Neutral Citation Number: [2021] EWHC 692 (Comm)

Case No: CL-2019-000412 & CL-2020-000432

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2021

Before :

SIR NIGEL TEARE
Sitting As A Judge Of The High Court

Between :

(1)PJSC NATIONAL BANK TRUST	**Claimants**
(2)PJSC OTKRITIE FINANCIAL CORPORATION	
- and -	
(1) BORIS MINTS	**Defendants**
(2) DMITRY MINTS	
(3) ALEXANDER MINTS	
(4) IGOR MINTS	
(5) VADIM BELYAEV	
(6) EVGENY DANKEVICH	
(7) MIKAIL SHISHKHANOV	

Nathan Pillow QC, Louise Hutton and Anton Dudnikov (instructed by **Steptoe & Johnson UK LLP**) for the **Claimants**
Camilla Bingham QC and James Nadin (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Fifth Defendant**
Charles Dougherty QC and Timothy Killen (instructed by **Kennedys Law LLP**) for the **Sixth Defendant**
Victoria Windle (instructed by **Brown Rudnick LLP**) for the **Seventh Defendant**

Hearing dates: 08 and 09 March 2021
Draft sent to Parties: 17 March 2021

Approved Judgment

I direct that 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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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 AM on 23 March 2020.

Sir Nigel Teare :

1. In recent years the Commercial Court has heard a number of cases which have concerned what are essentially Russian disputes. That has sometimes occurred because the defendants have taken up residence in London and so it has been possible to sue them in this jurisdiction and (on the basis of the law as it was until recently) no application for a stay has been able to be made. The present case is one which is essentially a Russian dispute. There are seven Defendants whom the Claimants wish to sue in this jurisdiction. All seven are Russians but all but one have left Russia. The first four Defendants reside in England and have been sued here. The Fifth and Sixth Defendants now reside in the United States and Israel respectively. The Seventh Defendant still resides in Russia. The Claimants' ground for suing the Fifth, Sixth and Seventh Defendants in this jurisdiction is that they are necessary or proper parties to the claim brought against the first four Defendants. The Fifth, Sixth and Seventh Defendants say, this being a Russian dispute, that they should be sued in Russia and the Commercial Court should decline the opportunity to hear the case against them. Whether or not the Commercial Court decides to hear the case against them depends upon whether the court in Russia or the Commercial Court in England is the *forum conveniens*. The first four Defendants have not sought a stay on such grounds. They are unable to do so because of the decision in *Owusu v Jackson* [2005] QB 801 and the circumstance that the proceedings against them were begun before the end of the transition period, following the UK's withdrawal from the EU.

The alleged claims

2. The Claimants are two Russian banks which lent sums of money to borrowers who have been described as "the O1 Group". It is said that the O1 Group was ultimately owned or controlled by the First to Fourth Defendants, "the Mints Defendants". At the time of the loans the Mints Defendants were resident in Russia but are now resident in England. Counsel for the Claimants have described the alleged claims against the Mints Defendants and the circumstances giving rise to them as follows:

> "[The Claimant banks] were on the brink of collapse and, shortly afterwards, were taken over by the Central Bank of Russia ("the CBR**"**) and subject to "*sanation*", a form of temporary administration intended to prevent bankruptcy. The management of each bank was replaced and a "*Participation Plan*" implemented, by which they were recapitalised with billions of US$ worth of public funds, effectively nationalising them.
>
> These claims are principally concerned with some US$800m of loans to the O1 Group—which were performing, significantly secured, and relatively short-term—that were re-paid with the banks' own money and replaced with illiquid, unsecured, non-income producing and extraordinarily long-term O1 bonds worth (at best) a small fraction of the price [the Claimant banks] were caused to pay for them, and of the value of the loans they replaced ("the Otkritie Replacement Transactions" and "the Rost Replacement Transactions").

> [The Claimant banks] allege that the Mints Defendants dishonestly procured the Replacement Transactions in conspiracy with the banks' then controllers, to benefit the O1 Group at the expense of the banks ("the Replacement Transaction Claims")."

3. The Fifth Defendant, Vadim Wolfson (described in the Claim Form as Vadim Belyaev), was in August 2017 the holder of over 28% of the shares in a company (Holding) which was a major shareholder in the Second Claimant, Bank Otkritie. He was also the Chairman and CEO of Holding.

4. The Sixth Defendant, Evgeny Dankevich, was in August 2017 the Chairman of the Board of Bank Otkritie.

5. The Seventh Defendant, Mikail Shishkhanov, was in August 2017 the sole shareholder and chairman of Rost Bank.

6. The Statement of Claim in the action against the Mints Defendants alleges a conspiracy between the Mints Defendants and Messrs. Wolfson, Dankevich and Shishkhanov to bring about the Replacement Transactions; see paragraph 32. However, when the proceedings were commenced on 28 June 2019 Messrs. Wolfson, Dankevich and Shishkhanov were not made party to them.

7. On 10 July 2020 the Claimants issued an application to join Messrs. Wolfson and Dankevich as Fifth and Sixth Defendants (in relation to the Otkritie Replacement Transaction) and Mr. Shishkhanov as Seventh Defendant (in relation to the Rost Replacement Transaction and what have been described as "patently uncommercial transactions with Stratola Investments" ("the Stratola Claims")). At the same time new proceedings were commenced against the Second, Third, Fifth, Sixth and Seventh Defendants, making the same claims.

8. Unlike English law, Russian law (I was told) does not recognise conspiracy as a cause of action. Instead the cause of action relied upon is a breach of a statutory duty under Russian law. The allegation of conspiracy is, no doubt, an important factual averment but it is not a necessary element of the cause of action upon which reliance is placed.

9. The cause of action relied on as a matter of Russian law is a breach by each of the Fifth, Sixth and Seventh Defendants of their duty pursuant to article 53 of the Russian Civil Code, that is, a duty to act in good faith and reasonably. That duty applied, so it is alleged, to the Sixth and Seventh Defendants because of their formal positions as officers of Bank Otkritie and Rost Bank respectively and the duty applied, so it is alleged, to the Fifth Defendant because of his alleged *de facto* control of Bank Otkritie. The breaches of that duty which are alleged are set out in paragraphs 53, 53A and 53B of the Consolidated Particulars of Claim. In essence it is said that those Defendants, knowing that the bonds purchased as part of the Replacement Transactions were worth a fraction of the price paid, that the bank in question was in a precarious financial position and that it was unlikely that the O1 Group could meet its obligations under the Replacement Transactions, approved the Replacement Transactions and by doing so failed to act in the interests of the bank in question or in good faith. They are said to have acted dishonestly.

10. On 4 August 2020, following an *ex parte* hearing, HHJ Pelling QC, sitting as a Judge of the High Court, granted permission for service of the proceedings out of the jurisdiction on the Fifth, Sixth and Seventh Defendants. It is that permission which those Defendants now seek to have set aside.

