Neutral Citation Number: [2019] EWHC 2031 (Comm)

Case No: CL-2018-000498

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2019

THE HONOURABLE MRS JUSTICE CARR

- -

Between :

Alexander Tugushev

Claimant

- and –

(1) Vitaly Orlov
(2) Magnus Roth
(3) Andrey Petrik

Defendants

JUDGMENT NO 2

- -
- -

Ms Helen Davies QC, Mr Richard Slade QC and Mr Richard Blakeley (instructed by **Peters & Peters Solicitors LLP**) for the **Claimant**
Mr Christopher Pymont QC, Mr George Hayman QC, Mr Benjamin John and Mr James Kinman (instructed by **Macfarlanes LLP**) for the **First Defendant**

Hearing dates: 12, 13, 14 June 2019

- -

Approved Judgment

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

.....

THE HONOURABLE MRS JUSTICE CARR

Mrs Justice Carr :

Introduction

1. This is the second reserved judgment in this litigation, the full background to which can be found in my judgment earlier this year (*Tugushev v Orlov and others* [2019] EWHC 645 (Comm)) ("the jurisdiction judgment"). There I held that the English courts have jurisdiction to entertain the claims against Mr Orlov on the basis of his domicile in England (and in the alternative that permission should be granted to serve out of the jurisdiction under CPR 6.36). I refused permission to appeal against that decision; Mr Orlov is currently exercising his right to renew his application for permission to appeal against it before the Court of Appeal.

2. I adopt below the same definitions and abbreviations as before and again nothing in this judgment is intended to lift confidentiality attaching to material in the confidentiality ring.

3. Following a resumed hearing, the issues now before the court are:

    i) Mr Orlov's challenge to the WFO and to the order permitting service out of the jurisdiction ("the service out order") on the basis of alleged breaches by Mr Tugushev of his duty of full and frank disclosure on his without notice application before Bryan J ("the non-disclosure application");

    ii) Mr Tugushev's application to continue the WFO/the WFO challenge by Mr Orlov ("the continuation application");

    iii) (if the WFO survives) Mr Tugushev's application for permission to apply in Russia to freeze assets ("the domestication application").

4. The parties have again engaged in some intricate footwork, for which I do not criticise them. But I propose to limit this judgment to the key points that have arisen. That should not be taken as any indication that I have not considered the full detail of the material advanced in reaching the conclusions that I have.

The non-disclosure application

5. Mr Orlov identifies the following four main categories of alleged failures by Mr Tugushev of his duty of full and frank disclosure:

    i) A (deliberate) failure fairly to present his prior conviction for fraud;

    ii) A (deliberate) failure to present fairly the credibility of Mr Orlov's claim that Mr Tugushev had divested himself of his shares in AA before taking up public office in 2003;

    iii) A (deliberate) failure to draw the court's attention to Mr Tugushev's previous statements that he had knowingly transferred his shares in AA to Mr Orlov and Mr Roth in 2003;

    iv) A (deliberate) failure to inform the court of parallel criminal proceedings in Russia.

6. He further relies on the following additional specific matters:

   i) A (deliberately) misleading presentation of evidence regarding Mr Orlov's domicile;

   ii) A failure (by oversight) to inform the court of evidence illegally obtained;

   iii) A failure (deliberate or by oversight) to inform the court that Mr Orlov had been found to be not resident in England in the Norwegian proceedings;

   iv) A failure (by oversight) to take the court appropriately through the application for permission to serve out of the jurisdiction pursuant to the tort or necessary or proper party gateways;

   v) A failure (by oversight) to address the court on the question of the governing law of his claims;

   vi) Reliance on illicitly recorded conversations between Mr Tugushev and Mr Orlov without (deliberately or by oversight) drawing attention to Mr Orlov's previous comments on these recordings.

The law

7. The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:

   i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;

   ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;

   iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

   iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no

amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the

importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.

(See in particular *Memory Corporation plc and another v Sidhu and another* (No 2) [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)

8. There is no suggestion that the same principles do not apply to a without notice application for permission to serve out as they do on a without notice application for a freezing order (as confirmed for example in *PJSC Commercial Bank PrivatBank v Kolomoisky and others* (supra) at [169] and *Sloutsker v Romanova* [2015] EWHC 545 (QB) at [52]) .

Category 1: failure to give fair presentation of conviction

9. In 2004 Mr Tugushev was arrested in Russia, subsequently convicted (in 2007) and sentenced to six years' imprisonment on charges of fraud. He later confessed but he says only as part of his parole application in order to secure his release from prison (in December 2009).

10. In his affidavit in support of his application Mr Tugushev addressed this as follows:

> "6.2 In 2004 I was arrested in Russia, subsequently convicted and sentenced to 6 years' imprisonment on charges of fraud. The charges against me were politically motivated and were untrue….
>
> 32. On 2 June 2004, I was arrested in connection with allegations of fraud under article 159(4) of the Criminal Code of the Russian Federation made against me by one Mr Alexandrov. The allegations were that I, assisted by others, received a payment of US$3.7 million in exchange for

> promising to award a 50,000 tons per annum fishing quota whilst knowing that my post at the State Committee did not carry with it the authority necessary to award such quota. Mr Alexandrov alleged that he was an intermediary in that arrangement and that it was he who paid the money and lost out. He claimed damages against me in a civil claim adjunct to the criminal proceedings. The allegations were wholly false. I believe that another deputy chairman at the State Committee Mr Burkov and his associate Mr Egiazaryan, at the time an influential member of the Russian State Duma, were behind my arrest because I refused to acquiesce in their plans to turn the State Committee into a vehicle for generating wealth for them. Mr Egiazaryan has close ties with Main Directorate for Organised Crime Control ("GUBOP"), which arrested me. I believe that Mr Burkov and Mr Egiazaryan influenced Mr Alexandrov into making the false allegations. I do not know what the basis of that influence was.
>
> 33. Despite the falsity of the charge, after a delay of 3 years, on 15 February 2007 I was convicted and sentenced to six years imprisonment. Having served a considerable amount of the sentence on remand, I was released on 2 December 2009. My conviction, which I maintain was wrongful, is now spent under Russian Law."

11. Mr Tugushev's skeleton argument on the without notice application also referred to the conviction (and Mr Tugushev's belief that the charges against him were politically motivated and untrue), and Bryan J referred to it in his judgment as follows:

> "15. Then on 2 June 2004, Mr Tugushev was arrested under Article 159(4) of the Criminal Code of the Russian Federation in relation to allegations of fraud which resulted in Mr Tugushev being sentenced to 6 years' imprisonment. He was released from prison on 2 December 2009 and returned to the Norebo Group. I should say Mr Tugushev denies those charges and believes they were politically motivated…"

12. The criticism now levelled at Mr Tugushev is that he did not set out the full detail and strength of the prosecution case against him, as revealed in a lengthy judgment of the Tverskoy District Court upon sentence. The offending involved deception, extortion and abuse of power, namely Mr Tugushev's governmental position as Deputy Head of the Russian Fishery Committee. Mr Tugushev extracted US$3.7million from the owners of a company named Pollucks LLC in exchange for his promise of additional fishing quotas which he was in fact not in a position to grant. It is said that there was overwhelming evidence against Mr Tugushev from multiple witnesses. The Russian police carried out a sophisticated "sting" operation which captured and recorded incriminating conversations involving Mr Tugushev.

13. Mr Orlov submits that this was an egregious failure which misled the court as to the cogency of the evidence against Mr Tugushev. The court should not have been allowed to contemplate that there was any possibility of Mr Tugushev launching a credible attack on his conviction. A proper understanding of the strength of the conviction would have coloured the court's approach on all aspects of the case; it would have known that Mr Tugushev's evidence could not be accepted without corroborating testimony.

