Neutral Citation Number: [2019] EWHC 194 (Comm)

Case No: CL-2018-000332

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: 11/02/2019

Before :

SONIA TOLANEY QC
(Sitting as a Judge of The High Court)

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Between :

MANCHESTER SHIPPING LIMITED	**Claimant**
- and -	
(1) BALFOUR WORLDWIDE LIMITED	**Defendant**
(2) NIKOLAY VICTOROVICH SOCHIN	

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- -

Nicholas Vineall QC and Simon Goldstone (instructed by **Wikborg Rein LLP**) for the **Claimant**
George Hayman QC and David Peters (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 12-14 November 2018, further written submissions 23 November 2018 and 30 January 2019

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Approved Judgment

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SONIA TOLANEY QC

Sonia Tolaney QC :

1. On 18 May 2018 Males J granted worldwide freezing orders ("**the WWFOs**") over the Defendants' assets, pursuant to a without notice application made by the Claimant ("**Manchester**"). The WWFOs were granted in the context of Manchester's claim in these proceedings **("the KGK claim")** that the Defendants fraudulently conspired to divert hire in the sum of $5.577m due from Caspian Hydra Technologies LLC ("**KGK**") in respect of three vessels (the "**Tur**", "**Tarpan**" and "**Sowena**" - collectively "**the Vessels**") for the period June to November 2016.

2. The Defendants now apply to discharge the WWFOs on two grounds **("the Discharge Application")**:

   2.1. First, the Defendants contend that Manchester has not suffered any loss, with the result that (a) it does not have a good arguable case capable of supporting the WWFOs (either at the level originally granted, or at all); and/or (b) the WWFOs are neither just nor convenient. The Defendants do not, at least for present purposes, dispute that Manchester has a good arguable case on liability or that there is a real risk of dissipation.

   2.2. Second, the Defendants suggest that, in any event, Manchester is guilty of breaches of the duty of full and frank disclosure of such severity and culpability that the WWFOs ought to be discharged, without the Court re-granting those orders.

3. In addition, and by an application dated 5 October 2018, the Defendants sought specific disclosure from Manchester of correspondence post-dating the WWFOs and said to be relevant to one of the issues which arises in the context of the Discharge Application. By the time of the hearing before me, the relevant document had been disclosed (subject to claims of privilege) by Manchester. The primary arguments at the hearing therefore related to the Discharge Application.

Background

4. It is common ground between the parties that the KGK claim arises in the context of a wider dispute between the Second Defendant ("**Mr Sochin**") and his former business partner, Mr Nikolay Baranov ("**Mr Baranov**"). Until 22 July 2016, Messrs Sochin and Baranov jointly operated an international shipping business which involved the ownership and operation of a large number of vessels, and was conducted through a web of companies ("**the Joint Business**").

5. On 22 July 2016, Messrs Sochin and Baranov entered into a business division agreement ("**the BDA**"), the purpose of which was to divide the assets of the Joint Business between them. Unfortunately, that division has not gone to plan. Messrs Sochin and Baranov have fallen out, leading to multiple disputes (and resulting litigation and arbitration) between the two of them and also between entities forming part of (or which were involved with) the Joint Business. The various proceedings include not only the present proceedings, but also proceedings in the courts in Russia and in the Isle of Man.

6. The focus of the Discharge Application before me, however, concerns only the KGK claim (and not any wider dispute in relation to the BDA). The KGK Claim is brought by

Manchester, an English company, controlled and directed by Mr Jonathan Townley ("**Mr Townley**"). It is common ground that, whilst the Joint Business was being carried on, Mr Townley's companies were used as vehicles for chartering vessels to third parties, and would remit the hire received (less a modest commission) to companies forming part of the Joint Business.

7. It is also common ground that:

   7.1. The Tur and Tarpan were, at all material times, owned by Arzalk Shipping Company LLC ("**Arzalk**"). The Sowena was, at all material times, owned by Silverburn Shipping Isle of Man Ltd ("**Silverburn**"). Silverburn was a company which formed part of the Joint Business. Silverburn is now said by the Defendants to be controlled by Mr Baranov.

   7.2. The three Vessels were each subject to bareboat charters in favour of a Russian company called Ark Shipping Company LLC ("**Ark**"). This enabled the Vessels to carry a Russian flag, and to operate in Russian waters. Again, Ark was a company which formed part of the Joint Business. Ark is now controlled by Mr Sochin.

8. It is Manchester's case that:

   8.1. As part of the operation of the Joint Business, Ark chartered the Vessels to Silverburn, which in turn sub-chartered them to Manchester - the intention being that Manchester would then hire the Vessels out at a market rate to an independent third party. This alleged sequence of charters and sub-charters between Ark, Silverburn and Manchester is said by Manchester to have been undocumented. Manchester's evidence is that it was liable to remit 99% of any hire received from third parties to Silverburn, the balance of 1% being Manchester's commission.

