, by reference to contrary advice. The reason for that is that what they would be facing would be the risk of committing criminal offences, criminal convictions which could damage their personal reputation, their livelihood and potentially their liberty. I consider that this is a case which is full square within those particular cases that one has where the Court has recognised that the claimant should not be put in such an invidious position. In particular, this is a case similar to the sentiments expressed by Millett J in *Bank of Crete v Koskotas* where he said in particular at page 926 to 927:

> "Voluntary disclosure is one thing; disclosure under compulsion of law is another. By enabling the bank to obtain information which it needs for the successful prosecution of civil remedies the Court should not place the bank in an impossible position in which it must either infringe its undertaking to this Court or find itself in breach of its duties under Greek law".

150. I consider that this case is a similar case. The claimants are faced with a stark choice, either put themselves at risk of being in contempt of Court in the English proceedings, or put themselves (and their directors and employees) at risk of criminal sanction on the basis of the expert legal opinion it has obtained. That, as I say, could not only put at risk the financial position of the individual officers

of the bank, but could also lead to criminal sanction, including imprisonment and hard labour, and in the case of the bank could be the loss of its banking licence.

151. That is entirely consistent with the application of the special circumstances test, where a person under an applicable foreign law is required to disclose material in question, for example, to a foreign legal authority, and that is exactly the sort of situation which is recognised, as I have already noted, in *Gee on Commercial Injunctions* at paragraph 25.08 where the author of that work expresses the view that in such circumstances where there is a threat of penalty if one does not comply, the Court would give leave for the information to be disclosed to foreign authorities because it would be a grave injustice for a person who has been granted relief to redress the wrong done to him to find himself compelled to choose between breaking an undertaking or breaking the law where he resides or carries on business and suffering a penalty abroad because of this.

152. In addition, and that is also entirely consistent with what is said by the editor of *Hollander, Documentary Evidence*, where it is said *"the Court will usually release a clash of undertaking in response to a request from the criminal authorities"* and there is a reference to the *Marlwood Commercial v Kozeny* case itself where the Court of Appeal held that because the public interest and investigation and prosecution of a specific offence took precedence over the concern of the Court to control the collateral use of disclosed documents, the Court would usually exercise its discretion in favour of compliance with a statutory notice requiring production to the criminal authorities.

153. Again, I consider that to be an analogous situation to the present one. The case, in my view, is *a fortiori* for the reasons that I have already given, in relation to the fact that the vast majority of the material protected by the undertaking has already been referred to in open Court, and that picks up the sentiments, as expressed in *Gee on Commercial Injunctions*, which I consider represents the position as a matter of English law, that (that is paragraphs 25.032 and 25.035) undertakings can be released by the Court and would be released once the material has entered the public domain for a public hearing, subject to retaining the power to retain confidentiality.

154. If sufficient good reason was shown then equally the position is very different according to whether or not material has already entered the public domain to a hearing in public. If it has, the burden is upon the person applying for the continuation of confidentiality to justify it, which must be done through submissions and evidence. I am not convinced, and do not consider, that the Defendants have discharged the burden for the continuation of confidentiality in terms of good reason. Certainly in the English proceedings they made no attempt to keep that information as confidential and not in the public domain on the return date of the injunction application, nor did they do so in the context of the Fourth Defendant's application in front of Cockerill J, as a result of which a large amount of this information has entered the public domain.

155. It is difficult to see what prejudice they would suffer in relation to the provision of this information; not least, on their own case, this information is information which the claimant already has and could take any action it wishes to take in relation to that (subject to first obtaining a release from the undertaking as

addressed above). I do not consider the fact that if it would be the Russian Court that is seeking that material to make any difference in that regard. I have already referred to the fact that the 11 November document expressly states that the English documents are "relevant to this criminal case").

156. Also, I do not consider there is any substance in the submissions which, by their very nature, had to be made to a degree tentatively, that essentially what was being suggested was that the Russian Criminal Courts were acting at the instruction of the Claimants in doing what they are doing (i.e. in effect as a "puppet" for the Claimants). That is a very serious allegation to make against the criminal authorities of a foreign state. There is no concrete evidence of that (or indeed any evidence that would justify such a finding) and the lynchpin relied upon (the reference to "civil and other financial claims" in fact points to legitimate forms of relief in the criminal proceedings and criminal forms of relief when read together with Order of 29 October 2019).

157. I do not consider it would be appropriate to express a view on the Defendants' allegation in circumstances where the Defendants have not made good the submission as to the matters they are seeking to put forward. As already noted that would be a very serious allegation to make against the Russian prosecuting authorities and would require commensurate evidence in order to justify this Court to make any such conclusion. Certainly, neither the evidence they have put forward, nor the submissions they have made before me, would begin to justify this Court giving credence to such a serious allegation against another national State. If necessary to do so, I reject such allegation for the purpose of this application.

