EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2013/0160

BETWEEN:

EMMERSON INTERNATIONAL CORPORATION

Applicant

and

[1] VIKTOR VEKSELBERG
[2] GOTHELIA MANAGEMENT LIMITED
[3] INTEGRATED ENERGY SYSTEMS LIMITED
[4] RENOVA HOLDING LIMITED

Respondents

Appearances:

Mr. Philip Marshall, QC, with him Mr. Robert Weekes, Mr. Ajay Ratan and Ms. Colleen Farrington for the Applicant
Mr. Paul McGrath, QC, with him Mr. Michael Bolding and Miss. Arabella di Iorio for the First, Second, Third and Fourth Respondents

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2018: June 4, 5;
October 29

CPR 17.1(1)(e) – Disclosure of information -'relevant property or assets which may be the subject of an application for a freezing order' 'fishing' - Jurisdictional threshold – Exercise of discretion – Undertaking in damages

The applicant is a corporate vehicle of a Russian businessman, Mr. Abyzov. In 2006 Mr. Abyzov embarked upon a joint enterprise with another Russian businessman, the First Respondent, Mr. Vekselberg and/or an investment group of companies associated with him called the Renova group. Their idea was that each would commit cash and assets to the joint enterprise, which would invest in energy and other businesses by purchasing shares, and they would profit in proportion to their contributions. The applicant committed around US$500million. Mr. Abyzov understood and believed that Mr. Vekselberg and the companies associated with him committed around US$800million. Disputes arose between them and the applicant wants to recover its money.

The joint enterprise was structured in such a way that the assets it acquired were largely held directly or indirectly through the Third Respondent, a company registered in Belize ('IES Belize'). The applicant discovered, allegedly some months after the event, that Mr. Vekselberg and/or the Renova group had transferred most of the shareholdings out of IES Belize in May 2011 for little or no consideration. In 2015 most of those assets were transferred on, again for apparently nominal consideration, without the applicant's prior knowledge. After these proceedings commenced the applicant received disclosure of email correspondence dating from May 2011 which suggests, upon its face, that persons within the Renova group wished to 'clean up' IES Belize to frustrate legal proceedings they expected Mr. Abyzov might bring. The applicant though did not apply for freezing order relief. In 2017 Mr. Vekselberg and/or the Renova group transferred a significant portion of the same assets to a Russian company, ostensibly prompted by the Russian government's 'de-offshorisation' programme. The applicant contends that the real reason was to put the assets out of the applicant's reach. Mr. Vekselberg and the Renova group deny this, and indeed any motive to dissipate the assets. They point out that the assets have been transferred to companies that are defendants to these proceedings, so they remain within the applicant's reach, and, in any event the applicant's inordinate delay in seeking freezing order relief is fatal to any freezing application now.

In April this year, Mr. Vekselberg and a Renova company associated with him became the subject of United States political sanctions. These had the effect of blocking the business of Renova group companies and freezing United States Dollar bank accounts. This prompted Mr. Vekselberg and the Renova companies to reorganize their affairs urgently to enable them and the companies in which they have invested to continue in business. Part of this reorganization appears to involve migrating assets to Russia. The applicant considers that the sanctions have given Mr. Vekselberg and the Renova group an opportunity to put assets beyond the applicant's reach, to render enforcement of a BVI judgment problematic.

The applicant says it may well need to apply for a freezing order to prevent these proceedings being futile. The applicant brings this application pursuant to CPR 17.1(1)(e) to seek wide-ranging information about the assets and transactions of Mr. Vekselberg and companies associated with him, for the purpose of deciding whether to apply for a freezing order and, if so, to target it better.

Held: allowing the application in part:

1. CPR 17.1(1)(e) permits the Court to make an order requiring a respondent to provide information about property or assets which may be the subject of an application for a freezing order.

2. A two stage test applies:

   (1) First, a jurisdictional threshold needs to be satisfied by the applicant. This is whether there is 'some credible material' on which an application for a freezing order might be based.

   JSC Mezhdunarodniy PromyshIenniy Bank v. Pugachev [2015] EWCA Civ 139 at paragraphs 49 to 52 followed.

(2) Secondly, a general exercise of discretion aimed at deciding whether it is just and convenient, in all the circumstances, to make the order sought.

Lichter v. Rubin [2008] EWHC 450 (Ch) followed.

3. An order pursuant to CPR 17.1(1)(e) is not an order prescribed by the CPR as normally requiring an undertaking as to damages from the applicant. The Court has power to require the applicant to give an undertaking pursuant to CPR 26.1(4)(a). Before imposing such an undertaking as a condition for making an order pursuant to CPR 17.1(1)(e) the Court will require credible evidence that there is a realistic risk of loss.

JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at paragraph 64 followed.

JUDGMENT

[1] WALLBANK, J. (Ag.): This judgment concerns an application pursuant to rule 17.1(1)(e), Civil Procedure Rules 2000 ('CPR'), whereby the applicant, Emmerson International Corporation ('Emmerson'), seeks disclosure of assets that may be subject to a freezing order in the future.

The Parties

[2] Emmerson is an entity controlled by Mr. Mikhail Abyzov. Mr. Abyzov and entities associated with him (for convenience the Abyzov Parties or 'APs') seek to recover approximately US$500million, together with interest, from Mr. Viktor Vekselberg and entities associated with him (for convenience the Vekselberg/Renova Parties or 'V/RPs'), after they fell out over a joint venture. Mr. Vekselberg is understood by the APs to be the moving spirit behind the entities associated with him.

[3] Emmerson has brought this application by way of an urgent notice of application filed on 15th May 2018. The V/RPs from which Emmerson seeks disclosure in this notice of application are:

(1) Mr. Vekselberg;

(2) Gothelia Management Limited ('Gothelia');

(3) Integrated Energy Systems Limited ('IES Belize');

(4) Renova Holding Limited ('Renova Holding').

[4] The affidavit in support of the application, the thirteenth affidavit of Mr. Andrey Titarenko, mentioned a further party as a respondent, Renova Industries Limited ('Renova Bahamas'). The draft order included still another respondent, Lamesa Holding SA. Neither Renova Bahamas nor Lamesa Holding SA is mentioned as a respondent in the notice of application.

[5] Whilst Mr. Titarenko describes the role Renova Bahamas is alleged to have played in the series of events that has given rise to the claim, he makes only a passing mention of the name Lamesa. He says that a 'Lamesa Group' comprised the personal portfolio investments of Mr. Vekselberg and his family, and that it is through the 'Lamesa Group' that Mr. Vekselberg holds the largest shareholding in the Bank of Cyprus. Mr. Titarenko does not here explain how Lamesa Holding SA relates to the 'Lamesa Group'. I note that the pleadings mention 'Lamesa' in various contexts. Emmerson could have included Lamesa Holding SA and 'Renova Bahamas' in its notice of application but did not.

[6] Moreover, there is evidence for the V/RPs, by way of a twentieth affidavit of one Mr. Williams, a solicitor with Messrs. Akin Gump Strauss Hauer & Feld LLP ('Akin Gump'), that only the respondents named in the notice of application were formally served.

[7] That said, the V/RPs put in a comprehensive response to the application. I am therefore prepared to treat both Lamesa Holding SA and Renova Bahamas as properly parties to this application. However, in relation to Lamesa Holding SA the application fails from the outset, in my respectful opinion, as the evidence filed in support of this application does not set out any grounds for the relief sought to be ordered against this company. CPR 17.3 (1) provides that an application for an interim remedy must be supported by evidence on affidavit unless the court otherwise orders. I see no good reason for ordering otherwise in respect of Lamesa Holding SA here.

Background

[8] The following summary is a simplified overview. Most of the facts are unfortunately in dispute between the parties, so the account that follows should not be treated as reflecting any findings, even preliminary.

[9] Mr. Vekselberg and Mr. Abyzov are successful Russian businessmen. In 2006 they reached an oral understanding that they would enter into some form of commercial cooperation. What it was exactly is in dispute but for present purposes we can call it a joint venture. A business manager associated with Mr.Vekselberg, a Mr. Slobodin, was also a party to this joint venture for his own account. The idea was that the joint venture partners would together manage and grow a pool of assets within the Russian and/or Commonwealth of Independent States energy sector. These gentlemen would act personally and/or through various companies associated with them.

[10] By the end of 2006, the V/RPs incorporated a company in Belize to act as holding company for the joint venture assets. This was IES Belize. The asset pool, or a large part of it, was transferred to IES Belize.

[11] The APs contributed cash to the joint venture. The contributions were recorded on paper as made pursuant to five written loan agreements. By the end of 2011, the APs had contributed around US$500 million in cash. They believed, they say, that the V/RPs had invested around US$800 million. They allege that this was not in fact the case and that they had been deceived as to the nature and extent of the V/RPs' contributions. The significance of this is that the size of the joint venture partners' respective contributions determined the size of their respective share in it, and with that, potentially at least, the proportion of their eventual distributions.