Other proceedings

11. Before dealing with the clear and attractive submissions advanced by all counsel it is necessary to summarise the other proceedings which have been commenced in Russia, Cyprus, New York and in arbitration in London in the wake of the "sanation" procedures in respect of the Otkritie and Rost Banks which took place on 29 August 2017 and 21 September 2017 respectively. Very considerable sums of Russian public money were made available to rescue the banks from insolvency. I was told that Bank Otkritie required 927 billion roubles (about US$ 15 billion) to restore its liquidity and capital and that Rost Bank required 810 billion roubles (about US$13.5 billion) to restore its liquidity and capital. The Replacement Transactions were carried out shortly before the "sanation" of both banks; the Otkritie Replacement Transactions were carried out on 9-10 August 2017 and the Rost Bank Replacement Transactions were carried out on 21 August 2017.

12. As a result of the sanation of the two banks the CBR is the majority owner of Bank Otkritie and of Rost Bank. Certain "bad and dubious" assets were transferred to the First Claimant, "NBT", which explains why it is the First Claimant. For the sake of simplicity (in so far as that is possible) I shall continue to refer to Bank Otkritie and Rost Bank and only refer to NBT when it is necessary to do so.

13. On 31 October 2017 Bank Otkritie commenced what have been described as "the Invalidation Proceedings" in Russia. These were brought against a number of O1 companies and their object was to set aside the Otkritie Replacement Transactions. Certain of those companies had the benefit of a London arbitration clause and an order restraining Bank Otkritie from pursuing the Invalidation Proceedings was obtained from this court in June 2018. Although Bank Otkritie filed a notice of discontinuance against those companies which had the benefit of the London arbitration clause the Russian court continued with the proceedings after the CBR intervened to submit that Bank Otkritie should not be permitted to discontinue. Judgment was given in those proceedings in favour of Bank Otkritie in October 2018.

14. The companies which were party to the London arbitration agreement commenced an LCIA arbitration against Bank Otkritie in January and February 2018 seeking a declaration that the Otkritie Replacement Transactions were valid. Bank Otkritie counterclaimed for a declaration that it was invalid on the grounds (I was told, with the consent of the parties) of the same conspiracy which is alleged in the proceedings in this court. The arbitral tribunal (Sir Christopher Clarke, Sir Stephen Tomlinson and Sir Rupert Jackson) heard those competing claims over a five week period in July and August 2020. Evidence was given by certain of the Mints Defendants but not by the Fifth, Sixth or Seventh Defendants. None of the Defendants was party to the arbitration. The award is awaited.

15. On 27 December 2017 Rost Bank commenced its own Invalidation Proceedings in Russia, their object being to set aside part of the Rost Replacement Transactions. I

believe that the Russian court has given judgment in favour of Rost Bank but I am not sure of the date of such judgment.

16. On 19 January 2018 Bank Otkritie commenced proceedings in Cyprus against certain O1 companies and the Sixth Defendant seeking a declaration that the Otkritie Replacement Transactions were void on the grounds of fraud. These proceedings were discontinued on 10 January 2019.

17. On 17 September 2018 criminal proceedings were brought in Russia, following an application by Bank Otkritie, against the Sixth Defendant in relation to the Otkritie Replacement Transactions. These are continuing.

18. On 30 May 2019 Rost Bank commenced further Invalidation Proceedings in Russia, their object being to set aside another part of the Rost Replacement Transaction. The Russian court gave judgment in favour of Rost Bank on 13 August 2020.

19. On 28 June 2019 (the same day on which the English proceedings were commenced) the CBR on behalf of Bank Otkritie commenced what have been described on this application as "Insolvency Proceedings" against the Fifth and Sixth Defendants and others, claiming damages relating to the sanation of Bank Otkritie. Judgment was given in favour of Bank Otkritie in September 2020. The judgment is secret. I was however told that the damages awarded amounted to some US$2.8 billion.

20. Although the hearing was heard in secret the pleadings and certain submissions were in evidence and so, with the assistance of the expert evidence of Russian law which the parties adduced on this application, the outline of the Insolvency Proceedings is reasonably clear. The proceedings are based upon article 189 of the Bankruptcy Law which enables the CBR in the name of a bank which is undergoing bankruptcy prevention measures such as sanation to claim damages from a person in control of the bank who has brought about the sanation of the bank by his negligence or bad faith. According to the solicitor acting for the Fifth Defendant it was alleged in the Statement of Claim that those in control of Otkritie Bank "used an overly risky business model, and undertook overly risky transactions, which led to the downgrade of the credit-rating of the Bank and a consequent loss of liquidity." The Statement of Claim was in evidence and supports that summary. A written submission dated 11 December 2019 by the CBR appears to give what might be described as further particulars of the allegation by reference to an audit of the Bank's activities. It is headed "facts bearing evidence to the improper management of the risk management system and internal control system by the persons controlling the Bank." It must also be noted that the same submission advanced a case of bad faith based upon "inappropriate disclosure in the Bank's reporting documents of the real quality of assets, expressed in the systematic insufficient creation of reserves". The damages claimed by the CBR in the name of Otkritie Bank were said by the solicitor to be, in summary, the difference between (i) the income actually received from the funds invested by the CBR in Bank Otkritie and (ii) the income that would have been earned by the CBR if it had invested those funds at the key rate (a rate set by the CBR). The expert evidence of Russian law confirmed that that was the measure of damages which was sought in the Insolvency Proceedings.

21. The downgrade of the Bank's credit rating was on 3 July 2017 and so it follows that the alleged negligence and bad faith occurred prior to that date. The Replacement

Transactions occurred in August and September 2017 shortly before the sanation of both banks. The chronology therefore strongly suggests that the wrongdoing alleged in the English proceedings, a dishonest approval by the Fifth and Sixth Defendants of the Otkritie Replacement Transactions, occurred after the wrongdoing alleged in the Russian Insolvency Proceedings, negligence or conduct in bad faith which caused the down grade of the Bank's credit rating and loss of liquidity.

22. This was not accepted by counsel for the Sixth Defendant who relied upon a reference in the CBR's written submission of 11 December 2019 to the Otkritie Replacement Transactions which were said to have been for the "unlawful purpose of causing harm to the Bank as established by" the decision of the Russian Court in the Invalidation Proceedings on 9 October 2018. It was further observed that the Russian Court had found that the Replacement Transactions were "a scheme made with the aim of causing harm to the Bank".

