Neutral Citation Number: [2019] EWHC 2061 (Comm)

Case No: CL-2019-000412

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

Royal Courts of Justice,
The Rolls Building,
Fetter Lane, London, EC41 1NL

Date: 29/07/2019

Before :

MR JUSTICE JACOBS

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Between :

(1) PJSC NATIONAL BANK TRUST **(2) PJSC OTKRITIE BANK FINANCIAL CORPORATION**	**Claimants**
- and -	
(1) BORIS MINTS **(2) DMITRY MINTS** **(3) ALEXANDER MINTS** **(4) IGOR MINTS**	**Defendants**

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Nathan Pillow QC and Anton Dudnikov (instructed by **Steptoe & Johnson UK LLP**) for the **claimant**
Stephen Midwinter QC (instructed by **Simmons and Simmons LLP**) for the **1st, 2nd and 3rd defendants**
Brian Kennelly QC (instructed by **Stephenson Harwood LLP**) for the **4th defendant**

Hearing dates: 11th July 2019

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Approved Judgment

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

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MR JUSTICE JACOBS

Mr. Justice Jacobs:

Introduction

1. On 27 June 2019, Moulder J. granted a worldwide freezing order ("WFO") against the four Defendants to these proceedings. The application for the WFO was supported by a 49-page skeleton argument which addressed the well-known requirements for such an order, and in particular whether the Claimants had a good arguable case and whether there was a risk of dissipation of assets. The Claimants also anticipated and addressed arguments that might be advanced on the basis of delay in seeking relief. The application was supported by a 100-page Affidavit of Mr. Andrey Tseshinskiy, who joined the First Claimants ("NBT") in February 2019 as a "Director of Special Projects Department No. 2", and in June 2019 had joined the Second Claimants ("Bank Otkritie") as an Advisor dealing with distressed assets. Mr. Tseshinskiy's Affidavit contained a number of volumes of documentary exhibits.

2. The events giving rise to these proceedings are as follows. The Claimants are Russian banks. They, or their predecessors in title, lent very large sums to companies in or connected to a group of companies known as the O1 Group. I shall refer to the Claimants and their predecessors in title collectively as "the Banks" or "the Claimants". The Claimants' case is that the O1 Group, including the borrowers from the Banks, was ultimately owned by the First Defendant, Mr. Boris Mints. He is the father of the 2nd – 4th Defendants.

3. The claims arise from an alleged fraud which the Claimants contend was hatched and implemented by all of the Defendants and certain former directors of the Claimants. This occurred in mid-2017, when the two Banks were on the brink of being taken over by the Russian central bank ("CBR") because of their serious financial problems. The essence of the alleged fraud was that very substantial loans to the O1 Group, which at that stage were performing and were on commercial terms and significantly secured, were repaid using the Banks' own money. They were replaced with what the Claimants contend to be illiquid and uncommercial corporate bonds, worth a small fraction of the price the Claimants paid for them and of the value of the loans that they replaced.

4. In accordance with the usual practice, the WFO was granted, initially at least, for the period up to and including the return date, which was set for Thursday 11 July 2019. Prior to that date, there were a number of developments which it is not necessary to describe in detail. The parties agreed some amendments to that order so as to make clear that certain corporate bank accounts were excluded from the operation of the WFO. Pursuant to the terms of the WFO, the Defendants provided asset disclosure, after agreed extensions of time, and such disclosure was in due course confirmed by affidavit or affirmation. The Defendants did not, however, serve any witness evidence which sought to challenge the case which the Claimants had advanced in their evidence before Moulder J., or the conclusions which they had drawn from that evidence and which persuaded the judge that this was an appropriate case for a WFO.

5. In the absence of any such evidence, and also in the absence of any notification to the court (pursuant to F 15.8 of the Commercial Court Guide 2017) that the return date hearing would last for more than 30 minutes, the Claimants assumed that the Defendants did not oppose the continuation of the injunction, and that the return date (for which the Court in fact allotted half a day) would therefore deal with various

important but ancillary matters relating to the WFO; and in particular whether (as has now happened) the injunction should be replaced by undertakings to similar effect. When skeleton arguments were exchanged in the early afternoon of 10 July, however, the 1st – 3rd Defendants made it clear that they were squarely challenging the continuation of the WFO. These two points were to some extent related. This was on the basis (i) that the Claimants had not made out a sufficient case that there was a risk of dissipation of assets and also (ii) that there had been material delay in the Claimants applying for the WFO. The written submissions of the 1st – 3rd Defendants were adopted by the 4th Defendant.

6. The Defendants' challenge to the WFO took the Claimants by surprise, and correspondence was sent to the court in that connection on the afternoon of 10 July. The 1st – 3rd Defendants made it clear in that correspondence that they objected to any adjournment, stating that their arguments about delay and the absence of evidence of a risk of dissipation were "short points of submission that do not depend on any points of factual dispute or on witness evidence". They emphasised that the Defendants had not filed any witness evidence on these points, and that therefore there was no basis for the Claimants to have time to reply to such statements and thereby expand upon the evidence before Moulder J.

7. When the hearing commenced on 11 July, Mr. Pillow QC for the Claimants indicated that he was ready and able to proceed, provided that the court had sufficient time to hear the application which he estimated would last a day. He emphasised the importance of paying regard to the evidence which had actually been served in the proceedings, saying that certain statements made in the skeleton argument of the 1st – 3rd Defendants were unsupported by evidence. I indicated that it was desirable that the case should if possible proceed, particularly bearing in mind the problems which, according to the Defendants, were being caused by the existence of the WFO. I could allocate 1 day to the hearing, and no party suggested that this was inadequate.

