Neutral Citation Number: **[2020] EWHC 757 (Comm)**

Case No: CL-2016-000095

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

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

Date: 27/2/2020

Before:

THE HON. MR JUSTICE BRYAN

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Between:

NATIONAL BANK TRUST **(a company incorporated in Russia)**	**Claimant**
- and –	
(1) ILYA YUROV **(2) SERGEY BELYAEV** **(3) NIKOLAY FETISOV** **(4) NATALIYA YUROVA** **(5) IRINA BELYAEVA** **(6) ELENA PISCHULINA**	**Defendants**

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David Davies (instructed by **Steptoe & Johnson UK LLP**) for the **Claimant**
Paul Stanley QC and **Alexander Halban** (instructed by **Gresham Legal Limited**) for the **First and Fourth Defendants**
Tim Penny QC (instructed by **Fried, Frank, Harris, Shiver & Jacobson LLP**) for the **Second and Fifth Defendants**
James Willan (instructed by **Byrne & Partners**) for the **Third and Sixth Defendants**

Approved Consequentials Judgment

MR JUSTICE BRYAN:

A. INTRODUCTION

1. The parties appear before the court today on the hearing of matters consequential upon my judgment of 23 January 2020 reported at [2020] EWHC 100 (Comm) ("the 2020 Judgment"). For the reasons set out in that judgment, the claims of National Bank Trust ("the Bank") succeeded against the Defendants, namely the First Defendant ("Mr. Yurov"), the Second Defendant ("Mr. Belyaev"), the Third Defendant ("Mr. Fetisov")(collectively, "the Shareholders") and their wives ("Mrs. Yurova", "Mrs. Belyaeva" and "Mrs. Pischulina", respectively) in the specific respects identified in that judgment.

2. By an order dated 23 January 2020, the court entered judgment for the principal sums due to the Bank by way of damages, being around US$900 million ("the 23 January Order"). The 23 January Order also provided for the release of the funds deposited by the Bank by way of security for costs. All other consequential matters were deferred to this hearing. On this hearing, the Bank relies on the 17th Witness Statement of Mr. Neil Dooley of its solicitors, Steptoe & Johnston UK LLP ("Dooley 17") which deals with various consequential matters and to which I have had regard. Statements have also been lodged on behalf of Mr. Yurov, Mr. Belyaev and Mrs. Belyaeva, to which I have also had regard.

3. On 30 January 2020, the Bank's solicitors circulated –

    (1) A draft order in relation to declaratory relief as well as other consequential matters, including costs and interest (henceforth referred to as "the draft Hearing Order")

    (2) A draft post-judgment worldwide freezing order (henceforth referred to as "the draft post-judgment WFO")

4. There was a worldwide freezing injunction against the Defendants up to trial. It was made by Leggatt J on 11 February 2016, and subsequently varied and continued ("the 2016 WFO"). The granting of a post-judgment worldwide freezing injunction is not opposed by the Shareholders. This is no doubt in recognition of the fact that (as I am satisfied is the case) it is appropriate to grant such an injunction, in the context of the findings that I have made in relation to the frauds perpetrated by the Shareholders, and the associated dealing

with the Bank's assets for the benefit of the Shareholders, and the offshore network of companies ultimately beneficially owned by them.

5. A large number of matters have been agreed between the parties in relation to the draft Hearing Order and draft post-judgment WFO. In this regard, it is agreed that the Bank is entitled to costs on an indemnity basis against the Shareholders in the context of the findings that the court has made in this action in relation to the frauds perpetrated by the Shareholders and the evidence given by them during the course of the trial.

6. Pre- and post-judgment, simple interest has been sought by the Bank on the conservative basis that interest is only payable for the period following 31 December 2015, at a rate of 3%. The Bank has calculated interest conservatively for the simple reason that it recognises that it is unlikely to recover the full US$900 million principal and this interest. I understand the said rates of interest and associated interest calculation has been agreed. Formal declaratory relief has also been discussed between the parties and largely agreed, although certain matters remain for resolution before me today.

7. It is also common ground that there should be up-to-date asset disclosure by the Shareholders, although the precise wording as to what is to be provided remains for determination at this hearing. However, issues remain between the parties in relation to the precise wording of the order, including in particular:

    (1) whether (and if so what) allowance should be made for living and legal expenses, and

    (2) the appropriate form of relief against the Shareholders' wives.

8. An issue also arises as to whether the Bank should be permitted to use information disclosed pursuant to the existing worldwide freezing order in civil enforcement proceedings in this and other jurisdictions. The Bank also seeks the release of funds (US$600,000) provided by way of fortification and cross-undertaking damages, both in these proceedings and in the related Dianthi proceedings, which I do not understand to be controversial.

9. No application for permission to appeal is made before me today by any of the Defendants, save a discrete application for permission to appeal by Mr Belyaev and Mrs Belyaeva, concerning a particular finding made by me as to the terms on which funds with an

investment in the name of Mrs. Belyaeva are held. I heard that application after hearing the matters the subject matter of this Consequentials Judgment. At the conclusion of that hearing I refused permission to appeal.

10. I address below the following matters that arose for consideration and determination, as appropriate:

    (1) An application by an Austrian Bank ("Bank Winter"), requesting that the Court should attach a disclaimer to the 2020 Judgment to state (amongst other matters) that Bank Winter did not participate in the proceedings.

    (2) Particular requests relating to the wording of the draft Hearing Order

    (3) The Bank's application to be released from its undertaking in Paragraph 8 Schedule B of the 2016 WFO, in order to use information obtained under compulsion of that WFO in order to enforce judgment.

    (4) Ms. Pischulina's request not to be subject to the post-judgment WFO, in exchange for an undertaking (*inter alia*) not to dispose or deal with a particular property without the written consent of the Bank or the written permission of the court.

    (5) The issue of whether the post-judgment worldwide freezing order should contain any provision for living and/or legal expenses for Mr. Yurov and Mr. Fetisov, and the amount of the living expenses provided for in relation to Mr. Belyaev.

B. BANK WINTER

11. The first matter that arises for determination today is an application made by a non-party: namely an Austrian Bank ("Bank Winter"), which has made written representations to me about references to Bank Winter in the 2020 Judgment. I granted permission to Bank Winter to make written submissions to me and also to appear orally before me today if they wished to do so.

12. Bank Winter is not a party to this action and equally, no witnesses of Bank Winter gave evidence before me. However, there was documentary disclosure before me involving Bank Winter and I heard factual evidence as to transactions involving Bank Winter during

the course of the trial, in relation to which it was necessary for me to make factual findings in relation to the transactions involving Bank Winter for the purpose of addressing the allegations made by the Bank against the various Defendants.

13. Bank Winter took up the opportunity to make written submissions before me, and I have given careful consideration to those submissions. In those submissions, Bank Winter identify the specific paragraphs of my Judgment in which I made reference to Bank Winter. Those paragraphs include paragraphs [1491], [1601], [1614] to [1618], [1634] to [1635], [1638], [1651], [1655] and [1656]. It is said that in those paragraphs, I make findings in relation to Bank Winter. Bank Winter is concerned that those findings may be relied upon against it in other ongoing proceedings: in particular, there are ongoing Austrian proceedings in which Bank Winter is the Defendant (*National Bank Trust v Bank Winter & Co AG,* 21 Cg 55/19b, "the Austrian Proceedings"). In the Austrian proceedings (in which none of the Defendants to the English proceedings are involved) the Bank, I am told, has relied on the 2020 Judgment extensively in written submissions made on 7 February 2020. It is said that the Bank is relying heavily on the 2020 Judgment in relation to matters which involve Bank Winter.

14. In fact, from the Bank's skeleton argument in response, it appears that Bank Winter has been aware of the English proceedings for many years. Further in in those very Austrian Proceedings, long prior to the 2020 Judgment, Bank Winter itself relied heavily on materials adduced by the Shareholders in these proceedings, including their witness statements and extracts from cross-examination: this evidences a significant degree of cooperation, it is said, between the Shareholders and Bank Winter. It is said that the Shareholders themselves have also relied on part of Bank Winter's pleadings from the Austrian proceedings as indeed is the case: see, for example, footnote 393 of Mr Fetisov's closing submissions.