   8.2. During the relevant period, and pursuant to a series of charterparties dating from September 2015 ("**the Manchester Charterparties**"), Manchester hired out the Vessels to KGK in return for a total hire of $5.577m (which has not, in the event, been paid) ("**the Hire**"). The Manchester Charterparties were governed by Russian law and subject to Russian jurisdiction.

   8.3. Manchester contends that it was not paid the Hire by KGK because the Defendants wrongfully sought to divert payment thereof to the First Defendant ("**Balfour**") by fraudulently (a) procuring KGK and Balfour to enter into sham charterparties, the material terms of which mirrored those of the Manchester Charterparties ("**the Balfour Charterparties**"); and (b) seeking to procure KGK to pay the Hire to Balfour under those charterparties, rather than to Manchester.

   8.4. In addition, Manchester advances claims against Mr Sochin for breach of his fiduciary duties owed to Manchester.

9. In response, the Defendants contend that:

   9.1. Ark, rather than Silverburn, in fact chartered the Vessels to Manchester. In these proceedings, they rely upon three written charterparties between Ark and Manchester to that effect ("**the Ark Charterparties**"). (I note, however, that in May

2018, in proceedings in Russia, Mr Sochin expressly disavowed the existence of any charterparty between Manchester and Ark – a point which I raised with Mr Hayman QC, Leading Counsel for the Defendants, but in respect of which the Defendants had no explanation).

9.2. Nevertheless, on the basis of the Ark Charterparties, the Defendants now claim that the Hire ought to have flowed up from KGK to Manchester, and then to Ark. The Defendants contend that Mr Baranov was, and remains, anxious to avoid this outcome (as Ark is now controlled by Mr Sochin), and was determined to ensure that that Hire instead flowed to a company which, the Defendants allege, was under his sole control (namely Silverburn). It is said, therefore, that Manchester's allegation that there was an undocumented arrangement whereby Manchester was liable to remit 99% of the Hire due to Silverburn, has been instigated by Mr Baranov.

9.3. Accordingly, the Defendants suggest that it is in fact Mr Sochin (through Ark) who is in fact ultimately entitled to the Hire payable by KGK and not Silverburn.

10. A fundamental flaw in the Defendants' case, however, is the fact that until October of this year, the Defendants claimed that the Hire was payable to Balfour pursuant to the Balfour Charterparties. Indeed, and as further described below, Balfour brought proceedings in Russia to enforce its alleged right under those agreements. However, the Defendants now admit in these proceedings that the Balfour Charterparties were concocted by Mr Sochin and were sham charterparties.

11. This is a significant admission to which I return below. However, I should record that the Defendants suggest, on this Discharge Application, that the concocting of the Balfour Charterparties and the steps they took to enforce those agreements were legitimate "self-help" steps taken because Mr Sochin was concerned that Mr Baranov would take steps to divert monies generated by the operations of the Joint Business to himself. They also suggest that, had Mr Sochin succeeded in transferring the relationship from Manchester to Balfour, then the Hire payable by KGK (or the substantial majority thereof) would have flowed to one company controlled by Mr Sochin (namely Balfour) rather than another (namely Ark). Thus, it is said, in commercial terms, the transfer (had it succeeded) would have been a neutral one.

12. The concocting of the Balfour Charterparties, however, cannot be so easily brushed aside. Indeed, Balfour went to some lengths to enforce what it now accepts were sham agreements. It commenced proceedings in Russia (in the Arbitrazh Court of the Ashakhan District) on 6 October 2017, in which it sued KGK for the Hire. On 13 November 2017, Manchester intervened in those proceedings. On 17 November 2017, Manchester then brought separate claims of its own, claiming that KGK owed the Hire to it, pursuant to the Manchester Charterparties.

13. On 25 December 2017, Manchester assigned its right of action against KGK to a Russian entity called Morshelf-Caspiy LLC ("**Morshelf**"). The relevant assignment ("**the Morshelf Assignment**") provided, in effect, for Morshelf to (a) remit to Manchester the first $2.3107m of any sums recovered from KGK; and (b) retain for itself any recoveries in excess of this amount. Manchester's position is that, in circumstances where Balfour was asserting its claim to the Hire, it was necessary to enter into the Morshelf

Assignment, given difficulties it faced as an English company prosecuting its claims in Russia.

14. In February 2018, Balfour's claims against KGK failed and Manchester's claims (by now pursued by its assignee, Morshelf) succeeded. KGK and Balfour appealed but their appeals were unsuccessful.

15. KGK (but not Balfour) pursued a second appeal to the Court of Cassation. That appeal was dismissed on 17 October 2018. The Court of Cassation handed down its written reasons for that decision on 24 October 2018.

16. A further set of proceedings has since been started in Russia, in the Moscow City Court, by KGK against Manchester, aimed at the invalidation of the Morshelf Assignment. Manchester contends that this shows that KGK is in league with Mr Sochin; the Defendants suggest that this shows that KGK is determined to take every step available to it to avoid paying the Hire due in respect of the Vessels.