8. Mr. Pillow then made oral submissions for the Claimants, followed by Mr. Midwinter QC for the 1st – 3rd Defendants. Mr. Kennelly QC then made his submissions on behalf of the 4th Defendant. During the course of his argument, and as foreshadowed to some extent in his written submissions, Mr. Kennelly suggested that if the WFO was not immediately discharged, the 4th Defendant would then prepare a "full discharge application with evidence"; something which would occupy a month. At the end of his submission, I raised the issue of whether such a further application would be permissible, bearing in mind that (i) this hearing was the return date of the WFO, and (ii) there had been no request for an adjournment of the return date with the injunction to continue in the meanwhile. In cases where a party wishes to contest a freezing order, but has not had sufficient time to prepare evidence for a full-scale hearing, the return date is typically adjourned on the basis that the freezing order continues until the hearing. Mr. Pillow made it clear that such a further application by the 4th Defendant would in principle not be permissible, and that his clients would be minded to object to such application. I was keen to ensure that there was no misunderstanding on the part of the 4th Defendant or his counsel as to what might or might not be permissible in due course, and enquired whether the 4th Defendant wished to press his opposition to the continuation of the injunction, or by contrast wished to reserve the possibility of making the foreshadowed full-scale discharge application in due course. After a short adjournment, Mr. Kennelly indicated that his client no longer wished to object to the

continuation of the injunction, because he wanted to preserve the possibility of making a discharge application, on fuller evidence, in due course. Mr. Pillow's response was to reserve his clients' position in relation to the permissibility of any future application. The upshot of these exchanges was therefore that the 4th Defendant did not oppose the continuation of the injunction, and that the opposition to its continuation was made only by the 1st – 3rd Defendants.

9. The parties' arguments lasted a full day. At the conclusion of the argument on the relevant issues, I said that my decision was that the WFO would indeed continue and that I would give my reasons for that conclusion in due course. This decision was subject to the question of whether the WFO should be replaced by undertakings, as has now happened. These are my reasons.

Risk of dissipation – legal principles

10. There was no dispute as to the applicable legal principles, which were summarised by Popplewell J. in *Fundo Soberano De Angola v Santos* [2018] EWHC 2199 (Comm):

> (1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
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> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
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> (3) The risk of dissipation must be established separately against each respondent.
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> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
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> (5) The respondent's former use of offshore structures is 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. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
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> (6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not

threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

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

11. In *Holyoake and another v Candy and others* [2017] EWCA Civ 92, paras [50] – [51], the Court of Appeal emphasised that the burden was on the applicant to satisfy the threshold. The court decides the case on the basis of all the evidence before it. If the applicant has failed to adduce sufficient evidence, then the application will fail. Unless the applicant has raised a prima facie case to support the order, the defendant is not obliged to provide any explanation or answer any questions posed. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the defendant will be expected to provide an explanation.

12. Having considered and reviewed the written and oral submissions made prior to and at the hearing, I have no doubt that the Claimants have provided solid evidence of a risk of an unjustified dissipation of assets; i.e. putting the assets out of reach of a judgment whether by concealment or transfer. The principal factual matters which have led me to this conclusion can best be explained by reference to the sequence of events in 2017 and 2018 comprising:

a) The termination of the security arrangements which existed prior to the transactions in August 2017.

b) The transactions in late 2017 whereby three companies – Centimila Services Ltd. (“Centimila”), Nori Holding Ltd (“Nori”) and Coniston Management Ltd. (“Coniston”) – divested themselves of assets which had been returned to them as a result of the termination of the security arrangements. Two of these companies, Centimila and Nori, were within the O1 Group. The third, Coniston, was beneficially owned and controlled by Alexander Nesis. Mr. Nesis had, via another company, assisted the Defendants in connection with the termination of the security arrangements.

c) A transaction in early 2018, whereby Nori substantially reduced its capital. The shareholder resolution for a reduction in capital was dated 29 December 2017, and it contemplated that approximately US$ 200 million would be returned to its shareholder “by either transfer of the amount or payment in kind by 30 June 2018”. The approval of the Cyprus court for this transaction was obtained in March 2018. It is not clear from the evidence when the transfer of the amount or the payment in kind took place, but it presumably did not take place prior to court approval in March 2018. The Claimants contend that it should not have taken place at all, given its obvious prejudicial impact on creditors, and in particular the Banks which had by that stage intimated and

commenced proceedings against Nori arising from the termination of the security arrangements.

The termination of the security arrangements in August 2017

13. The Claimants' substantive claims in the present proceedings are based upon what the Claimants contend to be, in summary, the fraudulent and corrupt termination of the security arrangements whereby loans which were secured by valuable assets were repaid using the Claimants' own money and replaced with bonds which were of negligible or questionable value. The 1st – 3rd Defendants (and indeed the 4th Defendant during the time when he was opposing the continuation of the WFO) accept that the Claimants' case met the requisite standard of "good arguable case". The merits of that case are to be resolved hereafter, as against the Defendants, in the present proceedings. Similar issues as to the nature and propriety of the transactions in August 2017 will arise, as between the Claimants and Centimila, Nori and Coniston, in LCIA arbitration proceedings which were commenced by those three companies in January and February 2018, and are now proceeding by way of a consolidated arbitration.

14. In those circumstances, it is not necessary or desirable for me to address the merits of the Claimants' case in any detail, save to say that my view on the evidence and argument presently before me – and also bearing in mind the absence of any witness evidence from the Defendants themselves – is that the Claimants comfortably crossed the good arguable case threshold. I summarise in paragraph 20 below a number of features of the transaction which lead me to conclude that this is not a case where the Claimants have scraped across the good arguable case threshold.

15. However, it is necessary to say something about the nature of the fraud alleged in order to decide whether it demonstrates a real risk of dissipation. The authorities indicate that the nature of the dishonesty alleged must be scrutinised in order to see whether it points to the conclusion that assets are likely to be dissipated. It is also relevant to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty. I will endeavour to explain the factual position as briefly as possible.