[12] During 2011 a document headed 'Principal Terms' was drawn up. The V/RPs (but not the APs) treat this as the constitutive document for the joint venture. This appears to have

been executed on or about 21st October 2011 by the APs and V/RPs. The effect of this document, as a legally binding and enforceable contract, or not, is also disputed.

[13] Disagreements have arisen between the parties and the APs claim their money back, with interest, through these proceedings. They were commenced in 2013.

[14] The APs' first claim is a contractual claim in debt and/or damages. They have added proprietary claims and claims in fraud. They claim recovery from Mr. Vekselberg and Renova Bahamas of a sum which currently stands at approximately US$900 million, with interest accruing at a daily rate of about US$115,000. The APs further claim a percentage share (41.65%) of the value of each distribution the V/RPs received from the joint venture.

[15] The V/RPs vigorously defend the APs' claims. The parties dispute the effect of all their contractual arrangements. In particular, there is a dispute whether the APs' contributions are to be treated as loans or capital contributions. Both sides accuse the other of switching positions and they argue whether or not they really did so. The APs say that the V/RPs initially maintained that the APs' contributions were capital contributions, not loans. The APs say the V/RPs then performed a *volte-face*, to allege the opposite. The APs suggest this change of case was purely tactical. If the contributions were loans, the V/RPs would potentially only be liable in debt or damages for breach of contract. If a judgment debtor were no longer to have any assets, the APs would stand to recover nothing. If the contributions were capital contributions, on the other hand, proprietary remedies might be available to the APs, enabling them to trace assets in the hands of third parties.

[16] There are now three main pleading strands in the litigation (although there are around eighty (80) different pleading documents):

(1) The 'main claims', which broadly concern the APs' contractual claims;

(2) The 'Third Ancillary Claim', which broadly concerns claims by the APs for restitution and constructive trust arising out of alleged conduct of the V/RPs in

removing assets from companies that were debtors under purported loan agreements; and

(3) The 'Schedule 4 Claims', which broadly concern claims by the APs in deceit and unlawful means conspiracy. These include claims concerning the alleged deception by the V/RPs as to the extent of their contributions.

The Starlex transfer

[17] For this application the APs place particular significance upon asset transfers pleaded in the Third Ancillary Claim. Briefly, on or about 31st May 2011, the V/RPs caused the assets of IES Belize to be transferred to a Renova group company called Starlex. Those assets included IES Belize's 100% shareholding in a subsidiary holding vehicle, IES Cyprus. The APs say they were not told about these transfers in advance, but found out late in 2011 or in 2012. The V/RPs say Mr.Abyzov was aware of these transfers by around July 2011. The APs also say that they did not know until 2014 that the transfers had been made for no consideration and allegedly resulted in the insolvency of IES Belize. Previously, the APs understood that IES Belize had held assets worth around US$4.4 billion. The APs believe that IES Belize still holds a number of shares but worth no more than about US$20 million. That value is not enough to meet the liability the APs say IES Belize has to pay their money back. The V/RPs dispute the APs' characterization of this transfer and its financial result upon IES Belize.

[18] The APs have interpreted certain emails disclosed, allegedly belatedly, by the V/RPs as showing that senior staff working for the V/RPs had plotted in May 2011 secretly to 'clean up' IES Belize, as they called it, in anticipation of claims by the APs. The APs interpret 'clean up' to mean that the V/RPs wanted to strip assets out of IES Belize. The email trail suggests that the V/RPs planned to give a respectable sounding commercial explanation as their cover story. The changes to IES Belize would be described as a 'purely technical reorganization' to do with a potential transaction involving a well-known energy company. The V/RPs have since indeed proffered such an explanation for the Starlex transfer in their witness statement evidence. They deny any asset stripping plan. They assert that these

emails have been taken out of context and do not in fact support the APs' plot theory. The V/RPs have, however, not taken me to documents to support their assertions. Whilst the full meaning and effect of these communications will be a matter for trial, their plain words do suggest that the V/RPs intended to remove assets from IES Belize to frustrate legal action by the APs. There are other communications which can be construed the same way, but they are more ambiguous.

The Renova Bahamas/Sunglet transfer

[19] The APs complain that the V/RPs made a further transfer of IES Cyprus in 2015, again without informing the APs in advance. This transfer was made on or about 30th December 2015 from Starlex to Renova Bahamas (as to 85% of the shares in IES Cyprus) and to another company controlled by the V/RPs called Sunglet (as to the other 15% of those shares). Sunglet is majority owned by Renova Bahamas and minority owned, indirectly, by Mr. Slobodin. Moreover, say the APs, they have only recently discovered a share sale and purchase agreement pertaining to this transaction which records that the purchase price for IES Cyprus, a company with very valuable assets, was a mere US$2.

The OOO Renova Holding Rus transfer

[20] The V/RPs have disclosed, in their pleadings filed on 8th December 2017, that Renova Bahamas has transferred its 85% shareholding in IES Cyprus to a Russian company called OOO Renova Holding Rus on 13th October 2017. The V/RPs say this was done in response to the Russian Government's policy of promoting the 'de-offshorisation' of businesses with predominantly Russian assets held through offshore corporate structures. They say that the principal asset of the IES business is a stake in a major Russian electricity company, PAO T Plus. This asset transfer ensured that PAO T Plus and other Russian assets owned by IES Cyprus would ultimately be owned by a company incorporated in Russia. The APs consider this explanation to be 'nonsense' for a number of reasons. Rather, say the APs, this transfer was done in response to service of the APs' claim against Renova Bahamas.

[21] On the APs' case, a pattern emerges of asset shifting being engineered by the V/RPs, for no valuable consideration, with the APs discovering this only after the event on each occasion.

[22] Starlex, Sunglet, Renova Bahamas and OOO Renova Holding Rus are all (now) parties to these proceedings. The V/RPs argue that these transfers cannot therefore be characterized as dissipation of assets, because they remain within the APs' reach. They argue these transfers are not evidence of a risk of dissipation in any way. Furthermore, they argue that the years and months of delay that the APs have allowed to elapse since these transactions would doom to failure any attempt by the APs to obtain a freezing order in respect of them now.

[23] The APs disagree. The APs say they may indeed apply for a freezing order. They say these transfers show that the V/RPs are not persons who can be trusted and that they have a propensity to move assets around and have a desire to frustrate the APs' claims. They argue that the lack of valuable consideration indicates that the transactions were not made in the ordinary or proper course of business. They contend that delay is not fatal, particularly where fraud has been pleaded.

The U.S. Sanctions

[24] The APs also cite a new set of circumstances. Indeed, it is this new turn of events which the APs rely upon to move the Court now. On 6th April this year the government of the United States of America imposed sanctions upon certain Russian individuals, including Mr. Vekselberg and a Russian company associated with him, JSC Renova Group of Companies ('RGC'). This caused the V/RPs to restructure their affairs on an urgent basis, in order for them – and various third parties - to continue in business. As a result of the sanctions all 'US persons' (which term includes any company incorporated within the United States, and any entity with a presence there) have been required to terminate all dealings with Mr. Vekselberg and RGC or their property, and any company in which they

directly or indirectly hold an interest of 50% or more. Such persons or entities are referred to as 'blocked persons'.

[25] The V/RPs say the effect of the sanctions has, in practice, been to freeze all of their assets located outside Russia or to make dealing with them in any meaningful way practically impossible. They say that all their bank accounts, save for Mr. Vekselberg's personal bank accounts in Russia, have been frozen, either because the sanctions apply directly to the banks holding those accounts, or because those banks are concerned about the risk of being targeted by secondary sanctions. As a result, none of the respondents, save for Mr. Vekselberg, is able to access or transfer funds held in any of their bank accounts unless and until the sanctions are lifted.

[26] The sanctions have also disrupted the V/RPs' access to United States Dollar based financial and capital markets. The APs assert that the V/RPs thus appear intent upon depending more upon Russian banking arrangements.

[27] Another effect of the sanctions has been to prevent the V/RPs' on-shore legal adviser, a large United States law firm with branches in London and Moscow, from acting. The V/RPs consequently applied for the trial of this matter, which was listed for twenty four sitting days in June this year, to be vacated. The APs consented. The V/RPs obtained an order from this Court on 12th April 2018 permitting them to take no further steps in these proceedings until 12th July 2018. The purpose of this stand-still was to enable the V/RPs to reorganize their on-shore legal representation. The APs have launched this application during this stand-still period. The V/RPs accuse them of opportunistically doing so at a particularly vulnerable time.

[28] The APs adduce documentary evidence from various public sources showing that the V/RPs are, at least ostensibly:

(1) disposing of assets;

(2) reducing shareholdings in businesses in which they have invested below levels prohibited by the sanctions; and

(3) transferring assets to Russia.

[29] The APs are concerned that the V/RPs will, or will ultimately, also move the asset sale proceeds to Russia.