14. I am not attracted by the submission for Mr Tugushev that, because this issue went to Mr Tugushev's credibility only, a lesser standard of disclosure was required. This is a case where the credibility of the parties is central. It would have been better to say more by, for example, fleshing out the use of a covert police operation and incriminating recordings of meetings and telephone conversations.

15. But it is a question of degree. Paragraph 6 of Mr Tugushev's affidavit would not have sufficed. But in paragraph 32 he set out :

    i) the precise charge against him;

    ii) the sum involved in the fraud;

    iii) the fact that the conviction related not only to fraud but abuse of position;

    iv) the sentence imposed.

16. Mr Tugushev was entitled to express his view that the charge was politically motivated and to deny it, a position which he maintains today. On balance, I have concluded that he did enough and I do not find that there was a material failure to give full and frank disclosure or fair presentation in this regard. The conviction was squarely before the court. It is reasonable to assume that Bryan J would have understood that a conviction leading to a sentence of six years' imprisonment was based on substantive evidence of fraud on the part of Mr Tugushev, even if Mr Tugushev denied any criminality. In other words, in all the circumstances, the effect of the affidavit was not such as to mislead the court in a material respect.

<u>Category 2: failure to disclose declarations and statements relating to AA shareholding in 2003</u>

17. This category arises out of documents only very recently discovered by Mr Orlov. Mr Orlov submits that the documents demonstrate that, contrary to Mr Tugushev's case and just as Mr Orlov has always maintained, Mr Tugushev divested his shares in AA in 2003 - as he was obliged to do upon taking up public office in September 2003.

The issue

18. Mr Tugushev was at all material times aware that Mr Orlov's defence to the AA conspiracy claim would include the assertion that Mr Tugushev had disposed of his shareholding in AA before taking up his appointment as Deputy Chairman to the State Fisheries Committee of the Russian Federation ("the State Fisheries Committee").

19. For this reason he deposed by affidavit in support of his application for the WFO and in his Particulars of Claim (at paragraph 13) that he retained this shareholding

notwithstanding his appointment to public office. At paragraph 113 of his affidavit he stated that he understood that the false assertion that he had sold his AA shares in 2003 was being advanced to resist his disclosure application in Norway. In paragraph 114 of his affidavit he quoted from a statement of Mr Orlov dated 7 December 2015 including the following:

> "Around the beginning of 2003, A. Tugushev informed me that he decided to become a public employee of GosKomRybolovstvo. I tried to beguile him out of this, because I saw potential in our joint business.
>
> At the same time, A. Tugushev informed me that due to the federal legislation forbidding public employees to participate in any commercial activities, he intended to sell his share in the business. A. Tugushev and I agreed that his share in [AA] would be bought out by ZAO "Norebo Invest".

20. Mr Tugushev went on to say (at paragraph 115) that "the allegation is false in every respect". At paragraph 182 he stated:

> "As regards the case that I sold my AA shares in 2003:
>
> 182.1 I did not.
>
> 182.2 The relevant Russian legislation in force in September 2003, the Federal Law No 119 FZ of 31 July 1995, did not prohibit me from owning shares. It required Russian civil servants to place on trust their shares subject to a state guarantee but the mechanism for doing so was not yet enacted."

21. Leading counsel for Mr Tugushev then repeated in oral submission to Bryan J that Mr Orlov's assertion that Mr Tugushev had sold his shares in AA because of his appointment to public office was, so Mr Tugushev said, "wholly false". Thus Bryan J recorded in his judgment:

> "14. One thing that then happened was that on 22 September 2003, Mr Tugushev was appointed as Deputy Chairman of the State Fisheries Committee of the Russian Federation and as a result stepped down from his management role but retained, it is said, his shareholding and interest in the Norebo Group, although again I note that, from the material I have been shown, it has been alleged by Mr Orlov that that appointment led to Mr Tugushev divesting himself of his shares and any interest, something which is strongly denied by Mr Tugushev."

22. Following service of the WFO and Mr Tugushev's affidavit, Mr Orlov's solicitors pressed Mr Tugushev repeatedly on this issue. Evidence from Professor Maggs was served indicating that, upon appointment to the State Fisheries Committee, Mr Tugushev would have been required under Russian law to provide a signed

declaration and thereafter annual reports setting out prescribed particulars of any shares in which he was interested and any other income from or participation in commercial organisations. He was asked to produce those documents. The response from Mr Tugushev was that he did not have copies of any such documents, referring to his time in prison, and had no recollection of filing documentation of the kind suggested. Evidence was served from Mr Vaneev indicating that he was not prohibited under Russian law from owning shares whilst in public office. Mr Orlov maintained his position, as did Mr Tugushev his, stating that he had no memory of completing or filing such declarations in 2003 or 2004 among the many documents he would have had to sign upon taking office in the State Fisheries Committee.

The new documents

23. The new documents relied upon appear to have been discovered in May 2019 by two employees of AO Alternativa in the course of a document review being carried out because of a pending office move. The employees are said to have found a number of hard copy files comprising copies of documents from criminal case file No. 323823, the case file for the investigation resulting in Mr Tugushev's conviction for fraud. The discovery was reported to the Norebo Group which passed the documents on to Mr Orlov's lawyers.

24. That file contains a number of documents, in particular:

i) A Declaration of Compliance by an Individual with the Restrictions Associated with Holding an Official Position of the Russian Federation or a Government Position in the Federal Civil Service (in precisely the form anticipated by Professor Maggs) completed and signed by Mr Tugushev in hand on 22 May 2003. On the face of the document he declared that he had no shares or other equity interests in any commercial organisations;

ii) Internal governmental correspondence in January 2004 querying Mr Tugushev's compliance with applicable restrictions on his carrying out business activity or being a member of a commercial organisation's management body by reference to two specific companies. By handwritten letter dated 23 January 2004 in response Mr Tugushev stated that as at 22 September 2003 he was not a shareholder of nor held management positions in those companies, enclosing a list of supporting documents;

iii) Internal governmental correspondence later in January 2004 from the Acting Chairman of the State Fisheries Committee setting out a number of complaints about Mr Tugushev's conduct in office and requesting his removal and complaints about his interests in the two companies referred to above and a failure of disclosure on his part. A letter dated 27 January 2004 asserted that as at that date the Unified State Register of Taxpayers showed Mr Tugushev as a shareholder of Karatt CJSC, Sevkomp CJSC, Oktyabr CJSC and Murmanrybprom CJSC;

iv) A typed letter dated 5 February 2004 signed by Mr Tugushev in hand addressed to the Head of the Department of the Personnel and Civil Service in which he stated:

> "On the basis of data supplied by the Russian Ministry for Tax and Revenues regarding the participation of me…..as a founder of the companies [Karatt CJSC, Sevkomp CJSC, Oktyabr CJSC and Murmanrybprom CJSC], I hereby inform you that on entering government service I took all actions necessary to alienate shares and ownership interests in commercial organisations. As per the above, I …did not violate the Federal Law (On the Principles of State Service of the Russian Federation).
>
> Attached: Legal conclusion – 8 pages,
>
> Documents confirming the transfer of shares – 11 pages"
>
> The legal opinion attached was from a Russian law firm and concluded that, based on documents presented by Mr Tugushev, sufficient actions were taken by him prior to him taking up public office to transfer away his rights to the shares and equity interests in the four companies (and also Karat LLC). It noted that Mr Tugushev had passed his interests in Karatt CJSC and Karat LLC to AA. The documents attached recorded Mr Tugushev selling his shares in Oktyabr CJSC in 2002 to a Mr F V Kuznetsov, someone whom Mr Tugushev denied in 2016 being acquainted with or having ever met. They also showed a sale of shares in respect of Sevkomp CJSC and Murmanrybprom CJSC in January 2003, when Mr Tugushev said in 2016 he was on holiday outside the Russian Federation;

v) A further Declaration of Compliance by an Individual with the Restrictions Associated with Holding an Official Position of the Russian Federation or a Government Position in the Federal Civil Service (again in precisely the form anticipated by Professor Maggs) completed and signed by Mr Tugushev in hand on 29 March 2004. On the face of the document he declared that he had no shares or other equity interests in any commercial organisations.