16. The position at the beginning of August 2017 was that Bank Otkritie had outstanding loans to companies in or connected to the O1 Group ("O1 Companies") of around US$ 500 million (the "Otkritie Loans"). Separately, another Russian bank JSC Rost Bank ("Rost Bank") was owed some US$ 350 million by O1 Companies. These loans (collectively "the O1 Loans") were on commercial terms, in large part secured, performing, and were due to be repaid in the relatively short term: from as early as late 2017 (i.e. only a matter of months after August 2017, when the transactions took place) through to 2020.

17. At this time, both Bank Otkritie and Rost Bank were in severe financial difficulties. Indeed, very shortly after the transactions in issue, the banks were bailed out and taken over by the CBR in August and September 2017. However, the position in early August 2017 was that the Banks had been provided with, and retained, valuable security for the O1 Loans. In particular, the Banks held security in the form of pledges of shares in one of the companies within the O1 Group, namely O1 Properties Ltd. of Cyprus ("O1 Properties"). These shares had been pledged by Nori, Centimila and Coniston. This security was of real substance and value: O1 Properties owned 15 business centres in

Moscow, with tenants including major international companies, and its asset portfolio was valued as of January 2017 at US$ 4.128 billion. In addition to these pledges, some security had been provided directly on real property.

18. The evidence indicated that it was known to the Defendants, in August 2017, that both Banks were in financial difficulties, and that the CBR would shortly be taking over Bank Otkritie at least. The Claimants' case was that the Defendants would also have known or expected that the other bank, Rost Bank, would also be taken over. If and when this happened, it would be potentially damaging to the O1 Group and thereby the Defendants' interests. At that time, the Claimants' evidence was that O1 Group itself had its own financial difficulties, and was looking to restructure its facilities. The prospective takeover by the CBR would inevitably jeopardise any hope of generous or flexible treatment by the Bank's management of the loans which the Defendants wished to be restructured. It would also leave the Banks, through their new CBR management, incentivised to find and capture valuable assets to fill the holes in their respective balance sheets. Some of the O1 Loans had provisions entitling Bank Otkritie to increase the interest rate payable, demand that more collateral be put in place, or even accelerate the loans and demand immediate repayment. There was therefore, on the Claimants' case, a real risk that the O1 Loans might go into default, which would have led the Banks, under the control of the CBR, to enforce the security for them, with the consequence that the Defendants would lose some of their most valuable assets.

19. What then happened was, in substance, that the Defendants regained control of the valuable securities which had been pledged or otherwise provided to the Banks. Within a relatively short space of time, the securities previously pledged to the Banks were provided in whole or part, to other creditors of the O1 Group, and in particular the Moscow Credit Bank ("MCB"), which was also owed large sums by companies within the O1 Group and which was seeking security for their lending. The securities held by the Claimants were replaced by bonds ("O1 Bonds") issued by a company within the O1 Group ("the replacement transactions"). The Claimants contend that this was accomplished with the dishonest or corrupt assistance of the two individuals who occupied the position equivalent to CEO at Bank Otkritie (Mr. Dankevich) and at Rost Bank (Mr. Shishkhanov). Both of these individuals had known the 1st Defendant for a long time, and the 1st Defendant and Mr Dankevich were friends and former colleagues, but their tenure at the Banks was about to come to an end as a result of the imminent takeover by CBR. The Claimants therefore contend that there was an unjustified, dishonest and unlawful dissipation of the security held for the Banks. There was, they say, no honest explanation for swapping loans which were secured, and producing income, for bonds.

20. The Claimants point to various surprising and disturbing aspects of the transactions. These included the following:

    a) The bonds were long term, maturing in 2032 with no option to redeem early. Their effect was to extend the period of credit from, at most, a further three years for a further 15 years.

    b) The bonds paid no coupon until maturity, except for a very small amount. The Banks would therefore receive no income at all, as compared to regular interest at commercial rates payable on all of the O1 Loans. The

coupon rate was not fixed but entirely variable, and the coupon eventually payable was not compounded.

c) There was no security for the bonds such as pledges of shares or other valuable properties. Their value was entirely dependent on the long-term creditworthiness of the O1 Group: the issuer was a special purpose company, O1 Finance, but they were guaranteed by the Cypriot company at the head of the group namely O1 Group Ltd ("O1GL").

d) There had been no negotiation of the terms of the bonds in the market before their issue. A Russian bond expert engaged by the Claimants has said that he has never seen anything like the O1 Bonds. Their market value depended on their liquidity and marketability, but the Claimants' evidence was that they were illiquid and unmarketable. In view of the lack of income, the bonds represented a gamble on the financial state and asset base of two private companies (O1 Finance and O1GL) fifteen years into the future, albeit that there was a possibility in August 2017 that the repayment date would be amended to ten years. All of the Bank Otkritie employees involved in the transaction, and to whom the Claimants have since spoken, have admitted that O1 Bonds were illiquid and on non-market terms.

e) On the day after the bonds were issued, Mr Evgeny Dankevich, who was the Bank Otkritie's most senior executive (the Chairman of its Management Board, equivalent to its CEO), was actively taking steps to obtain citizenship in the Caribbean, and has since fled to Israel and refused to cooperate with the Claimants, except in return for a full release and indemnity which the Claimants are not prepared to give. It was Mr. Dankevich who alone authorised the purchase of the O1 Bonds, using his powers to do so personally as CEO. According to one witness, Mr. Dankevich was the only person in Bank Otkritie in favour of the deal.

f) The Claimants have examined transcripts of contemporaneous telephone conversations in which various employees describe the transaction or the bonds as "crazy", "bad", "unreasonable", "folly", "strange", "bullshit", and "garbage".

g) The purchase price of the bonds was paid over to O1 Finance/ O1GL before being routed back via various companies to the borrowers and thence to the Banks as repayment of the O1 Loans. It was therefore the Banks' money that was used to repay the loans, but this was not done by simple book entries whereby the loans were replaced by the bonds. Instead, the transaction involved movements of large sums of money across a complex web of entities, so that it would not have been apparent that the Banks' money was being used to repay its loans.

h) The routing of funds included the use of the Latvian account of an entity called ICT Holding (BVI) Ltd. which was owned or controlled by a third party, Mr. Alexander Nesis.

i) The transactions were carried out with remarkable haste, with everything being accomplished on 9/10 August (Otkritie) and 21 and 25 August (Rost Bank), at a time when the intervention of CBR was imminent.