158. Yet further, I consider that I am entitled to take into account the fact that two judges of this Court have considered the underlying merits of the claim and have been satisfied that there was, at the very least, a good arguable case of civil fraud. Why is that relevant? It is relevant in an important sense, which is that that brings into play the case law that I have already referred to about the furtherance of international co-operation in combating fraud (see, for example, *Bank of Crete* supra at 925H and the need for international cooperation between the courts of different jurisdictions in order to deal with multinational frauds).

159. By releasing the undertaking in the form that is sought, this will allow the Russian criminal proceedings to have access to the material relating to the related transactions so far as it relates to the assets of the Defendants and their location. I am satisfied, contrary to the submissions of the Defendants, that it is quite clear from the order granting the motion of 29 October 2019, when read together with the 11 November 2020 document, that, in fact, the purpose of the seizure order that has been made is not simply for the purpose of securing civil claims (when read carefully by reference to the preceding paragraphs), but also that the reference to "other financial claims" are legitimate aspects of the criminal proceedings and what was contemplated in the 29 October 2019 order granting the motion in relation to Article 115 of the Criminal Procedure Code of other aspects and other aspects of relief and other financial claims in the Russian proceedings, namely, penalties that might be imposed or other financial charges or a potential property confiscation. I therefore reject the suggestion that the whole purpose of the 12 November order is (or is simply) in some way to further the interests of the Claimants' civil claim, a claim which they have not brought in Russia. There is a legitimate criminal aspect to the information

that is sought and that information sought is relevant to that criminal investigation, including, for the purpose of any penalty to be imposed or other financial charges, or any potential property confiscation. Indeed it is expressly stated that "the information is relevant to the criminal case"). In all those contexts the information sought, going as it does to the schedule of assets and the affidavit, would appear to be of considerable relevance to the criminal proceedings themselves. That links in, therefore, with the general sentiments about disclosure furthering international co-operation in combating fraud.

160. Turning then in yet further detail to the applicable principles in *Crest Homes v Marks*, I consider that this is a case where there are special circumstances which constitute cogent and persuasive reasons for permitting collateral use. Firstly, and quite apart from the fact that most of the information is already in the public domain, the release of that information will permit the use of that information in those criminal proceedings which do not simply have a civil aspect but contain criminal forms of relief, for the reasons that I have just identified. That will further international comity and also will be consistent with the principle I identified from the relevant legal authorities, that this jurisdiction will lend its assistance to foreign Courts in the furtherance of the rectification of wrongs that are done in relation to fraudulent conduct, in relation to which I am entitled to take into account the fact that two judges of this Court have already found that there is a good arguable case of fraud against these Defendants.

161. I am also satisfied that the release of the undertaking in the form of the modification that is sought will not occasion injustice to any of the Defendants. I was not impressed by the suggestion of what that prejudice would be, not least

in circumstances where various expressions have been used during the course of this hearing, one of which is that the *"cat is out of the bag"*, another is that the *"genie is out of the bottle*", and whether those are apt or not, the reality is that the vast majority of this information is already in the public domain, there is a good arguable case that the defendants have committed a fraud upon the bank, and set against that backdrop of the criminal proceedings I do not consider that the defendants will suffer prejudice by the variation that has been made.

162. Yet further, this is not a case where the Claimants are seeking to be released from their undertaking in order for them to further proceedings abroad. This is a case where they are faced with the invidious situation of potentially being liable for criminal penalties unless this Court releases the undertaking that is undertaken.

163. I bear in mind everything that was said by Hilyard J in the *ACL* case. I consider that case is distinguishable on its facts, in particular the fact that that was a case where the FBI US subpoena was not addressed to the Claimants and there was a carve out. Neither of those points apply in this case. Hilyard J himself, at paragraph 77 of his judgment, recognised the submission that the applicants had emphasised that there is a strong public policy factor in favour of permission being in the public interest and investigation and prosecution of fraud, both in domestic cases and in cross-border cases where general principles in favour of mutual international assistance are also in play. The distinction in that case, which was made at paragraph 78, does not apply in this case. In this case there is no doubt that the addressee of the seizure order is the claimant. Equally, there is no carve out or protection, certainly on the evidence of the Russian lawyer

instructed by the Claimants, for the fact that there is an English order in place and the Russian Court is clearly aware of that and has nonetheless made the seizure order that has been made.

164. Contrary to another submission of the Defendants, I do not see anything wrong in principle of the Russian Courts in doing that. That seizure order is made in furtherance of the legitimate aims of those criminal proceedings, including the form of relief which is identified. I consider that this Court should further the investigation of frauds which have been committed upon companies and that assistance should be given to the authorities of other countries who are themselves investigating criminal conduct arising out of those very same matters which arise in this case. Those are very strong public policy factors in favour of permission, which weigh heavily in this case.

165. In the present case I consider the fact of compulsion in this case is itself a powerful factor as part of the cogent and persuasive reasons for giving permission, but that of course is not in itself the complete answer or justification for granting the relief sought. But I do also consider that the use for which permission is sought justifies the erosion of the public interest which lies behind the rules.

166. In this case any erosion or exception to that is limited. Firstly, as I have said, most of the information is in the public domain, and CPR 31.22 recognises the fact that in those situations the public interest of maintaining confidentiality is not eroded. On the contrary, it is recognised as part of the open justice principle, as I have identified in the relevant authorities. Once material is in the public

domain, in fact the public interest lies in that information being available generally.

167. I consider that when we are looking at the competing public interest of the public interest which lies behind the rules in terms of the express undertaking and the implied undertaking in terms of disclosure and the public interest in furthering the detection and furtherance of criminal and civil proceedings abroad to prevent fraud, on the facts of this case the weight very strongly comes down in favour of granting the relief that is sought, especially in circumstances where, as I have identified, I am not satisfied that the Defendants will suffer any real prejudice by the order that is made. If and to the extent that they do suffer any prejudice as a result of the variation of the order, ultimately that is a consequence of the fact that to a good arguable case standard, courts of this jurisdiction have found that there is a good arguable case that they have committed civil fraud. Those who commit civil fraud should expect that this Court will assist foreign Courts in the pursuance of any consequential matters in relation to that, both criminal and civil. I am satisfied the Defendants have not begun to demonstrate that the Russian criminal proceedings are anything other than proper proceedings, or that the seizure order is being sought simply for the fact that the claimant has intervened as a victim in the context of any civil claim, rather the criminal proceedings are contemplating legitimate criminal forms of relief which are foreshadowed in the 29 October 2019 order and inferentially referred to in the 11 November document.

168. Whilst recognising, of course, the importance of preserving the undertaking in appropriate cases it is not to be preserved blindly as Laddie J said in *Cobra Golf*

v Rata and in the end the interests of justice must prevail and that sometimes means, as in this case, that the documents must be released for collateral use, in particular, in a case such as the present, as in cases such as *Bank of Crete v Koskotas* and the general formulations identified in the textbooks, where a claimant is placed in an invidious position such as the present. I am satisfied that the claimant should not be placed in that position in the present case and for all the reasons I have given there are cogent reasons why the application should be acceded to, that are not outweighed by any prejudice that may be suffered by the defendants. Accordingly and for those reasons, I will grant the relief sought.

169. In reaching the conclusion that I have, I should say I have given careful consideration to all the submissions that have been made before me, both in writing and orally, but I hope that the parties will forgive me, at now after 9pm, the hearing having started at 2pm, if I do not elaborate further. I confirm that I have given careful consideration to all the submissions from all the parties. Accordingly, for the reasons I have given, I release the Claimants from their undertaking.

170. So far as the position of the Fourth Defendant is concerned, as I say, he is not a party to this application but is concerned about the privacy, confidentiality of information which may be revealed that relates to him. The Claimants are alive to this and the Claimants have said that they will redact the relevant parts of the material before providing the same to the Russian Investigator. Mr. Matthews, on behalf of the Fourth Defendant, says that is not particularly consistent, or indeed not consistent at all he says, with the submission that the Claimants are

compelled, at risk of criminal sanction, in relation to provision of the information. I am satisfied in relation that, that Mr. Pillow's riposte to that is a good one, which is, of course, that the seizure order relates to the First to Third Defendants and is not seeking the Fourth Defendant's documentation in any event. Accordingly, I am satisfied that appropriate steps can be put in place in the form of redaction to meet any legitimate concerns of the Fourth Defendant in relation to confidentiality, although it must ultimately be borne in mind, if there are any difficulties in that regard, that the Fourth Defendant himself has already instigated discharge proceedings in England which has led to at least some of that material being in the public domain.

171. I would point out that, in fact, it is the Claimants who are at risk in relation to disclosing any information in relation to the Fourth Defendant which could be considered to be in breach of the undertaking, because their application which is made before me today does not extend to relief of the undertaking in relation to the Fourth Defendant, which remains in place. For that reason Mr. Pillow acknowledges that care will have to be taken in relation to the redaction exercise which he is undertaking.

172. Finally, can I thank all parties for the quality of their written and oral submissions, and indeed the supporting evidence that has been put before this Court at very short order. I was pleased that the Commercial Court, in the best traditions of this Court, was able to accommodate this hearing at short notice. Accordingly, and for the reasons given, I grant the release from the undertaking.