25. Mr Orlov submits that these documents flatly contradict both Mr Tugushev's case in relation to the AA shares and the AA conspiracy, and his claim to have held a one third interest in a joint venture business since 1997. They are highly relevant to a key issue in and fundamental to the AA conspiracy claim. It is inconceivable that Mr Tugushev had forgotten these events. He was under pressure at the time and had to justify his position to the authorities. Whatever dispute there may be now between the Russian law experts, Mr Tugushev understood at the time that what was required of him upon taking public office was that he was not permitted to have any interest in commercial organisations. He was at pains to show that he was not breaking the requirements as he then understood them to be.

26. Mr Tugushev accepts that the documents are genuine and written and/or completed and/or signed by him. He states that he does not have copies of them:

> "Nor could I remember, and could not be reasonably expected to remember, the contents of any such documents dating back to early 2003 and 2004."

As for the declarations, he believes that at the time he was only required to disclose real property. Further, he would not have considered his interests in private unlisted companies to be securities and so would not have disclosed them for this reason as well. He did not commission or read the legal opinion that accompanied his letter of 5 February 2004. He relied on Mr Orlov and his cousin, Mr Romanovsky, to procure this material.

27. A number of detailed submissions are made on behalf of Mr Tugushev to demonstrate that this material is not as damaging to him as Mr Orlov suggests (or indeed damaging at all), including the following:

    i) In both declarations Mr Tugushev only completed the real property section, crossing out for example the section for money in accounts in banks and other credit organisations. This supports his evidence that he believed he only had to declare real property interests. (Mr Orlov submits that this is a particularly difficult submission by the time it comes to the declaration in March 2004);

    ii) Mr Tugushev has consistently said that he had no recollection of filing any such documentation. He was required to sign a great many documents on taking up office at the State Fisheries Committee;

    iii) The dates of the transfers of shares in Oktyabr CJSC (in 2002) and in respect of Sevkomp CJSC and Murmanrybprom CJSC in January 2003 had nothing to do with (being well in advance) of his taking up office in September 2003 (if those dates are correct). Equally, the transfers relating to Karatt CJSC and Karat LLC are dated December 2002;

    iv) The fact that the legal opinion records transfers of shares in Karat LLC by Mr Tugushev to AA provides significant support for Mr Tugushev: had Mr Tugushev disposed of his shares in AA and understood that he needed to show that he had divested himself of all shareholdings, he would have volunteered as much about AA, just as he was volunteering information about Karat LLC;

    v) Mr Tugushev's statement in the letter of 5 February 2004 was, in context, limited to the specific companies under scrutiny.

28. These submissions, with which Mr Orlov in any event takes strong issue, miss the point so far as non-disclosure is concerned. Mr Tugushev will have the opportunity at trial fully to explain his position on these documents. But the fact that he completed the forms and declarations and wrote the letters in the terms that he did is a) directly material to the AA conspiracy claim and b) undisputed. This unquestionably would have been disclosed at the without notice hearing, had Mr Tugushev's lawyers been made aware. Mr Tugushev's construction and explanation of the documents could have been advanced alongside them, but the documents are at the very least arguably consistent with Mr Orlov's case and inconsistent with that of Mr Tugushev. They were undoubtedly material.

29. The question then is whether the failure on the part of Mr Tugushev to disclose these matters was deliberate. There is real force in Mr Orlov's submission that the failure cannot have been an oversight or innocent. The challenge to Mr Tugushev's ability to serve in public office because of the existence of corporate shareholdings was not a

fleeting issue nor was it on any view an unimportant one. It involved formal declarations to officials by Mr Tugushev on two separate occasions, personal handwritten correspondence from him and the involvement of lawyers. Although the events took place some time ago, the AA conspiracy claim is rooted in events going back to 1997 and thereafter, which Mr Tugushev has explored in detail. Moreover, Mr Tugushev examined his criminal files in 2005 which, so it would appear, contained the documents in question. He has said that he became "deeply familiar" with the contents of the files which were presented for review by him and his defence lawyers for a period of over four months.

30. In the face of Mr Tugushev's assertion that he had forgotten about these events at the time of his application for the WFO, however, it would not be right for me to conclude on an interlocutory basis that his failure to disclose them was intentional. Mr Tugushev then invites me to conclude that his duty of reasonable enquiry did not extend to matters in 2003 and 2004 which he did not recall. I cannot accept this submission. His failure to investigate whether or not he had signed such declarations was a reckless disregard of his duty of full and frank disclosure to the court, particularly in the light of Mr Orlov's express contentions of which Mr Tugushev was well aware. Those contentions required Mr Tugushev to consider very carefully whether they might be correct and make relevant enquiries. Even if Mr Tugushev had forgotten about these events (or their main thrust, namely that he had been required to show at the time of taking up public office that he had divested himself of interests in commercial organisations), it was impossible for him reasonably to be certain that he had not signed such documents or written in the terms that he had. In this regard he wrongly overstated his position in his affidavit, making a positive case with a categoric outright denial of Mr Orlov's suggestion, not qualified for example by reference to any possible lack of recollection.

31. On notice of Mr Orlov's likely defence, Mr Tugushev was duty bound to make relevant enquiries of the authorities and those with whom he had been in contact at the time to confirm the position. He appears to have made none. He cannot show that due enquiry (of his lawyers at the time, his criminal files, the Civil Service, the Ministry of Fisheries and/or Taxes) would have been fruitless, not least since it is clear that relevant documents do still exist. Given the passage of time since the dispute had arisen (by early 2016), it also cannot be said that there was insufficient time to make relevant enquiries and investigations before the application.

32. The position is then aggravated by Mr Tugushev's subsequent flat and dismissive denials that there was any merit whatsoever in Mr Orlov's position on this issue and continued failure to research these events, something which I consider to be relevant to the exercise of my overall discretion.

<u>Category 3: failure to draw the court's attention to Mr Tugushev's previous statements that he had knowingly transferred his shares in AA to Mr Orlov and Mr Roth in 2003</u>

33. This category is based on Mr Tugushev's position that he did not know of or consent to the transfers of his shareholding in AA in July 2003. It breaks down into the following allegations of non-disclosure of the following facts:

    i) That Mr Tugushev told the Russian bailiff in 2012:

> "I have no properties. I'm neither a member, nor manager of any business entities. I hold no shares or bonds … I hold no shares in Roliz CJSC. I hold no shares in Almor Atlantika CJSC. I have not heard anything about the shares in those companies. I would found and be employed with them, but all shares were sold in 2003 to Karat company. I hold no shares in Akros. Nor am I employed with the company. I hold no shares in MTF OJSC.";

ii) That Mr Tugushev told the Russian Investigative Committee in March 2016:

> "In 2003, based on the agreement we had reached on creating Karat Holding, the shares of the above-listed companies [which include AA] were re-registered nominally to other individuals (nominee holders) who were friends of mine and V. Orlov and employees of companies that were to be combined into the Holding.";

iii) That one of Mr Tugushev's lawyers, Mr Begun, told the Russian Investigative Committee in April 2016:

> "A.I. Tugushev explained that since 1998 he has been a shareholder of Karat Group, however, at some point in time, when he was employed as a civil servant, he ceased to be the owner of shares and lost the relevant rights.";

iv) That Mr Tugushev had pleaded as follows in the Norwegian Proceedings:

> "At the time Tugushev entered into the public sector, there was no prohibition in Russian legislation against ownership of shares or ownership interests in private companies. The only condition set by Russian law was that Tugushev transferred his shares into a trust. However, there were no set requirements relating to how the trust wealth should be established or managed. Thus, Orlov and Roth managed Tugushev's shares on behalf of Tugushev, while he worked in the public sector.."
>
> and
>
> "In 2003, Mr Tugushev was appointed vice-chairman of the Fisheries Committee in Russia. The transition to the public meant that Tugushev could no longer participate in the daily follow-up of the Fisheries Group, and Tugushev's stake was placed in trust with Orlov and Roth."