21. A rationale for the transactions has been provided by various O1 Companies in LCIA arbitration proceedings in London and in Cyprus litigation. In essence, the commercial rationale alleged is that there was a desire to assist the liquidity of the Claimants themselves, by replacing debt with more liquid instruments which could then be used to attract cash through, for example, repo transactions. This rationale was advanced in submissions by Mr. Midwinter on behalf of the 1st to 3rd Defendants. Their case is that there was no fraudulent conspiracy: the restructuring was nothing other than an above-board commercial transaction. They refer to the fact that the restructuring was worked on by at least 25 employees of Bank Otkritie, and was approved by that Bank's majority shareholder and its CEO. They say that it was improbable that there was a fraud not only in relation to Bank Otkritie, but separately in relation to Rost Bank. Overall, they contend this was simply a deal which was to facilitate the generation of finance by the Banks, who could use bonds to undertake repo transactions and/or for pledges.

22. The Claimants contend that this rationale is implausible; because the O1 Bonds were on such obviously illiquid and unmarketable terms that it cannot reasonably have been believed by either side that they would enable the generation of cash; especially bearing in mind that this would come at the expense of loans producing regular cash by way of interest income at commercial rates backed with valuable security. In addition, there is only evidence of one repo transaction actually being carried out, and this involved fewer than 5% of the bonds. It is true that the CBR's intervention took place not long after the replacement transactions. But there was sufficient time to carry out more repo transactions, if that had been the intention, particularly bearing in mind the urgency with which the replacement transactions were carried out (and the Defendants' case that there was indeed urgency). The Claimants also rely upon the fact that they have been unable so far to locate a single contemporaneous document in which the rationale is said to be as described in the LCIA arbitration or Cyprus proceedings.

23. I consider that if the replacement transactions were the only evidence relied upon as solid evidence of a risk of dissipation, they would be sufficient to justify the grant of a WFO. The Defendants accept that the evidence is sufficient to meet the required standard of a good arguable case. That means that there is a good arguable case that the replacement transactions were dishonest and indeed corrupt. Although it is necessary to scrutinise the dishonesty alleged to see whether it points to the conclusion that assets are likely to be dissipated, it is my view that this conclusion follows from the nature of the transactions, their value, and the manner in which they were carried out.

a) These were transactions which, if the Claimants' case is correct, had as their object the removal of valuable assets which were available as security to the Banks for the liabilities of the borrowers (and hence as security for any default or subsequent judgment), and their replacement by illiquid and unmarketable assets. I agree with the Claimants that, in broad terms, this can be viewed as "dissipatory" transactions. The object of the fraud was to take existing security away from the Banks.

b) The transactions were on a very substantial scale. The principal basis on which the Claimants calculate their loss is the difference between the

value of the loans immediately before the replacement transactions, and the value of the O1 Bonds with which they were replaced. This amounts to US$ 572 million.

c) The means by which the replacement transactions were accomplished, and then the way in which the assets released from the pledges were dealt (as described in more detail below) involved a complex web of corporate entities in various jurisdictions.

24. In these circumstances, as in *VTB Capital Plc v Nutritek International Corporation* [2012] EWCA Civ 808, it can in my view reasonably be inferred that individuals who use these methods to defraud a bank in this way and on this scale might readily resort to similar methods to render their major assets proof against enforcement in response to proceedings being taken against them.

25. In reaching this conclusion, I have taken into account the submission on behalf of the 1st – 3rd Defendants that the merits of the Claimants' claims are very much in dispute, and that LCIA arbitration proceedings have been commenced by Nori, Centimila and Coniston in order to establish the propriety of what occurred. However, I was not shown in the evidence any material which indicated that the 1st – 3rd Defendants had compelling answers to the case which was advanced. For example, the Claimants' skeleton argument on the application drew specific attention to the absence of any contemporaneous document in which the rationale is said to be as described by the Defendants. The Defendants did not produce any such document in evidence, and indeed conceded that the Claimants have a good arguable case. In those circumstances, I did not consider that the fact that the Defendants have contested and will continue to contest the Claimants' claims, carries them very far on the question of risk of dissipation; certainly when set against the matters on which the Claimants are able to rely. Moreover, the 1st – 3rd Defendants did not in my view put forward any convincing reason as to why the conclusion, namely that there was a real risk of dissipation, could not reasonably be drawn from the nature and scale of the replacement transactions, and the means by which they were carried out.

26. Furthermore, I agree with the Claimants that the involvement of Mr. Nesis, the beneficial owner and controller of the ICT Group, is of relevance in the context of the risk of dissipation. It would not be a significant point if viewed in isolation. However, it does show that the Defendants are able to procure the assistance of third parties in order to route very substantial sums across multiple borders and through multiple accounts.

27. Moreover, the replacement transactions did not stand on their own. My conclusion as to the real risk of dissipation is reinforced, and in my view put beyond any real doubt, when considering the subsequent dispositions of the assets which were released from the pledges.