The Sulzer share buy-back

[30] An example of steps taken by the V/RPs in response to the sanctions is the fact that the Renova group recently reduced its stake in Sulzer, a Swiss engineering company. The Renova group holds that interest via Tiwel Holding AG ('Tiwel'), a Swiss company which is an indirect subsidiary of Renova Holding. In April 2018, Sulzer agreed to purchase a significant number of its own shares from Tiwel (amounting to 14.6% of Sulzer's total issued shares) to ensure that Tiwel's shareholding would be below 50% and that Sulzer would not, therefore, be regarded as a blocked person for purposes of the sanctions. That sale completed on 12th April 2018, within six days of the start of the sanctions. The V/RPs explain that following the sale, the governmental sanction administering body, 'OFAC', confirmed that the sanctions would not continue to apply to Sulzer, but it required the proceeds of the sale to be paid into a blocked account located in the United States. Also, as a condition for approving the buy-back, OFAC has required all future dividend payments relating to the Renova group's remaining shares in Sulzer to be paid into a blocked United States account for as long as the sanctions remain in effect.

The Schmolz + Bickenbach reduction

[31] The APs point to another transfer following the sanctions as suggesting a risk of dissipation. The APs give evidence that Mr. Vekselberg and/or companies in the Renova group used to own 42% of the shares in a publicly listed Swiss company called Schmolz + Bickenbach Beteiligungs GmbH. Their ownership vehicle for this stake was a company called Liwet Holding AG. Liwet is an indirect subsidiary of Renova Holding. Liwet also

holds shares in another Swiss company called Oerlikon. The APs learned through public documents that Mr. Vekselberg and/or the Renova group's interest in Schmolz + Bickenbach has been reduced from 42% to 12.6%.

The Liwet transfers

[32] They learned further that Mr. Vekselberg and/or companies in the Renova group have reduced their previous 100% beneficial ownership of Liwet to about 44.46%. They did this by transferring about 38.9% to 'long-standing partners' of Mr. Vekselberg, a Mr. Evgeniy Olkhovik and a Mr. Vladimir Kremer, and about 16.63% to a new structure ostensibly for the benefit of various senior managers under the Renova group's employee incentive programme. The APs say that the disposal of about 55.54% of the Renova group's interest in Liwet amounts to a transfer in value to Mr. Vekselberg's 'partners' and senior managers worth approximately US$1.4 billion.

[33] The V/RPs explain that the transaction was carried out to incentivize senior management at a time when the impact of sanctions was causing some managers to resign. In return the Renova group would receive minority interests held by Mr. Olkhovik's and Mr. Kremer's companies in the Renova group's main Russian holding companies. No cash would be moved as a result. The V/RPs give evidence that this transaction was a one-off with the extremely specific purpose of providing Mr. Olkhovik and Mr. Kremer with an interest in a publicly traded company. The V/RPs assert, through their affiant who gave evidence on their behalf in response to this application, Mr. Cheremikin, the Chief Legal Officer of the Renova group, that they have no 'current intention' to carry out similar transactions.

[34] The APs are not convinced by this explanation. They say they have a well-grounded suspicion that this transaction was not proper. The value of assets transferred was, they say, simply too great to be plausible. Also, the effect was a share-swap, whereby Renova Holding (indirectly) alienated shares in a Swiss company which would be relatively amenable to enforcement, replacing them with shares in Russian companies against which enforcement of a BVI judgment would be more difficult. The APs say they have real

concerns that these apparent disposals to 'partners' of Mr. Vekselberg or to senior managers of the Renova group are not genuine transfers, but merely an asset holding device.

[35] The APs call attention also to apparent use by V/RPs of nominees to create the impression of independence from Mr. Vekselberg. The APs give evidence alleging that a Mr. Blavatnik has 'fronted' the acquisition by Mr. Vekselberg and Gothelia of a considerable shareholding in a company called TGK-7 using Mr. Blavatnik's company, Lygendor Enterprises Limited, as nominee owner.

[36] Mr. Vekselberg himself directly owns very little. He is the discretionary beneficiary of a Cayman discretionary trust, from which he professes to have, in the words of his Cayman lawyers, a 'mere hope' of receiving distributions. It is fair to say that Mr. Vekselberg is no stranger to sophisticated off-shore wealth preservation arrangements.

Migration of assets to Russia

[37] The APs refer to press reports that shortly before the sanctions came into force the Renova group had paid off its loan debts owed to western banks, in an amount of approximately US$1 billion. This, say the APs, is indicative of the V/RPs' desire and broader plan to transfer cash and banking relations away from western financial institutions to Russia.

[38] The APs further assert that previously published information about the V/RPs' shareholding in a Russian bank has recently been removed by the bank from the public domain. The APs accept that loss of such transparency may not be at the instigation of the V/RPs, but it signals greater difficulties for enforcement of a judgment in Russia.

[39] The APs call attention also to steps taken by the Russian government to assist sanctioned entities. These include altering some of its foreign exchange controls and reducing

transparency requirements applicable to Russian persons. The APs say this increases the possibility and hence the risk of dissipation.

[40] The APs thus say that the sanctions have given the V/RPs occasion to move assets, which will have the effect of rendering nugatory a judgment in its favour. This, say the APs, puts Emmerson at real risk of irremediable harm. The APs say that there is at the very least a real prospect that Emmerson will have to apply for a freezing order to ensure that these very substantial proceedings are not rendered futile. Emmerson says that many of the assets of the Renova group are held through opaque offshore structures and little information is available about them in the public domain. It says it needs the disclosure now sought to reach a more informed view whether to apply for a freezing order and if so, to target such an application better.

Other disposals

[41] The APs point to other disposals, or intended disposals, prior to the sanctions, as indicating that the V/RPs seek to liquidate holdings. The APs contend that these increase the risk of dissipation. One such disposal was a sale by the V/RPs of shares in a bank called JSCB International Financial Club. This was publicized on 22nd March 2018 and the V/RPs say the APs have known about it since then, without taking any action.

[42] Another intended disposal was a proposed sale of shares in a company called Kamchatka Gold JSC. This was announced on 28th January 2018 and the V/RPs say the APs also knew about it since then, without taking any action. The V/RPs state that this deal fell through at the negotiation stage.

Summary of factors relied upon by Abyzov Parties

[43] The APs contend that they have a reasonable prospect of successfully obtaining a freezing order. They rely upon four factors. First, the asset transfers out of IES Belize and onwards without the APs' knowledge or consent and for no substantial consideration. The

apparent purpose was to 'clean up' IES Belize to frustrate legal proceedings by the APs. Secondly, the APs have made claims in fraud. They point out that the V/RPs do not dispute that the APs have a good arguable case in this regard. This good arguable case of fraud, say the APs, is sufficient alone to establish a real risk of dissipation.[1] Thirdly, as a consequence of the sanctions imposed on Mr. Vekselberg and RGC, the Renova group is restructuring and selling assets and it will be practically impossible for them to continue using western banks. This gives the V/RPs a strong incentive to move assets or their proceeds of sale to Russia. The APs would face considerable difficulty in enforcing a BVI judgment in Russia. Fourthly, the V/RPs' 'evasive responses and thin defences' to the APs' claims in these proceedings, including their *volte-face* in relation to the nature of the APs' contributions, are further credible evidence from which to infer risk of dissipation.

The Respondents' position

[44] The V/RPs contend that the application is opportunistic, misguided and without merit. They submit that the applicant does not make an application for a freezing order now because it knows full well that it cannot meet the stringent conditions applicable. Whilst they accept that the applicant has a good arguable case on the merits of its substantive claims, they say there is no credible evidence of a real risk that the V/RPs will dissipate assets. They further contend that the disclosure order sought extends well beyond assets which would otherwise be available for enforcement, that the applicant seeks disclosure of past transactions, and the requested time for compliance, within seven days, is too short.

[45] The V/RPs submit that there is no credible evidence of a real risk of dissipation for, in sum, the following reasons.

[46] The proceedings have been ongoing for four and a half years without the APs applying for a freezing order. That must be contrasted with the very thorough and intensive way in which both sides have litigated the matter. Three of the historic transactions the applicant

[1] Referring to A.H. Baldwin and Sons Ltd. v. Sheikh Saud Mohammed Bin Al-Thani [2012] EWHC 3156 (QB) ('Al-Thani') at [31](4) (Haddon-Cave J) and VTB Capital plc v. Nutritek International Corp [2012] EWCA Civ 808, [2012] 2 Lloyds Rep 313 at [177] (Lloyd LJ).

now relies upon were known to the APs for a considerable length of time, one since 2011. At no point have the APs suggested that any of the V/RPs would dissipate their assets, despite these transactions being the subject of correspondence and pleadings. No explanation has been given by the APs for their delay in making this asset disclosure application, or an application for a freezing order, in so far as it relies upon those historic transactions. Delay indicates that there is no real risk of dissipation. Those historic transactions would not ground an application for a freezing order now, on account of excessive delay. Those transactions can thus not provide credible support for this application. This Court has no jurisdiction to make an asset disclosure order if there is no reasonable prospect of a freezing order being granted.