34. I do not consider that there has been any material non-disclosure as alleged under this category. In broad terms, express and clear reference was made throughout the application to the fact that Mr Orlov would say that Mr Tugushev had voluntarily given up his shares in 2003. At the time of the application Mr Tugushev did not recollect his 2012 statement to the bailiff and did not have a copy of it. Having now seen it, he accepts that it was not accurate for him to have said to the bailiff that he

sold his shares in 2003; he explains what he meant and why he said what he did. Some of the material said to have been wrongfully withheld was in fact placed before the Judge: Mr Tugushev's statement to the Russian Investigative Committee was actually quoted in Mr Tugushev's affidavit (with his explanation). The April 2016 statement of Mr Begun (at meetings of which Mr Tugushev says he had no knowledge nor for which he had given Mr Begun any authority) was exhibited. The Judge was not taken expressly to the passages referred to in Mr Tugushev's pleadings in the Norwegian proceedings – but they essentially propounded the trust thesis already before Bryan J as a result of paragraph 182 of Mr Tugushev's affidavit. They do not amount to a pleading that Mr Tugushev's shares had been sold or his interests otherwise knowingly transferred.

35. Bearing in mind proportionality and the overall presentation of this aspect, I am not satisfied that there has been any material non-disclosure and certainly none that was deliberate.

Category 4: failure to inform the court of parallel criminal proceedings in Russia

36. A failure to disclose related proceedings in another jurisdiction may justify a discharge, not least since a judge needs to be satisfied that the grant of the order in question will not be oppressive (see *Behbehani v Salem* (supra) at 731).

37. Mr Orlov submits that Mr Tugushev failed to inform Bryan J that criminal proceedings (pursuant to Mr Tugushev's complaint of 18 January 2016) were to commence/had commenced against Mr Orlov on 25 July 2018, a fact that he must have known (at least by the return hearing date on the WFO of 30 July 2018). Mr Orlov's Russian lawyers discovered the commencement of the proceedings on 31 July 2018. The timings cannot have been accidental, submits Mr Orlov. A lawyer for Mr Orlov also states that, based on her experience, investigators normally fulfil their duty of informing a complainant such as Mr Tugushev immediately a decision to commence proceedings is taken. Further, given his links to the law enforcement authorities, she would be very surprised if he had not been aware of the intended order opening the criminal proceedings.

38. Mr Orlov also points to an update letter dated 17 April 2019 from a Russian official which states that the criminal investigation has established that the subject matter is a civil law matter and it is planned to terminate the criminal investigation for lack of evidence of any crime. The update states at the end:

> "[Mr] Tugushev was required to file an application with the law-enforcement agencies and open the criminal case for his statement of claim against [Mr] Orlov to be examined by the High Court of Justice of England and Wales."

39. Mr Tugushev states that he did not learn of the commencement of criminal proceedings against Mr Orlov until the morning of 30 July 2018 when he attended the Investigative Committee, at around the same time as the hearing on the return date was taking place. He left the meeting confused because of the passage of time since his complaint had been made and by the fact that Mr Orlov was not named as a suspect. At the time he did not think that the opening of the case had any immediate significance to what was happening in London.

40. I am not satisfied that Mr Tugushev knew at the time of the application for the WFO (or before the return hearing date) that criminal proceedings against Mr Orlov were about to commence/had commenced or that there was any material non-disclosure. Mr Tugushev put clearly before the court what he knew, namely that he made a criminal complaint against Mr Orlov, which had been transferred to the Investigative Committee in Moscow. Whilst in March 2018 the Investigative Committee had issued a decree declining to commence criminal proceedings, Mr Tugushev understood that the investigation might be continuing.

41. Against what is speculation that he must have known on 23 July 2018 that criminal proceedings were about to commence against Mr Orlov is Mr Tugushev's clear statement that he did not. The statement in the update letter about the need for criminal proceedings is technically inaccurate and difficult to understand. It would also be unsafe to rely on the letter in a vacuum: it was provided in response to a specific request for information regarding arguments set forth in a letter from one of Mr Orlov's lawyers which has not been disclosed. Additionally, there is force in Mr Tugushev's reasoning that he did not tell any Russian authorities about his intended application and proceedings against Mr Orlov in England in any way a) because of the strict need for secrecy in advance b) his distrust of the Russian criminal authorities and c) the real risk of leaks. The timing of the commencement of the proceedings is readily explicable by the fact that the time limits for the pre-investigation check were expiring at some point between 23 and 31 July 2018. Finally, Mr Tugushev points to the fact that, contrary to the expectations of Mr Orlov's lawyer, he was not informed by the Russian authorities of the decision to terminate the criminal investigation, something he learned only from Mr Orlov's lawyers in this litigation.

Additional matters

42. None of the further matters relied upon by Mr Orlov persuade me that there are any other instances of material non-disclosure such as would justify discharge of the WFO (or other sanction) (either separately or as part of the bigger picture).

43. I can take each ground of complaint shortly:

    i) A (deliberately) misleading presentation of evidence regarding Mr Orlov's domicile: it is said that Mr Tugushev adduced evidence from a private investigator which he knew to be very seriously misleading evidence, to the effect that Mr Orlov spent Christmas in England in at least 6 out of 9 years since 2009. In fact, to Mr Tugushev's knowledge (because he was there), Mr Orlov had spent Christmas with his sons in Austria in 2011, 2012 and 2013. Whilst Mr Tugushev's affidavit did refer to the fact that Mr Orlov had been in Austria in December 2013, the mistake has been rightly accepted. It was not identified by Mr Tugushev (who was apparently not taken through the detail of the private investigator's evidence) or his lawyers during the preparation of the application, and an apology has been given. It was an unfortunate (but in my judgment non-deliberate) error. The fact remains that Mr Orlov had spent some Christmases since 2009 in England with his family and there were multiple other factors pointing to a domicile here;

    ii) A failure (by oversight) to inform the court of evidence illegally obtained: it is said that a substantial part of Mr Tugushev's evidence as to Mr Orlov's

domicile was border data compiled by the Russian border service. It is said that this data cannot be lawfully obtained, a fact which ought to have been, but was not, made clear to the judge. Unlike the position in *Franses v Al Assad* [2007] EWHC 2442 (Ch), however, there is a lively debate between the parties' experts as to whether this is the case. The court could have been told in terms that there might be an issue as to whether the data had been lawfully obtained. But the court was made expressly aware that the data was not publicly available and had been obtained by Mr Tugushev's private investigator via a contact from the Russian Border Service. Bryan J was clearly alive to what he described as a "concern about how [the private investigator] obtained that information" but felt able to rely on the material nevertheless;

iii) A failure (deliberate or by oversight) to inform the court that Mr Orlov had been found to be not resident in England in the Norwegian proceedings: it is said that there was an unfair presentation of this finding. In particular, Mr Tugushev's skeleton argument stated that there had been no such finding: rather the Oslo County Court had "commented" that, based on the information and documentation provided by Mr Orlov's counsel, Mr Orlov was resident in Russia. But, the court was told, the Oslo County Court had not been given the full picture. I have addressed the nature and weight to be attached to the finding of the Oslo County Court at paragraphs 186 to 189 of my first judgment. Against those findings, it cannot be said that there was any material non-disclosure, deliberate or otherwise. The court's finding in the Norwegian proceedings was incidental and based on very limited material;