The disposition of the (prior) security for the Otkritie Loans

28. The pledges in favour of Bank Otkritie, of the shares in O1 Properties, were terminated on 9/10 August 2017. On 29 August 2017, Bank Otkritie was placed into temporary administration by the CBR. On 20 September 2017, a meeting took place between the CBR and the 1st Defendant at which the CBR threatened to take action to reverse the

Otkritie replacement transaction. On 27 September 2017, Bank Otkritie wrote formally to the various O1 Companies demanding the reversal of the replacement transaction and putting them on notice that proceedings would be commenced if they failed to comply.

29. Thereafter, a series of steps were taken the effect (and the Claimants say, the purpose) of which was to protect the valuable shares in O1 Properties from any enforcement action by Bank Otkritie. It will be recalled that the companies which had pledged these shares were Nori, Centimila and Coniston. The effect of the replacement transactions was therefore to give these shares back to those companies. On 25 October 2017, an entity called Agdalia Holdings ("Agdalia"), which was wholly owned by O1 Group, was incorporated in Cyprus. Immediately thereafter, Nori and Centimila set about transferring their shares in O1 Properties to Agdalia.

30. On 31 October 2017, Bank Otkritie commenced proceedings in Russia, seeking to set aside the replacement transactions. Amongst the defendants were the former pledgors, Nori, Centimila and Coniston. Subsequent to the commencement of these proceedings, Coniston transferred a large number of its shares in O1 Properties to Agdalia, and also transferred other shares to a company called Parmera Assets Ltd.

31. The final part of this story is that in December 2017, Agdalia pledged the shares in O1 Properties to MCB, another creditor of the O1 Group, which had apparently demanded additional security. Subsequently, these pledges were enforced by an assignee of the MCB debt.

32. The Claimants submitted that this sequence of events was important as providing solid evidence of a risk of dissipation. What happened was, in summary, that after Nori, Centimila and Coniston were on notice of claims to reverse the replacement transaction with Bank Otkritie, and thereby to restore the security which had previously been pledged, those companies took steps to divest themselves of the very assets which would be the subject-matter of the claims. Had the shares remained with the three companies, then the Claimants would be in a position to regain the securities which they had lost. However, the disposal of the shares in O1 Properties to Agdalia, and thence the further pledge of those shares to MCB, was designed to render nugatory any judgment which reversed the replacement transaction. The Claimants submitted that this would be solid evidence of a risk of dissipation even if Nori, Centimila and Coniston had received full value from Agdalia for the O1 Properties shares that were transferred. However, there was no clear evidence that Agdalia had provided any value at all for the shares which had been transferred, since disclosure of documents concerning these transactions has not yet been forthcoming from the Defendants or the companies concerned. And although these transactions featured heavily in the skeleton argument and Affidavit in support of the WFO, none of the Defendants provided any evidence or documents for the return date hearing which sought to explain them.

33. Mr. Midwinter QC on behalf of the 1st – 3rd Defendants argued that it was normal and reasonable for one company in a group to assist another company by providing assets which could be used as security for a borrowing. Accordingly, there was nothing in this part of the story which provided any support for the case on risk of dissipation. He said that it was commonplace for shares to be transferred to a different entity within the same corporate group when they are to be put to a new use. This did not involve any reduction of the assets of O1 Group.

34. I disagree and I accept the Claimants' arguments summarised in paragraph 32 above. The relevant transfers of shares to Agdalia occurred, on the evidence before me, after the three companies (Nori, Centimila and Coniston) were on notice of claims by Bank Otkritie to set aside the replacement transaction. In those circumstances, a transfer away of assets which are the subject of intended or actual proceedings, and which takes place shortly after such proceedings are threatened or commenced, is prima facie a classic dissipation of assets. I say prima facie, because it would certainly be possible for a party to explain that the transfer had a commercial rationale, and to show that the transferor received full value for the assets which had been transferred away. In the present case, however, I was shown no evidence that the transferors had received full value from Agdalia for the assets transferred, nor any explanation as to the commercial benefit to the three companies arising from the transfer of their assets. This was notwithstanding the fact that these transactions were heavily relied upon both in the Claimants' skeleton argument for the without notice application, and in Mr. Tseshinskiy's Affidavit. The fact that another group company may have wished to use the assets of Nori or Centimila for securing an indebtedness provides no justification for those companies transferring their assets away, particularly in circumstances where they were on notice of Bank Otkritie's intended or actual proceedings to reverse the replacement transaction. Accordingly, these events provide in my view solid evidence of a risk of dissipation. I do not accept that it is commonplace, in circumstances such as the present, for a company simply to transfer its assets away to a different company within the group. Nor is it relevant, in circumstances where there is a potential claim against particular companies within a group, that there has been no overall reduction in the assets of the group as a whole.

The reduction in capital of Nori

35. On 29 December 2017, the shareholder of Nori (O1GL) passed a resolution for the reduction of its share capital. On 01 March 2018, an order was made by a Cypriot court which enabled Nori to reduce its share capital from around US$ 202 million to only US$ 2,289, and to allow Nori to pay around US$ 202 million to its sole shareholder, O1GL. As set out above, the transfer to the shareholder was to be accomplished by the end of June 2018.

36. This transaction was relied upon both in the Claimants' skeleton argument and in Mr. Tseshinskiy's Affidavit in support of the WFO. It is fair to say that, in their submissions at the hearing, the Claimants made rather more of this transaction than they had done previously. However, this was done by reference to the existing evidence, and in my view it was legitimate for the Claimants to do so. Since the 1st – 3rd Defendants had not submitted any witness evidence for the hearing, there was nothing in the materials before me which provided any explanation for this transaction.