[47] The V/RPs then turn to the effect of the sanctions. They point out that it is only Mr. Vekselberg and a company associated with him, RGC, that is affected by the sanctions. The V/RPs say reliance upon the sanctions as demonstrating a risk of dissipation is misplaced. Rather, the sanctions will benefit the applicant, for a number of reasons. Among these are that each and every transaction will be subjected to careful scrutiny not only by the United States authorities but by all third parties dealing with the V/RPs. Also, the sanctions have led to a number of legitimate transactions, which have resulted in the proceeds being paid into blocked bank accounts, effectively freezing the money. The V/RPs say that there have been a number of other transactions that the APs have known about for several months, unconnected with the sanctions.

[48] The V/RPs' legal practitioners state that they represent the Second and Fourth Respondents solely for the purposes of resisting this application and that neither of those Respondents submit to the jurisdiction. The V/RPs further argue that this Court has no jurisdiction to order Gothelia to disclose information, on grounds that declaratory relief only is being sought against it, and not a money judgment. The V/RPs say there is 'no prospect' of a money judgment against Gothelia.

[49] The V/RPs remind the court that upon applying for a freezing order, an applicant has to show 'solid evidence' demonstrating a risk of dissipation, mere inference or generalized assertion being insufficient.

[50] The V/RPs contend that 'the mere possibility of a party using a complex corporate structure or corporate reorganization to dissipate assets, without more, does not equate to a risk of dissipation'.[2]

[51] The V/RPs seek to cast doubt upon the APs' assertions that enforcing a BVI judgment in Russia would cause them difficulties, by citing three cases where BVI judgments have been enforced in Russia. The APs dispute this evidence, contending that those cases are procedurally and/or substantively problematic and are not indicative that BVI judgments can readily be enforced there. Rather, the APs seek to show that the opposite is the case. The APs observe that the V/RPs have not put into evidence views of their Russian law expert which have previously included an opinion that it is indeed difficult to enforce BVI judgments and/or orders there. They say the V/RPs have retained an independent Russian law expert, a Dr. Asoskov, and that Dr. Asoskov has previously given evidence in English proceedings of a 'substantial risk' that English court judgments would not be recognized and enforced in Russia. The APs suggest the same applies to the judgment of any other foreign court in a jurisdiction without a treaty with the Russian Federation for the mutual recognition and enforcement of judgments, such as the BVI.

[52] The APs adduce evidence that in 2016 less than 70% of attempts to enforce a foreign judgment or arbitration award in Russia were successful, and that this included applications for enforcement under international treaties.

[53] The APs also ask that this Court take notice of remarks made by our Court of Appeal in Garkusha v Yegiazaryan and others[3] that 'a costs order of this Court would not be

[2] Holyoake & Anor. v Candy & Ors. [2017] EWCA Civ 92 at paragraph 59(ii) (Gloster LJ).
[3] BVIHCMAP2015/0010 (Webster JA (Ag)).

enforceable in Russia, and even if it is enforceable, the enforcement procedure, if opposed, would be attended with substantial obstacles and extra burdens'.

The relief sought in the draft order

[54] The scope of the asset disclosure sought in the draft order requires the respondents to provide details of all their assets above an individual value of US$10million. They would also be required to provide:

(1) details of all shares owned by them, and other interests in companies, regardless of the value of those shares or interests;

(2) details of all their bank accounts, regardless of the balance of the account;

(3) detailed information about any disposal of their assets exceeding US$10 million in value which occurred between 29th January 2018 and the date on which the information is provided;

(4) (a) 'Any document' within their possession, power or control anywhere in the world 'that evidences the existence, location or value or details of any assets belonging to the [respondents] … where the value of the asset is US$10,000,000 or more';

(b) 'All trust deeds relating to any trust in which [each Respondent] has an interest…';

(c) 'All bank statements in relation to the respondents' bank accounts … whether past or present going back to 1 January 2018';

(5) details of any interests in any discretionary trust, and certain assets beneficially held by third parties.

[55] The draft order requires the requested information to be provided within seven days.

[56] The APs contend that the relief sought in the draft order is reasonable, limited (by reason of the US$10million threshold), and that the respondents should not have difficulty providing the information within the seven days. They say that the V/RPs should not be allowed to 'cherry-pick' which assets to disclose up to the value of the claim, as such assets could be located in places like Russia where enforcement would be difficult.[4]

[57] The V/RPs, on the other hand, contend that the scope of relief sought is wholly unreasonable, excessively intrusive and disproportionate. They describe it as an 'aggressive audit'. In oral submissions they called it a fishing expedition. Their learned Queen's Counsel drew a distinction between a targeted request for more information about assets and a general demand that the Respondents should disclose all their assets.

[58] They also submit that the Court has no jurisdiction, on an application under CPR 17.1(1)(e), to require disclosure of past disposal transactions because CPR 17.1(1)(e) is limited to information about assets 'which are or may be the subject of a freezing order'.

[59] Moreover, the V/RPs argue it is unnecessary to require disclosure of documents, as the information would need to be provided under oath. Also, the standard wording for ancillary disclosure orders made with freezing orders does not require provision of documents. Moreover, the Court has no jurisdiction to make an asset disclosure application under CPR 17.1(1)(e) in relation to assets held by third parties, in the absence of credible evidence that they would be available for enforcement (for example, evidence that particular discretionary trusts are a sham).[5] They say the APs have adduced no such evidence.

[4] In line with dicta of the English Court of Appeal in Motorola Credit Corporation v Uzan (No 2) [2004] 1 WLR 113 at 153 (paragraph 146).
[5] Relying upon JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139 at paras 17 and 43.

Legal principles

[60] CPR 17.1(1)(e) provides that the Court may grant an order requiring a respondent to provide information about property or assets which may be the subject of an application for a freezing order:

> "17.1 **–** Orders for interim remedies
> (1) The court may grant interim remedies including –
> […]
> (e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;
> […]
> (2) In paragraph (1) (e) and (h), **"relevant property"** means property which is the subject of a claim or in relation to which any question may arise on a claim.
> […]
> (3) The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind."

[61] The rule is in materially identical terms to r.25.1(1)(g) of the English CPR. The courts of our own jurisdiction have not ruled in detail on the operation of this provision.[6] I do not see any difference between the relevant powers of the English courts and those of this Court. So I will adopt the analysis which has been applied under English law.

[62] The leading English authority is the decision of the English Court of Appeal in JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev[7] ('Pugachev'). The following principles apply. Consideration of an application for disclosure under the rule involves two stages:

[6] Quality Motors Limited v. Clarke Investment Ltd SLUHCV2008/0574 (Unreported) appears to be the only decision, but it does not offer a detailed analysis for cases where a freezing order has not yet been applied for.
[7] [2015] EWCA Civ 139.

(1) First, a jurisdictional threshold needs to be satisfied by the applicant. This is whether there is 'some credible material' on which an application for a freezing order might be based.[8]

(2) Secondly, the court effects a general exercise of discretion aimed at deciding whether it is just and convenient, in all the circumstances, to make the order sought.[9]

[63] In relation to the first stage Lewison LJ stated in Pugachev at paragraphs 49 to 51:

> "49.In *Parker v CS Structured Credit Fund Ltd* [2003] EWHC 391 (Ch), [2003] 1 WLR 1680 Mr Gabriel Moss QC considered the scope of this power. He held that this sub-rule did not amount to a free-standing jurisdiction to order disclosure of information which may, in some remote sense, be relevant to some possible application for a freezing injunction. He did not devote much attention to the precise threshold that must be crossed before the power should be exercised; but that was because the claimant accepted that it had no material that would have justified an application for a freezing order. Mr Moss did, however, say at [23]:
>
> "… it seems to me that it is dealing with a situation where there is either an application for a freezing injunction on foot or one where it is at least likely that there will be such an application. In other words, the provision assumes that there is some credible material on which such an application might be based."
>
> 50. "Some credible material" seems to me to be a lower threshold than "good reason to suppose". This was also the view that Henderson J took in *Lichter v Rubin* [2008] EWHC 450 (Ch), *The Times*, April 18, 2008. In that case Henderson J said at [15]:
>
> "The likelihood … is not one that has to be demonstrated to any very high degree and certainly does not amount to a likelihood on the balance of probabilities. It seems to me that a reasonable possibility, based on credible evidence, should be sufficient to found the jurisdictional requirement of 25.1 (1)(g)"
>
> 51. At [21] he said:
>
> "But I do accept … that 25.1 (1)(g) is intended to provide machinery, in a suitable case, for the provision of information in advance of an application for a freezing injunction. Plainly a provision of that nature would lose its utility if it were

[8] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at [49]-[52] (Lewison LJ).
[9] Lichter v. Rubin [2008] EWHC 450 (Ch) at [21].

> necessary to demonstrate at that stage that a freezing order would, in due course, be granted. It is only necessary to show that a freezing order may be applied for, and whether or not the application would be successful is not a matter on which the court can form a view at this stage; it need only be satisfied that there are credible grounds for making an application if so advised."