iv) A failure (by oversight) to take the court appropriately through the application for permission to serve out of the jurisdiction pursuant to the tort or necessary or proper party gateways: Mr Tugushev, who was represented by different leading and junior counsel before Bryan J, accepts that forum arguments were not addressed in the evidence, skeleton or oral argument in any detail before Bryan J. He accepts that the court should have been taken through the arguments and any obvious counterarguments (and it should have been made clear that the question of *forum non conveniens* fell to be considered at this stage). It is also accepted that the service out order falls to be set aside so far as it relates to the contractual claim. Without condoning them in any way, these were lawyers' shortcomings in a very complex and heavy application and in circumstances where the question of forum was immaterial to jurisdiction based on domicile. It is not suggested that they were deliberate. The court had the gateways and their requirements well in mind, including for example the need for Mr Petrik not to be sued merely as an anchor, as the transcript and ensuing judgment of Bryan J demonstrate, and I have now carried out the balancing exercise on the question of forum in Mr Tugushev's favour;

v) A failure (by oversight) to address the court on the question of the governing law of his claims: Mr Orlov points to his contention that Mr Tugushev's claims against him are governed by Russian law. Again, this was a lawyers' shortcoming. Mr Tugushev readily acknowledges that it would have been

better had the question of governing law been raised, but essentially for the sake of completeness only;

vi) Reliance on illicitly recorded conversations between Mr Tugushev and Mr Orlov without (deliberately or by oversight) drawing attention to Mr Orlov's previous comments on these recordings, in particular in a section of a pleading lodged by Mr Orlov in November 2017 in the Norwegian proceedings. The thrust of Mr Orlov's case as there set out, namely that he was resisting the Norwegian proceedings on the basis that Mr Tugushev had sold his shares in AA in 2003 and had no ownership or other interest in the Norebo Group, was always fairly and squarely before the court. Moreover, the specific transcript relied upon by Mr Orlov was before Bryan J as the first entry in Annex 2 to Mr Tugushev's skeleton argument. That Annex was drawn to the court's attention in the main body of the skeleton (at paragraph 97) expressly for the purpose of identifying examples of past comments by Mr Tugushev which did not correspond with how he was now putting his case.

Consequences of non-disclosure and sanction

44. The serious failure on the part of Mr Tugushev to make due enquiry in relation to his shareholding in AA upon his taking up position with the State Fisheries Committee in 2003 - despite Mr Orlov's express assertion that he had been obliged at that stage to divest himself of that shareholding - justifies discharge of the WFO. That Mr Tugushev had transferred his shares in AA upon the taking of public office in 2003 was (and remains) a core piece of Mr Orlov's defence to the AA conspiracy claim, as Mr Tugushev knew at all material times. I do not accept that the non-disclosure does not taint the WFO at all because the WFO was based (in terms of value) on the Norebo conspiracy claim (and not the lower value AA conspiracy claim). In this context it is artificial to separate out the merits of the separate conspiracies; the existence of one conspiracy (in forensic terms at least) can be said to support the existence of another and influences the overall picture before the court. Further, the alleged misappropriation by Mr Orlov in the AA conspiracy was specifically relied upon by Mr Tugushev on the question of risk of dissipation (as reflected in paragraph 76(2) of Mr Tugushev's skeleton at the without notice hearing). The position was then compounded by Mr Tugushev's continued failure to engage with Mr Orlov's contentions in relation to the AA shares in the aftermath of the WFO.

45. On the further question of whether or not then to re-grant the WFO in the interests of justice, it is appropriate to determine the ultimate fate of the WFO at the conclusion of my consideration of the continuation application below.

46. Mr Orlov also submits that I should discharge the service out order for non-disclosure and not re-grant it. On the basis of my primary finding on jurisdiction, that order is of course irrelevant. However, as already indicated, Mr Orlov is seeking permission to appeal that finding, and then to challenge my alternative findings that there was a proper basis for the service out order. It may therefore become relevant.

47. Here the fact that the failure of due enquiry was limited to the AA conspiracy claim is material. I would set the service out order aside but only in so far as it relates to that claim. But I would then re-grant it in the interests of justice. If Mr Orlov were to obtain permission to appeal and then to succeed in an appeal against my primary

finding, a refusal to regrant the service out order would mean the effective end of the AA conspiracy claim in this jurisdiction. That would not be a proportionate result or in the interests of justice. It would raise the unpalatable prospect of the Norebo Group conspiracy claim proceeding here and the AA conspiracy claim proceeding elsewhere. Moreover, it is one thing to be deprived of draconian relief in the form of a freezing order for non-disclosure. It is another to be deprived of the ability to pursue a claim in a chosen (and otherwise appropriate) jurisdiction at all. Appropriate sanction and deterrent can be found in an order that Mr Tugushev should pay the costs of the application to serve out of the jurisdiction in so far as it related to the AA conspiracy claim.

The continuation application

48. The following issues arise on the continuation application:

i) Whether or not there is a real risk of dissipation;

ii) If so, whether the continuation of the WFO is just and convenient, or whether the WFO is being used as a tool of oppression;

iii) Whether, if continued, the scope of the WFO is too extensive and should be limited.

The law on risk of dissipation

49. The law is again non-contentious. Generally, a cautious approach is appropriate before deployment of what has been called one of the court's nuclear weapons. As for risk of dissipation specifically:

i) The court must conclude on the whole of the evidence before it that the refusal of a freezing order would involve a real risk that judgment would remain unsatisfied, in the sense that, unless restrained by injunction, either the defendant will dissipate or dispose of his assets other than in the ordinary course of business or assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes. The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets;

ii) The risk is not to be inferred lightly. Bare or generalised assertion of risk by a claimant is not enough. There must be solid evidence of the risk of dissipation;

iii) Mere reliance on the alleged dishonesty of the defendant is not, of itself, sufficient to found a risk of dissipation. The court must scrutinise with care whether what is alleged to have been the dishonesty justifies the inference of a real risk of dissipation. Where the dishonesty alleged is at the heart of the claim against the defendant the court may be able to draw the inference that the making out to the necessary standard of that case against the defendant also establishes sufficiently the risk of dissipation of assets;

iv) A defendant's former use of offshore structures may be relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets;

v) Each case is fact specific and relevant factors must be looked at cumulatively.

(See *Bank Mellat v Nikpour* (supra) at 92; *Elektromotive Group Ltd v Pan* [2012] EWHC 2742 QB at [33]; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* (supra) at [49]; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2014] EWHC 4336 (Ch) at [221]; *Fundo Soberano De Angola v Dos Santos* [2018] EWHC 2199 (Comm) at [86]; *Metropolitan Housing Trust Ltd v Taylor and others* [2015] EWHC 2897 (Ch) at [29] to [31].)

50. The question of delay, or more accurately, Mr Orlov's conduct over the period since the dispute between the parties has arisen, is relevant on this application. The mere fact of delay on the part of the applying party does not, without more, mean that there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order (see eg. *Madoff Securities International Ltd and another v Raven and others* [2011] EWHC 3102 (Comm) at [156]). However, where a defendant knows that he faces legal proceedings for a substantial period of time prior to the grant of the order, and does not take steps to dissipate his assets, that can be a powerful factor militating against any conclusion of a real risk of dissipation (see eg. *Candy v Holyoake* [2017] EWCA Civ 92; [2018] Ch 297 at [62] and *Petroceltic Resources Ltd v Archer* [2018] EWHC 671 (Comm) at [58] and [64] to [65]).

Finding on risk of dissipation

51. Bryan J was satisfied that the test of real risk of dissipation was met "at least for the purposes of this without notice application". In particular, he referred to the existence of allegedly fraudulent proceedings, directly related to the alleged conspiracy itself, and the alleged attempts to divest Mr Tugushev of his one third interest. He also referred to Mr Orlov's use of complex corporate structures and nominees to conceal interests. There had not been any undue delay and any delay did not obviate the real risk of dissipation nor amounted to a reason not to exercise his discretion to grant an injunction.

52. The evidential picture now before the court on an *inter partes* basis, and which includes Mr Orlov's full response to the suggestion of a real risk of dissipation, is inevitably fuller.

Mr Tugushev's case

53. Mr Tugushev puts his case on a cumulative basis which, in his submission, justifies the conclusion that on any view there is a real risk of dissipation. He says that the starting point is that it is accepted that there is a good arguable case that Mr Orlov was engaged in the dishonest and fraudulent AA and Norebo Group conspiracies, the goal of which was to deny Mr Tugushev his interest in AA and the Norebo Group and the fruits of that interest.

54. Heavy reliance is placed on the fact that there is a good arguable case that Mr Orlov was directly involved in the creation and manipulation of fraudulent court proceedings, in particular the Koptevskiy proceedings referred to at paragraphs 74 to 76 of my first judgment, designed to cheat or disrupt Mr Tugushev's pursuit of this very claim. It is most unlikely that these sham proceedings were a dishonest frolic of Mr Golubev as opposed to a course of conduct authorised and encouraged by his client, Mr Orlov. Reference is made, amongst other things, to a rental agreement signed by Mr Orlov in 2015 (but wrongly backdated to 2012) shortly before the commencement of the Koptevskiy proceedings for a studio apartment in Moscow necessary to found jurisdiction for those proceedings and to emails (including from Mr Tugushev to Mr Orlov) sent to Mr Tugushev's ostensible lawyer from Mr Orlov's own email account.

55. Mr Tugushev submits that other examples of dishonest activity on the part of Mr Orlov designed to cheat or disrupt his claims include:

    i) Mr Orlov's denial to the Moscow police in November 2017 that he had ever offered Mr Tugushev US$60million for his share in the business;

    ii) Mr Orlov's denial in the Koptevskiy proceedings that he knew about the facts surrounding the transfer of the Norebo Invest shares in circumstances where there is now evidence that the terms of that transfer were specifically confirmed with Mr Orlov.

56. Mr Tugushev also relies on the fact that Mr Orlov is a sophisticated international financial operator. In the past he has used a Panamian Foundation to hold his shares in TTC. The Norebo Group includes offshore companies in Cyprus, the BVI and Mauritius. The AA conspiracy itself involved a complex corporate reorganisation in the course of which (on Mr Tugushev's case) his shares were wrongly transferred to Norebo Invest, then onwards to Premium Utilities SA, a Luxembourg company, and then to Norebo Holding. Norebo Invest was 99% owned by Mr Petrik as a nominee for Mr Orlov.

57. Mr Tugushev suggests that Mr Orlov used his Panamanian Foundation to hide assets from his former wife during their divorce proceedings. Specifically, he transferred his shares in TTC there in 2010 shortly before those proceedings commenced, and transferred them back in 2014 after they were concluded. No explanation for these timings has been proferred by Mr Orlov.

58. Mr Tugushev also points to the fact that Mr Orlov has very recently started new proceedings in Murmansk in response to the potential recognition in Russia of the jurisdiction order that has been made. It is said that Mr Orlov has (at best) misrepresented the nature of the order in an attempt to neuter the WFO and preclude any subsequent enforcement. This demonstrates the lengths to which Mr Orlov will go to avoid any prospect of enforcement in Russia and that his reliance on the stability of his ownership of shares in the Norebo Group is no answer to the risk that a judgment in favour of Mr Tugushev would go unsatisfied.

59. As to the fact that the vast bulk of Mr Orlov's wealth is tied up in his shares in Norebo Holding which Mr Orlov argues would be either impossible or very difficult to sell, Mr Tugushev's key submission is that he can nevertheless take steps to reduce

their value if he chose to do so, for example, by increasing the level of his borrowings against the shares or by directing Norebo Holding to increase the level of its indebtedness for his benefit. The shares are pledged but their unencumbered value is around US$718million, so that there is ample scope to increase borrowing. Mr Orlov directed subsidiary companies within the Norebo Group to fund US$199million towards his purchase of Mr Roth's shares in Norebo Holding in 2016. A further US$51million was borrowed by Mr Orlov from Norebo Holding or its subsidiaries.

60. Finally, Mr Tugushev submits that there has been no undue delay such as would negative a finding of real risk of dissipation or militate against the continuation of the WFO. Two key pieces of information only came to Mr Tugushev in the first half of 2018, namely documents relating to Mr Orlov's involvement in the Koptevskiy proceedings

Analysis

61. In this particular case, the logical starting point for an assessment of the risk of dissipation involves a careful consideration of the nature and circumstances surrounding the assets in question.

62. Mr Orlov provided asset disclosure on 7 August 2018. His main asset is his shareholding in Norebo Holding, the ultimate Russian holding company of the vertically integrated fishing business (ie the Norebo Group) which Mr Orlov has built over the last 20 years. The Norebo Group not only harvests fish from the ocean, but it processes and distributes it. It employs over 3,000 people, operates 46 fishing and transport vessels (with crew sizes ranging from 14 to 130 persons) and three land based facilities in nearby Moscow, Murmansk and Petropavlovsk-Kamchatsky. The business operates through a number of subsidiaries, all ultimately owned by Norebo Holding. There are 14 Russian fishing companies, two Russian companies with land-based operations and one port facility. There are five principal trading companies focussing primarily on sales to Russia, Europe, Asia, the US and Africa. There are also subsidiaries whose functions are holding real estate, transport, stevedoring and ship repair.

63. In other words, the Norebo Group is a huge physical undertaking which makes its money by using large, expensive machinery manned by numerous operatives to haul, process, package, sell and ship 400,000 metric tonnes of fish a year, supplying household names such as McDonalds, Tesco, Findus, High Liner, Birds Eye, Marcadona, Youngs and Smales. Mr Tugushev estimates the value of the Norebo Group to be in the region of USD$1.5billion. Mr Orlov's expert values Mr Orlov's shareholding in Norebo Holding at approximately US$718million in June 2018, and possibly significantly more.

64. Beyond that, Mr Orlov owns 50% of TTC, with the other 50% owned by Mr Roth. Across four countries, the business employs some 300 people, operates two fishing, one supply and six transport vessels, and owns a ship management company. TTC's principal business is investment holding and the provision of management services. According to Mr Orlov, its business is currently effectively paralysed, due to a shareholder dispute between him and Mr Roth which has resulted in the presentation by each of unfair prejudice petitions against the other in Hong Kong.

65. In terms of real estate, Mr Orlov owns four properties in Russia; an apartment in Murmansk (which he has just renovated), a small house and a datcha (next to each other) outside Murmansk (where he and Ms Shumova live when in Russia), and an apartment in St Petersburg (where his mother lives permanently). Outside Russia, he owns two villas in Gran Canaria (with a total value of some €6.05million and where he holidays with his sons). He then also owns the Wharf flat (purchased for £13million and where he lives when in London) and the Fulham flat (valued at £4.5million where one of his sons lives permanently). Mr Orlov's only moveable asset of sufficient value to require disclosure pursuant to the WFO (ie worth over US$50,000) is a Mercedes Benz located in Gran Canaria.

66. Thus, in summary, the vast bulk (some 88%) of Mr Orlov's wealth consists of his shareholding in Norebo Holding, the value of which far outweighs the value of Mr Tugushev's claims. He also owns valuable shares in TTC. There is then real estate in Russia, Gran Canaria and England. Beyond that there is a Mercedes Benz vehicle and some (but relatively insignificant) cash sums in various accounts.

67. I do not consider the proposition that Mr Orlov would seek to reduce the value of his shareholding in Norebo Holding as suggested, either at all or in any event sufficiently to defeat any judgment in Mr Tugushev's favour, to be a realistic scenario.