37. I consider that it provides strong and solid evidence in support of a real risk of dissipation. What happened, on the evidence before me, is that substantial monies were held within Nori. It is possible (as Mr. Tseshinskiy tentatively suggested in his Affidavit) that these assets were related to the shares which had been transferred to Agdalia. That is not clear on the present evidence, but that does not matter. What is important is that these monies were then transferred out, pursuant to the reduction in capital, apparently in disregard of the potential rights of Bank Otkritie to rescind the replacement transaction or to obtain damages from Nori or both. Again, this seems to me to be a classic case of dissipation, whereby a company divests itself of its assets, for

no consideration, in circumstances where it is facing a substantial claim. This point is reinforced, in the present case, by the fact that both Nori and Centimila are now in Creditors Voluntary Liquidation in Cyprus. The effect of the transfer has therefore been to leave Nori as a worthless shell company.

38. The Claimants also relied, in this connection, upon the fact that there was no evidence showing where this US$ 200 million had gone. However, they were able to point to evidence, in the disclosure pursuant to the WFO, which showed that, at around the time when the reduction in capital was proposed, there was a reorganisation of the Mints' family discretionary trusts. In his disclosure Affidavit, the 1st Defendant refers to the creation of a trust called the MF Trust, of which he was the settlor. This trust seems to have acquired assets on, and also perhaps after, 27 December 2017. The 1st Defendant says that: "In settling the assets on The MF Trust I divested myself of legal ownership in those assets: they are held and controlled by the trustee". The date given for the settlement of the trust is 27 December 2017.

39. The evidence as to the destination of the US$ 200 million is unclear, and has not been addressed by the Defendants in their evidence. It seems to me to be a reasonable possibility that these monies went into this, or another family trust. In my view, this is further supportive evidence of a risk of dissipation; since enforcement of a judgment in favour of the Claimants against Nori would necessarily be more difficult where Nori's former assets were now within such a trust.

40. I have referred in this section to Nori. I was also told by Mr. Pillow that there had also been a reduction in the capital of Centimila, although he pointed out that there was no evidence thereof before the Court. In my view, however, the Claimants' point is sufficiently made by reference to the position of Nori, where relevant documents are before the Court. If the factual position were similar for Centimila, then that would provide further evidence supporting the Claimants' case.

The arguments of the 1st – 3rd Defendants

41. The submissions of Mr. Midwinter on behalf of the 1st to 3rd Defendants did not draw any distinction between them, as far as risk of dissipation was concerned. In other words, it was not suggested that there was a stronger or weaker case against any particular Defendant. Nor was any distinction drawn, for the purposes of risk of dissipation, between the 1st to 3rd Defendants and the corporate entities which had featured in the case. There was no suggestion, for example, that the 1st – 3rd Defendants did not control the entities which had committed the alleged fraud on the Claimants. Nor was it suggested that evidence of dissipation by Nori or Centimila, which were controlled by the Mints family, was not evidence of a risk of dissipation by the 1st - 3rd Defendants themselves. When considering risk of dissipation, it is in my view legitimate to look at the actions of those who control a corporate entity; evidence that a company has dissipated assets may constitute relevant evidence of a risk of dissipation against those who control the company.

42. The principal argument advanced was that there was insufficient recent evidence of any dissipation. Mr. Midwinter submitted that it was clear, from documents filed in the Cyprus proceedings, that by January 2018 the Claimants intended to come after the Mints family. Proceedings had already been started in Russia by that time. There was,

however, no good evidence of any dissipation in the 18 months that had elapsed since that time.

43. I did not consider that there was any force in this argument. The transactions relied upon by the Claimants all took place in a period of less than two years prior to the application for the WFO. The reduction in capital by Nori, and the consequent payment out of US$ 200 million, appears to have taken place in the first 6 months of 2018; i.e. just over a year prior to the application for a WFO. I do not consider that it is necessary for the Claimants to show solid evidence of a risk of dissipation by reference to transactions taking place later in time, particularly bearing in mind the nature and scale of the transactions on which the Claimants were able to rely, and the way in which those transactions were carried out.

44. I accept, of course, that if a claimant can only point to dissipatory transactions of some antiquity, a court may be reluctant to hold that there is any existing risk of dissipation at the time that the application is made; rather in the same way that a court may be reluctant to treat very old convictions of a defendant in a criminal case as evidence of a propensity to commit an offence many years later. But the transactions relied upon by the Claimants are in my view relatively recent, and in my view (for reasons already given) they provide the requisite solid evidence. I see no reason to disregard them because they were not more recent. Nor in my view is there a requirement for the applicant for a WFO to be able to identify recent dissipatory transactions. This may not be altogether easy, for example because a claimant may not have had recent dealings with a defendant or because of a lack of available information on recent activities of a defendant. Rather, the evidence must be considered as a whole. If there are very large transactions carried out within a period of a year or two prior to the application for a WFO, this may well be (and is in this case) material evidence in support of a risk of dissipation, even if the trail goes somewhat cold thereafter. Ultimately, the question is whether or not solid evidence exists, and in my view it does.

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

46. Mr. Midwinter also relied upon the fact that it was Nori, Centimila and Coniston which, in January and February 2018, had started arbitration proceedings in London. This demonstrated that those companies, and by implication the Defendants, were actively seeking to vindicate their rights, and were hotly disputing the Claimants' case. I did not consider that this argument was of any strength, when set against the matters to which I have referred. It is true that it was these companies which started arbitration proceedings. But they did so not long after they had given their shares in O1 Properties to Agdalia, and around the same time as the reduction in Nori's capital; i.e. at the time of the steps which the Claimants contend to be aimed at making those companies judgment-proof. I regard those facts as saying far more about the risk of dissipation

than the fact that the companies (two of which are now in Creditors Voluntary Liquidation) have started arbitration proceedings.

Delay

47. I was referred to a number of authorities relating to the possible impact of delay on the court's willingness to grant a freezing order. The issue of delay has been considered in a number of relatively recent Court of Appeal authorities.