23. The reason why the Replacement Transactions were mentioned is not clear. Immediately before they are mentioned the submission of the CBR had noted that "the unfair and improper performance by the Defendants of their obligations to ensure the creation of an effective risk management system corresponding to the scale of the Bank's activities and the level of risks assumed and allowing timely and adequate reporting of assets depreciation significantly hampered the implementation of measures to prevent bankruptcy, in particular, such measures could have been started earlier and as a result could be more efficient and less resource-intensive." Thus the submission appears to have been explaining a consequence of the negligence and bad faith alleged against the Defendants to the Insolvency Proceedings. The submission then goes on to mention a consequence of the delay in taking measures to prevent the bankruptcy of the Bank. "Furthermore, if measures to prevent bankruptcy had been started earlier, then the Bank would not have made transactions aimed at withdrawing assets from the credit institution." Reference is then made to the Replacement Transactions of 9 and 10 August 2017.

24. The reference has been considered by the Russian law expert advising the Claimants, Mr. Bayramkulov. He said that "part of the funds invested by the Central Bank [were] intended to cover the "financial hole" in Bank Otkritie caused by the Otkritie Replacement Transactions."

25. Whatever the purpose of the CBR in mentioning the Replacement Transactions the conduct which led to those transactions does not appear to have been part of the case alleging a breach of duty. A little later in the submission the case being alleged is summarised as follows:

> "Thus, the foregoing testified to the fact that the controlling persons of the Bank ……..in contravention of principle of good faith and reasonableness in the implementation of management and control functions, as well as in violation of banking rules, created and maintained such a System of Internal Control and a Risk Management in the Bank, which made it possible to systematically conceal the poor quality of the Bank's assets through non-disclosure and distortion of the necessary reserves, which eventually led to the need for the bailout of the

> Bank. Due to their status, these persons could not have been ignorant of the actual financial condition of the Bank."

26. This emphasises that the basis of the claim in the Insolvency Proceedings was the conduct of those in control of the Bank which led to the need for intervention by the CBR. That conduct, poor management and control, preceded the Replacement Transaction which was executed only very shortly before the bail out or sanation of the Bank. It may be that the Replacement Transactions increased the amount of the bail-out to cover what Mr. Bayramkulov described as a "financial hole", in which case they would have increased the damages recoverable by the CBR. But they do not appear to have been the basis of the Insolvency Proceedings.

27. Counsel for the Sixth Defendant submitted that drawing conclusions as to the basis of the Insolvency Proceedings in circumstances where the trial had been in secret was an unsafe exercise. I accept that the secret nature of the trial means that one cannot know what was said at the trial but the Statement of Claim and the written submission of the CBR are reasonably clear as to the basis of the claim brought against the Defendants to the Insolvency Proceedings. That conclusion tends to be supported by the circumstance, as noted by Mr. Bayramkulov, that in the Insolvency Proceedings brought against the Seventh Defendant (see below) there are no references in the Statement of Claim to the Rost Replacement Transactions.

28. On 28 August 2020 (soon after permission had been granted to serve the English proceedings out of the jurisdiction on the Fifth, Sixth and Seventh Defendants) Bank Otkritie commenced proceedings in New York against the Fifth Defendant seeking damages in respect of certain actions prior to the sanation of the Bank, but not in relation to the Otkritie Replacement Transactions.

29. On 18 September 2020 Rost Bank commenced two sets of proceedings against the Seventh Defendant and others in respect of Rost Bank, alleging a breach of Article 53 of the Russian Civil Code ("the Article 53 proceedings"). These proceedings were not, I understand, in relation to the Rost Replacement Transactions.

30. On 21 September 2020 the CBR on behalf of Rost Bank commenced Insolvency Proceedings against the Seventh Defendant and others claiming damages relating to the sanation of Rost Bank.

31. On 26 February 2021 NBT gave notice that it intended to commence further proceedings against the Sixth Defendant in connection with the sanation of the First Claimant.

Forum conveniens

32. There was no dispute as to the applicable principles.

33. Questions of *forum conveniens* are determined by the principles established in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 476. The principles have subsequently been referred to by both the Privy Council (in *Altimo Holdings v Kyrgyz Mobil Tel* [2012] 1 WLR 1804) and the Supreme Court (in *Lungowe and others v Vedanta Resources and another* [2020] AC 1045). In the latter case Lord Briggs summed up the principle in these terms:

> "The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the *Spiliada* case, summarised much more recently by Lord Collins in the *Altimo* case at para 88 as follows:
>
> "The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; …"
>
> That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

34. *Spiliada* concerned an application by a defendant seeking a stay of proceedings commenced as of right. Lord Goff stated:

> "In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum."

35. Where permission is required to serve out of the jurisdiction the burden lies on the claimant to show that England is the proper place in which to bring the claim. As was made clear by Lord Goff in *Spiliada*:

> "The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."

36. If another forum appears to be the clearly or distinctly more appropriate forum then permission to serve out will be refused, unless the claimant has a legitimate juridical advantage in pursuing its claim in England so that "substantial justice" cannot be achieved in the alternative forum. Thus in in *Lungowe and others v Vedanta Resources and another* service out of the jurisdiction was permitted because in Zambia (the more appropriate forum) it would be impossible for the claimants to fund their claim and there were no suitably experienced legal teams for the complex litigation required and thus there was a real risk that the claimants would not be able to obtain substantial justice there.

Application to this case

37. There is no doubt, and no dispute, that this is a Russian case. The Claimants and the Defendants are Russian. The alleged wrongdoing by all Defendants occurred in Russia, though, perhaps inevitably, there was at least one relevant meeting in the South of France. The alleged losses were sustained in Russia. The causes of action relied upon are creatures of Russian law. Most of the documents are in Russian.

38. There is only one reason why the Claimants seek to bring the claims against the Fifth, Sixth and Seventh Defendants in England and that is that the claim against the Mints Defendants is being heard in England. In those circumstances it is said that the risk of multiplicity of proceedings about the same issue and of inconsistent decisions is a "very important factor indeed, in the evaluative task of identifying the proper place"; see *Lungowe and others v Vedanta Resources* [2020] AC 1045 at paragraph 69 per Lord Briggs.

39. This factor has been stressed, in particular, in actions where conspiracy is alleged. In *Donohue v Armco* [2002] 1 Lloyds Rep. 425 Lord Bingham said, at paragraph 34:

> "The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice."

40. The strength of the factor in that case was such that it was sufficient to override the requirements of an exclusive jurisdiction clause.

41. In *JSC BTA Bank v Granton* [2011] 2 AER (Comm) an application was made to set aside service of proceedings out of the jurisdiction on companies who were a necessary or proper party to proceedings brought against Mr. Ablyazov and Mr. Zharimbetov. It was alleged that Mr. Ablyazov and Mr. Zharimbetov had conducted a fraudulent scheme whereby money was extracted from the bank for the personal benefit of Mr. Ablyazov. The companies upon whom service had been permitted were utilised by Mr. Ablyazov for this purpose.

42. Christopher Clarke J. refused to set aside the permission for service out of the jurisdiction. At paragraph 12 and following he said:

> "12. But for the presence of Mr Ablyazov and Mr Zharimbetov in this jurisdiction, England would not be the appropriate forum for any trial. However, as I have said, in February 2009 both of them fled from Kazakhstan, moved to England and have become presumptively domiciled here. Criminal investigations have been launched against them in Kazakhstan relating, inter alia, to the loans to the Borrowers. Mr Ablyazov contends that the claims against him are politically motivated and has sought asylum here. Both he and Mr Zharimbetov have in other proceedings alleged the absence of the rule of law in Kazakhstan and contend that they would face political persecution if they returned there.
>
> 13. That circumstance fundamentally alters the position. Mr Ablyazov and Mr Zharimbetov are the alleged architects of the fraud. In view of their domicile within this jurisdiction there is no possibility of their applying to stay the proceedings against them and they have no intention of doing so. On 3rd September 2010 they issued an application for an order that the claim in these proceedings against them should be struck out or permanently stayed on the grounds that it is an abuse of process of the English court and/or that to allow it to proceed would be contrary to English public policy. What is said is that the nationalisation of the Bank was part of a scheme to expropriate Mr Ablyazov's assets and to eliminate him as a political force and that the present claim is a continuation of that scheme. Subject to the outcome of that application (currently due to be heard in January 2011) the claim against them will continue. In those circumstances it seems to me plain, as it did to Mr Kealey, QC, that the applicants are necessary and proper parties and that England is distinctly the most suitable of the competing forums.
>
> 14. As to the former, the applicant companies are all alleged to be controlled by Mr Ablyazov and to be the vehicles by which he fraudulently enriched himself. It makes little sense to decide whether that is so in proceedings which do not have both Mr Ablyazov and Mr Zharimbetov, on the one hand, and the Borrowers and Intermediaries on the other. The same essential issues lie at the heart of the claim against all of them, namely whether there was a massive fraud orchestrated by those two persons using the applicants as the means of carrying it into effect. Proceedings without those two or without the Borrowers and Intermediaries as parties would be incomplete.
>
> 15. As to the latter, England is the forum in which the whole dispute can be tried in circumstances where the court is more likely than any other to have before it the evidence of all the

> relevant participants. It is fanciful to suppose that Mr Ablyazov and Mr Zharimbetov would voluntarily take part in any claim against them in Kazakhstan. If a judgment was obtained against them in Kazakhstan, I can foresee great scope for dispute as to its enforceability in the light of the allegations which they make about persecution by the Kazakh authorities. It is in the interests of justice in this case that the claim against the applicants should be brought in a court to whose jurisdiction the first two defendants are unquestionably subject and before which there can be no good grounds (assuming good health) for non appearance.
>
> …….
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> 17. If the proceedings against Mr Ablyazov and Mr Zharimbetov go ahead as, subject to the strike out/ stay application, they will, and the proceedings against the applicants are heard in Kazakhstan (or elsewhere) there is an obvious risk of inconsistent judgments and of waste and duplication of costs. That is a powerful factor in favour of having the applicants as parties to this litigation: see *889457 Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679 (Comm), para 25; *Citi-March Ltd v Neptune Orient Lines Ltd* [1996] 1 WLR 1367, 1375-6.
>
> 18. I do not ignore the size of the connection of the case with Kazakhstan, the swathes of documentation which are in Russian, and the fact that the claim is governed by Kazakh law. I do not, however regard those matters as outweighing the considerations to which I have referred or rendering the English court an inappropriate, or less appropriate, forum."

43. In that case Mr. Ablyazov and Mr. Zharimbetov were the most significant parties on the defence side (see paragraph 29) and that was a factor which had a bearing on whether it was appropriate to join the companies (see the discussion at paragraphs 23-29). Although aspects of that case bear comparison with the facts of the present case, as counsel for the Claimants submitted, I do not know whether the Mints Defendants are the most significant parties on the defence side in this case. They may be of equal significance to the other Defendants.

44. In *ED&F Man Capital Market v Come Harvest Holdings and others* [2019] EWHC 1661 (Comm) a claimant was bound to bring proceedings against two defendants in England by reason of an exclusive jurisdiction clause. The Claimant later decided to join other defendants to the proceedings upon the grounds that they were implicated in the alleged fraud. Daniel Toledano QC (sitting as a Judge of the High Court) said at paragraphs 51-52 as follows:

> "51. In my judgment, the present case, unlike *Vedanta*, is one where the need to avoid multiplicity of proceedings and the risk of irreconcilable judgments should bear considerable weight in the evaluation of proper forum.

> 52. This is especially so in circumstances where the claims that MCM is advancing by their nature require a single forum for their resolution. This is a case where a single overarching conspiracy is alleged against the First to Fourth Defendants as well as against Straits. Those claims need to be considered together alongside all of the claims now asserted against all Defendants. Documents and evidence available against one Defendant ought to be available against all Defendants. All of this points to the desirability of a single composite forum for this litigation. Although it was not known as at 23 November 2018 that the Third to Eighth Defendants would all submit to the jurisdiction of the English Court, that was certainly a possibility and that is now the position."

45. The Court of Appeal upheld this approach; see *ED&F Man Capital Markets v Straits Singapore* [2020] 2 Lloyd's Rep. 14. Flaux LJ said at paragraph 49:

> "49. Contrary to Mr Lewis QC's submissions, the judge did not overstate the importance of avoidance of multiplicity of proceedings and the risk of irreconcilable judgments as a factor in determining the proper place for the claim to be tried in the interests of all the parties. He said at [51] that in the present case it should be given considerable weight and rightly recognised at [52] that the nature of the claim of an overarching conspiracy was such that it needed to be considered alongside all the claims against all the defendants, with mutual disclosure available. As he said, that all pointed to the desirability of a single composite forum for this litigation. Given the exclusive jurisdiction clause in the Master Agreements with the first and second defendants and the fact that the third to eighth defendants had submitted to the English jurisdiction, that single composite forum and the proper place for the overall litigation to be tried was England. In my judgment, the judge's evaluation as to why England was the proper place to bring the claim and the weight he gave to the avoidance of multiplicity of proceedings and of the risk of irreconcilable judgments were unimpeachable."

46. These authorities provide undoubted support for the Claimants' case on this application, notwithstanding that they are not on all fours with the present case. The response of the Fifth, Sixth and Seventh Defendants is that the Claimants are only in a position to rely upon the undesirability of the multiplicity of suits and of inconsistent judgments because they chose to sue the Mints Defendants in England rather than in Russia, which is otherwise the clearly or distinctly more appropriate forum. In this regard reliance is placed on the approach of Lord Briggs in *Vedanta* at paragraphs 75, 79 and 87. Where the risk of irreconcilable judgments arises because the claimants have chosen to exercise a right to sue a party in England rather than in a jurisdiction which is an available (and appropriate) forum the risk of inconsistent judgments loses its force because it has arisen from the claimants' own choice.

47. In the present case it was not suggested that the Claimants could not have chosen to sue the Mints Defendants in Russia. Rather, it was submitted that no rational claimant would have chosen to do so because the Mints Defendants would not have entered an appearance (or the Russian equivalent) and so any resulting judgment would not be enforceable in any other jurisdiction. Even if they did enter an appearance the Mints Defendants would be likely to resist enforcement upon the grounds, it would be said, that the Russian proceedings were not fair. By contrast a judgment of the English court would be enforceable in other jurisdictions without difficulty. It was therefore said that the approach in *Vedanta* was not applicable in the present case.

48. This question had not been raised in the exchange of evidence before the hearing. In that exchange the Defendants did not suggest that the Mints Defendants ought to have been sued in Russia and the Claimants did not adduce evidence of their reasons for suing the Mints Defendants in England. But the latter did raise the issue in Counsel's skeleton argument (see paragraph 21), though perhaps not as clearly or as fully as it was in oral submissions. (That is not a criticism because the skeleton argument was, as its title proclaims and the Commercial Court Guide requires, a "skeleton" argument.) The issue raised by paragraph 21 was debated before me.

49. The Mints Defendants were not involved in this application and so there is no evidence from them as to what they would have done had proceedings been issued against them in Russia. Counsel therefore had to rely upon such inferences as could be drawn from such material as there was.

50. I was told by counsel for the Claimants, without objection, that the Mints Defendants are interested in certain trusts in the Cayman Islands and that the Claimants would wish to enforce any judgment they obtain against such trusts. It was submitted that a Russian judgment would face difficulties in this regard because the Mints Defendants would take care not to appear in any Russian proceedings with the result that any resulting judgment of the Russian court would not be enforceable in the Cayman Islands.

51. In order to test the reliability of this submission my attention was drawn by counsel for the Sixth Defendant to the response of the O1 companies to the proceedings which were in fact commenced against them in Russia. It was said that two non-Russian companies, owned or controlled by the Mints Defendants, namely, O1 Properties and Rebusia, had participated in the Invalidation Proceedings by, respectively, appealing a freezing order made in the Invalidation Proceedings and appealing the judgment in the Invalidation Proceedings. It was therefore said that the Mints Defendants, if sued in Russia, would have contested the proceedings. This submission was based upon the evidence of Mr. Tseshinskiy served on behalf of the Claimants.

52. It is difficult to draw reliable conclusions from this evidence. Although O1 Properties was said to have appealed against the freezing order, it was also described as a person not participating in the Invalidation Proceedings. And although Rebusia was said to have appealed the judgment in the Invalidation Proceedings the actual judgment records that Rebusia did not attend the hearing (whereas other companies were described as having participated in it).

53. Had proceedings been issued against the Mints Defendants in Russia seeking damages against them in respect of the Otkritie Replacement Transactions it is possible that they

would have defended them because they have assets in Russia. It is also possible that the Mints Defendants might have been alive to the risk that by taking part in such proceedings they would thereby facilitate enforcement of a Russian judgment in the Cayman Islands and so would not have been concerned about their Russian assets.

54. Without knowing the value of the Mints Defendants' assets in Russia or the appreciation, if any, that the Mints Defendants had that assets in a Cayman Islands trust may be "immune" from a Russian judgment in proceedings in which they had not participated, I do not consider that the Claimants can establish, the burden of proof being on them, that the Mints Defendants would not have defended proceedings brought against them in Russia.

55. However, there remains the second limb to counsel's argument, namely, that were a Russian judgment obtained against them the Mints Defendants would resist enforcement of it, whereas an English judgment would not face such difficulties.

56. It is apparent from the Defences of the Mints Defendants that they have accused those now in charge of Bank Otkritie of the "abusive pursuit of legal proceedings". In particular they have said that the criminal complaint included misleading and false descriptions of the Replacement Transactions. They have alleged that prosecutions of large scale economic crime have a negligible rate of acquittal in Russia, that mounting a defence is "almost impossible" and that complainants with state connections are known to be able to influence the conduct of such prosecutions. The normal formalities of procedure were not followed. Counsel submitted that it was therefore likely that allegations of this nature would be relied upon to resist enforcement of a Russian judgment on the grounds that the procedure was not fair.

57. Counsel for the Fifth Defendant submitted that reliance on the Defences was not sufficient. But in my judgment the Defences are good evidence of the views which the Mints Defendants hold concerning Russian criminal proceedings.

58. It was also said that the allegations in the Defences concerning criminal proceedings were made by amendment in January 2021 and so cannot be relied upon when seeking to set aside the order made by this court in August 2020. However, the allegations cast light on the Mints Defendants' likely response to a judgment of a Russian court and can properly be referred to.

59. It could also be said that the allegations concern criminal proceedings and so do not support the suggestion that the Mints Defendants would have the same views with regard to civil proceedings brought against them in Russia. However, the allegations are particulars of a general allegation that those now in control of Bank Otkritie have embarked upon a coordinated campaign against the Mints Defendants. It would be surprising if the Mints Defendants did not extend that allegation to civil proceedings as part of the alleged campaign.

60. Counsel for the Fifth Defendant submitted that there was no evidence that the Mints Defendants challenged the integrity of the civil justice system in Russia. Counsel said that the evidence relied upon might suggest that the CBR has "got it in for the Mints family" but that does not establish that the Mints Defendants "abhor the Russian civil justice system".

61. I consider that it is a reasonable inference from what is stated in the Defences that had the Mints Defendants been sued in Russia and been found liable by a Russian Court they would seek to resist enforcement of such a judgment by relying upon their case that there was in Russia an unfair campaign against them. I consider it unlikely that they would draw a hard and fast line between the CBR and the Russian civil justice system. The allegation that "complainants with state connections are able, and known to be able, to influence the conduct and outcome of a prosecution" does not suggest the drawing of such a line. When faced with an attempt to enforce a Russian judgment on the trusts in the Cayman Islands it seems to me very likely indeed that they would raise their complaints about the alleged campaign against them in Russia with a view to resisting enforcement of the judgment.

62. Counsel for the Claimants therefore submitted that the Claimants, when deciding whether to sue the Mints Defendants in England (where they are now susceptible to the jurisdiction of this court) or in Russia (from which the Mints Defendants have "fled", the verb used by the First Defendant in his Defence), would only be acting rationally if they preferred to sue them in England than in Russia.

63. The reasonableness or otherwise of the Claimants' decision to sue the Mints Defendants in England rather in Russia, was not focussed upon in the exchange of evidence prior to the hearing of the application. The question arose as a response to the arguments based upon *Vedanta* which were fully aired in the skeleton arguments and the oral submissions of counsel. That explains why there is no witness statement from Mr. Dooley explaining why the Claimants chose to sue the Mints Defendants in England rather than in Russia.

64. Having considered the opposing submissions and the factual context in which the question has arisen I consider that the submission made by counsel for the Claimants that their choice to sue the Mints Defendants in England was the only rational choice appears to me to be likely to reflect the reality of the matter. The Claimants and those advising them are likely to have considered the prospects of being able to enforce without undue difficulty any judgment they obtained on assets of the Mints Defendants and in particular in the Cayman Islands. Although the CBR is part of the Russian State and so unlikely to agree with the Mints Defendants' views of Russian justice it seems to me more likely than not that the Claimants would consider that the relative ease with which an English judgment could be enforced in the Cayman Islands was a cogent reason for suing the Mints Defendants in England. This conclusion echoes the approach of Christopher Clarke J. in *Ablyazov*, which I have quoted above, though that was, perhaps, a particularly clear case. The ease with which a judgment can be enforced has long been recognised as a legitimate juridical advantage; see *International Credit and Investment Company (Overseas) Limited v Shaikh Kama Adham* [1999] I.L.Pr 302 at paragraphs 24-25 per Morritt LJ. (and also *Inter-Tel Inc v OCIS* [2004] EWHC 2269 at paragraph 25, *Sharab v Al-Saud* [2009] 2 Lloyd's Reports 160 at paragraph 63, and *Karafin Bank v Manoury-Dara* [2009] EWHC 1217 (Comm) at paragraph 26).

65. The Fifth Defendant in his motion to dismiss the New York proceedings against him described the "alleged liquidity issues" with Otkritie Bank as having been "manufactured by the CBR". That suggests that he too considers that the authorities in Russia were pursuing him unreasonably or unfairly. The solicitor for the Sixth Defendant has given evidence that he is unable to visit Russia "for fear of being arrested

and imprisoned, possibly without the opportunity for a fair hearing." Thus both of them may also seek to resist the enforcement of a Russian judgment against them. By contrast the Seventh Defendant remains in Russia and appears to be content with the Russian legal system because he has volunteered to waive any time bar in Russia for proceedings against him.

66. It is now necessary to consider whether Lord Briggs' approach in *Vedanta* is applicable in the present case. In that case the "anchor defendant" had offered to submit to the jurisdiction of the Zambian Court to enable the whole case against it and the Zambian subsidiary of the anchor defendant to be tried there. In the present case there has been no such offer by the Mints Defendants to submit to the jurisdiction of the Russian Court but it is accepted that they could have been sued in Russia. In *Vedanta* there was no suggestion that the anchor defendant, having offered to submit to the jurisdiction of the Zambian Court, would oppose enforcement of a Zambian judgment on the grounds that the authorities in Zambia were responsible for a campaign against the anchor defendant.

67. I accept that the Claimants exercised a choice to sue the Mints Defendants in England. But it was reasonable for them to make such a choice because of the relative ease of enforceability of an English, compared with a Russian, judgment. That distinguishes the present case from *Vedanta*.

68. That being so the risk of multiplicity of proceedings and of inconsistent judgments which would result from suing the Mints Defendants in England and the Fifth, Sixth and Seventh Defendants in Russia remains a "very important factor" when considering whether England is clearly or distinctly the more appropriate forum for the determination of the claims against the Fifth, Sixth and Seventh Defendants.

69. Counsel for the Fifth, Sixth and Seventh Defendants submitted that this was not a case where the whole case could be tried in a single forum, first, because of the other proceedings in Russia and, second, because of the London arbitration proceedings and for that reason the approach of the court in *Donohue*, *Ablyazov* and *ED&F Man* was inapplicable.

70. The Insolvency Proceedings are concerned, not with the alleged misconduct which brought about the Replacement Transactions, but with the earlier negligence or bad faith which brought about the need for "sanation" of Bank Otkritie and Rost Bank. Although the Replacement Transactions may have increased the size of the bail out and hence the quantum of the damages recoverable by the CBR, the losses caused to Bank Otkritie and Rost Bank by those Transactions are only sought to be recovered in the English action. The only "overlap" between the two sets of proceedings is that they both raise the question of "control", which is of particular importance to the Fifth Defendant. I accept that in that particular respect there will not be a single forum examining the question of control, though the period of time during which "control" is being investigated is different in the two sets of proceedings.

71. The Invalidation Proceedings do, however, concern the Replacement Transactions and so there is a risk of inconsistent findings between the judgment which has already been given in Russia in those proceedings and the judgment of this court. However, the Fifth, Sixth and Seventh Defendants are not party to the Invalidation Proceedings.

72. The London arbitration proceedings concern the Otkritie Replacement Transactions and an award is awaited. There is a risk of inconsistent findings between the award and the judgment of this court. However, the Fifth and Sixth Defendants are not party to the arbitration and the award will be private, not public like the judgment of this court.

73. The present case is therefore one in which it cannot be said that issues concerning the alleged conspiracy between the Mints Defendants and the Fifth, Sixth and Seventh Defendants will be determined in just one forum if this court retains jurisdiction over the Fifth, Sixth and Seventh Defendants. There is already, to the extent noted above, a risk of inconsistent judgments. But the extent of that risk will be materially increased if this court declines jurisdiction over the Fifth, Sixth and Seventh Defendants. For in that event the claims against them arising out of the alleged conspiracy would have to be determined in Russia whilst the claims against the Mints Defendants arising out of the same conspiracy would be determined in England. That increased risk is something which is capable of causing great difficulty not only for the individuals affected but also for the judicial systems of England and Russia. In *The El Amria* [1981] 2 Lloyds' Reports 119 at p.128 Brandon LJ described such a risk as "a potential disaster from a legal point of view". It is obviously something to be avoided, if possible.

74. A related point arising from the number of proceedings issued in Russia and elsewhere was made by counsel for the Fifth and Sixth Defendants. It was suggested that the proceedings before this court were abusive because either the same claim was being pursued in multiple jurisdictions or, if not, the claim in the English proceedings could have been brought in the Russian Insolvency Proceedings and it was abusive and oppressive to subject a defendant to different claims arising out of "the same story" in different courts. Among the authorities relied on in this regard were *Wright v Bennett* [1948] 1 All ER 227, *Australian Commercial Research and Development Limited v ANZ McCaughan Merchant Bank Limited* [1989] 3 All ER 65, *Johnson v Gore-Wood & Co.* [2002] 2 AC 1, *David Shaw Silverware North America Limited v Denby Pottery Company Limited* [2013] EWHC 4458 (QB), and *Munipio de Mariana v BHP Group* [2020] EWHC 2930 (TCC).

75. Although counsel for the Claimants submitted that this point was not open to the Defendants because the application was based upon *forum non conveniens* rather than abuse of process he accepted that it was a relevant factor when considering *forum non conveniens*. I consider that I can properly consider the point.

76. Two points can be made in response. First, England is the only jurisdiction in which damages for the alleged wrongful conduct in bringing about the Replacement Transactions are claimed against the Fifth, Sixth and Seventh Defendants. They are not claimed against them in the Invalidation Proceedings, in the Insolvency Proceedings or in the Article 53 proceedings. They are not claimed against the Fifth Defendant in New York. They might have been claimed in the Cyprus proceedings against the Sixth Defendant but those proceedings have been discontinued. Second, it is accepted that the damages claim *could* have been brought against the Fifth, Sixth and Seventh Defendants in the Insolvency Proceedings. However, it does not follow that the damages claim *should* have been brought in Russia. That depends upon the now familiar question whether, given that the claim against the Mints Defendants is in England, the materially increased risk of inconsistent decisions is a good reason for

bringing the claim in damages against the Fifth, Sixth and Seventh Defendants in England.

77. When judging these matters of *forum conveniens* the court is encouraged to stand back and look at the matter in round; see *Vedanta* at paragraph 87. I have sought to do so. Given (i) the likely reason why the Claimants chose to sue the Mints Defendants in England and (ii) the material increase in the risk of multiple proceedings and of inconsistent judgments that would result if the Fifth, Sixth and Seventh Defendants were sued in Russia, I consider that the forum in which the claims against the Fifth, Sixth and Seventh Defendants can be "suitably tried for the interests of all the parties and for the ends of justice" is England. Since this is a "Russian" case that might cause some to question that conclusion. But the claim against the Mints Defendants is being tried here. The Claimants had good reason to sue the Mints Defendants here rather than in Russia. The causes of action relied upon by the Claimants against the Fifth, Sixth and Seventh Defendants arise out of the same events as the causes of action relied upon against the Mints Defendants. It is consistent with the ends of justice and the interests of the parties that judgment on all those claims is reached by a court which has heard evidence and submissions from all parties, not just some.

78. It is however necessary to make particular mention of the Seventh Defendant. He, alone amongst the Defendants, appears to be content with the fairness of Russian proceedings against him with regard to the Rost Bank Replacement Transactions. He still resides in Russia. His position is therefore different from that of the Fifth and Sixth Defendants. His plight and the prejudice he would suffer by the case against him being heard in England rather than in Russia has been eloquently expressed by his counsel and I have given anxious consideration to the question whether his different position requires an answer different from that which is appropriate to the Fifth and Sixth Defendants. Having done so I have concluded that the desirability of the English Court reaching a judgment on this matter after hearing evidence and submissions from the Claimants and all of the Defendants in proceedings which would bind each of the Claimants and the seven Defendants is such that it outweighs the personal inconvenience and extra expense to the Seventh Defendant which will, I accept, result from a dismissal of the Seventh Defendant's application.

79. I should also mention two points made by counsel for the Sixth Defendant.

80. I am told that the Sixth Defendant is a "mere" banker, as opposed to an "oligarch" who happens to be a banker. I am told that, although by most standards he must be a wealthy man (his salary and bonuses were substantial and he has engaged a major firm of solicitors and an eminent Queen's Counsel to represent him) his assets are such that the Claimants cannot expect to make any significant recovery at the end of these proceedings after he has paid not only his own costs but also those of the Claimants. Indeed, when starting these proceedings in June 2019, Mr. Tseshinskiy said that he had seen no evidence to suggest that the Sixth Defendant had any substantial assets and it was not therefore "commercially sensible to include him as a co-defendant". It was therefore submitted that these proceedings now commenced against him are "pointless and wasteful". However, counsel accepted that even if there is clear evidence that a defendant has no assets it may be right for a claimant to seek vindication of his rights through the courts. The Claimants' attitude to suing the Sixth Defendants has changed but it is not clear why. There were discussions between them which may evidence the

answer but they were without prejudice. What seems clear is that the Claimants wish to vindicate their rights, even though the prospect of worthwhile recovery from the Sixth Defendant appears remote. The Sixth Defendant was the chairman of the board of Otkritie Bank. The CBR, on its case, had to bail out the bank with billions of roubles. From the Claimants' point of view there may well be powerful reasons for being seen to vindicate their rights against the Bank's former chairman. What is clear to me is that the bare facts of this case do not enable me to say that there cannot be a good reason for the Claimants wishing to vindicate their rights through court proceedings notwithstanding that it is unlikely that any meaningful recovery can be made.

81. The Sixth Defendant also fears that if he defeats the Claimants' claim the Claimants may then commence proceedings against him in Russia. In response the Claimants have given an undertaking not to sue him in Russia. That is said to be worthless because it would not be respected in Russia. However, Otkritie Bank has been a substantial litigator in this court. It is improbable that it would not honour an undertaking given to this court.

82. For these reasons, and subject to the further argument that the order of HHJ Pelling QC should be set aside on the grounds of a failure to give full and frank disclosure, I would dismiss the applications to set aside the permission to serve these proceedings out of the jurisdiction on the Fifth, Sixth and Seventh Defendants.

Time Bar

83. Before dealing with that further argument I should mention, briefly, the argument stemming from the risk that any claim against the Fifth, Sixth and Seventh Defendants in Russia would now be time barred. Under Russian law, there is a 3 year limitation period which would have expired in late 2020 (subject to an argument about "suspension" of the time bar). It was suggested that this was a further reason for dismissing the application because "practical justice" could not be achieved in Russia. Without referring to the authorities it suffices to say that this issue depends upon whether the Claimants can be said to have unreasonably failed to protect the time bar in Russia by commencing proceedings in July 2020 when they commenced proceedings in England. There is no evidence that proceedings in Russia could not have been commenced on the express basis that the proceedings were to protect the time bar position whilst the Claimants proceeded with the proceedings in England. The proceedings were commenced urgently in England to protect against the time bar. There was every reason to do the same in Russia, yet nothing was done. Had it been necessary to decide this issue I would have held that it was unreasonable not to have protected against the time bar in Russia. On that basis the risk of a time bar defence would not have been a further reason for dismissing the applications.

Failure to give full and frank disclosure

84. It is accepted that, when applying *ex parte* for permission to serve out of the jurisdiction on 4 August 2020, the Claimants failed to disclose to the court the existence of the Insolvency Proceedings in which damages were claimed against the Fifth and Sixth Defendants. It is further accepted that such information was material to the exercise of the court's discretion.

85. The Defendants submit that this was such a serious breach of the duty of full and frank disclosure that the order for service out should be set aside.