17. So far as the present proceedings are concerned, Manchester's original Particulars of Claim were concerned only with the KGK Claim and the WWFOs were granted in support of that claim. In its Amended Particulars of Claim (**"the APOC"**) Manchester has added a new claim, alleging that the Defendants took steps wrongfully to divert hire payable by a third party ("**MARIS**") in respect of a vessel known as the Shevchenko. However, no interim injunctive relief is now sought in respect of that separate claim ("**the MARIS Claim**"), such relief having been refused by Popplewell J. Accordingly, the matter which is presently before me is the suitability of the WWFOs granted in respect of the KGK Claim, and that claim alone. It is not, therefore, necessary for me to consider the MARIS Claim.

The Discharge Application

18. As I have indicated above, there are two grounds on which the Defendants contend that the Freezing Orders ought to be discharged, each of which I consider in turn.

Ground 1: no loss

19. In summary, the Defendants contend that:

    19.1. The essence of the KGK Claim is that the Defendants have wrongfully sought to divert the Hire payable by KGK in respect of the Vessels away from Manchester, and towards Balfour.

    19.2. However, since such attempts have failed, there is now no real prospect that such diversion will ever occur. Rather, Manchester's assignee (Morshelf) has obtained judgment against KGK for the Hire due under the Manchester Charterparties from the Arbitrazh Court of the Ashakhan District. That judgment has been upheld on appeal, and further upheld on a second appeal by KGK only (and not Balfour) to the Court of Cassation.

19.3. Balfour no longer seeks to challenge the said judgments, with the result that there is no prospect of KGK being ordered to pay any part of the relevant Hire to Balfour.

19.4. Thus the Defendants submit that Manchester has not, as a matter of analysis, suffered any actionable loss as a result of the Defendants' alleged wrongdoing.

19.5. Further, the Defendants contend that, in any event, KGK failed to pay the Hire not because of anything the Defendants did, but rather because KGK itself was unable or unwilling to pay the sums due. The Defendants rely on two points in this regard: first, the Defendants point to the fact that when Manchester entered into the Manchester Charterparties in 2015, it freely accepted the risks associated with having KGK as a contractual counterparty. Those risks included (a) credit risk (namely, the risk that KGK would be unwilling or unable to pay sums contractually due); and (b) jurisdictional risks (namely, the risk of being unable to obtain from the courts in Russia, or enforce, any judgment against KGK). Accordingly, it is said that Manchester's loss cannot be recovered from the Defendants; secondly, the Defendants submit that Manchester's evidence, in the form of a statement from Mr Systra, a former employee of KGK's managing company, reveals that the major shareholder of KGK's managing company chose to use available funds for purposes other than paying KGK's creditors. Thus the Defendants contend that their alleged wrongdoing had nothing to do with KGK's failure to pay the Hire to Manchester.

19.6. Finally, the Defendants contend that, following the claims pursued in Russia, enforcement against KGK is likely to be successful and thus it is "*overwhelmingly likely that all, or the vast majority of the [Hire] will in fact be paid to Morshelf by KGK*". Thus it is said that, but for the Morshelf Assignment, Manchester would in fact have received all the Hire (or such of it as KGK is financially capable of paying).

19.7. For these reasons, the Defendants submit that Manchester therefore lacks the good arguable case necessary to support the grant of a freezing order.

19.8. In the alternative, the Defendants contend that, on its own case, Manchester was effectively acting as a conduit for the payment of money from KGK to Silverburn (save to the extent of the 1% of any Hire actually paid, which Manchester was entitled to keep for itself). Accordingly, the Defendants submit that Manchester's loss (as matters stand) is limited to the amount of the Hire which it would have been able to retain for itself (namely 1%, or $55,770) and therefore it is said that the WWFOs should be discharged as it would not be just and convenient to maintain them for this relatively small sum.

19.9. Mr Hayman also submitted that the only interest of Manchester which may legitimately be protected by interim injunctive relief is its interest in preserving the chose in action represented by KGK's liability to pay Hire for the Vessels under the Manchester Charterparties. He contended that a freezing order over the assets of the Defendants generally is neither a necessary nor an appropriate means by which to protect that particular and narrow interest, and is therefore neither just nor convenient.

19.10. Finally, I should record that the Defendants also contended that the Morshelf Assignment was not an arms' length assignment and thus would result in double

recovery for Manchester if Morshelf was permitted to retain sums paid by KGK and Manchester was able to claim that same sum from the Defendants. However Mr Hayman QC accepted in oral submissions that this was not a matter that I could determine on this Discharge Application and, accordingly, I do not consider it further.

Relevant legal principles

20. The relevant legal principles were not in dispute and were helpfully set out the Defendants' Skeleton Argument as follows.

21. It is trite law that a Court will grant a freezing order where (a) the claimant has a good arguable case on the merits; (b) there is a real risk of the defendant engaging in improper dissipation of its assets, so as to render itself judgment-proof; and (c) it is, in all the circumstances of the case, just and convenient to grant the order.

22. For these purposes, the classic statement of what amounts to a good arguable case is to be found in the judgment of Mustill J (as he then was) in *Ninemia Maritime Corp v Trave* [1983] 2 Lloyd's Rep 600, 604-5. In short what is required is a case that is "*more than barely capable of serious argument*" but which does not necessarily have more than a 50% chance of success.