48. In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 906 at [34], Bean LJ said that "it is not generally the rule that delay in applying for a freezing injunction…is a bar in itself to the obtaining of relief". He added:

> "…It may mean in some cases that there is no real risk of dissipation and that if the claimant had seriously thought that there was, an application would have been made earlier. But that cannot possibly be said in the present case. I agree with the observations on this topic made by Flaux J in *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm). If the court is satisfied on the evidence that there remains a real risk of dissipation it should grant an order, notwithstanding delay, even if only limited assets are ultimately frozen by it."

49. The observations of Flaux J. in *Madoff,* to which Bean LJ referred, included the following:

> "(1) The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard inter partes, does not, without more, mean 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, despite the delay, even if only limited assets are ultimately frozen by it;
>
> (2) The rationale for a freezing injunction is the risk that a judgment will remain unsatisfied or be difficult to enforce by virtue of dissipation or disposal of assets (see further the citation from *Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M")* [2008] 2 Lloyd's Rep 602; [2008] EWHC 1615 (Comm) below). In that context, the order for disclosure of assets normally made as an adjunct to a freezing injunction is an important aspect of the relief sought, in determining whether assets have been dissipated, and, if so, what has become of them, aiding subsequent enforcement of any judgment;
>
> (3) Even if delay in bringing the application demonstrates that the claimant does not consider there is a risk of dissipation, that is only one factor to be weighed in the balance in considering whether or not to grant the injunction sought."

50. In *Ras al Khaimah Investment Authority v Bestfort Development LLP* [2018] 1 WLR 1099, Longmore LJ said at [55]

> "Delay on the part of a party applying for a freezing injunction gives rise to rather more elusive considerations. It can be said that any serious delay means that an applicant does not genuinely believe there is any risk of dissipation or conversely (and more cynically) 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. 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. The former argument is also open to the objection that it is the fact of the risk rather than a claimant's apprehension of it that should govern the court's decision.
>
> 56 Nevertheless relief is often denied to an applicant who pursues his rights in a dilatory fashion; it was denied by Roth J in *Anglo Financial SA v Goldberg* [2014] EWHC 3192 (Ch) where there had been several years of negotiation about the matters in dispute before an injunction was applied for… "

51. Both the Claimants and 1st – 3rd Defendants referred to the decision in *Holyoake and another v Candy and others.* The case contains no general (or different) statements, to those set out above, as to the effect of delay. In that case, the Court of Appeal, reversing the judge, concluded that the applicant had not established a risk of dissipation. In reaching that conclusion, the Court of Appeal relied upon a number of matters. These included, in paragraph [62], the conclusion that if there had been a real risk of the defendants unjustifiably dissipating their assets, "it would have materialised by the time of the application." Having reviewed the facts including a 16-month period between the time when the claim was first intimated, and the time of the application, the court concluded that it was unlikely that the defendants would unjustifiably dissipate their assets in the future, "having not done so by this point". This conclusion seems to have reflected a finding of the judge at paragraph [46] of his judgment; namely that the defendants had not re-arranged their affairs in the way that the claimants feared, or at any rate could not be shown to have done so. The judge had wrongly disregarded what the Court of Appeal considered, on the facts of that case, to be a powerful factor against any conclusion of a real risk of dissipation.

52. In the present case, there exists (for reasons already given) strong and solid evidence of a real risk of dissipation. Since I am satisfied that there is and remains a real risk of dissipation, I consider it appropriate to grant the order, notwithstanding such delay as has occurred. In fact, the delay in the present case has not been extensive, and is for the most part readily understandable given the complexity of the case and the other circumstances. The essential features of the chronology are as follows.

53. The events giving rise to the present claim occurred in August 2017. They concerned a Russian bank and Russian defendants, and had no connection with England. The reason that the proceedings have now been commenced here, and that there is a jurisdictional basis for doing so, is that it is now known that the Mints family has moved here. However, there is no evidence that this was publicly known until it was reported by the Daily Mail in May 2018 and the evidence does not show that the Claimants became aware of this press report, or that they appreciated that it was accurate, at that time. In

any event, a press report of that kind is not sufficient in my view to warrant a conclusion that a claimant will be able to establish English jurisdiction on the basis of the defendant's domicile, or to found a criticism of a claimant for not starting proceedings earlier. Mr. Tseshinskiy's evidence was that the actual whereabouts of the Defendants was not known publicly, and also that the First Defendant had connections to both Israel and Malta. The most that can be said is that if the press report came to the Claimants' attention, it warranted further investigation.

54. However, it is clear that by no later than September 2018 the Claimants were aware of press reports that the Mints were within the jurisdiction, since this was referred to in the defence served in the LCIA arbitration proceedings. Accordingly, by that time, it can fairly be said that the Claimants could have started investigating the possibility of commencing proceedings in England. It is also the case that, by that time, there had been various sets of proceedings in existence; in particular, Russian proceedings which had been commenced in October 2017, the LCIA arbitration proceedings commenced by Nori and Centimila in January 2018, and proceedings in Cyprus also commenced in January 2018 by Bank Otkritie. All of these proceedings involved various O1 companies, rather than the Mints family as personal defendants. They do, however, show that from an early stage, and certainly by January 2018, there were potential claims in fraud certainly against the 1st Defendant, and possibly against other members of the Mints family.