15. In their written submissions, Bank Winter ask me to issue either what they describe as a "disclaimer" to the 2020 Judgment by means of an addendum, or short supplementary judgment, in order to make clear that Bank Winter was not a participant in the proceedings and that the court at trial did not receive evidence from Bank Winter or hear representations on its behalf. My attention is drawn to an example of a disclaimer which was made by Tugendhat J in *Rothschild v Associated Newspapers* [2012] EWHC 177 QB at [10]. I also

had referred to me what was said by Nicola Davies J, as she then was, in *R (Lewin) v Financial Reporting Council and others* [2018] EWHC 446 (Admin) at [21] and [62] and also the decision of the Court of Appeal in *Re W (a Child)* [2016] EWCA Civ 1140.

16. For its part, the Bank has made written submissions in response to those of Bank Winter. It submits that it is obvious from the face of the 2020 Judgment that Bank Winter was not a party to the proceedings and nobody could possibly think that it was. It is equally obvious, from any reading of the 2020 Judgment, that Bank Winter did not participate in the proceedings, was not represented at trial, and did not serve any witness evidence. It is submitted the court does need to issue a further judgment in order to state the obvious. It is also pointed out, fairly in my view, that the authorities relied upon (the *Rothschild* case and the *Lewin* cases) relate to concerns in relation to individuals who were not involved in underlying proceedings: neither are commercial disputes. Equally, the third authority (*W (a Child),* a family law authority) is a very different case to the present one.

17. It is pointed out that Bank Winter, in this case, is no different to the many other individuals and entities which were referred to during the course of the trial, including professional advisors (Vassiliades & Co, Chrysanthou & Chrysanthou and EPAM) and other Banks (Bank of China, Bordier Bank and VP Bank) that it was necessary to refer to in the context of adjudicating upon the issues that arise and making associated findings. It is also pointed out that as a matter of English law, it is trite law that there is no issue estoppel in relation to non-parties arising from findings made in a judgment.

18. I consider that there is no need for the making of a supplemental judgment or disclaimer in the terms that is sought by Bank Winter. As I have already foreshadowed and now say expressly, I consider that all that is necessary is to make clear what the situation was in relation to Bank Winter. The position is that Bank Winter was not a party to the proceedings, it did not participate in the proceedings, it was not represented at trial, it did not serve any witness evidence, and I did not hear evidence from any witnesses from Bank Winter.

19. I am satisfied that the findings that I made were necessary for the purposes of these proceedings. I was alive, as a judge is always alive, to the position of third parties who were not present and represented. Those matters which were raised in relation to Bank Winter, and which I addressed, were matters that it was necessary to raise, and for the court

to address, in order to deal with the allegations of the Bank against the individuals concerned.

20. The position in English law is that in circumstances where Bank Winter was not a party to the action, Bank Winter are not bound by any findings made in this court. How the 2020 Judgment may or may not be used in foreign proceedings, be that by National Bank Trust or, indeed, by Bank Winter itself or anyone else, is a matter for the local law and procedure of any foreign jurisdictions. I have made clear in this judgment what the circumstance were in which it was necessary to address matters concerning Bank Winter, and this judgment can itself be referred to in foreign proceedings in case of need.

21. The next matter that arises is an application for costs against Bank Winter made by Mr Davies QC on behalf of the Bank (i.e. National Bank Trust). It is said that although they are not a party, they have made an application to this court and that has resulted in costs being incurred by the Bank.

22. I do not consider it is appropriate to make a costs order against Bank Winter.

    (1) Firstly, Bank Winter were seeking clarification of my Judgment, and although they were not successful in gaining what they described as a "disclaimer" or "supplemental judgment", I have clarified what the position is in relation to Bank Winter in this judgment which can be referred to, as necessary, in any foreign proceedings.

    (2) Secondly, any costs incurred by the Bank are likely to be modest and I am not unalive to the fact there is ongoing litigation between the Bank and Bank Winter in Austria.

    (3) Thirdly, and foremost, although I gave an opportunity for Bank Winter to attend today and make oral submissions, they shortly before the hearing wrote a letter to the court saying that no discourtesy was intended by not attending, but that in the interest of saving costs and because time is tight on the issues arising on this application today, they would stand on their written submissions. I consider that that was a sensible and proportionate approach to the matters they were raising.

23. If I had been minded to make a costs order, I also consider that it would not have been appropriate for me to such an order without giving Bank Winter a fair opportunity to deal

with that costs application which was made against them. That would have necessitated either a further hearing or further submissions in writing, resulting in further costs.

24. In all the circumstances, I consider the appropriate order to make is no order as to costs.

C. MATTERS RELATING TO THE WORDING OF THE DRAFT HEARING ORDER

C.1 VESTRA WEALTH MANAGEMENT ACCOUNT

25. The next matter that arises before me today relates to an aspect of the draft Hearing Order in connection with monies found to have been held on trust for Mr Belyaev. This is paragraph 5 of the draft Hearing Order. The first part of paragraph 5 is uncontroversial because it is consistent with the findings which I made: that Mrs. Belyaeva held £1.9 million of the £5 million of UK government bonds deposited into her account with Vestra Wealth Management on resulting trust for Mr. Belyaev.

26. The second part of paragraph 5 seeks for it to be recorded that Mrs. Belyaeva now holds 38% of the funds in that account on resulting trust for Mr. Belyaev. It is said, however, on behalf of the Belyaevs that, in fact, the monies found to have been held on trust for Mr. Belyaev have been spent.

27. I consider that this gives rise to an issue of principle on which the parties are not in agreement, that has developed somewhat during the course of argument, and which has not been fully argued before me today, including arguments that are said to arise in relation to the alternative claim under Section 423 of the Insolvency Act 1986, with some matters only being ventilated in reply (and further submissions in relation to such reply).

28. I do not consider that it would be appropriate to make any binding ruling at this time in relation to the second aspect of relief that is sought. I consider the appropriate time to consider and determine any such matter is in the context of any enforcement action in relation to the monies that are in the Vestra Wealth Management account. If and when it becomes necessary to determine the issue of principle between the parties in the context of enforcement, I can see the sense (so far as that proves to be practicable) of any associated hearing being before me given my knowledge of the background to the matter, albeit that ultimately it is a discrete issue capable of being determined by any judge.

29. Accordingly, I will order that if, in due course, there is enforcement action taken in relation to the Vestra Wealth Management account, then so far as practicable, it will be listed before me. Otherwise, like enforcement against any other asset, it will be dealt with by whichever judge it comes before.

C.2 PROPERTY TRANSFERS: MR. FETISOV AND MS. PISCHULINA

30. The next matter that arises is in relation to paragraph 6 of the draft Hearing Order. This relates to the findings I made in connection with the transfers of property in relation to Mr. Fetisov and Ms. Pischulina.

31. It is agreed is that Mr. Fetisov is the 50% beneficial owner of 14 Broomfield Ride, Oxshott, Leatherhead, Surrey, KT22 0LW, which is currently registered in the sole name of Ms. Pischulina. This is consistent with what I found at [1396] to [1401] of the 2020 Judgment.

32. What is suggested is that Paragraph 6 should continue, stating that the purported transfer of 50% of the interest in the said property from Mr. Fetisov to Ms. Pischulina during 2015 was invalid and of no effect. I do not consider that it is necessary to include those words within the order, not least in circumstances where Paragraph 7 of the draft Hearing Order caters for steps to re-register the title as soon as practicable in joint names in common as to 50% each.

33. If there was any doubt by any third party as to what findings I made, reference can be made to paragraph [1400] of the 2020 Judgment.

C.3 MRS. BELYAEVA'S CLAIM UNDER THE CROSS-UNDERTAKING IN DAMAGES

34. The next matter that arises is in relation to Paragraph 7 of the Draft Hearing Order which relates to the release from the cross-undertaking in damages given by the Bank at paragraph 1 of schedule B to the 2016 WFO.

35. That paragraph and that relief is agreed to, or at least not objected to, by those acting on behalf of Mr Yurov and his wife and on behalf of Mr Fetisov and his wife. However, Mr Belyaev proposes that the undertaking not be released, and proposes alternative wording.

It is also said that this part of the draft Hearing Order should expressly refer to the 2016 WFO as being discharged.

36. It is said by Mr. Belyaev that there should be three further paragraphs, which specifically concern Mrs. Belyaeva's ability to apply for a claim in damages in the cross-undertaking in damages on the 2016 WFO (Insertions underlined)

> "The WFO against the Fifth Defendant dated 11 February 2016, as varied, is hereby discharged.
>
> By 26 March, the Fifth Defendant shall inform the Bank whether she intends to make a claim for damages on the cross-undertaking as to damages, and if she does, there should be a directions hearing (before Bryan J, if possible) to consider the same.
>
> Upon the determination in the Bank's favour of – (i) any application by the Second and/or Fifth Defendants for permission to appeal (and if permission is granted any subsequent appeal) and (ii) the issue of whether there is to be any award on the cross-undertaking as to damages in favour of the Fifth Defendant, the Bank is released from the cross undertaking in damages given at paragraph 1 of Schedule B to the worldwide freezing order made by Leggatt J on 11 February 2016 […]"

37. The background to this matter is that the 2016 WFO was made by Leggatt J against all the Defendants, in the sum of £830 million (referred to as the "2016 WFO" in this judgment). Mr. Yurov unsuccessfully sought to challenge that freezing injunction: this resulted in a decision of Males J (as he then was) which is referred to in the 2020 Judgment, and itself reported at [2016] EWHC 1991 (Comm). No application was made to vary or discharge that injunction by Mr. Belyaev or Mrs Belyaev and nor indeed was there any suggestion that that injunction was causing any difficulties for Mrs. Belyaev, who is a housewife with no business.

38. I consider that the prospect of any application to seek permission to enforce that cross undertaking in the 2016 WFO being made is very unlikely, in circumstances where (1) the 2016 WFO is being replaced by an unopposed post-judgment WFO; (2) there has been no finding that the 2016 WFO was improperly made; and (3) there has not at any stage been any application to vary the 2016 WFO by either of the Beylaevs. I will say nothing about the merits of the application itself, lest such an application is made and it comes before me, but I do consider the likelihood of any such application being made by Mrs. Belyaeva to be very small indeed, in circumstances where there is no suggestion that the injunction was

either improperly granted or that there was any suggestion at any time that that order was causing any difficulty for Mrs. Belyaev (still less was any application made to vary it).

39. I do not consider that this is an appropriate case to maintain the undertaking pending any appeal. The present position is that none of the defendants (leaving aside Mr Belyaev's disceret application) has sought permission to appeal before me. Obviously, it is a matter for them if they wish to seek permission to appeal elsewhere, but there is nothing which suggests there is any likelihood of an application arising under the cross-undertaking. Accordingly, I release the undertaking in relation to all the Defendants.

40. In those circumstances, I consider that the order that is essentially agreed to by the other Defendants (as set out in the Bank's draft post-judgment WFO) is the appropriate order to make, rather than that proposed at paragraphs 17 to 19 of the alternative draft.

41. In addition, I do not consider that there needs to be an express provision for the discharge of the 2016 WFO. That is catered for in the express wording of the replacement post-judgment WFO. If further clarification of the position is needed, no doubt that can be agreed between counsel.

D. THE BANK'S APPLICATION TO BE RELEASED FROM AN UNDERTAKING

42. The next matter that arises is an application by the Bank to be released from its undertaking in the 2016 WFO not to use information obtained as a result of that order for the purpose of other civil proceedings. The Bank asks that it be permitted to use information and documentation provided by the Shareholders pursuant to the 2016 WFO for the purpose of enforcing the 23 January Order, and any orders resulting from this hearing, in England and Wales as well as in Switzerland and other specified countries. This application is not objected to by Mr. Yurov or Mr. Belyaev. It is, however, objected to by Mr. Fetisov.

43. The undertaking itself is at Paragraph 8 of Schedule B of the 2016 WFO and provides as follows:-

> "The Applicant will not <u>without the permission of the court</u> 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."
>
> (emphasis added)

D.1 Applicable Principles

44. The applicable principles in relation to whether or not a court should give permission for such use are conveniently set out by Hildyard J in *ACL Netherlands BV v Michael Richard Lynch & Anor* [2019] EWHC 249 (Ch). It is, however, to be borne in mind that that was a case in which an application was being brought at an interlocutory stage, shortly before a long and imminent trial, that provision be made of documentation to the FBI (i.e. in the context of a criminal investigation).

45. The purpose of undertakings (such as the one given by the Bank to the court that they would not make collateral use of documents obtained in policing the 2016 WFO) is to give the court control of documents and information obtained in support of the due administration of justice (see *Marlwood Commercial v Kozeny* [2005] 1 WLR 104).

46. Overall, in order to justify an order in relation to the collateral use of the documents, the applying party needs to establish that (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 who has given the disclosure.

(1) The test for collateral use of documents

47. At [23] and following, Hildyard J identifies the rules of procedure under the CPR in relation to the disclosure and exchange of witness statements. He identifies that disclosure reflects and promotes the public interest in ensuring that all relevant evidence is provided to the court (per Jackson LJ in *Tchenguiz v Serious Fraud Office* [2014] EWA Civ 1409 at [56]). In the following paragraphs he addresses the other procedural rules, and then at [28] to [31] he states as follows:

> "28. So much as to the scope of the rules. The real point in issue in this case is as to the scope of the exceptions, and, in particular (since none of the other exceptions applies presently), as to the practice and case law governing the exercise of the Court's discretion to give permission for some other use.
>
> 29. Although it was decided (in the House of Lords) before the CPR and thus concerned the implied undertaking which was the precursor of the relevant rules, the leading case in this context, at least as regards the overall approach required of the Court, is still *Crest Homes Plc v Marks* [1987] AC 829.

30. 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).

31. So far, I have treated the same principles as being applicable to both the collateral use of disclosed documents and the collateral use before trial of witness statements. However, certain differences should be noted also which suggest, in my view, that a more restrictive approach should be taken to the collateral use of witness statements prior to trial, especially (as it seems to me) when the trial is imminent. These differences are the consequence of the peculiar status of witness statements prior to their deployment in evidence at trial. …"

48. At [31(3)], Hildyard J commented that it is ordinarily difficult to obtain permission for collateral use of such documents :

"(3) As Hobhouse J said in *Prudential Assurance v Fountain Page* [1991] 1 WLR 756, at 775 (a case cited in *Hollywood* [*Hollywood Realisations Trust v Lexington Insurance Co* [2003] EWHC 996 (Comm)], albeit one that arose under a pre-CPR regime):

> "Circumstances under which [the] relaxation [of the restriction on collateral use of a statement] would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice of the serving party".

(2) Public Interest in favour of disclosing the documents

49. Hildyard J continued at [33] and [34], commenting that the collateral use of documents will only ordinarily be allowed where there is some public interest in its favour: for example, the public interest in investigation or prosecution of serious fraud.

"[33] In my view, the burden is such that, in reality, it will usually be difficult, if not impossible, to obtain permission for collateral use (especially in the case of witness statements) except where the Court is persuaded of some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect.

[34] The most common public policy interest relied on as overriding the public interest in preserving confidentiality and privacy expressed by the rules is the public interest in the investigation and/or prosecution of serious fraud or criminal offences."

50. Mr Willan (on behalf of Mr. Fetisov and Ms. Pischulina) accepts that the reference to "prosecution of serious fraud" includes civil fraud, but he says even in that context, there have to be cogent and persuasive reasons why it is in the public interest in relation to civil

fraud and also that it would not cause injustice. I bear well in mind in relation to both of those points that the burden is upon the Bank as applicant.

51. A public interest can include an interest in discovering the truth in satellite proceedings. In that regard, in *Cobra Golf Inc v Rata* [1996] FSR 819, Laddie J stated at p 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 the documents must be released for collateral use. In deciding how to exercise the discretion the court must also bear in mind, as Denning M.R. said in *Riddick v Thames Board Mills Ltd* [1977] QB 881, that
>
> > the reason for compelling discovery of documents 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 of discovering the truth, i.e. in making full disclosure.
>
> That principle operates in favour of releasing relevant documents from hub into satellite proceedings as long as no significant injustice is done to the disclosing party."

(3) Post-Judgment Collateral Use of Documents

52. *ACL* was a pre-judgment case. The decision of *Kazakhstan Kagazy Plc v Baglan Abdullayevich Zhunus & Ors* [2018] EWHC 369 (Comm) was a post-judgment case. In that case, after a long trial, and as part of the consequential matters for determination, Picken J had to consider the question that arises before me today, namely as to a party's use of material disclosed pursuant to a freezing order. At [184] to [186], Picken J stated as follows:-

> "Use of material disclosed pursuant to the freezing order.
>
> [184] Mr Howe submitted that the Claimants should no longer be subject to the usual undertaking that the information disclosed to them pursuant to the Freezing Order is not to be used in any proceedings other than these proceedings. It was Mr Howe's submission, specifically, that, in circumstances where the Claimants now have (or shortly will have) a judgment against Mr Arip for a significant sum which they wish to enforce against Mr Arip's assets, they should not be restricted in such enforcement by

any unmeritorious argument that, in doing so, they are making use of information obtained as a result of the Freezing Order.

[185] Mr Foxton did not object to this application insofar as civil proceedings are concerned. He did, however, resist an amendment to the Freezing Order which would permit information to be disclosed in criminal proceedings, submitting that the Court should be concerned to control how the Claimants use such information in criminal proceedings in order to ensure that the use is not oppressive to Mr Arip.

[186] I agree with Mr Foxton about this. I do so even though Mr Howe made the point that in some jurisdictions there is an overlap between civil and criminal proceedings. Mr Howe suggested that this adds "an extra layer of complexity and an unnecessary restriction" on the Claimants' ability to enforce which would be removed if the amendment to the Freezing Order sought were to be ordered. It seems to me nonetheless that, if the Claimants wish to use information disclosed by Mr Arip for the purposes of criminal proceedings, they ought to be required to seek the Court's permission, probably on notice to Mr Arip, so that the Court can consider the appropriateness of what is proposed to be done on a case by case basis.."

53. In *Bank of Crete SA v Koskotas (No 2)* [1992] 1 WLR 919 the court concluded that it was generally appropriate for use to be made of material obtained in English proceedings in foreign enforcement proceedings for the purpose of obtaining recovery of misappropriated funds pursuant to an English judgment. This engaged the wider policy interest of international co-operation between courts to deal with multi-national frauds. In this regard:

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

> "That was the basis upon which I extended paragraph 5 of Morritt J.'s original order to permit the 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 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".

(4) Use of Material obtained via Norwich Pharmacal Relief in support of WFOs

54. The majority of the cases, including *Crest Homes v Marks*, relate to documents obtained as party of the disclosure process. However, in the context of *Norwich Pharmacal* orders, there has been consideration by this court in the *Skat* litigation (*SKAT v Solo Capital Partners & Ors*) including by Phillips J on 18th June 2018, and twice by Cockerill J, first in June 2018 and, second, on 12th October 2018, of the granting permission to use material which was obtained via Norwich Pharmacal relief, which was then used in support of worldwide freezing orders, and in relation to which there were then applications to release the associated undertakings for use in various civil proceedings in a number of different jurisdictions.

55. Cockerill J, in a judgment delivered on 12th October 2018 ([2018] EWHC 2785 (Comm)), referred in granting permission to use material, stated as follows at [30]:-

> "30. In circumstances where this is potentially, it would seem, an extremely serious and in terms of size enormous fraud on a Danish Government entity, their Revenue entity, which is seeking to provide redress via that Government entity essentially to the Danish taxpayer for the wrong that is it has suffered and to trace the proceeds of fraud, there must also be a very strong public interest in assisting SKAT to that end."

56. In a further hearing in the *Skat* litigation, in a judgment handed down on 18th October 2019 ([2019] EWHC 2807 (Comm)), I myself considered the applicable principles at [16] to [26], including the development of the case law through *Crest Homes v Marks*, *Cobra Golf v Rata* and *Bank of Crete v Koskotas (No 2)* and reached the conclusion, on the facts of that case, that it was in the public interest to release further material, some of which was already in the public domain.

(*5) Open Justice Principle*

57. In relation to the section of my judgment in *Skat* dealing with material that had already been referred to in open court, the principle of open justice was also at play. The open justice principle was most recently addressed in the decision of the Supreme Court in *Cape Intermediate Holdings v Dring* [2019] UKSC 38, in which the importance of open justice

was emphasised and approval given to the principles identified in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618 in the context of rights of third parties to documents filed in civil proceedings under CPR rule 5.4C. In that case, it was the default position that the public should be allowed access to the parties' written submissions and arguments, and to documents which have been placed before the court and referred to during the hearing. Such access is granted on a successful application, in which the court must balance the purpose of the open justice principle and the value of the information in achieving it, against any risk of harm which this disclosure may cause to maintaining an effective judicial process or to others' legitimate interests, and the practicalities and proportionalities of the request.

D.2 Application of the principles to the present facts

(1) The relevant background and issues in dispute

58. It is important to understand the backdrop to this matter, which is set out in some considerable detail in the supplemental skeleton argument provided by the Bank. The position in Switzerland is that a number of Swiss accounts associated with the Shareholders have already been frozen by the Swiss authorities, as was described in Mr Popkov's First Affidavit in lengthy proceedings on 25 January 2016. In the Second Affidavit on 11 February 2016, in support of the 2016 WFO, Mr Popkov explained various accounts that had been frozen in Switzerland. It is important to appreciate and understand that the freezing of all those Swiss accounts pre-dates the Shareholders' asset disclosure.

59. Accordingly, the Bank knew of many of the Shareholders' main assets when it applied for the 2016 WFO, and the Shareholders' asset disclosure consisted of confirming their ownership of those assets, and then identifying some previously unknown assets which were disclosed. Thus, in relation to Mr. Fetisov and Ms. Pischulina, the essential structure was that the Bank listed known assets in Schedule C2 and then those two defendants (at that time represented by the same lawyers as Mr Yurov), responded with a commentary and table of additional assets. In fact, for present purposes, the only relevant new asset that Mr Fetisov did disclose was his shareholding in an English company called Enton Holding Limited, where a value of $380,025 was given. The commentary for the relevant entry on that asset table says, *"Account held at Bordier.."*. I have been told by Mr Willan on behalf of Mr. Fetisov during the course of the application before me this morning that there is also

reference to him having a beneficial interest in Enton in his own statement of case, evidenced by a Statement of Truth. It is also important to bear in mind that, in Mr Belyaev's case a different company is in the same position as Enton, and Mr Belyaev makes no objection to the order that is sought.

(2) Cogent and Persuasive Reasons to grant collateral use

60. In the present case, I consider that there are cogent and persuasive reasons to grant collateral use:

(1) Mr David Davies QC (who appears for the Bank), says there are indeed cogent and persuasive reasons why the relief sought should be granted. He says there is a very strong legitimate public interest in the enforcement of English judgments: all the more so in this case where there have been serious findings of dishonesty made against Defendants (including against Mr. Fetisov) in the 2020 Judgment, and the use of documentation in Switzerland is in the context of the identification and enforcement against assets which are involved in the subject matter of the 2020 Judgment.

(2) It is said by Mr Willan that this is very much theoretical: there is no descent to particularity and it is no more than an assertion of what is said to be in the public interest.

(3) I disagree with the submission made by Mr. Willan. I consider that it is strongly in the public interest that the disclosed material is used for enforcement, in a post-judgment context where there has already been a finding of civil fraud, so that the perpetrators of that fraud do not retain the benefits of sums received in that context. Material which has been disclosed should be available to a claimant in foreign enforcement proceedings in order to further the public interest. Civil proceedings are not an end in themselves – their end goal (in cases of fraud) is that damages should be paid to the claimant (see *Bank of Crete* at 924H) Further, there is a need for international co-operation between the courts of different jurisdictions in order

to deal with multi-national and other frauds (see *Bank of Crete* at 925G) – in this case, the pressing need for co-operation relates to the enforcement stage.

(3) Cogent and persuasive reasons to use the disclosed materials do not give rise to injustice

61. Equally, in terms of injustice to the Defendants and the public interest in preserving their privacy and protecting confidential information (*Cobra,* at [53]) I am satisfied me that the use of the disclosed material in furtherance of enforcement in Switzerland does not give rise to injustice on the part of Mr Fetisov. The suggestion that there might be any injustice was, I am satisfied, theoretical in the extreme.

62. I consider that the scope of the true debate between the parties as to the information to be released is actually very much narrower than it at first might appear. In circumstances where there is already material used in relation to Enton in the statement of case, it is worth considering whether there is any risk of injustice to Mr Fetisov by the release that has been sought. Further, there is an equivalent company in relation to which Mr. Belyaev is in a similar position (regarding information revealed in the WFO) and Mr Belyaev is not objecting to the order that is sought.

63. I also bear in mind, although it is not on the critical path of my reasoning, that in all likelihood, the vast majority of this information (if not all this information) is already in the public domain, primarily through the 2020 Judgment and associated proceedings. In this regard:

    (1) The 2020 Judgment itself is public, and the 2020 Judgment contains detailed findings as to the following matters:

        (a) in relation to the Shareholders' beneficial ownership of the offshore network, the fact that they have received US$68 million in their accounts at Bordier Bank Switzerland via sham contracts and that those funds represented principally, but not exclusively, distributions from Willow River and RTB, which had been acquired and funded by loans from the Bank without declarations of the Shareholders' beneficial interest: (see the 2020 Judgment, [817(2)] and [1909] to [1910] ff).

(b) There are exceedingly detailed findings in that part of the 2020 Judgment considering Willow, River and RCP. There are also findings that US$425.5 million of the initial Willow River RCP loans was not used for the purposes of property portfolio, but was instead routed to the Shareholders' Bordier accounts, and that further sums were received in those accounts in relation to the Moscow River transactions: see the 2020 Judgment at [817(3)].

(c) At no stage during the trial did counsel for any of the Shareholders suggest that any part of the trial should have any confidentiality restrictions imposed or that it should not be taking place in public, and much of the relevant material will have been referred to in open court and relied upon in the 2020 Judgment.

(2) Equally, there are express references to the asset disclosure in both the written openings: the Bank's opening, at [19], the Bank's closing at Vol. 1, [29] and, indeed, in the 2020 Judgment, there is reference in the context of the Shareholders' wives to that asset disclosure at [1374] and [1387]. The effect of the principle of open justice is that the public should be allowed, as a default position and subject to a successful application to the court, access to the asset disclosure, as a document that was referred to in both written openings.

64. I consider that the relevance of all this material is as follows: when one is considering the risk of injustice to Mr Fetisov of asset disclosure which, ultimately, is likely to boil down to the Enton material, that is but a drop in the ocean compared to the mass of material in relation to the frauds that have been perpetrated involving the Swiss accounts (Bordier Bank and the like). The suggestion that there is anything in the asset disclosure documents which could lead to any risk of injustice against Mr Fetisov is limited in the extreme.

65. *(3) Conclusion*I come then to weighing the overall balance of the matter. I am satisfied that there is, on the basis of what Mr Davies has told me, a very strong public interest following the 2020 Judgment where I made serious findings of civil fraud against Defendants (including Mr Fetisov), that the material provided under the 2016 WFO should be released. There are compelling, cogent and persuasive public interest reasons that that material should be deployed, if appropriate, in Swiss civil proceedings to ensure that those who have perpetrated frauds do not retain monies which it is said ultimately originate from fraud and that assets ultimately belonging to the individual Defendants should also be

amenable to execution in furtherance of the 2020 Judgment. When weighing any potential injustice against that I consider that the prospect of any real risk of injustice is minimal. Accordingly, and balancing all the factors together, I am satisfied that this is an appropriate case for the release in relation to civil proceedings in Switzerland, not only in relation to Mr Belyaev and Mr Yurov, but also in relation to Mr Fetisov.

E. MS. PISCHULINA AND THE FREEZING ORDER

66. The next application before me relates to whether or not the Sixth Defendant, Ms Pischulina, should continue to be subject to a worldwide freezing injunction (now in the form of the post-judgment WFO). In fact the draft post-judgment WFO (at paragraph 10) only contains a very narrow freezing injunction in respect of Ms. Pischulina's assets:-

> "Until further order of the court, the Sixth Respondent is not to dispose of, deal with or diminish the value of 14 Broomfield Ride, Leatherhead, Oxshott, Surrey, KT22 0LW".

67. It is not envisaged that Ms. Pischulina be subject to a broad worldwide freezing order against the entirety of her assets or up to a certain value. It will be seen that, in reality, the order sought is essentially to police the worldwide freezing order in relation to her husband.

68. Ms. Pischulina has suggested that she is willing to undertake to the court as follows: firstly, that she will not without the written consent of the Bank or the permission of the court dispose of, deal with, or diminish the value of essentially the Oxshott property; and secondly, that she will consent to a restriction being entered into against the Oxshott property in Form AA.

69. The following arguments were made before me:

    (1) It is said, on behalf Ms. Pischulina, that the continuance of the 2016 WFO in the form proposed by the Bank is potentially damaging to her and to her reputation, in that recipients of such an order may well misunderstand the position as to whether she is subject to a worldwide freezing order against *all* her assets: that may cause her difficulty. In addition, she has a business and again in that context there is a legitimate reason for her to no longer be subject to a worldwide freezing order. Set against that backdrop, it is said there is no good reason why she should be subject to a worldwide freezing order in circumstances where she is willing to offer an

undertaking with similar consequences in terms of contempt if she were to breach it, and also that the position is protected by reference to a caution on the register.

(2) Against that, it is said there is no reason not to grant the order in the form sought by the Bank, and, in contrast, it is more complicated and burdensome for there to be an undertaking. There was evidence, certainly as against her husband, of attempts at judgment proofing. It was suggested that in those circumstances, therefore, there should be a continued limited freezing order.

70. I am satisfied that in circumstances where an undertaking and an associated caution are going to be given, then provided that those are given and the order can record the undertaking and the caution, it is not appropriate to extend the freezing order going forward post-judgment against Ms Pischulina. That will then enable her, in the carrying on of her business and in her daily life, to make clear to anyone she deals with that she is no longer subject to a freezing injunction, the nature of which is often misunderstood even by banks and might well be misunderstood by any foreign entities that she deals with.

F. DEFENDANTS' LIVING EXPENSES

71. The next question that arises is whether or not there should be any provision in the worldwide freezing order in relation to living and legal expenses. This arises in the following way:

(1) All three Shareholders enjoyed under the 2016 WFO allowances for living expenses: £45,000 a month for the two Yurov defendants, £34,000 a month for the two Belyaev defendants and £26,000 a month for the two Fetisov defendants.

(2) I am told by the Bank that this had the following effect: since the 2016 WFO was obtained, the Defendants have been entitled to spend around £4.5 to 6 million on living expenses between them, and they have also been entitled to use the frozen assets to pay for legal costs. Exactly what has been spent on legal costs is not agreed, but the Bank at least says the Defendants appear to have spent around £12 million between them on these proceedings.

(3) Whether or not any of that is correct, quite clearly large sums have been spent both on legal expenses and on living costs.

72. It is submitted by the Bank that the position going forward in relation to a post-judgment WFO should be different. Leaving aside the position of Mr Belyaev, there should be no provision for living expenses or for legal expenses in respect of Mr Yurov and Mr Fetisov. The Bank advances it submissions on two bases:-

(1) First, on the basis that the Bank invites the court to draw an inference that there are further specific sources of monies available to Mr Yurov and Mr Fetisov. The Bank alleges that these monies arose in relation to a supposed boxing club business plus the proceeds thereof, and also monies said to have been received in relation to rental in relation to RCP and Willow.

(2) Secondly, on the basis that there are other sources of funds, including, the funds of the wives, which could be used for both legal and living expenses.

E.1 APPLICABLE LEGAL PRINCIPLES

73. The applicable legal principles are common ground between the parties. The starting point as identified by Sir John Donaldson MR in *Law Society v Shanks* [1988] 1 FLR 504

> "Mareva injunctions addressed to natural persons should always make provision for the defendant's living expenses unless there is reason to believe that the defendant has other assets to which the order does not attach and which would be available for that purpose.
>
> Furthermore, there should always be provision for the payment of ordinary debts as they become due, because the purpose of a Mareva injunction is not to establish a potential or actual judgment creditor as a priority creditor."
>
> (emphasis added)

74. The injunction in that case was made post-judgment, as here, and *Gee* at [21-062] cites the above passage as a principle of general application, and opines that there should be provision for living expenses even in the context of relief granted or continued post-judgment. That position, of course, is subject to the caveat which I have highlighted above.

75. The position is the same for legal expenses. The standard exception to the freezing order provides for the payment of reasonable legal costs. As David Richard J (as he then was) held in *HMRC v Begum* [2010] EWHC 2186 (Ch) at [34]:-

> "The payment of reasonable legal costs in the defence of a claim is not the dissipation of assets against which a freezing order in aid of non-proprietary claims provides protection. It is a proper application by a defendant of funds belonging to the defendant, no different in that respect from the use of funds in the ordinary course of business or the payment of reasonable living expenses. The assets may be reduced but they are not in a relevant sense dissipated. There is, moreover, the deeper concern that a claimant should not be able to deprive the defendant of the ability to defend himself through the use of his own funds. Different considerations may, but will not necessarily, apply if there are assets beyond those frozen by the order which are available for the payment of legal costs and other legitimate outgoings."
>
> (emphasis added)

76. Similarly, in *Sundt Wrigley & Co Ltd v Wrigley* (CA 23th June 1993 unrep.) it was stated that:

> "In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence."
>
> (emphasis added)

77. Mr Stanley submits that the starting point is that the exception to a freezing order allowing payment of legal and living expenses should be made in all cases unless the defendant has other assets not frozen by the order which could be used to fund those expenses.

78. The applicable principles were considered by Males J in the case of *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd* [2015] EWHC 2748 (Comm) at [33] to [57]. At [35] and [36] he said:

> "35. The starting point is that a freezing order has been made against the defendant. Otherwise the question of use of frozen funds to pay legal expenses could not arise. This means that the court has already concluded that, even before the claimant's claim has been established, justice requires that the defendant's freedom to dispose of its own assets as it sees fit should be restrained. However, a freezing order is not intended to provide a claimant with security for its claim but only to prevent the dissipation of assets outside of the ordinary course of business in a way which would render any future judgment unenforceable. While the disposal of assets outside of the ordinary course of business is prohibited as being contrary to the interests of justice, payments in the ordinary course of business are permitted even if the consequence will be that the defendant's assets are completely depleted before the claimant is able to obtain its judgment. This has been clear since the decision of Robert Goff J in *The Angel Bell* [1981] 1 QB 65 in the early days of what were then called Mareva injunctions. Moreover, so long as the payment is made in good faith, the court does not enquire as to whether it is made in order to discharge a legal obligation or whether it represents good or bad business on the defendant's part.

36. A further principle is that a defendant is entitled to defend itself and, if necessary, to spend the frozen funds, which are after all its own money, on legal advice and representation in order to do so. This is recognised by the standard wording of the usual freezing order, although the defendant's right to spend its own money on legal advice and representation is limited to expenditure of "a reasonable sum". (Despite the substantial figures for legal expenditure in this case, it was not submitted on this application that the sums which the Respondents propose to expend were unreasonable). It was held by Sir Thomas Bingham MR in *Sundt Wrigley Co Ltd v Wrigley* (unreported, 23 June 1995) to be "the ordinary rule" in a non-proprietary case."

79. The judge then quotes from that judgment in the passage that I have already referred to and which provides that in the case of a Mareva injunction since the money is the defendant's, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence, subject to him demonstrating that there is no other assets with which to fund the litigation. The judge continued at [37]-[41]:

"37. Two points should be noticed here. The first is that even where the defendant has no other assets, its right to use the frozen funds is only "the ordinary rule". It is therefore capable of being outweighed in an appropriate case by other considerations. Ultimately it is the interests of justice which must be decisive. The second point represents an important qualification on the defendant's right to choose how it spends its own money. That qualification is necessary in order to strike a fair balance between the parties. It is that in order to be permitted to use the frozen funds, the defendant must demonstrate "that he has no other assets with which to fund the litigation". This places an onus on the defendant to demonstrate that there are no other assets available, not frozen by the order, which he could use to pay for legal advice and representation in defence of the claim.

38. This second point has been adopted in many later cases, for example *Halifax Plc v Chandler* [2001] EWCA Civ 1750 where Clarke LJ said at [17]:

> "… in the Mareva case, in order to be allowed to spend frozen monies, the defendant must show that he has no other assets which he can use."

39. He added at [27] that:

> "… it is incumbent on a defendant, like any applicant, to put the facts fully and fairly before the court."

40. The burden on the defendant to put the facts before the court has been emphasised in further cases. It was described as "the burden of persuasion" by Sir Anthony Clarke MR in *Serious Fraud Office v X* [2005] EWCA Civ 1564 at [35] and [43], a case concerned with a restraint order made under section 77(1) of the Criminal Justice Act 1988 to which the same principles were held to apply. It is necessary that the defendant should have this burden in part because it is the defendant, not the claimant (at any rate in the usual case), who knows the facts, but also because the court has already

concluded that there is a risk of disposal of assets outside the ordinary course of business or it would not have granted the injunction in the first place. Judges are entitled in an appropriate case to have a "very healthy scepticism" about unsupported assertions made by a defendant about the absence of assets, as Sir John Donaldson MR noted in *Campbell Mussels v Thompson* (1985) 135 NLJ 1012.

41. At [43] of his judgment in Serious Fraud Office v X, Sir Anthony Clarke MR identified the issue in these terms:

> "43. … The question for the judge was whether X discharged the burden of proof or, as I would prefer to put it, the burden of persuasion. That depends upon an analysis of the facts. As I see it, on an application to vary a restraint order in a case of this kind, where the order relates to all the defendant's assets, the position in principle is that it is for the defendants to satisfy the court that it would be just to permit him to use funds which are identified as being caught by the order. If the court concludes that there is every prospect of the defendant being able to call on assets which are not specifically identified in the order, or assets which others will provide for him, I do not think that the court is bound to vary the order in the terms sought."

(emphasis added)

80. The learned judge continued at [42]-[43] as follows

> "42. Thus it is relevant to consider not only the defendant's own assets, but whether there are others who may be willing to assist the defendant to obtain legal advice and representation. In this respect the position is similar to that which obtains when the court is considering an argument that security for costs should not be ordered on the ground that it would stifle the claim (cf. *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 , where Peter Gibson LJ referred to consideration of whether a claimant "can raise the money needed from its directors, shareholders or other backers or interested investors", pointing out that "as this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation)."

43. Clarke LJ went on in *Serious Fraud Office v X*, at [46] and [47], to approve statements of principle contained in the 5th Edition (2004) of *Gee on Commercial Injunctions*. These were as follows:

> > "20.054 … Therefore, the principle is that a defendant can use his own money which is frozen under a Mareva injunction to fund the defence provided that it is apparent that there are no other funds or source of payment which should as a matter of objective fairness be used to pay for the defence rather than the frozen funds. **This may require the defendant to adduce 'credible evidence' about his other assets before the court can be satisfied that it is just that he should be able to use the particular frozen assets.**

> 20.056 The same principle of objective fairness applies when an injunction is granted worldwide and the question arises whether the defendant should be at liberty to pay an expense using his English assets or assets safely frozen outside the jurisdiction by a local court, or whether he should be left to make the payment from assets which are not effectively frozen or may not be available for execution or satisfaction of the judgment."

44. It is inherent in this approach that, because the court is dealing with risks and prospects rather than certainties, and is doing so at an interlocutory stage, there is a real risk that the court, even doing the best it can on the material available, may reach what is in fact a wrong conclusion. It may conclude that a defendant has failed to adduce credible evidence that it has no other available assets and has therefore failed to discharge the burden of persuasion even if, in fact, the defendant has no other assets. It may conclude that there is a reasonable prospect that a defendant's friends or associates will rally to his support, but that prospect may not materialise. In such circumstances the court will refuse to allow the frozen funds to be used, even if that means that in fact the defendant is left unable to pay for legal representation to defend the claim. However, this is no different from any other situation in which there is a risk that the court may make a mistaken interlocutory assessment, for example when it concludes that an order for security for costs will not stifle a claim. It should not deter the court from making the best assessment it can on the material available and imposing on the defendant the burden of persuasion for the valid reasons identified above.

45. Immediately before the passage quoted above and approved in *Serious Fraud Office v X*, paragraph 20.054 of *Gee* puts the matter in this way:

> "In exercising the discretion whether or not to grant an application to vary an injunction the court acts in accordance with what is 'just and convenient'. This is the test laid down in s.37(1) of the Supreme Court Act 1981. On an application for a variation, the claimant has already established a real risk of dissipation and a good arguable case. The principles which apply in considering whether to grant a variation are the same as those which apply when considering whether or not to grant Mareva relief. …
>
> "The correct test is to consider objectively the overall justice of allowing the payment to be made including the likely consequences of permitting it on the prospects of a future judgment being left unsatisfied, and bearing in mind that the assets belong to the defendant and that the injunction is not intended to provide the claimant with security for his claim or to create an untouchable pot which will be available to satisfy an eventual judgment."

46. I accept this as an accurate summary. Its value, in my judgment, is the emphasis which it rightly gives to the need for an assessment of "the overall justice" of the case. The principle that a defendant bears the burden of persuading the court that there are no other assets available to fund the litigation is one aspect of that assessment, but not the only aspect. In most cases the absence of other assets will be decisive. Justice will require that such assets as there are should be available to fund the defendant's defence. But in what is likely to be an exceptional case, this is capable of being outweighed by other considerations.

47. In the present case Tidewater relies upon what it says is the injustice of allowing Respondents who have flouted orders of the court when it suits them to do so and who remain in contempt of court to invoke the court's discretion, as a matter of justice and convenience, to permit a variation of the injunction. Mr Hossain for the Respondents submitted that this is an irrelevant consideration and that the present application should be confined to an examination of whether the Respondents have access to funds which are not effectively frozen by the order. I do not agree. In my judgment the overall justice of the case needs to be considered, and that is capable of extending to the wider considerations relied on by Tidewater."

(emphasis added)

81. Then, under a heading "Availability of other sources of funds" Males J considered in accordance with those principles whether the Respondents had discharged the burden of showing they had no funds available to pay for legal advice and representation other than certain funds. That is set out at [48] to [57], which I will not set out in full in the interest of time. Males J reached the conclusion that the Respondents had failed to discharge the burden of persuasion. He relied on, amongst other matters, the following points:

(1) At [54], there was reference to very little information and almost no documents provided relating to the various trusts established by the Otunba and the assets which these hold, with very general assertions made with no supporting evidence, and then importantly, in my view, at [56] he said this:

> "Seventh, although the Otunba and Toks as her eldest son must be well connected and highly respected members of their tribe, and perhaps also of wider society in Nigeria, they have made no attempt to show that family, friends or business associates would be unable and unwilling to assist them in obtaining legal representation for the defence of this claim."

(2) Having identified those various factors he reached his conclusion at [57]:

> "In accordance with the principles set out above, my conclusion that the Respondents have failed to discharge the burden of persuasion which they bear is sufficient for this application to fail."

(3) At [58] he reached the conclusion that even if the respondents had no available assets, the overall justice in that particular case based on the facts in that case were such that he still would not have allowed an allowance for legal expenses.

E.2 APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

82. Turning to the facts of the present case, Mr. Yurov and Mr. Fetisov submit that some provision should be made for their legal and living expenses whilst the Bank contends that no provision should be made. The Bank makes four points in this regard:-

(1) The Defendants have the burden of persuading me of their inability to meet legal and living expenses from any source;
(2) There is considerable evidence before me of Ms. Pischulina's wealth from earlier asset disclosure;
(3) There is a distinct lack of any evidence presented by the Defendants on this application as to why their wives cannot pay their expenses/why any claim of theirs would be stifled;
(4) In such circumstances I ought to conclude that there is every prospect of them being able to fund their legal and/or living expenses from their wives (although I could give them a liberty to apply to provide the evidence that they failed to adduce at this hearing).

83. The Bank accepts that Mr. Belyaev is entitled to an allowance for living and legal expenses in the new post-judgment WFO, and value this at £1,500 per month. Mr. Belyaev contends that he should be entitled to £17,000 per month: this contention is not based on evidence of his need brought before me, but based on Leggatt J's determination pursuant to the 2016 WFO.

(1)The Defendants have the burden of persuasion

84. On 30 January 2020 Steptoe & Johnson UK LLP on behalf of the Bank wrote to the solicitors acting for the Defendants. At paragraph 2.3 of that letter, in relation to the freezing order, the following is said:

> "In relation to living and legal expenses exceptions to the order, our clients' position is that, given the findings in the judgment, there should be no exceptions for Mr Yurov and Mr Fetisov unless Mr Yurov and Mr Fetisov produce cogent evidence justifying the presence of such exceptions in the post-judgment WFO. In particular, we would expect their evidence to address (with supporting documents): (i) the supposed boxing club business and any other income; (ii) what their current living expenses actually are and in particular distinguishing between genuinely necessary living expenses and luxury expenditure; and (iii) **the ability of their wives to meet ongoing expenses including in respect of legal costs out of their own funds**."
>
> (emphasis added)

85. I am satisfied that as a result of this letter it was clear to each of the Defendants from 30 January, (almost four weeks prior to this hearing), that:

(1) the Bank was going to submit that there should be no allowance for living and legal expenses, and

(2) one of the matters that it expected to be dealt with in the supporting evidence adduced by Mr Yurov and Mr Fetisov was the ability of their wives to meet ongoing expenses, including in respect of legal costs out of their own funds.

86. It is right to say that in that same letter and at the same time a point was also being made about proceeds from the boxing club and any other income. However, all three defendants were represented by highly experienced solicitors and legal counsel, who would be aware of the law, including the law that I have identified and the burden of persuasion. Therefore, those defendants would have known (through their representatives) that the reason they were being asked to provide evidence in relation to their wives' ability to meet ongoing expenses, was for the application of the very principles that were identified in the cases that I have cited, including what was said by Sir Anthony Clarke MR, in *Serious Fraud Office v X* and, indeed, was said by Males J, as he then was, in *Tidewater*.

87. Lest there be any doubt in relation to that, it is also to be borne in mind that the 2020 judgment was handed down on 23 January and consequential directions were given in relation to when the skeleton arguments were to be lodged in advance of any hearing. In that regard, they were to be lodged initially by on or around 7 February but, in any event, the Bank lodged its skeleton argument on 14 February. Again, that skeleton argument referred to the burden of persuasion in paragraph [29.8], albeit by reference to Mr Yurov and Mr Fetisov having not demonstrated by cogent credible evidence that they have not had access to a secret and very substantial stream of income since 2014 (a reference to the boxing club and rental income). It was pointed out that unless they produced such evidence, they should not be permitted to use the limited frozen assets, and it was also pointed out that at the time of the service of the skeleton, they had produced no evidence at all despite being on notice of the Bank's position since 30 January by reason of the letter that I have referred to.

88. Further, paragraph [29.9] of the Bank's skeleton argument made clear that the Bank was also relying on the principle that it would only be appropriate make an allowance for living expenses and legal expenses if there was evidence that there were not funds available from another source. The Bank stated expressly as follows:-

> " 29.9. Mr Yurov and Mr Fetisov's wives also have assets that can be used to fund legal and living expenses. For example, Mrs Yurova is the 50% beneficial owner of the Cypriot properties, which can be sold for this purpose (with the Bank's consent). Ms Pischulina has her US$1m house in Bali and a business of her own."

89. That paragraph refers in a footnote to two sources. Firstly, reference is made to Mr Fetisov's evidence at trial which was as follows at paragraph 243*: "Finally, my wife has always been the sole owner of her house in Bali. In this regard I note that she has wealth which is independent of me, including from (a) her interest and participation in a Russian multimedia distribution business (known as Group Alion Russia) until about 2009 and (b) the sale of her interest in the brand "Nexx" in about 2011".* Secondly, reference is also made to the asset disclosure of Ms. Pischulina (Bundle 3, Tab 6 pp. 61-2)

(2) Evidence from Ms. Pischulina's Asset Disclosure

90. Further, there is evidence before me from the earlier asset disclosure that Ms. Pischulina is a person of wealth in her own right. In the context of the 2016 WFO, Mr Fetisov swore an affidavit. In the course of that affidavit at pages 61 to 62, which is the cross referenced to Ms Pischulina's asset disclosure, it was said as follows: *"In addition to schedule C2 Ms Pischulina confirms she owns the following,"* and then there is a reference to (amongst other matters) a property in London with a value of £1.6 million, a property in Moscow, properties in Indonesia valued at US$870,000, an RBSC bank account with £15,000 in it and a savings account also at RSBC, a Santander bank account with approximately £32,000 in it, another savings account at Santander with approximately £3,000 in it, a Metro Bank current and savings account with an amount of about £28-29,000 between the two, a Bank of Cyprus account with €120,000 in it, an account with Vestra Wealth in Jersey with £551,000 in it and also a dollar account with Vestra Wealth with £684,000 in it, shares of US$720,000, shares of $120,000 in another company, as well as vehicles et cetera. It is clear therefore that Ms Pischulina is a person of considerable wealth in her own right. That is, of course, the position as at 19th February 2016. The long and short of it is that there is evidence, that there have been assets available to the wife of Mr Fetisov which could be

used both for living expenses and for legal expenses going forward. Equally, a similar exercise could be done and was done in relation to Mr Yurov's wife. For reasons that I am going to come on to, it is not necessary, however, to deal with that today.