68. As set out above the Norebo Group is a vast, public-facing and international business. It is a business that Mr Orlov built up – he says by developing a reputation as a man who did not miss his payments. Perhaps more importantly for present purposes, his evidence that he does not wish to sell or dissipate the business has instinctive force. He has worked in the fishing industry ever since he graduated in 1991. Mr Orlov did not start out a rich man, but has created what he regards as one of the best, if not the best, fishing groups in the world. It represents his life's work of which he is proud. He intends to continue working at it until it is too much for him. He says that he would not sell or dismantle it to avoid a judgment against him.

69. Mr Orlov makes the following further points in response to the suggestion that he might sell his shareholding:

    i) He would need to find a buyer. He does not know what buyers there might be;

    ii) Selling the business would not be simple given the need for clearance from the Governmental Committee on the Control over Foreign Investments in the Russian Federation. This is not an easy process and it is very unlikely that permission to sell to a foreign investor would be granted. (The fishing companies are active in an area deemed to be of strategic importance to the Russian state). Further, any significant transfer would be subject to prior approval by the Federal Anti-Monopoly Service ("FAS"). Any buyer who did not first receive clearance from the Governmental Committee and the FAS would be at risk of losing the necessary fishing quotas and no buyer would ever take such a chance. Finally, the fact that his shares (save for those in Arctic Shipping LLC which are of no significant value) are pledged in favour of the Norebo Group's lender ("the lender") would mean that Mr Orlov could not sell or transfer any of his shares without the lender's consent.

70. As for dissipation, Mr Orlov states that that would be equally complex. The companies within the Norebo Group are audited by "big four" accountancy firms to IFRS standards, with their own assets, liabilities, employees and creditors. Even if Mr Orlov were able to co-opt the directors into stripping the companies of assets, it would be impossible to do so quickly or discreetly. Further, any such activity would likely be in breach of covenants to the lender, a large multi-national bank, which would take prompt steps to prevent it. As he puts it:

> "…The Norebo Group funds much of its capital expenditure with debt facilities, secured… inter alia over my shares in Norebo Holding, and shares in the fishing companies. If I were to attempt to devalue the lender's security by hollowing out the companies, enforcement of the share pledges would swiftly and inevitably follow."

71. Expert evidence of Russian law has been served on both sides to address the restrictions identified by Mr Orlov as set out in paragraph 69(b) above. Mr Khokhlov for Mr Orlov states that a sale of Norebo Holding (or the assets of its group) would be subject to competition clearance pursuant to the Russian Federal Act of 26 July 2006, which would require an application to be made to the Russian competition authority. The fact of such an application would be announced publicly on the authority's website and would mean a delay of between one and 13 months (and most likely 3 to 6 months). The Russian law experts are essentially agreed on the existence of these restrictions, but Ms Mannapova, for Mr Tugushev, states that there are "methods" to be used to get around them. Mr Khokhlov states that in truth these "methods" amount to illegitimate evasion of the relevant regulations and are unlikely to be effective. Use of such methods could entail heavy penalties and no purchaser on this scale would be likely to adopt them. Mr Khokhlov confirms that very considerable restrictions would apply if Mr Orlov wished to sell his shares to a non-Russian.

72. It is because of these issues arising in relation to Mr Orlov's capacity to sell or dissipate his shareholding and/or the assets of the Norebo Group that, as indicated above, Mr Tugushev focusses on the means available to Mr Orlov of reducing the value of his shareholding, in particular by increasing his borrowings against his shares.

73. As set out above, Norebo's lender is a large multi-national bank. There is no evidence that the lender has allowed Mr Orlov improperly to strip value out of the Norebo Group in the past. Additionally, the lender would not wish to countenance improper dissipation of the value of the shares (which would reduce the value of its security), and any improper dissipation would be likely to be in breach of the Norebo Group's banking covenants, prompting swift enforcement of the pledges. Mr Tugushev argues that this does not demonstrate that the lender would be in a position to prevent Mr Orlov from increasing his own levels of borrowing against the shares or that they themselves would decline to lend further sums. But on any view it materially limits potential dissipation avenues, leaving Mr Orlov with the option of a narrow (and potentially very unattractive) strategy of increased borrowing. And, as it was put for Mr Orlov, the existence of such a possibility does not equate with a real risk that it will be exploited.

74. Further, Mr Orlov's shares are worth far more than the value of Mr Tugushev's claim at USD$350m. There would have to be a very significant diminution in order to bring the value of Mr Orlov's shareholding close to that level.

75. I also take into account the absence of any evidence of material dubious or irregular payment activity within the Norebo Group. Some of Mr Tugushev's attempts to demonstrate otherwise missed the mark, for example:

    i) It was suggested that Mr Orlov received more than £18m in dividends only three days before the grant of the WFO which he did not declare. These monies, it was said, appeared to have been dissipated before or after the WFO. In fact, it appears that there were set-offs against debts owed to Mr Orlov by various Norebo group companies effective prior to the grant and service of the WFO;

    ii) It was suggested that Ms Shumova was the "beneficiary of a substantial sinecure from Norebo, despite having no role in the company". In fact, it appears that the (relatively modest) payments made to Ms Shumova were most probably made in respect of interior design services provided by her.

76. There was nothing improper or unlawful in Mr Orlov's borrowing to purchase Mr Roth's shares which was proper and lawful financial assistance to Mr Orlov. Details surrounding the financing of the purchase of those shares is set out in Mr Orlov's solicitors' letter of 10 June 2019. There is no evidence to suggest that the arrangement was not genuine and legitimate.

77. For these reasons, I do not consider that there is a real risk that Mr Orlov would seek to devalue his corporate shareholding in the Norebo Group, which represents the bulk of his wealth and which far exceeds the value of Mr Tugushev's claim, in order to avoid liability to Mr Tugushev.

78. As for TTC, as indicated, TTC is deadlocked at shareholder level because of a disagreement with Mr Roth. Mr Orlov states that he has been sidelined in the business, with Mr Roth and the third director, Mr Klock, consistently outvoting him (or his alternate). Mr Tugushev suggested there might be a settlement of the proceedings in Hong Kong. There is no obvious reason for such optimism in what appears to be an entrenched dispute. TTC does not appear to be a realistic target for sale or dissipation by Mr Orlov. Nor is it clear that Mr Orlov could in some way procure that the board of TTC declare a dividend to suit his particular interests either because of the proceedings underway or because currently Mr Roth, with the assistance of Mr Klock, has control of TTC, its subsidiaries and their assets. And in any event, Mr Orlov's main wealth is to be found in the Norebo Group.

79. As for the real estate in Russia, Gran Canaria and England, as reflected in the jurisdiction judgment, Mr Orlov has a settled pattern of life involving all of the properties. He lives or holidays with his family in all of them (with the exception of the Fulham flat for his son and the Russian flat for his mother). There is no basis for believing that Mr Orlov's domestic and family arrangements will change. And again, Mr Orlov's main wealth, more than sufficient for Mr Tugushev's purposes, is to be found in the Norebo Group.

80. Further, there is no evidence of any relevant activity on the part of Mr Orlov in terms of dissipating his assets since 2016 when Mr Tugushev launched his criminal complaint against Mr Orlov, followed by the Norwegian proceedings in 2017 (foreshadowed in a pre-action letter in December 2016 and commenced with the express purpose of obtaining evidence for substantive legal proceedings). Even before 2016, in 2014, Mr Tugushev was demanding a share in the Norebo Group. Communications between lawyers in late 2015 intimated the clear prospect of litigation between the two men.