55. The evidence of Mr. Tseshinskiy was that the Claimants first considered bringing the present claim and seeking interim relief against these Defendants, in the second half of 2018. He acknowledges in his Affidavit that there has been some lapse of time in making the application. Mr. Tseshinskiy's Affidavit explains some of the difficulties that faced the Claimants, as well as other factors which accounted for the delay. These included: (i) the Claimants were investigating other suspicious and potentially fraudulent transactions, and wanted if possible to bring all claims at one time in order to avoid multiplicity of proceedings; (ii) they wished to explore the possibility of a commercial solution, and this was explored in a number of meetings; (iii) there were serious issues accessing relevant Bank Otkritie emails, with the e-mails relied upon by the Claimants on the WFO application only being located in early April 2019; (iv) officers of Rost Bank were unwilling to co-operate with the Claimants at least until April 2019; (v) it was only in November 2018 that the rights giving rise to the claims were assumed by the first Claimant; (vi) the Claimants needed to be sure of their ground in establishing that the Defendants, or at least one of them, was in fact domiciled in England. It was only in December 2018 that the first Claimant's management team took over responsibility for the potential litigation, and it then swiftly put in place a team to review the possibility of claims, including claims against the Defendants, and a team to search for and to reinstate emails. It was only in April 2019 that, following the receipt of a report from a business intelligence consultancy, the Claimants received evidence which strongly suggested that all of the Defendants had relocated to England and were domiciled here.

56. Against this background, I do not consider that it can fairly be said, as the 1st – 3rd Defendants contend, that there has been a delay of 20 months in bringing the present proceedings: i.e. a delay since October 2017, when proceedings in Russia were commenced. It was not until there was reasonably reliable evidence of the Defendants' domicile in England that proceedings in this jurisdiction could be commenced with any

degree of confidence. It was only in April 2019 that the Claimants obtained firm evidence that the Defendants had relocated to England, and by that time they had already instructed Steptoe & Johnson on their behalf. However, as indicated above, the Claimants were aware by September 2018, when they filed their defence in the LCIA proceedings, that it was possible that the Defendants were in England. Furthermore, Mr. Tseshinskiy accepts that proceedings were being contemplated in the second half of 2018. It can therefore in my view be said that, since September 2018, there was some delay in investigating the claim and then instructing London solicitors in March 2019. There was then some delay before the application was made in June 2019, although I do not regard this as material in view of the complexity of the transactions and the evidence, and the need to ensure that all relevant facts were fairly disclosed to the court.

57. Accordingly, the relevant period of delay is in my view around 6 months from September 2018 to March 2019.

58. Moulder J. was made aware of the delay, and the reasons for it, and did not consider that it ought to prevent the grant of the WFO. I take the same view. In my view, this is clearly not a case where such delay as has occurred is evidence of an absence of genuine belief, on the part of the Claimants, in the risk of dissipation. Indeed, I note that attempts have been made, successful to some extent in Russia, to obtain freezing orders against various companies within the O1 Group. These attempts were made reasonably promptly after the intervention of the CBR, and they evidence a genuine belief in the need to freeze assets to prevent dissipation. It is true that no applications were made at this early stage against these Defendants. But I see no basis for concluding that this was because there was no genuine belief in a risk of dissipation by these Defendants, in circumstances where there was evidence of such a belief in relation to companies which they controlled. Mr. Tseshinskiy gave detailed reasons for the delays which occurred, and I see no reason to reject that evidence. Whilst it may be that there has been some delay which could have been avoided, it does not follow that the conclusion should be drawn that this had anything to do with a lack of genuine belief in the need for a WFO.

59. Nor, in my view, is this a case where the order can be said to be futile because there is almost certainly nothing left in the stable. Indeed, Mr. Midwinter made it clear that he was not running the case on delay in that way.

60. Rather, the case for the 1st – 3rd Defendants was based on the argument, similar to that successfully advanced in *Candy,* that the delay demonstrated the absence of a risk of dissipation; because there was no evidence to show that the Defendants had availed themselves of the opportunity to dissipate their assets. However, I consider that there is limited value in seeking to compare the facts of particular cases, such as *Candy*, with the facts of the present case. I have endeavoured to apply the relevant principles as to risk of dissipation in the context of the facts described above. Having done so, I have concluded that there is solid evidence of a risk of dissipation. Furthermore, contrary to paragraph 27 of the written submissions of the 1st – 3rd Defendants, the Bank has been able to produce "evidence of some serious efforts at dissipation of assets by the 1st – 3rd Defendants over the last two years". In particular, the Nori reduction in capital occurred within the first half of 2018, thereby contradicting the submission that "there is no evidence whatsoever that any of the 1st – 3rd Defendants has taken or intends to take any steps to dissipate any of his assets in the 20 months since [the transfers to Agdalia]."

61. In view of the existence, in my view, of sufficient material from which a real risk of dissipation can be inferred, it is for the Defendants to come forward with satisfactory explanations in response to this evidence. This could consist of satisfactory explanations of the transactions and facts upon which the case of dissipation is based. Or it could consist of positive evidence that, notwithstanding those matters, there is no real risk of dissipation; for example, by providing evidence as to the state of the defendant's assets some time ago and showing that there has been nothing that could properly be called dissipation since then. However, beyond assertions in written and oral submissions, there has been no positive evidence of that nature.

62. The Defendants also referred, on occasions, to the possibility of the Claimants bringing proceedings in Cyprus for a WFO against the present Defendants, and to the Claimants' delay in so doing. I did not consider that this argument advanced the case based on delay. When delay is put forward as a reason for the court not granting a WFO, the focus in my view should be on such delay as occurred in seeking relief from the English court. This is particularly so in the present case, where the evidence indicates that the Defendants are domiciled here and where there is no evidence that the Defendants are domiciled or have assets in Cyprus. Moreover, the whereabouts of the Defendants were not known at the time that the Cyprus proceedings were commenced in January 2018, and the various reasons given by Mr. Tseshinskiy for the delay in commencing proceedings in England applied, at least for the most part, to potential proceedings in Cyprus.

63. Ultimately, the question is whether it is just and convenient to grant the WFO: see *Candy* at paragraph [34]. Although there has been some delay in the present case, I consider that it remained just and convenient to continue the WFO granted by Moulder J., subject to the question of whether it should be replaced by undertakings (as has now happened).