23. Whenever the Court grants a freezing order, it does so subject to a financial limit which reflects the value of the claim in respect of which the claimant has been able to establish a good arguable case. It necessarily follows that the question of whether a claimant has a good arguable case is one which has to be asked in relation to both liability and quantum.

24. The ultimate purpose of a freezing order is to protect a claimant's interest in ensuring that any judgment which it may ultimately obtain is not rendered unenforceable as a result of the defendant having unjustifiably dissipated its assets in the meantime - see *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, *per* Lord Donaldson at 76.

25. Accordingly, in each case, it is essential that the Court identifies the particular interest of the claimant's which is said to require protection, and assesses whether that interest is of a type which requires and justifies the particular protection afforded by a freezing order. This will form an important element of the Court's assessment of whether and to what extent the grant of a freezing order is just and convenient.

26. In undertaking that assessment, the Court must not lose sight of the fact that a freezing order represents one of the most invasive forms of relief available to the English Court, and has the potential to cause significant prejudice to the defendant who is the subject thereof. Accordingly, the court should always address its mind to (a) the least invasive form of relief which is necessary to provide sufficient protection to a claimant's relevant interest; and (b) whether a general freezing order over assets represents such relief: see the observations of Gloster LJ in *Holyoake v Candy* [2018] Ch 297 at [45].

Analysis

27. In this case, there is (now) no dispute that Manchester has a good arguable case on liability, the Defendants having admitted that they concocted the Balfour Charterparties. Nor do the Defendants suggest that there is no risk of dissipation. Thus the focus of the Discharge Application is, as summarised above, directed to the issue of whether Manchester has a good arguable case that it has suffered loss and damage in the amount of the Hire (accepting that credit will be given for any sums which are remitted to Manchester by Morshelf pursuant to the Morshelf Assignment).

28. In my judgment, Manchester does have a good arguable case that it suffered such loss and damage and I am not persuaded by any of the Defendants' arguments to the contrary, for the following reasons:

    28.1. The Defendants have now admitted, very late in the day (and only after bringing and losing proceedings in Russia both at first instance and on appeal), that they concocted the Balfour Charterparties; and that Balfour in fact does not have (and never had) any entitlement to the Hire. The fact that the Defendants failed to divert payment of the Hire to Balfour does not mean, as they suggest, that Manchester has suffered no actionable loss. On the contrary, Manchester has a good arguable case that the Defendants' conspiracy to divert payment of the Hire to Balfour has caused Manchester not to be paid the sums due to it by KGK under the Manchester Charterparties.

    28.2. Indeed, prior to the suggestion that Balfour had any claim to the Hire, KGK had duly made payments of sums due to Manchester under various charterparties. On 26 September 2016, when KGK fell slightly behind in making payments due, it made a payment proposal to Manchester, by which it proposed a timetable by which it would make all outstanding payments in short order.

    28.3. The payment proposal was sent to Mr Sochin who had been dealing with KGK on the basis that he was authorised to act on behalf of Manchester. (There is a dispute, which I am not asked to determine, as to whether he was in fact so authorised; however, certainly by 1 July 2016 he was no longer authorised to act on Manchester's behalf).

    28.4. Having received KGK's payment proposal, Mr Sochin did not, however, disclose it to Manchester but, instead, fabricated a backdated letter dated 1 March 2016 which stated that KGK owed the Hire to Balfour. Mr Sochin then fabricated the Balfour Charterparties.

    28.5. Following Balfour's claim to the Hire, unsurprisingly KGK did not make payment of the Hire to Manchester. The effect of Balfour's claim, at its lowest, was to embroil Manchester in long and protracted litigation in Russia, involving two competing claims to the same debt.

    28.6. I accept the submission made by Mr Vineall QC, Leading Counsel for Manchester, that this was not a risk which Manchester assumed simply by entering into the Manchester Charterparties with KGK. As Mr Vineall submitted, the risk of having

to take steps to enforce a straightforward debt claim against a Russian counterparty in a Russian Court is very different proposition to the risk that materialised as a result of the Defendants' conduct.

28.7. Further, the fact that KGK has not paid the Hire, following the decisions of the courts in Russia that KGK owes those sums to Manchester, does not establish that KGK was unwilling or unable to pay those sums in 2016 when they fell due; in fact, at that time, as I have mentioned, KGK was making payment proposals to Manchester. Likewise Mr Systra's evidence cuts both ways: as Manchester submits, it shows that, contrary to the Defendants' case, in October 2016, KGK had access to funds and therefore was able to make payment of the Hire; it is true that KGK nevertheless did not do so – but until relatively recently, it was not clear to whom payment should be made.