[64] Thus, in relation to the first stage, the likelihood of an application for a freezing injunction being made is not one that has to be demonstrated to any high degree. It does not amount to a likelihood on the balance of probabilities. A reasonable possibility, based on credible evidence, is sufficient to found the jurisdictional requirement.[10] The freezing application should have a reasonable prospect of success, in the sense that the court need only be satisfied that there are credible grounds for making a freezing application if so advised. The court is not required to form a view whether or not the application will be successful.[11]

[65] In relation to the second limb, once the jurisdictional threshold has been crossed the court has a general discretion to decide whether it is just and convenient in all the circumstances to make the order sought.[12] When exercising the court's discretion, it must weigh the prejudice to the respective parties. As stated by the English Court of Appeal in Pugachev[13]:

> "We must not lose sight of the fact that at this stage the claimants are only asking for information. An order for the provision of information is far less intrusive than an order which prevents someone from dealing with assets".

[66] In Grupo Torras SA & Anor. v Sheikh Fahad Mohammed AI-Sabah & Ors.[14] the English Court of Appeal remarked in relation to this balancing exercise:

> "Undoubtedly, if the plaintiffs ultimately lose the jurisdictional battle, there is some prejudice to Sheikh Fahad in that it will then not be possible to undo the invasion of his privacy. While this prejudice is real it is of a lesser order than the prejudice that Grupo Torras may suffer if it is unable to police the Mareva injunction for some time. (. . .) The balance tilts decisively in favour of disclosure now."

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[10] Lichter & Or. v Rubin [2008] EWHC 450 (Ch.) at paragraph 15 (Henderson J.).
[11] Lichter & Or. v Rubin [2008] EWHC 450 (Ch.) at paragraph 21 (Henderson J.).
[12] Lichter & Or. v Rubin [2008] EWHC 450 (Ch.) at paragraph 17 (Henderson J.).
[13] [2016] 1 WLR 160 at 176 paragraph 55 (CA) (Lewison LJ), cited with approval in Holyoake v Candy [2017] 3 WLR 1131 at 1152 at paragraph 47 (Gloster LJ).
[14] [2014] 2CLC 636 at 644 F- H (Steyn LJ).

[67] Grupo Torras SA was endorsed by the English Court of Appeal in Motorola Credit Corporation v Uzan & Ors, where such an order was recognized as giving 'the teeth which are critical to the freezing order'.[15] It was also adopted by the English Commercial court in JSC BTA Bank v Ablyazov where the learned judge considered that the prejudice the defendant would suffer by comparison to the claimant was 'minimal'.[16]

[68] On the other hand, the provision must not to be used to mount a fishing expedition. What is and what is not a fishing expedition turns on a 'fairly fine dividing line'.[17]

[69] Whether or not an application for a freezing order would have a reasonable prospect of success necessarily entails consideration of the criteria for the grant of a freezing injunction. Those criteria are well established[18] and can be summarized as follows:

(1) the claimant must have a good arguable case against the defendant;
(2) there must be a real risk of the defendant dissipating its assets other than in the ordinary course of business, so as to frustrate any judgment that might be obtained against it in due course; and
(3) it must be just and convenient, in all the circumstances, to freeze the defendant's assets (or at least a proportion of them).

[70] In relation to the risk of dissipation, the applicant urges that removing assets from the jurisdiction to another jurisdiction, and thus potentially putting those assets beyond the reach of the applicant, demonstrates a risk of dissipation.[19] The applicant then cites the case of Stronghold Insurance Co. Ltd. v Overseas Union Insurance Ltd. [20] as support for a proposition that a freezing order may be made to prevent a respondent moving his

[15] [2002] EWCA Civ 989 at paragraph 28 (Waller LJ) and at paragraph 37 (Woolf LJ).
[16] [2010] EWHC 2219 (Comm.) at paragraph 49 (Christopher Clarke J).
[17] Lichter & Or. v Rubin [2008] EWHC 450 (Ch.) at paragraph 24 (Henderson J.).
[18] For a recent review and summary of the principles see e.g. PJSC Tatneft v Gennadiy Bogolyubov et al. [2016] EWHC 2816 (Comm) (Picken J).
[19] Relying upon Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera SA [1979] AC 210, at p229 per Lord Denning MR.
[20] [1996] LRLR 13 at 18, 19 (Potter J).

assets out of the jurisdiction even where he has legitimate business reasons for doing so. I would observe, however, that in that case the conduct of the defendant was such as to cast into doubt its *bona fides*. Conspicuously absent from the applicant's submission is the need for the court to consider whether the transaction has been carried out in the ordinary course of business. The authorities are however clear that it is not every disposal of assets that amounts to dissipation, but a disposal of assets otherwise than in the ordinary course of business in a way which will have the effect of making the defendant judgment proof.[21]

Ordinary course of business

[71] At the hearing, when I raised this, the APs said that none of the transactions prompted by the sanctions were in the ordinary course of business. The V/RPs argued that although the circumstances were out of the ordinary, the steps taken in response to them were commercially apposite. The approach for ascertaining what constitutes the ordinary course of business is set out by the Privy Council in Countrywide Banking Corporation Ltd v Dean (by Gault J).[22] It is a fact- specific, objective inquiry. In particular, Gault J stated that:

(1) 'the transaction must be examined in the actual setting in which it took place';

(2) this 'defines the circumstances in which it is to be determined whether it was in the ordinary course of business';

(3) this determination then 'is to be made objectively by reference to the standard of what amounts to the ordinary course of business';

(4) 'the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business';

[21] See e.g. National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraphs [69] and [70] (Males J).
[22] [1998] AC 338. See also Koza Limited & ors. v Mustafa Akçil & ors. [2017] EWHC 2889 (Ch).

(5) '[b]ecause the transaction is undertaken objectively by reference to the ordinary course of business, there may be circumstances where a transaction, exceptional to a particular trader, will nonetheless be in the ordinary course of business as for example its first transaction of a particular type' and (conversely) '[i]t may be that transactions undertaken in the past will, because of changed circumstances, no longer be considered as in the ordinary course of business'; and

(6) '[t]he particular circumstances will require assessment in each case'.

[72] The Privy Council in Countrywide Banking Corp v Dean treated the focus of the inquiry as on the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties.[23] As further remarked in Ashborder BV v Green Gas Power Ltd, businessmen are not likely to take so narrow a view of what constitutes the 'ordinary course of business' that it would not embrace a transaction for the preservation and continuance of a company's business, merely because it was not a transaction that had ever been carried out before.[24] In other words, restructuring a business in response to extraneous circumstances can be part of ordinary course of business.

[73] The applicant cites **Congentra AG v Sixteen Thirteen Marine SA (The 'Nicholas M')**[25] as authority for a proposition that dealing with assets in a way that makes enforcement more difficult can amount to dissipation. The implication conveyed was that such a transaction could amount to dissipation even if done in the ordinary course of business. However, the learned judge in **The 'Nicholas M'** used a wider and more precise formulation[26] than was urged by the applicant, namely that it is disposals other than in the ordinary course of business, or dealings that cannot be justified for normal and proper business purposes, which a freezing order is intended to prevent.

[23] [1998] 1 BCLC 306 at 316 (PC)
[24] [2004] EWHC 1517 (Ch) at paragraph 203 (Etherton J). See also paragraph 205.
[25] [2008] EWHC 1615 (Comm) at paragraph 49 (Flaux J).
[26] At paragraph 49.

[74] The applicant rightly points out that 'secretion of assets' to render a judgment nugatory is also a type of conduct which a freezing order is designed to prevent, with reference to *dicta* in Derby & Co. Ltd. v Weldon,[27] Adahi & Ors. v Adahi,[28] and MacKew v Moore.[29]

Risk of dissipation

[75] In the context of a risk of dissipation, the English Commercial Court in National Bank Trust v Yurov,[30] summarized the principles as follows:

> "As has been said many times, the purpose of a freezing order is not to provide the claimant with security but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business in a way which will have the effect of making itself judgment proof. It is that concept which is referred to by the label "risk of dissipation" (. . .). [T]he defendants advance seven propositions which the bank does not dispute and which I accept. They were as follows:
> a. The claimant must demonstrate a real risk that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.
> b. That risk can only be demonstrated with solid evidence; mere inference or generalised assertion is not sufficient.
> c. It is not enough to rely solely on allegations that a defendant has been dishonest; rather it is necessary to scrutinise the evidence to see whether the dishonesty in question does justify a conclusion that assets are likely to be dissipated.
> d. The relevant inquiry is whether there is a current risk of dissipation; past events may be evidentially relevant, but only if they serve to demonstrate a current risk of dissipation of the assets now held.
> e. The nature, location and liquidity of the defendant's assets are important considerations.
> f. Whether or to what extent the assets are already secured or incapable of being dealt with is also relevant.
> g. So too is the defendant's behaviour in response to the claim or anticipated claim."