(3) Evidence presented by the Defendants on this application

91. I now turn to the evidence on the application before me. In this regard:

(1) Whilst evidence has been put in both by Mr Yurovand Mr Fetisov concerning the allegations which are made in relation to the boxing club (against Mr. Yurov and Mr. Fetisov), and also in relation to rental income and in relation to particular assets, what is striking is that neither Mr Yurov and Mr Fetisov nor their respective wives have produced any evidence whatsoever that there were not funds otherwise available, nor have they adduced any evidence whatsoever that there would be any stifling of any claim.

(2) This is notwithstanding the legal authorities I have identified, the letter of 30 January 2020, and the content of the Bank's skeleton argument at paragraph [29.9], and evidence from asset disclosure suggesting that funds were available. The Bank submits that it abundantly clear that Mr. Yurov and Fetisov have their wives' funds available to them.

92. In relation to the burden of persuasion as described by Sir Anthony Clarke in *Serious Fraud Office v X*, the position is that neither Mr Fetisov or Mr Yurov have put forward any evidence in relation to the absence of assets from third parties, most obviously from their wives, to meet living expenses or legal expenses. I am left in a situation, therefore, that on the only evidence before me, the only conclusion I can properly reach is that Mr Yurov and Mr Fetisov are able to call on assets in the form of assets of their wife. If anything, the point was demonstrated in oral submissions before me today. Mr Stanley candidly and rightly acknowledged that his clients may have taken their eye off the ball because a large aspect of the evidence was concerned with the boxing club and the rent. Therefore, he accepted that there was no evidence before me in relation to the assets available to his client from third parties, in particular from his wife, in circumstances which I do not have to go into now but where again there is evidence before this court that his wife has assets which at least at first blush could be used for living expenses and for legal expenses.

(*4) Conclusion as to provision in the freezing order in relation to legal and living expenses*

93. Set against that backdrop, I indicated to both Mr Yurov's counsel and Mr Fetisov's counsel that I could simply rule once and for all time that there should be no provision in the freezing order in relation to legal expenses and living expenses (absent change of circumstances), because neither of their clients had produced any evidence as to the non-availability of assets on the part of their wives. It was the primary position of Mr Davies, on behalf of National Bank Trust, that I should do so.

94. However, I considered it preferable not to follow such a course. Rather I suggested the following course of action during the hearing:

    (1) I indicated to counsel for Mr Yurov and Mr Fetisov that it would inappropriate to insert into an order a figure at this stage for legal expenses or living expenses. This is because I, at the moment, have no evidence which would justify any suggestion of stifling or the like and there is evidence before me that their wives have assets which could be used for legal expenses and living expenses.

    (2) However, I was prepared to order that the relevant defendants' asset disclosure (which is going to take place within the next 14 days) should also extend to evidence as to what assets are available to the respective defendants via assets of their wives. Then, if those defendants could demonstrate by evidence that they were unable to fund living or legal expenses, I would permit them under the liberty to apply to make an application to vary the order.

95. Such a proposal was not accepted by Mr Willan who appears on behalf of Mr Fetisov and his wife. It is a proposal which is more generous than is contemplated on the authorities in circumstances where the position in relation to Mr. Willan's client is that there is simply a complete lack of evidence in relation to the current state of the assets of his wife and whether or not such assets can be used. This point was graphically illustrated by the fact that orally during the course of his submissions Mr Willan suggested that Ms Pischulina might <u>not</u> be willing to expend the limited remaining funds on legal expenses. The difficulty with this suggestion is that Mr Fetisov has had every opportunity to put in witness evidence before this court over a period of many weeks on the timetable to this hearing, and yet there is no evidence whatsoever before me in support of that suggestion. This is a

good illustration of the fact that if a party wishes to make a submission in relation to stifling, they should put evidence before the court in that regard.

96. On the basis of the evidence before me now, and for the reasons that I have given, the only conclusion that I can reach is that there are assets available to Mr Yurov and to Mr Fetisov which could be used to fund both legal expenses and living expenses at this time. Whilst I could rule upon this once and for all, I am prepared to leave open the possibility (should Mr Yurov and Mr Fetisov choose to adduce evidence as to their wives' assets) of a further application. Accordingly, the appropriate order at this time is that there shall be no provision for legal expenses or personal expenses.

97. There is, of course, always liberty to apply, and I am going to give Mr Yurov and Mr Fetisov the opportunity to provide the type of evidence as to third party assets (including those of their wives) that they have not provided for the purpose of this hearing. It is a liberty, because there is no obligation upon them to provide evidence of third party assets. However it would only be with the benefit of such evidence that the court would be in a position to consider whether it was appropriate to vary the existing order and to make an allowance for living expenses and legal expenditure.

98. Accordingly, and for the reasons that I have given:-

    (1) I am satisfied that there is every prospect of both these defendants being able to call on assets belonging to their wives to fund living expenses and also legal expenses in the ensuing time period going forward.

    (2) However, I am prepared to give these defendants an opportunity to put in evidence in relation to third party assets (if they so wish) and then, if they consider such a position to exist, advance any case based on stifling. Of course further investigation into the existence of such third party assets may simply reveal that there are assets available to their wives which could be used.

(5) Mr. Belyaev's Position

99. In relation to Mr Belyaev's position:-

(1) It is accepted by the Bank that he should have a provision in respect of living expenses and a reasonable sum for legal advice. The figure proposed is that of £1,500 a week.

(2) Mr. Belyaev contends that the sum should be £17,000, based on 50% of the allowance allotted to him and his wife under the 2016 WFO (£34,000). Mr. Belyaev contends that Knowles J considered the various expenditure of the family and regarded that figure as reasonable.

100. Of course, Knowles J's conclusion was at a time when there had been no judgment against Mr. Belyaev, and related back, no doubt, to the expenditure he might incur as a successful banker. Mr Belyaev now faces a judgment of some US$900 million against him with no income stream coming in as a banker, successful or otherwise. One would have thought therefore that he would be likely to cut his cloth according to monies that are still available to him. In fact, on at least one permutation of the evidence, Mr Belyaev himself is saying that the only available source has been exhausted and therefore it must follow that he is relying upon his wife's assets. I should say his wife's unencumbered assets included indisputably a figure of £870,000 in a Vestra Wealth account. However, it is said on his behalf that the Bank has conceded the point of principle that he should be entitled to some figure. As I have identified, he says the figure going forward should be a figure of £17,000, i.e. half of £34,000.

101. I consider that if this order is going to be in place for any length of time, it is important that this court knows the up-to-date, and true, position as to how much money is actually needed by Mr Belyaev in the circumstances in which he now finds himself. Accordingly, although I am willing to insert into the Order a figure of £17,000 at this time, that is on the basis that within the same timescale as lodging the affidavit of assets (and also any evidence as to his wife's assets) Mr Belyaev also serve a witness statement stating what his actual requirements are going forward. Obviously, it is a matter for him what is said in that witness statement, but what is said in that statement (1) must be true; and (2) will be subject to, no doubt, critical examination by the Bank as to the credibility and/or reasonableness of what is being suggested. That will then mean that the court is in a position, going forward, on any application by the Bank, to consider whether the figure of £17,000 remains appropriate, or whether it should be amended.

102. The final question that arises is the timescale within which further information has to be provided as to assets. Mr Yurov and Mr Fetisov agree to provide such information within the 14 days but Mr Belyaev says that he requires 28 days. The only distinguishing feature I can identify that Mr Penny articulated was that the Belyaevs are out of the jurisdiction. One has got to bear in mind, however, that the Belyaevs have known about the position since 30 January at the latest and they have not only incurred legal expenditure but have put in detailed witness statements in relation to aspects of their assets. I am somewhat circumspect in accepting the submission that 28 days are needed. Given the distinguishing factor that the Belyaevs are out of the jurisdiction (although in this day and age with modern technology I doubt that factor makes a great deal of difference) I will order that the information has to be provided within 21 days.

103. This concludes the individual matters addressed at the consequential hearing. The Belyaevs' discrete application for permission to appeal is addressed in a separate Ruling.