28.8. Nor does the fact that KGK mounted its own appeal challenging the decision that the Hire was owed to Manchester (and not Balfour) and that it is seeking now to challenge the Morshelf Assignment establish that KGK would never have paid the Hire to Manchester. KGK's conduct in resisting payment of the Hire in litigation involving Balfour and Morshelf has only been possible as a result of the Defendants' wrongful actions – and it may well be that, but for the Defendants' interference, KGK would have paid the Hire to Manchester in accordance with its payment proposals. I note, in any case, that the Defendants' assertions on this Application that KGK would never have paid the Hire to Manchester is not a point that has been pleaded in their Defence and it is not an allegation that I can determine on this Application.

28.9. As for the Morshelf Assignment, as I have indicated earlier in this Judgment, the parties accept that I am not in a position on this Application to determine whether or not it was an arm's-length assignment. For present purposes I accept that Manchester has a good arguable case that, as a result of the claim made by Balfour to the Hire, Manchester became concerned as to its prospects of advancing a competing claim and, for that reason, entered into the Morshelf Assignment on the terms it did. As matters stand, no amount of the Hire has been paid to Manchester by Morshelf. Manchester accepts that it must give credit for any sums received.

28.10. Finally, I do not accept the Defendants' alternative submission that Manchester has only suffered a loss in respect of the 1% of the Hire to which it was entitled to retain as commission. Pursuant to the Manchester Charterparties, the Hire (and not just the 1% commission) was payable to Manchester and accordingly it is entitled to sue for the full amount. The arrangements it made in respect of any onward payment are not relevant to its present claim.

29. Accordingly, in my judgment I am satisfied that Manchester has a good arguable claim that it has suffered loss in the amount of the Hire and that, subject to the Defendants' alternative ground which I consider below, it is appropriate to continue the relief granted by Males J in the form and amount of the WWFOs.

Ground 2: Material non-disclosure

30. The Defendants also submit that the WWFO should be discharged on the grounds that, on the without notice application, Manchester committed multiple (and serious) breaches of its duty of full and frank disclosure.

31. In summary, the Defendants rely on six categories of alleged breaches as follows:

    31.1. First, it is said that Manchester failed to make full disclosure in relation to the merits of its case on causation and loss.
    31.2. Second, that Manchester failed to make proper disclosure in relation to the Ark Charterparties.
    31.3. Third, that Mr Baranov's connection with these proceedings was not disclosed.
    31.4. Fourth, that full disclosure in relation to the Morshelf assignment was not made.
    31.5. Fifth, that full disclosure of the delay in making the without notice application was not made.
    31.6. Finally, that there was non-disclosure in relation to Mr Townley's alleged prior dishonesty.

32. I consider each category in turn below.

Relevant legal principles

33. The principles applicable in considering whether there was material non-disclosure in an application for a without notice freezing injunction were summarised by Cooke J in *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm) as follows:

> "65. ... The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made. The question of materiality is a matter for the court and not the subjective judgment of the applicant or his lawyers.
> 66. There is a high duty on the applicant which can be summarised as follows, by reference to CPR 25.3.5 and authorities there referred to:
> "(1) The duty on the applicant in such circumstances goes beyond merely identifying points of defence which might be taken against him, important though that is.
> (2) The applicant has to show the utmost good faith, identifying the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents.
> (3) The applicant has to investigate the nature of the claim asserted and the facts relied on before applying, and has to identify any likely defences. He has to disclose all facts which reasonably could or would be taken into account by the Court. The duty is not restricted to matters of fact but extends to matters of law.
> (4) The applicant also has a duty to investigate the facts and fairly to present the evidence.
> (5) There is a high duty to draw the Court's attention to significant factual, legal and procedural aspects of the case.

(6) Full disclosure has to be linked with fair presentation. The judge has to have complete confidence in the thoroughness and the objectivity of those presenting the case for the applicant.
(7) It is the undoubted duty of counsel to draw to the judge's attention weaknesses in his case and to make sure the judge understands what might be said on the other side even if the judge says he has read the papers."
67. I take into account the comments made in Brinks Mat v Elcombe [1988] 1 WLR 1350 at paragraphs 6 and 7 of the judgment of Ralph Gibson LJ and at pages 1358C-G and 1359C-E in the judgments of the other Lords Justices in the context of the consequences which should be visited or not visited upon the applicant who fails in his duties. The authorities show that the interests of justice must be paramount and that a due sense of proportion is required in relation to the assessment of the seriousness of the breach. Moreover, caution must be observed when the non-disclosure in question depends on proof of facts which are in issue in the action and the court must not conduct a mini-trial."

34. On that last point, the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381 emphasised that the duty to disclose does not mean that the applicant must rehearse before the Judge at the without notice application a detailed analysis of the possible inferences the defendant may seek to rely on especially when the existence and relevance of the underlying facts are disputed.

35. The ambit and significance of the duty of full and frank disclosure was recently analysed in *Fundo Soberano De Angola & Others v Dos Santos & Others* [2018] EWHC 2199 (Comm) (at [50]-[53]) in which by Popplewell J described the duty of the applicant as a duty to make full and fair disclosure of all of the material facts.

Analysis

36. The Defendants devoted a large part of the evidence served in support of this Application to their various allegations of non-disclosure. However, in relation to many of those allegations, neither the evidence nor the written submissions served by the Defendants identified with any precision the facts and matters alleged not to have been disclosed. It was only during the hearing before me that the Defendants identified the specific matters about which complaint was made (in the form of a schedule handed up towards the end of Mr Hayman's oral submissions).