[27] [1990] Ch 48 at page 57 D (CA) (Parker LJ).
[28] [2015] EWHC 3912 (Ch) at paragraphs 21 and 23 (Snowden J).
[29] [2012] EWHC 1287 (QB) at paragraph 33 (Donaldson QC).
[30] [2016] EWHC 1913 (Comm) at paragraphs [69] and [70] (Males J).

Delay

[76] In the context of risk of dissipation, delay on the part of an applicant is a material consideration. Delay suggests that the applicant does not consider there is a sufficiently serious risk of dissipation. It can also suggest that the applicant believes it does not have a strong case on other grounds for seeking a freezing order. Also, the longer the delay the more likely it is that improper disposals will already have occurred.

[77] Learned Queen's Counsel for the applicant urged however that authorities show a developing trend downplaying delay as a countervailing factor. He observes that in A.H. Baldwin and Sons Ltd. v. Sheikh Saud Mohammed Bin Al-Thani[31] the material embezzlement was perpetrated in 2005 and the case was heard in 2012. Delay is also not an attractive point for a respondent to take. In Antonio Gramsci Shipping Corp v Recoletos Ltd & Ors Cooke J stated:

> "It is no answer for a Defendant to come to the court to say that his horse may have bolted before the gate is shut and then to put that forward as a reason for not shutting the gate. That would be to pray in aid his own efforts to make himself judgment proof – if that indeed is what has occurred – and to avoid the effect of any court order which the court might make."[32]

Cross-undertaking as to damages

[78] The respondents submit that if the Court should make a disclosure order, the applicant should be required to give an undertaking as to damages. The respondents accept that an information disclosure order does not interfere with dealing in property; consequently the probability of substantial loss flowing from it is low. They urge however that because such an order is intrusive, an undertaking should be required as the price for the relief.

[79] CPR 17.4(1) and (2) set out the types of orders which require applicants to give undertakings as to damages. A CPR 17.1(1)(e) order is not one of them. But the Court has a case management power to require such an undertaking pursuant to CPR

[31] [2012] EWHC 3156 (QB).
[32] [2011] EWHC 2242 at paragraph 29.

26.1(4)(a), to further the overriding objective of the CPR. In Pugachev the court's approach was to require credible evidence that there was a realistic risk of loss before requiring such an undertaking.[33]

Discussion

(1) Scope of CPR 17.1(1)(e)

[80] The scope of CPR 17.1(1)(e) is wide, but not boundless. It first enables the Court to order a party to provide information about the location of relevant property as so defined. This part of the rule can be used to assist a party who claims a proprietary remedy, as well as one who brings personal claims. The applicant here claims a proprietary remedy, but it does not bring this application under this first part. The second part is distinct from the first. It enables information to be disclosed about relevant property which is or may be the subject of an application for a freezing order. Freezing orders apply only to personal claims. The information that may be provided under this second part includes but is not limited to location of relevant property.

[81] The provision contains no express guidance as to the type and extent of information that can be disclosed under the second part. That does not mean any and all information should necessarily be disclosed. The overriding objective of the CPR provides necessary guidance.[34] The type and extent of information to be disclosed depends upon what is proportionate in the circumstances of each case, for its just and fair disposition.

[82] Where an application for information is made in respect of property that may be the subject of a freezing order application, it is axiomatic that the property can still be frozen. I agree with the respondents that the Court cannot order provision of information concerning property the respondents have already disposed of.

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[33] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139.
[34] CPR 1.1 and 1.2.

[83] This begs the question whether a disposal has genuinely occurred. Where there is reason to believe that there has not been a genuine disposal, or that a disposal may have been made on such terms that the assets remain amenable to enforcement[35], CPR 17.1(1)(e) provides a mechanism whereby information concerning such assets can be obtained. Where there is 'good reason to suppose',[36] based on credible evidence, that there has not been a genuine disposal to a third party, that property may still be frozen. It is common for freezing orders to apply a broad construction as to what should be treated as the defendant's assets. Freezing orders thereby catch those assets which are not in the legal ownership of the defendant but in respect of which the defendant 'retains the power to direct how the assets should be dealt with'.[37]

(2) Purpose of CPR 17.1(1)(e)

[84] The purpose of CPR 17.1(1)(e) also bears consideration.

[85] The purpose of ordering disclosure about the location of relevant property is expressly stated. Also, where property has already been frozen, the provision provides a procedural basis for ancillary disclosure orders to police the freezing order. On the other hand, its purpose is not to provide a license to 'fish' for information.

[86] CPR 17.1(1)(e) does not circumscribe its own purposes. Some of the debate before me concerned whether the relief sought in the draft order was more extensive than standard disclosure orders ancillary to freezing orders. This, with respect, is a sterile question, because their purposes are different. Wide-ranging disclosure orders intended to police freezing orders are made in the context of the court already being satisfied that the applicant has fulfilled the stringent requirements for a freezing order. But where a freezing order has not yet been applied for there is nothing to police. It does not follow that an

[35] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at paragraphs 17 and 43.
[36] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at [57].
[37] Group Seven Ltd v Allied Investment Corporation Ltd & Ors [2013] EWHC 1509 (Ch) at paragraph. 63(5) (Hildyard J).

applicant who seeks information before applying for a freezing order should be granted a similarly wide order.

[87] One of the purposes of CPR 17.1(1)(e) is clearly to provide a mechanism whereby a potential applicant for a freezing order can force disclosure of information which a defendant holds but will not otherwise disclose. The provision thereby enables the court to prevent a defendant defeating the ends of justice.

[88] The courts will be astute to prevent 'fishing'. In Lichter v Rubin the English High Court recognized that there is a 'fairly fine dividing line'[38] between what is and what is in practice meant by this. The line is expressed in terms of a jurisdictional threshold: before the court will consider using its powers under CPR 17.1(1)(e), an applicant must show the court that he is not coming to 'fish'.

[89] In Parker v CS Structured Credit Fund Ltd[39] the applicant had no material to show a risk of dissipation of assets. He was hoping to use the rule to see if there might be cause for making a freezing application. The English court did not allow it.

[90] On the permissible side of the 'fairly fine dividing line' are specifically targeted applications for disclosure, of which Pugachev is an example. There, the court ordered the beneficiary of a discretionary trust to provide details of the trust and trust assets to enable the claimant to investigate whether in reality the beneficiary was in control of the trust assets.[40] There were a number of reasons for suspecting that he was. The court allowed this question to be investigated.

[91] The breadth of a disclosure order is a matter that turns on the circumstances of each case.

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[38] Lichter & Or. v Rubin [2008] EWHC 450 (Ch.) at paragraph 24 (Henderson J.).

[39] [2003] EWHC 391 (Ch).

[40] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at paragraph 58.

[92] The applicant in this case says it needs disclosure of the location of assets and to know what plans there are to move them, and documentation to establish what the respondents' asset position is.

[93] The applicant contends that it has well founded suspicions of dissipation but no documents to prove it. The type of enquiry the applicant has in mind does not obviously fall on the permissible side of the 'fairly fine dividing line'. Their stated purpose of considering whether to make a freezing order application, and if so, in order to target it, looks very similar to the type of inquiry rejected in Parker v CS Structured Credit Fund Ltd.

(3) Prospects of obtaining a freezing order

[94] The first question to address is whether there is 'some credible material' on which an application for a freezing order might be based. The word 'material' is wider than 'documents'. In Pugachev Lewison LJ treated 'material' as synonymous with 'evidence' and 'grounds'.[41]

[95] In assessing whether the applicant brings credible material, I bear in mind that the jurisdictional threshold the applicant needs to cross is not a high one. It has to show no more than that there is a reasonable possibility, based on credible evidence, that he may apply for a freezing order and that such a freezing order has a reasonable prospect of success. The Court does not need to form a view as to whether or not the application will be successful.

[96] The respondents accept that the applicant has a good arguable case on the merits of its substantive claims. This includes the applicant's claims in fraud. The first part of the three-part test for the grant of a freezing order is therefore satisfied.

[97] The main controversy between the parties is whether the Applicant makes out a current risk of dissipation.

[41] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at paragraphs 49 to 51.

[98] Considering the criteria identified in National Bank Trust v Yurov,[42] the following appears. In terms of the nature of the respondents' assets, these largely comprise shares and cash. Some shares are publicly traded. Others are private. These assets are not all held directly, but through subsidiary holding companies.

[99] In terms of location, these assets appear to be held in diverse places. The V/RPs make use of off-shore jurisdictions and other financial centres, such as Switzerland. Some of the underlying companies which give considerable value to the shares are companies operating in Russia and the Commonwealth of Independent States. The APs identify a trend of the V/RPs increasingly to shift ownership and control of assets to Russia. I accept the applicant's submissions that enforcing a BVI judgment in Russia is likely to entail substantial obstacles and extra burdens, as remarked in Garkusha v Yegiazaryan and others[43]. I accept there is considerable uncertainty that any future BVI judgment will be recognized and enforced in Russia. Added to this is the apparent decrease in transparency within the Russian financial sector. I do not take into account the views ascribed to Dr. Asoskov by the applicant, as he has not expressed any opinion here.