81. In this context Mr Tugushev relies on *Ras Al Khaimah Investment Authority v Bestfort Development* [2017] EWCA Civ 1014 at [54] to [56]. There Longmore LJ addressed the question of delay in the context of a finding that a risk of dissipation had been established. He held that a finding that such delay as there had been could or should "counter" that established risk was illogical. In the course of doing so he commented on the argument that, if a defendant is prone to dissipate his assets, such dissipation will have already occurred by the time a court is asked to intervene. He stated (at [55]):

> "….This latter argument assumes that a defendant is already of dubious probity and it is a curious principle that would allow such a defendant to rely on his own dubious probity to avoid an order being made against him…"

82. Ignoring the question of whether or not this comment was obiter and the fact that the court was not taken to *Candy v Holyoake* (supra), it does not address the argument being advanced for Mr Orlov in the present circumstances. The fact that Mr Orlov has not dissipated his assets in the years over which Mr Tugushev's claims have been known to him is being used not as a countervailing factor to neutralise the risk of dissipation but rather as a tool to determine whether that risk exists in the first place.

83. In reaching my conclusion, I have considered carefully the further matters relied upon by Mr Tugushev. It appears to remain common ground that Mr Tugushev has a good arguable case on the substantive merits of the conspiracy claims. But that of course does not mean that the allegations are not hotly contested by Mr Orlov. Mr Tugushev himself also faces credibility issues, for example arising out of the new documents recently discovered by Mr Orlov in May 2019 and referred to above.

84. I accept that there is a good arguable case that Mr Orlov was involved in the false Koptevskiy proceedings. Whilst these are all matters to be argued out fully at trial, Mr Orlov's suggestion (for the first time) that Mr Tugushev might have been behind those proceedings or that Mr Golubev was on a frolic of his own does not obviously explain the emails sent to Mr Dryndin in particular. But evidence of specific dishonest activity on the part of a defendant does not *necessarily* lead to the conclusion that there is a real risk of dissipation of assets by him/her, particularly when the nature of those assets is considered. Whilst Mr Orlov's alleged dishonesty in the Koptevskiy proceedings was in the context of Mr Tugushev's present claims, it would be activity of a particular type, unrelated for example to any of Mr Orlov's assets including to his interests in the Norebo Group.

85. Mr Orlov is clearly a sophisticated businessman who has used offshore companies in the past (up to 2008). However, Mr Orlov's assets appear currently to be held in his

own name, it could be said unusually for a case of this type. His real estate, for example, is all registered in his own name. He does not appear to use offshore entities to hold his assets. Equally, Norebo Holding now has only one Cypriot subsidiary (and TTC seven). (Legislative changes in Russia in 2008 meant that the Russian fishing companies within the Norebo Group had to be held by Russian owners). Further, as the authorities make clear, the use of even complex corporate structures is not of itself disreputable.

86. In this regard, Mr Tugushev's case before Bryan J, namely that Mr Orlov used complex corporate structures involving companies in many jurisdictions to conceal his interests, is one with which Mr Orlov takes extreme issue (as reflected in his response at paragraph 251 of his second witness statement, for example). It does appear to have been overstated. The current position relating to Mr Orlov's ownership structure appears to be a relatively simple one.

87. The Panamanian Foundation set up by Mr Orlov for his sons is in the name of "Vitaly Orlov & Sons". Mr Orlov describes Mr Tugushev's claim that he used the Foundation to hide assets from his former wife as "nonsense". The Foundation was set up for the purpose of ensuring provision for his sons' education and welfare, as the name reflects. There was no secret about it, as Mr Orlov's ex-wife confirms. Mr Orlov has not explained the timing of the movements of his TTC shares into the Foundation by reference to his divorce proceedings and his ex-wife states in terms that she did not know of the Foundation's assets. But Mr Orlov can fairly say that she certainly knew about the Foundation itself and was in a position to make any enquiries in that regard that she wished. I know nothing of the background to or dealings between Mr Orlov and his former wife in the context of their financial settlement negotiations; it would be dangerous to speculate further.

88. As for Mr Orlov's denials to the police in November 2017 of having made an offer of US$60million for his share in Norebo Holding, the position is not as clear as Mr Tugushev would have it. Mr Orlov had consistently denied that Mr Tugushev had any shares in Norebo Holding. He told the police that he had never made an offer of US$60million for those shares:

> "As I said previously, in 2003 [Mr Tugushev] sold his share in the business and went into civil service. In light of this, after 2003 I did not and could not have offered [Mr Tugushev] US$60,000,000 for his share in the business."

89. It could be said that this statement was strictly accurate: whilst Mr Orlov had made Mr Tugushev an offer of US$60million in 2015, this offer was in exchange for a general release by Mr Tugushev of all claims against Mr Orlov and Mr Roth (rather than being for his share in Norebo Holding). In similar vein, on this basis Mr Orlov's denial that he asked his driver to contact Mr Tugushev with an offer of US$60million for his stake in the business could be sustained.

90. As set out above, Mr Tugushev suggests that Mr Orlov has given inconsistent evidence in relation to his knowledge of the facts concerning the preparation and signing of the sale transfer purportedly transferring the shares from Mr Tugushev to Norebo Invest as he lived in Norway at the time (by reference to later evidence from Mr Romanovsky). The statement of Mr Orlov relied upon emanates from the

mysterious Koptevskiy proceedings, the precise surrounding circumstances of which are unclear at least at present. I do not consider this point to advance Mr Tugushev's case materially on the question of risk of dissipation in circumstances where the existence of a good arguable case on the merits is already accepted.

91. Nor do I consider that Mr Orlov's commencement of the Murmansk proceedings bolsters Mr Tugushev's case on risk of dissipation. Consistent with the behaviour to date on both sides, Mr Orlov is pursuing (or preserving the possibility of pursuing) all legal avenues open to him. His understanding is that, in order to preserve his ability to challenge any domestication proceedings in Russia, he needed to commence proceedings in Murmansk within a month of being notified of the outcome of the jurisdiction judgment (or "the foreign court judgment", as it is put). This understanding is supported by the evidence of Professor Maggs; the fact that that evidence is disputed by Mr Vaneev does not alter the apparent reasoning behind the issue of the proceedings. (There is also to be a dispute as to whether the Murmansk proceedings are in any event out of time but that is not relevant for present purposes.) Thus the commencement of the Murmansk proceedings does not indicate a risk of dissipation of assets.

92. Pulling it all together, I am not satisfied that there is a real risk of dissipation such as to justify continuation of the WFO. In any event, in the light of my conclusion on the non-disclosure application, this is not a situation of continuation, but rather a question of regrant of the WFO afresh. In the absence of a real risk of dissipation, I do not regrant the WFO. I would add that, even if the position on risk of dissipation were border line, which I do not find it to be, I would not be persuaded that it would be in the interests of justice against the background of non-disclosure, to reimpose the WFO in the absence of anything other than a clear and compelling case as to the existence of a real risk of dissipation.

93. I emphasise that this does not preclude Mr Tugushev from re-applying for relief in the form of a freezing order if there are material new developments identifying a risk of dissipation (or there is material fresh evidence to that end). It is very clear that the parties are closely policing each other's activities, status and assets in any event (for example in terms of monitoring the litigation involving TTC in Hong Kong and the criminal proceedings in Russia). Mr Tugushev is in possession of considerable information regarding Mr Orlov's finances, not least as a result of the disclosure orders made at the same time as the WFO.

94. In the light of the above, it is unnecessary for me to address Mr Orlov's further submissions that the WFO is being used as a tool of oppression which, for the avoidance of doubt, did not persuade me. What they did serve to do, however, was to emphasise the very significant reach of the WFO, not only leading to the ancillary orders in the Isle of Man, Guernsey and Hong Kong, but also in terms of the monitoring and questioning by Mr Tugushev and his lawyers of the activities of Mr Orlov and the Norebo Group more generally. Nor does the domestication application arise.

Conclusion

95. For the reasons set out above, the WFO will be set aside and discharged. The service out order in so far as it relates to the AA conspiracy claim will be set aside but re-

granted on terms as to costs. I (perhaps over-optimistically) invite the parties to agree all consequential matters so far as possible, including costs.