86. In *U&M Mining Zambia Limited v Konkola Copper Mines PLC* [2014] EWHC 3250 (Comm) I had occasion to summarise the principles which should govern the exercise of the court's discretion in deciding what action to take as a consequence of a failure to give full and frank disclosure:

> "67. The scope of the duty of disclosure of a party applying ex parte for injunctive relief has been described by Bingham J. in *Siporex Trade v Comdel* [1986] 2 Lloyd's Rep. 428 at p. 437 as follows:
>
> "Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure."
>
> 68. I was also referred to authority which states that where there has been a breach of the duty to make full and frank disclosure the applicant "cannot obtain any advantage from the proceedings"; see *Bank Mellat v Nikpour* FSR [1985] 87 at p.90 per Donaldson LJ. But the passage quoted above from the judgment of Bingham J. shows that the court retains a discretion. It was said in *Brink's Mat v Elcombe* [1988] 1 WLR 1350 at p.1358 by Balcombe LJ that the discretion is to be used "sparingly" but he accepted that "the rule" that an injunction will be discharged if it was obtained without full disclosure cannot be allowed to become "an instrument of injustice". Thus in *Congentra v Sixteen Thirteen Marine* [2008] 2 CLC 51 and [2008] EWHC 1615 (Comm) Flaux J said at paragraph 63 that the overriding question for the court is what is in the interests of justice.
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> ……..

> 94. These breaches are serious and numerous and therefore suggest that the appropriate course is to refuse to continue the WFO in order to reflect the importance of the duty to give full and frank disclosure. The fact that the WFO would otherwise be continued is not by itself a reason why the court should refuse to discontinue the WFO. But it is a factor which requires the court to consider carefully whether discontinuance of the WFO is in the interests of justice.
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> 95. In that regard I have considered the following matters:
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> ……
>
> iii) The court's order must mark the importance of complying with the duty of full and frank disclosure and serve as a deterrent to ensure that persons who make *ex parte* applications realise that they must discharge that duty. That purpose can be satisfactorily achieved, in an appropriate case, by an appropriate order as to costs."

87. In the present case, in addition to the failure to disclose the Insolvency Proceedings, there was a failure to disclose what must then have been the Claimants' intention to commence the New York proceedings against the Fifth Defendant and the Insolvency Proceedings and Article 53 proceedings against the Seventh Defendant in Russia.

88. Mr. Dooley of the Claimants' solicitors has stated that whilst he was aware of the Insolvency Proceedings he inadvertently failed to disclose them. He said that he had completely forgotten about them and that neither he nor the officers at the Claimants who instructed him were involved in the Insolvency Proceedings. With regard to the Seventh Defendant he said that he had been informed that the team dealing with the English proceedings had no knowledge of the steps which the CBR intended to take with regard to the Seventh Defendant. I have not found in his witness statement an explanation concerning the failure to inform the court of the New York proceedings intended against the Fifth Defendant.

89. Mr. Dooley prepared a witness statement of 41 pages and 134 paragraphs in support of the application for permission to serve out of the jurisdiction. Paragraphs 126-133 dealt with "other proceedings" but failed to mention the matters mentioned above. I accept that the failure was inadvertent. It was not suggested that it was deliberate.

90. However, it was a serious omission. Although I have been told that those instructing Mr. Dooley were not involved in the Insolvency Proceedings I have not been told whether they were aware of them. It seems likely that they were aware of them. They involved very substantial claims against the Fifth and Sixth Defendants and substantial proposed claims against the Seventh Defendant in connection with what must have been a high profile collapse of two banks. It was incumbent upon Mr. Dooley to ensure that those instructing him were aware of the importance of the duty of full and frank disclosure. I assume that he made those instructing him aware of that but, for reasons which have not been explained, those instructing him cannot have made appropriate enquiries of the CBR.

91. Mr. Dooley quickly recognised his error and by a further witness statement dated 24 August 2020 informed the court of his omission. He said that there was no overlap between the Insolvency Proceedings and the claims in England because the damages claimed did not include the losses resulting from the Replacement Transactions. The point about damages appears to be correct but the suggestion that there was no overlap could only be made good by explaining (i) that the breaches of duty alleged in the Insolvency Proceedings related to an earlier period than the breaches of duty alleged in the English proceedings and (ii) that although the CBR's submissions referred to the Replacement Transactions those Transactions were not the subject of the Insolvency Proceedings. Had these matters been addressed it would, I suspect, have occurred to Mr. Dooley that it was appropriate to inform the Commercial Court that a further hearing was probably required so that the Court could satisfy itself that it was appropriate to maintain the order for service out. Instead, he advised the court that the Claimants were not seeking any order or direction from the court.

92. As is apparent from this judgment this is a case where permission to serve out would probably have been given if full disclosure of the Insolvency Proceedings had been made. However, it does not follow that the order for service out should not be set aside. The court must consider what is in the interests of justice and, in particular, whether the importance of complying with the duty of full and frank disclosure must be marked by an order setting aside the permission to serve out of the jurisdiction or whether it can be marked by an appropriate order as to costs.

93. The order made against the Defendants was not a freezing order but an order permitting service out of the jurisdiction. The duty of full and frank disclosure still applies but the potential for harm caused by a breach of the duty is less.

94. The failure was not deliberate but inadvertent. However, those instructing Mr. Dooley ought to have reminded him about the Insolvency Proceedings and informed him of the intended proceedings against the Fifth Defendant in New York and the Seventh Defendant in Russia.

95. When properly analysed the other proceedings did not have the result that permission to serve out should be refused. But potentially overlapping foreign proceedings are a most important matter when considering permission to serve out. I consider that insufficient attention was given to that matter by the Claimants when seeking permission to serve out of the jurisdiction *ex parte.* Counsel for the Claimants impressed upon me at the outset of his submissions that proceedings in Russia were to be expected given the enormous amount of public money required to bail out the two banks. That very circumstance ought to have ensured that the Claimants investigated those proceedings fully and made appropriate disclosure to the court.

96. The Commercial Court hears many applications *ex parte*. The Judges are reliant upon those seeking such orders to make full and frank disclosure. Otherwise great injustice can be caused.

97. Having weighed these considerations I am persuaded that in this case the interests of justice do not require that the permission to serve out of the jurisdiction be set aside. Rather, the Claimants' failure to comply with their duty can properly be marked by an

appropriate order as to costs so that the importance of their breach of duty is made plain not only to them but also to other litigants.

98. The appropriate order is that the Claimants recover none of their costs of these applications and that they pay one quarter of the costs of the Fifth, Sixth and Seventh Defendants.

Conclusion

99. The applications to set aside the order for service out of the jurisdiction on the Fifth, Sixth and Seventh Defendants are dismissed. However, the Claimants must pay their own costs of these applications and one quarter of the costs of the Fifth, Sixth and Seventh Defendants to mark the breach of their duty to give full and frank disclosure when applying for permission to serve out *ex parte*.