[100] In terms of liquidity, in principle shares and cash are relatively easy to shift or dispose of. However, the current United States sanctions have had the effect of freezing cash denoted in United States Dollars and, where shares are being disposed of, United States government approval is required and the proceeds of sale have to be held in blocked bank accounts. Similarly, dividends deriving from shareholdings are required to be paid into blocked bank accounts. In respect of those blocked or sanctioned assets, there is clearly no current risk of dissipation at all. However, the sanctions could be lifted at any time.

[101] The respondents' behaviour in response to the claim includes an improbable apparent change in their case. The respondents' apparent pleading *volte-face* begs questions whether the respondents are being genuine.

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[42] [2016] EWHC 1913 (Comm) at paragraphs [69] and [70] (Males J).
[43] BVIHCMAP2015/0010 (Webster JA (Ag)) (Unreported).

[102] I note also that the APs plead allegations that the V/RPs have acted dishonestly. The main act of dishonesty complained of is that the V/RPs lied about the extent of their contribution to the joint venture. The fundamental characteristic of this alleged instance of dishonesty is that the V/RPs would have gained a financial advantage to the detriment of the APs. The effect of the apparent pleading *volte-face* is the same; to deny the APs access to proprietary remedies in order for the V/RPs to gain a financial advantage over them. Disposal of assets so as to deprive a claimant of the fruits of his judgment is no different. I am satisfied the substantive case of dishonesty being advanced directly indicates the possibility of the V/RPs putting assets beyond the reach of the APs, to advance the financial interests of the V/RPs at the expense of the APs.

[103] I must also consider whether the applicant demonstrates a real risk with solid evidence that a judgment against the defendant may not be satisfied as a result of unjustified dealing with the defendant's assets.

[104] In the present case the applicant first points to the transfer of assets from IES Belize in 2011 to Starlex, then the onward transfer of assets in 2015 to Renova Bahamas and Sunglet. Both were done without the prior knowledge and consent of the APs. That itself is not objectionable, as there can be a genuine dispute over whether the V/RPs were required to consult the APs beforehand. Then there is the factor that these transfers were allegedly carried out for no substantial consideration. That does suggest that these transfers may not have been made in the ordinary course of business. But without sufficient further evidence as to the context of the transfers the apparent lack of substantial consideration is not of itself sufficient evidence of dissipation. Equally, it may not be significant that IES Belize was left without sufficient assets to meet eventual liabilities to the APs, as such liabilities are disputed anyway.

[105] The respondents rely upon the fact that these transfers were made to parties to this litigation, such that they are not instances of dissipation at all. However, conduct can demonstrate a risk of dissipation even if it does not itself amount to dissipation.

[106] These two transfers do not on their own, in my view, amount to sufficient evidence of a risk of dissipation. But there is also the documentary evidence which describes a high managerial level plan to 'clean up' IES Belize 'for the purpose of avoiding loss/freezing of assets in relation to the threat of possible legal action from' Mr. Abyzov. Shortly afterwards the transfer to Starlex was effected. This does point to an intention to move assets to prevent the APs reaching them. The V/RPs' protestations to the contrary are generalized and unsubstantiated. The interpretation placed on these communications by the applicant will obviously be a matter for trial, but is so far credible.

[107] Taking the various factors together - that the transfers were made without prior consultation with the APs, for (apparently) no substantial consideration, with (apparently) a high-level plan to frustrate legal action by the APs, and the existence of a good arguable case of dishonesty on the part of the V/RPs - there could well be a real risk that judgment for the applicant may not be satisfied as a result of unjustified dealings in the V/RPs' assets.

[108] That said, there has been an unexplained and lengthy delay on the part of the APs in applying for a freezing order based on these transactions. Also, these two transfers did not themselves result in assets being placed beyond the reach of the applicant. I accept the applicant's submission that delay, even lengthy, is not necessarily fatal to an application for a freezing order. But it must be right that it significantly reduces the prospect for obtaining a freezing order on the basis of the transactions concerned.

[109] Nor is the absence of actual dissipation in these transfers fatal. Just because a defendant has not dissipated assets does not mean that there is no risk that he may do so, particularly where there is documentary evidence which suggests a desire and plan to do exactly that.

[110] The court must consider realistically the particular circumstances of the companies involved in the transactions concerned. In the case of IES Belize, the delay in applying for

a freezing order would quite probably have allowed the V/RPs to 'clean up' this company long before a freezing order could be made. The fact that the company might still hold assets worth US$20million, as the applicant believes, suggests that the V/RPs have no particular desire, or perhaps ability, to move these also. This suggests that there is no current real risk of dissipation from IES Belize.

[111] The onward transfer of IES Cyprus to Renova Bahamas and Sunglet, and then to OOO Renova Holding Rus is of itself not necessarily objectionable. On the evidence available I cannot tell which side's explanations are more plausible. The latter transfer is an example, though, of a more general migration of the V/RPs assets from western jurisdictions to Russia.

[112] This brings into focus the extent to which transactions effected by the V/RPs to move assets to Russia and following imposition of the sanctions can objectively be said to be in the ordinary course of business.

[113] Applying the criteria set out in Countrywide Banking Corporation Ltd v Dean[44] the transactions must be considered in the actual settings in which they took place. The transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. The converse of a transaction in the ordinary course of business is a dealing that cannot be justified for normal and proper business purposes.[45]

[114] I do not find it unnatural that the V/RPs should want to move assets to Russia. Mr. Vekselberg and his senior associates are Russian. So is Mr. Abyzov. This was a joint enterprise between and for the benefit of Russians. Its operating method was to invest in other businesses, which inherently entails that investments should be bought and sold and otherwise dealt with in order to maximize returns. Significant operating assets are also Russian. The purpose of the sanctions is to interdict dealings with Russians. The Russian

[44] [1998] AC 338.
[45] Congentra AG v Sixteen Thirteen Marine SA (The 'Nicholas M') [2008] EWHC 1615 (Comm) at paragraph 49 (Flaux J).

government has implemented a de-offshorisation programme. It would be surprising if this combination of factors would not prompt the V/RPs to migrate assets and holding structures to Russia, as they were entitled to do.

[115] The immediate response to the sanctions by reducing shareholdings in western companies below the sanctioned level, by selling shares back to those companies, is also natural. There is nothing inherently sinister about this, particularly as the proceeds of sale have to be held in a blocked bank account. Although the circumstances are clearly not ordinary – because sanctions were not hitherto an everyday feature of commerce involving Russian businessmen – the solution adopted here is both perfectly legitimate and ensures the survival at least of the non-Russian company. That is a normal and proper purpose. This type of transaction is not evidence of a risk of dissipation at all.

[116] The transfers in May of this year by Renova Innovation Ltd, a subsidiary of Renova Holding, of shares in Liwet are a different matter. This was not a case of Liwet re-acquiring its own share capital. The shares were transferred to companies in which senior Renova group personnel have an interest as a purported management incentive and to companies and/or trusts in which associates of Mr. Vekselberg, Mr. Evgeny Olkhovik and Mr. Vladimir Kremer (and their families) have interests. These are persons connected with the V/RPs. The alleged high value of the assets transferred puts an objective observer on inquiry as to the genuineness of this transaction. In the background lies also the allegation that the V/RPs have used a nominee holding arrangement in at least one other case. The reference to an incentive begs additional questions. By its nature, an incentive is not a reward for past performance. It is a carrot held out to the incentivized person to inspire some kind of behaviour beneficial to the giver. Implicit is also a stick that if the desired behaviour is not produced the carrot will be withdrawn. The person giving the incentive retains some type and/or degree of control. The true nature of the arrangement depends upon its terms. Furthermore, the respondents themselves assert that these transactions were a "one-off". That in itself amounts to an admission that they were not 'normal' or 'ordinary' in the setting of the respondents' usual business.

[117] Moreover, the V/RPs are no strangers to sophisticated asset holding structures. Mr. Vekselberg himself is the beneficiary of a discretionary trust. That in itself is no criticism, nor suspicious. It is pertinent to note however that in response to increasing international transparency (and professional leaks), high net worth persons are increasingly placing less reliance upon confidentiality and secrecy laws in off-shore jurisdictions to conceal true ultimate beneficial ownership. They try to stay ahead of regulatory changes. They are opting for ostensibly transparent structures, such as discretionary trusts. Such transparency is often more apparent than real. True ownership is often ambiguous, and deliberately made so. A 'mere hope' is an elastic concept. The Liwet transfers do not involve a discretionary trust but they beg the question whether they are in reality a nominee arrangement in which the V/RPs retain power to direct how the assets should be dealt with. They are transactions which, in my view, warrant further investigation.