37. Overall, I found the Defendants' scattergun approach of making a large number of generalised complaints in lengthy and discursive evidence extremely unsatisfactory. It is trite that allegations of non-disclosure should be capable of being concisely and precisely stated. Further, the question is whether Manchester made full and fair disclosure of all of the material facts to Males J on the without notice application. In my judgment, it did. Manchester set out the crucial points in its evidence and written submissions, which the Judge confirmed he had read. Manchester fairly drew attention to factual and legal points in issue as well as arguments the other side might advance. I was not persuaded by the Defendants' submissions to the contrary, but nevertheless I consider below each of the specific heads of non-disclosure alleged.

Alleged material non-disclosure in relation to the merits of Manchester's case on causation and loss

38. The Defendants allege that Manchester failed to disclose the following facts and matters, namely that:

    38.1. Manchester had no evidence to support the proposition that KGK would ever have paid the Hire.

    38.2. The absence of such evidence was a difficulty which Manchester had the power to overcome since it had access to Mr Systra who could have explained KGK's reasons for refusing or failing to pay Manchester.

    38.3. There were a number of matters which strongly indicated that KGK would not have paid Manchester in any event.

    38.4. There were a number of risks faced by Manchester which were not causally connected with any alleged wrongdoing, in particular credit/counterparty and jurisdiction risk.

    38.5. There was a strong argument that the Morshelf Assignment was not by way of mitigation of loss because it mitigated pre-existing jurisdiction and credit counterparty risk.

    38.6. The nature of Manchester's relationship with Silverburn meant that on its own case Manchester's real loss was only 1% of the Hire.

39. A number of these points simply rehearse the submissions made in support of the first limb of the Defendants' application, which I have rejected for the reasons set out above. In any case, I do not accept that Manchester failed to make proper disclosure of these matters at the without notice hearing before Males J. In my judgment, Mr Townley's evidence and Manchester's submissions addressed the key factual points and arguments. In particular, so far as KGK's ability and/or willingness to make payment is concerned, Mr Townley's evidence set out Manchester's attempts to be paid by KGK and the failure to obtain such payment. In this regard, I note that the Defendants' own position was somewhat inconsistent, it being suggested, on the one hand, that KGK was in financial difficulties and therefore was unable to make payment of the Hire, yet on the other hand it was Mr Sochin's own evidence that KGK was good for the money, which is no doubt why he went to the trouble of forging documents to divert payment of the Hire to Balfour.

40. Accordingly I see no merit in this alleged category of non-disclosure.

Alleged non-disclosure in relation to the Ark Charterparties

41. The Defendants submit that Manchester failed to inform the Court of the existence and terms of the Ark Charterparties and/or failed to make proper enquiries which would have brought those documents to light, in breach of its obligations of full and frank disclosure.

It is said that, had Manchester done so, it would have had a significant impact on the Court's assessment of the merits at the without notice hearing.

42. Specifically, the Defendants contend that:

42.1. The Ark Charterparties were relied upon by Morshelf in the Russian proceedings. Thus even if Manchester was itself unaware of the existence of the Ark Charterparties, had it made reasonable enquiries prior to applying for the WWFO, that would have included enquiries of Morshelf about what was going on in the Russian proceedings.

42.2. In any case, Manchester was still in fact a party to the Russian proceedings when Morshelf deployed the Ark Charterparties and moreover, there was plainly coordination between Manchester and Morshelf in relation to the Russian proceedings (in particular through Mr Systra) so it would and/or should have been possible for Manchester to make appropriate enquiries and/or obtain documents from the Court file.

43. Manchester's submissions can be summarised as follows:

43.1. At the time of the without notice application for the WWFOs, Mr Townley was unaware of the existence of the purported Charterparties. It is accepted that if he had been aware of them he should (and would) have disclosed them.

43.2. It is not accepted that Manchester failed in its duty to make reasonable enquiries. On the Defendants' case it is not even clear what specific enquiries ought to have been made by Mr Townley that would have led to him discovering that such documents existed. In particular, Manchester had no reason to suspect that any such documents existed and no reason to ask Morshelf about them. Ark did not invoice Manchester until 2018, namely after the date on which the WWFOs were made. Thus it is unclear why Manchester would have anticipated that the Defendants would advance the case that since 2015 there existed charterparties under which Ark had not made any claims but which entitled Ark to payment of 99% of the Hire.

43.3. The Ark Charterparties are, in any case, irrelevant to Manchester's claim against KGK and thus would not have affected (and should not now affect) the Court's assessment of the merits.

43.4. For the avoidance of doubt, Manchester's case is that the Ark Charterparties are forgeries. In this regard, Manchester relies upon the facts that (a) the Ark Charterparties have emerged very late in the day, in circumstances where Mr Sochin had disavowed (in other proceedings) the existence of any charterparty between Manchester and Ark ; and (b) Mr Sochin's conduct to date in forging documents.

43.5. Finally, Manchester contends that the decision to substitute Morshelf for Manchester was made on 23rd January 2018. The Ark Charterparties were only put on the court file in the Russian proceedings thereafter, on 31st January 2018. Thus Manchester was not a party to the proceedings when the Ark Charterparties were put on the court file. Nor is it clear on the Defendants' case how copies of that evidence would have

been obtained from the court file or what enquiries in this regard (and/or from Morshelf) should have been made.

44. I accept Manchester's submissions that there was neither an actual failure to disclose a document in the possession of Manchester nor was there a constructive failure since there was no breach of any obligation to make reasonable enquiries. In my judgment, it is not obvious that any enquiries reasonably made by Manchester would have revealed the existence of the Ark Charterparties. In any case, I agree that the Ark Charterparties are not relevant to Manchester's claim against Balfour.

45. So far as the issue of authenticity is concerned, as both parties accept, on the without notice application it would not have been possible for the Court to determine whether the Ark Charterparties were genuine, nor is it possible for me to do so on this application.

Material non-disclosure in relation to the role of Mr Baranov

46. It is the Defendants' case that Manchester has not brought these proceedings for the proper purpose of vindicating any legitimate interest of its own but rather has acted at the direction of Mr Baranov, and for the improper purpose of securing an advantage in his ongoing dispute with Mr Sochin. The Defendants submit that the evidence which they have served in support of the Discharge Application (and, in particular, Ms Prince's third witness statement) provide compelling support for that case. However, they also accept that it is disputed by the Defendants, and that it is unlikely that the Court will consider itself able finally to determine the issue in the context of an interlocutory application.

47. For the purposes of the Discharge Application, therefore, the Defendants submit that there were a large number of matters which strongly suggested that Manchester was acting for the improper purpose which the Defendants allege, and which were not drawn to the Court's attention:

    47.1. First, it is said that Manchester's financial position was not disclosed to the Court. The Defendants contend that Manchester should have put its accounts in evidence and explained that these accounts show that it does not have sufficient resources to prosecute these proceedings or render it commercially rational for it to do so.

    47.2. Second, the Defendants allege that Manchester failed to inform Males J that its commercial viability was (and is) entirely dependent upon its relationship with Mr Baranov, and therefore Manchester failed to address the inference that it was subject to the de facto control of Mr Baranov and was seeking the WWFOs at his direction and for his benefit (essentially it said that Manchester is fronting for Silverburn).

    47.3. Third, the Defendants submit that Manchester failed to disclose that the value of Manchester's commercial interest in these proceedings was *de minimis* and that thus its decision to bring these proceedings made no commercial sense.

    47.4. Finally, the Defendants suggest that it is to be inferred from correspondence, including email correspondence between Mr Baranov and Manchester's solicitors, that Manchester failed to make a full and fair presentation of Mr Baranov's

involvement in these proceedings. Manchester also failed to disclose that its solicitors acted for Mr Baranov in related proceedings.

48. For its part, Manchester denies that Mr Baranov controls it and submits that it has a good claim against the Defendants which it is entitled to assert. In relation to the non-disclosures alleged:

    48.1. Manchester submits that in his evidence served in support of the application for the WWFOs, Mr Townley disclosed that Mr Baranov knew about the claim, supported the claim and will benefit through Silverburn. He also made it plain that Manchester was reliant on information from Mr Baranov in relation to the claim and identified the aspects of the evidence relied upon for which Mr Baranov was the source.

    48.2. Further, Manchester's financial position and its interest in the sums claimed was disclosed to the Court. Males J was shown that Manchester had £2m in its bank account at the time of the without notice application and Manchester also disclosed that its interest in the sums sought to be recovered was *de minimis*.

    48.3. In addition Manchester made plain the extent of Silverburn's interest in the outcome of its claim (again through the evidence of Mr Townley).

49. In my judgment Manchester did indeed make appropriate disclosure of these matters to Males J. Moreover I accept that Mr Vineall's submissions that, in any case, Mr Baranov's ultimate interest and Manchester's financial position and interest in the sums does not change the fact that Manchester is owed the Hire and is entitled to bring proceedings in relation thereto. I also accept that no adverse inference can be drawn that Mr Baranov was or is controlling these proceedings or giving instructions from the email correspondence I was shown. All it appears to show is that an arrangement was put in place to ensure that confidential information was not passed to Mr Baranov.

50. Accordingly, I reject the Defendants' submissions that Manchester failed to make proper disclosure in this regard.

The Morshelf Assignment

51. The Defendants submit that Manchester failed to draw attention to factors which strongly indicated that the Morshelf assignment was not an arm's length commercial agreement. In summary, the Defendants allege that Morshelf and Mr Baranov/Manchester are connected parties on the grounds that Mr and Mrs Systra, two former employees of KGK's managing company, who were fired in November 2017 now have direct control over Morshelf and there is evidence which suggests that the Systras were associates of Mr Baranov.

52. Manchester is criticised by the Defendants: (a) for not making sufficient disclosure of and/or enquiries about the relationship between Mr Baranov and Morshelf; and (b) for failing to identify the Systras as Manchester's source of documentation from within KGK. In addition, the Defendants contend that Manchester's explanation of the commercial rationale for the Morshelf Assignment is incoherent.

53. The Defendants accept, however, that even had these factors been disclosed, Males J could not have determined the substantive issue of whether the Morshelf Assignment was at arm's length and, accordingly, the Defendants are not in a position to contend that any such non-disclosure had any impact on the Court's assessment of the merits of the application for the WWFOs. In my judgment it did not do so. The points made by the Defendants go to that substantive issue, which is hotly contested and will be determined at trial. On the without notice application before Males J Manchester properly drew the Court's attention (at a general level) to the competing positions of the parties on that substantive issue. It was not incumbent on Manchester on the without notice application to seek to draw every inference or present every possible argument that the Defendants might make at trial. Accordingly, I reject the Defendants' submissions that there was material non-disclosure in relation to the Morshelf Assignment.

Alleged material non-disclosure in relation to delay

54. The Defendants submit that Manchester failed to explain to Males J that it knew all it needed to know in March 2017 in order to make an application from the WWFOs. Accordingly, Manchester failed to draw attention to the fact that the delay which required explanation was much more substantial than the time period addressed in Mr Townley's first affidavit. Manchester also failed to draw attention to the obvious weaknesses in its attempt to justify the delay by reference to a mediation in April 2018 and to proceedings in Russia and the Isle of Man, which involved Mr Baranov and not Manchester.

55. Manchester's response is as follows:

55.1. The Defendants make allegations of delay simply to bolster their case on non-disclosure, but it is not suggested that by itself such delay would be a material breach sufficient to discharge the freezing order.

55.2. In any case, Manchester submits that there was no such non-disclosure. The matters that needed to be put before the Court on the without notice application were as follows, that:

(a) The non-payment of Hire had been known about since 2016. In March 2017, Mr Baranov wrote to Mr Sochin accusing him of diverting the Hire. Mr Sochin's response was that Mr Baranov could not prove it.

(b) It was only in November 2017 that forged documents, including the back-dated letter and the sham (Balfour) charterparties came to Manchester's attention. Thus, before November 2017 Manchester had no documentary evidence to support the conspiracy it alleged.

(c) All of this was disclosed to Males J. The relevant chronology was set out by Mr Townley in his evidence in support of Manchester's application for the WWFOs.

(d) In these circumstances, Mr Townley focused in his evidence particularly on the delay from November 2017, giving reasons why the application had not been made closer to November 2017, including what was going on in other proceedings.

56. In my judgment, there is force in the essential submission made by Mr Vineall that it was not realistic for Manchester to seek the WWFOs without evidence to substantiate the allegations made. Once it had such evidence there was undoubtedly a delay in making the without notice application, but such delay was apparent to Males J from the evidence before him. In any case, even if it was not, I accept Mr Vineall's submission that any such delay was not material and would not have made a difference to the Court's assessment of the merits of the without notice application for the WWFOs.

Alleged material non-disclosure in relation to Mr Townley's alleged prior dishonesty

57. In an affidavit filed by Mr Sochin in the Manx proceedings, he raised an allegation of dishonesty against Mr Townley in relation to dealings between Ark and a Cypriot company called Endthwaite concerning a tug known as MB-1204. In short, Mr Sochin alleged that Mr Townley had falsely claimed that he had been misled by Mr Sochin's son into signing what Mr Townley thought was a charterparty for the MB-1204, but was, in fact, a sale agreement.

58. The Defendants submit that whilst Mr Townley mentioned the dispute between Ark and Endthwaite in paragraph 77 of his evidence served in support of the application for the WWFOs (which dispute was in fact settled in November 2017), his presentation was not full and frank because it failed to disclose the existence of relevant documentation which undermined Mr Townley's stance that it was simply a question of his word against another's.

59. I do not accept that submission. Mr Townley identified the (separate) dispute in his evidence. He was not, in my view, required to provide the level of detail suggested by the Defendants in order to make a full and fair presentation of the material facts relevant to the Court's assessment of the merits of the application for the WWFOs, which were sought in support of a different claim. Accordingly I reject this final head of complaint.

Conclusion

60. For the reasons set out above, I reject the Discharge Application.

61. One final point I should address relates to the ongoing developments in Russia and payments made by KGK to Morshelf. At the hearing before me, Mr Vineall updated the Court as to the up-to-date position in the Russian proceedings on the basis of enquiries made by his Instructing Solicitors. Following the hearing, both sides served further evidence and written submissions in relation to further enquiries that had been made.

62. For present purposes, it is not necessary for me to analyse those submissions at length. I accept Manchester's ultimate submission that, as matters stand, none of the developments or points identified by the parties affect Manchester's claim in these proceedings or its entitlement (at this stage) to the WWFOs. Manchester has already confirmed that if it recovers sums from Morshelf, then it will give credit as appropriate.

63. I will hear submissions on any further or consequential directions that may be appropriate.