[118] Other transactions cited by the applicant do not raise similar queries. I see nothing out of the ordinary course of business about the sale of shares in JSCB International Financial Club nor in the proposed but unsuccessful sale of shares in Kamchatka Gold JSC. Acquisition and disposal of shares is the ordinary course of business for an investment company. I also see no significance in the alleged potential disposal of other assets (such as UC Rusal) and other circumstances referred to by the Applicant (such as the dissolution of the Board of Directors of Renova Management AG).

[119] In sum therefore, of the transactions following the imposition of sanctions, it is only the Liwet transfers which in my view raise questions.

[120] The totality of the circumstances, which include the revelation of an apparent plan to 'clean-up' IES Belize in anticipation of legal action by the APs and the alleged use of at least one nominee to hold assets, presents the Court with objective facts from which a risk of dissipation can be inferred.[46]

[46] Applying dicta in Holyoake v Candy [2016] EWHC 970 (Ch) (Nugee J) and Cherny v Neuman [2009] EWHC 1743 at paragraphs 69 to 71 (Waksman QC).

[121] The totality of the circumstances is important, because the respondents' approach before me was to compartmentalize each transaction, and then explain why that transaction does not disclose a risk of dissipation. They then ask me to conclude that the circumstances, added together, do not disclose a risk of dissipation. It is easy to see why the respondents urge a segmented approach: if they can consign and restrict the IES Belize 'clean-up' evidence to a transaction or period for which delay and lack of actual dissipation would doom a freezing order application, then it would not affect consideration of later questionable transactions. It is right, I think, that I should maintain a view of the circumstances as a whole, including historic instances which give cause to doubt the V/RPs' good faith.

[122] I should say, for the record, that those circumstances do not include any assessment on my part of allegedly 'thin' defences advanced by the V/RPs. Beyond the undisputed point that the applicant has a good arguable case I do not go at this interlocutory stage.

(4) Justice and convenience of a freezing order

[123] The third aspect for consideration whether or not a freezing order would be granted is whether it would be just and convenient to do so. This part of the inquiry involves balancing factors such as delay, prejudice to the applicant and the respondents, and proportionality. These ultimately reduce to a consideration of the CPR overriding objective.

[124] Whether or not the Court would exercise its discretion to grant a freezing order in the circumstances presently before the Court, against one, more or all the other Respondents is not something I can be certain about. But this is not necessary. It suffices for some credible grounds to exist upon which an application for a freezing order, with a reasonable prospect of success, may be brought. I am satisfied that is the case. I am not persuaded that the applicant's delay in making an application is fatal.

[125] Consequently, the applicant meets the jurisdictional threshold.

(5) General discretion to order provision of information

[126] Once the jurisdictional threshold has been met, the Court has a general discretion to decide whether it is just and convenient in all the circumstances to make the order sought.[47] The Court must weigh the prejudice to the respective parties. A defendant is generally entitled to have its privacy protected. In the English common law system a claimant is not entitled to security for its claim: it must take its chances that a defendant may ultimately not have assets with which to satisfy a judgment. On the other hand, an injustice might be done if a claimant cannot adduce evidence in support of a freezing order that ought to be granted.

[127] Once the discretion is exercised to order disclosure, the appropriate scope needs to be determined. It is irrelevant that if a freezing order were to be made, a broad disclosure order might usually be made to police it. The applicant is not at that stage yet.

[128] Nonetheless, an order for provision of information is far less intrusive than an order preventing someone dealing with assets. A claimant may suffer severe, irremediable prejudice if it is denied information. On the other hand, a defendant is likely to suffer only the intrusion into its private affairs and the inconvenience of having to provide the information sought. Such inconvenience may not cause loss, but it is real nonetheless. The applicant submits, with considerable force, that upon the reported cases, the English courts have always come down in favour of disclosure.

[129] Whilst I am satisfied that it is just and convenient to order some degree of disclosure, the full range of information sought by the applicant against all the respondents is undoubtedly wide.

[130] There is also an issue whether there is a sufficient generalized risk of dissipation for the court to order all the respondents to provide information about their assets.

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[47] Lichter & Or. v Rubin [2008] EWHC 450 (Ch.) at paragraph 17 (Henderson J).

[131] A theoretical possibility of dissipation is to be distinguished from a current, real risk, demonstrated with solid evidence, that a judgment against a particular defendant may not be satisfied as a result of unjustified dealing with that defendant's assets.[48]

[132] This requires the position of each defendant to be considered. General control of numerous companies by the same persons does not necessarily mean there is a current, real risk of dissipation from all those companies. As I have already observed, the circumstances do not indicate a current, real risk of dissipation from IES Belize. There is also no solid evidence of a real risk of dissipation of Mr. Vekselberg's own assets. The same goes for Gothelia and Renova Bahamas.

[133] In this case what the applicant seeks is indeed an 'aggressive audit'. The applicant wants to undertake a purely speculative search. In my reckoning this is both conceptually wrong and beyond what is warranted by the evidence. The inquiry desired by the applicant is disproportionate in its width and thereby contrary to the CPR overriding objective.

[134] There are other considerations. I do not see that I have jurisdiction to order disclosure about asset transfers that have already occurred, unless there is good reason to suppose a genuine transfer was not made. That, in my reckoning, is the case with the Liwet transfers.

[135] In my opinion an information provision order should be restricted to investigation of the Liwet transfers, to verify whether they amount to a genuine disposal or constitute some form of nominee holding arrangement.

[136] It is appropriate to require the First Respondent, Mr. Vekselberg, and the Fourth Respondent, Renova Holding, to provide, or cause its subsidiary, Renova Innovation Ltd,

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[48] National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at paragraphs [69] and [70] (Males J).

and/or Liwet Holding AG, to provide the information. I have no reason to believe that they are unable to do that.

[137] A period of seven days should in my view suffice. The relevant documentation must be readily available to them. It would also keep to a minimum the opportunity for persons, should they be so inclined, to falsify documents.

[138] In relation to Gothelia, the V/RPs argue that no freezing order can lie against this company because no financial claims are made against it. That is not necessarily a strong argument as it is nonetheless a defendant and the applicant seeks to have it bound by a judgment. A more compelling reason for making no order against Gothelia, in my view, is that there is no suggestion that Gothelia played any part in the Liwet transfers. The same applies to IES Belize and Renova Bahamas.

(6) Undertaking as to damages

[139] The respondents have urged that if information should be ordered to be disclosed I should require the applicant to give an undertaking as to damages. I will adopt the English Court of Appeal's approach in Pugachev.[49] There is no credible evidence here that there is a realistic risk of loss. I will therefore not require such an undertaking.

(7) Confidentiality

[140] The respondents submit further that if I should order information to be disclosed, I should restrict its dissemination to the applicant's legal team. The respondents do not give any good reason for thinking that the information is of a type that is liable to be misused, nor indeed that the applicant will misuse it. Restrictions of the type proposed by the respondents suffer from the difficulty that a party's legal team will not be able to take proper instructions from the persons often best placed to provide vital context. I am

[49] JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 at paragraph 64.

satisfied that such a restriction here would amount to giving a disclosure order with one hand and emasculating it with the other. I will therefore not impose such a restriction.

(8) Costs

[141] As costs follow the event, it is appropriate that Mr. Vekselberg and Renova Holding, jointly and severally, should bear the applicant's costs. I was inclined to reduce the percentage of recoverable costs on grounds that the scope of relief sought was over-ambitious. Whilst it is true that considerable time has been spent on the issue of scope, it is also fair to say that there is no guidance in the authorities in respect of CPR 17.1(1)(e) or its English equivalent on this question. The application, wide though it was, was not hopeless.

Order

[142] For the reasons given the Court's order is as follows:

(1) The First Respondant and the Fourth Respondent shall produce, and/or cause Renova Innovation Ltd and/or Liwet Holding AG to produce, to the Applicant all documents relating to the transfer of shares in Liwet Holding AG to persons or entities associated with the First Respondent made since 6th April 2018.

(2) 'Documents' shall include any correspondence, by email or otherwise, memoranda, agreements, resolutions, statements, registers, custody account records, certificates, incentive programme terms and conditions, or any other thing on or in which information of any description is recorded, whether created before or after 6th April 2018.

(3) 'Transfer of shares' shall include but not be limited to the terms and conditions upon which such transfer(s) have been made, including but not limited to any options and any rights of pre-emption or revocation.

(4) 'Persons or entities associated with the First Respondent' shall include, but not be limited to, Mr. Evgeniy Olkhovik and Mr. Vladimir Kremer, and any persons or entities associated with them, and any person employed by or otherwise connected, whether directly or indirectly, with the First Respondent.

(5) The said documents shall be produced within seven calendar days of this order.

(6) The said documents shall be disclosed together with an affidavit or affirmation as to their authenticity and completeness.

(7) The applicant has liberty to apply to inspect originals and otherwise to verify authenticity.

(8) The First and Fourth Respondents shall pay the Applicant's costs of this application, to be assessed if not agreed within 21 days.

[143] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar