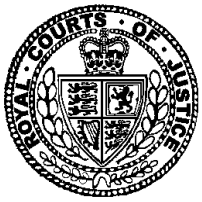

Neutral Citation Number: [2021] EWHC 743 (Comm)

Case No: CL-2018-000498

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) JSC KARAT-1 **(2) PJSC MURMANSK TRAWL FLEET** **(3) JSC YAMSY** **(4) LLC ROLIZ** **(5) JSC AKROS** **(6) JSC SAKHALIN LEASING FLOT** **(7) JSC BLAF** **(8) JSC RYBPROMINVEST** **(9) JSC ALTERNATIVA** **(10) NOREBO OVERSEAS HOLDING LIMITED** **(11) NOREBO HONG KONG LIMITED** **(12) NOREBO EUROPE LIMITED**	**Applicants in the Inquiry / Respondents in the Application**
- and -	
ALEXANDER TUGUSHEV	**Respondent in the Inquiry / Applicant in the Application**

- -
- -

Christopher Pymont QC, Benjamin John and James Kinman (instructed by **Macfarlanes LLP**) for the **Applicants**
Richard Slade QC and Richard Blakeley (instructed by **Peters & Peters LLP**) for the **Respondent**

Hearing dates: 10 March 2021
Draft sent to parties: 19 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.

.....

MRS JUSTICE COCKERILL DBE

"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 26 March 2021 at 10:00 AM"

Mrs Justice Cockerill :

Introduction

1. This is an application for security for costs. It is fair to say that it is an unusual one. That is because it is not brought by the defendant to a claim seeking protection against the possibility that – should he successfully defend himself against the claim – he will find himself unable to recover the costs of his defence. In this case the applicant seeking security for costs ("Mr Tugushev") is the Claimant in Commercial Court proceedings CL-2018-000498 in which this application is made. He is seeking security because he is on the receiving end of an inquiry into damages arising out of a Worldwide Freezing Order ("WFO") he obtained which was later set aside.

2. The questions before me are threefold:

   i) Is there any jurisdiction to make an order for security in such a case?

   ii) If there is, is there a real risk that any costs order will not be enforced in Russia?

   iii) If there is, in what amount should security be ordered?

Background

3. The relevant background can be fairly briefly stated for the purposes of this application.

4. These proceedings concern a claim by Mr Tugushev against three individuals: Mr Orlov, Mr Roth and Mr Petrik. There is what Mr Tugushev described as a bitter dispute between them over the ownership of three corporate groups, by far the largest and most valuable of which consists of a Russian company, JSC Norebo Holding ("**Norebo Holdings**") and its subsidiaries (the "**Norebo Group**"). The group is based primarily in Murmansk and much of its business model is reliant upon fish caught under fishing quotas issued by the Russian government. It is owned almost entirely by Mr Orlov.

5. Mr Tugushev claims that he, Mr Orlov and Mr Roth entered into a joint venture in Norway in 1997, by which it was agreed (inter alia) that they would each hold a one third interest in a joint venture business, now said to be run through Norebo Holdings and two other corporate groups. He claims to be entitled to at least a one third interest in each company, and that Mr Orlov and Mr Roth have conspired to keep that interest from him. These claims are denied by the Defendants, albeit to very different extents and in different ways.

6. On 23 July 2018, the day before the issuance of his claim, Mr Tugushev obtained a worldwide freezing order at an *ex parte* hearing before Bryan J against Mr Orlov (the WFO). As the usual "price" for that order, Mr Tugushev gave cross-undertakings in damages in favour of both Mr Orlov and others who suffered loss as a result of the WFO, along with fortification. They were in these terms:

> "(5) The Applicant [Mr Tugushev] will pay the reasonable costs of anyone other than the Respondent [Mr Orlov] which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the Court later finds that this order has caused such

> person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the Court may make."

7. On 30 July 2018 the WFO was varied and continued by Teare J.

8. The WFO was subsequently discharged by Carr J on 31 July 2019, following findings that Mr Tugushev was in material breach of his duties of full and frank disclosure when he obtained the WFO, which breach was aggravated by his denials that there was any merit whatsoever in points taken against him, and his continued failure to research information which was, or may have been, available to him. Further, Carr J held that there was no real risk of dissipation sufficient to justify a freezing order against Mr Orlov in any event. The Respondents ask me to bear in mind that this was therefore an order which should never have been granted.

9. The companies who are Respondents to this application ("the Companies") are all entities within the Norebo Group. They allege that that they suffered various losses as a result of the WFO, in the amount of roughly USD 10,000,000. The Companies' claim comprises increased interest charges, fees and interest relating to letters of credit entered into subsequent to the WFO, certain legal and accountants' fees and (until very recently) for increased travel expenses on the part of management.

10. The application for an inquiry into damages was granted (by consent) by Jacobs J on 19 May 2020. On 29 May 2020, the Companies served Points of Claim purporting to particularise their losses. On 26 June 2020, Mr Tugushev served Points of Defence in response. Points of Reply were served on 24 July 2020.

11. On 15 October 2020, Mr Tugushev issued this Application. The earliest practical date that it could be listed turned out to be 10 March 2021. The Inquiry itself is listed to start on 26 July 2021 with a time estimate of 4 days. The Main Proceedings are set down for a 16-week trial commencing in March 2022.

12. Mr Orlov is not now a Claimant in the Inquiry. He had originally intimated that he would be, and served a witness statement. He has however abandoned any claim in England to have suffered damage as a result of the WFO and instead has commenced proceedings in Russia alleging damage to his reputation.

13. As noted at the outset, Mr Tugushev now applies for security for his costs of the Inquiry against the Companies. The Application was initially made against all of the Norebo Companies but Mr Tugushev recognises that it should only be maintained against the Russian domiciled Companies. As such it is not pursued against the 10th to 12th Companies (being English and Hong Kong companies). This is of some relevance on the subject of quantum of costs. The English and Hong Kong Companies' claims represent only 6% of the total losses claimed (with 94% being claimed by the Russian Companies).

The parties' submissions in outline

14. Mr Tugushev submits that:

i) His Application falls squarely within CPR 25.12(1) because he is in substance a Defendant in the Inquiry.

ii) The Court should exercise its discretion to order security for Mr Tugushev's costs. The Companies are Russian companies. There is a real risk that a costs award made against them will be unenforceable in Russia. This is a conclusion that the Commercial Court has reached in recent cases and which ought to be reached here. While the Companies have adduced expert evidence suggesting that a costs only order is likely to be recognised and enforced in Russia, Mr Tugushev's expert disagrees and has explained in detail why there is a real risk that a Russian Court would refuse to do so. If that threshold is met, no points are taken against the Application as to why (in the Court's discretion) it should not be allowed, subject to some points as to quantum.

iii) Security should be in the sum of about £512,000.

15. The Companies oppose the application. They say:

i) The Court in essence has no jurisdiction to make an order for security for costs against them in the Inquiry. While the Court has a general jurisdiction to order security for costs it will never order security if it is contrary to the settled practice of the court or the rules of the Court. This application is contrary to that practice and the rules. This is because CPR 25.12 (reflecting settled practice) only allows for awards for security for costs made in favour of a "Defendant" to a "claim". Mr Tugushev is not a Defendant, he is the Claimant. The inquiry is not a "claim", it is an interlocutory application for compensation arising out of the steps which Mr Tugushev has taken (as it turns out, wrongfully) in this litigation. There is no real difference in the way in which the Court proceeds between the practice pre and post CPR and pre-CPR authority establishes that the Court will not order security for costs in a case such as this.

ii) There is no real risk that a costs award will be unenforceable against them in Russia. On the evidence before the court, there is no reason to think that there is any real risk of non-enforcement of any costs order against the Norebo Companies (and Mr Tugushev does not appear to be running a case that he should be entitled to the costs of any additional burdens). While it has been decided in other cases, arising on different facts and on the basis of the evidence then before the Court, that there was a real risk hypothetical English costs orders might not be enforceable in Russia, those decisions are not relevant to the assessment to made by reference to the evidence now before this Court.

iii) If any security is ordered, it should only be in the sum of about £121,000. This is for essentially two reasons:

a) Large portions of Mr Tugushev's recoverable costs will be recoverable against the Tenth to Twelfth Norebo Companies.

b) Elements of Mr Tugushev's estimated costs appear to be substantially overstated (particularly counsel's anticipated brief fees).

16. As will be apparent both sides relied on expert evidence on Russian Law, in the form of expert reports. Mr Tugushev's expert was Mr Vaneev; The companies' expert was Prof Asoskov. The experts were not called to give evidence.

Jurisdiction

The Law

17. The starting point is CPR 25.12(1), which reads as follows:

> "A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings."

18. The old rule under RSC 23 was somewhat differently phrased:

> "(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the court — . . . then if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to- give such security for the defendant's costs of the action or other proceeding as it thinks just. . . .
>
> (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim."

19. There are then a number of authorities which have been cited, both pre- and post CPR. I will first outline them in chronological order before going on to consider the light which they shed on the issues.

20. *Taly NDC International NV v Terra Nova Insurance Co Ltd* [1985] 1 WLR 1359, was a case in which a plaintiff sued several defendants and those defendants joined a third party by way of an indemnity claim against it. The plaintiff then sought orders for specific disclosure and interrogatories from the third party. The third party applied for security for its costs from the plaintiff, which application was unsuccessful both at first instance and on appeal.

21. The reasons why it was unsuccessful are set out in the judgment of Parker LJ at 1361H-1362A:

> "In my judgment the proceedings referred to in the rule, if they are not an action, are at least proceedings of the nature of an action and refer to the whole matter and not to an interlocutory application in some other proceedings. Were it otherwise, it appears to me that chaos would reign, for every time an interlocutory application was taken out by a defendant the plaintiff would be able to say, 'The plaintiff is in the position of the defendant in this application and the defendant is in the position of the plaintiff. They are proceedings. Therefore I ought

> to have security for the costs of this application.' One has only to examine that to see that it cannot have any foundation whatever."

22. Central to the submissions before me has been the next case: *C T Bowring & Co (Insurance) Ltd v Corsi & Partners Ltd* [1994] BCC 713. That is because it is the only authority which deals with the question of security for costs of an inquiry into damages, and is relied on in the Notes to the White Book; but it is (obviously) a case which pre-dates CPR.

23. In that case the plaintiff issued a writ against the defendant claiming balances due in respect of insurance and reinsurance businesses. In support of those proceedings, he obtained a Mareva (freezing) injunction the day prior to issue. Roughly two months later, the injunction was discharged by consent, and the action was settled. Following the settlement the defendant sought an inquiry under the usual the cross-undertaking in damages, claiming £3.75 million. The inquiry was therefore the only issue left between the parties. The plaintiff sought security for his costs of the application for the inquiry. This was refused at first instance and the plaintiff appealed.

24. Dillon LJ considered the evolution of the jurisdiction to award security for costs. Reference to s. 726 of the Companies Act 1985 caused him to look back past its predecessor (s. 24 of the Joint Stock Companies Act of 1857) and to say at 716 F-H:

> "Section 24 of the 1857 Act represented an innovation, and it and its successors represent even now the only established exception to the general rule of practice that a party who desires to litigate a claim shall not be prevented by the court from doing so, at any rate at first instance, on the grounds of his poverty and consequent inability to pay the costs of his adversary if his adversary were to be successful.
>
> There was, even before 1857, a power which the courts exercised, under their inherent jurisdiction, in certain cases to order a plaintiff to give security for costs. But again there was a strongly established rule of practice that a person who is in the position of a defendant is to be at liberty to defend himself and is not to be called on to give security … I regard this as a rule of practice, and not a mere matter of discretion to be determined on the facts in each individual case … I regard this rule of practice as of the same class as the rule of practice under which any litigant, other than the Crown or a public authority as law enforcer, who obtains an interlocutory injunction is required to give a cross-undertaking in damages. That is not a matter for discretion in the individual case."

25. Dillon LJ went on to consider the question of whether the applicant in that case was in the position of a plaintiff at 719B-F:

> "Indeed the express exclusion from the definition of 'plaintiff' of the person who seeks relief by way of counterclaim as a defendant indicates to me that the 'relief' referred to in the

> definition of 'plaintiff' is the relief claimed by the originating process, and not mere interlocutory relief. To say that a defendant who counterclaims is not a plaintiff but a defendant who issues an interlocutory summons or motion in the plaintiff's action is a plaintiff makes no sense at all to my mind…. The natural meaning of the term 'plaintiff in a context of litigation is the plaintiff in the proceedings as a whole or original proceedings."

26. He then concluded at 721E-H:

> "… the rule that a defendant cannot be ordered to give security when he has been brought before the court and is seeking to defend himself (as opposed to counterclaiming in respect of matters which go beyond his defence) would preclude a plaintiff from claiming security against a defendant, whether a foreign resident or an impoverished company, in respect of an application by that defendant to set aside or curtail a Mareva or other injunction obtained ex parte by the plaintiff. In my judgment, an application by the defendant for an inquiry as to damages under the cross-undertaking when the Mareva or other injunction has been discharged is likewise a mere matter of defence.
>
> For this conclusion there are several reasons which are cumulative (or different aspects of the same point), viz: (1) the cross-undertaking is the price which the plaintiff has to pay for obtaining an injunction before the action can be finally tried and decided, (2) the damages under the cross-undertaking are not strictly damages but compensation to the defendant for loss suffered if it is subsequently established that the interlocutory injunction should not have been granted, and (3) there is no separate cause of action for the damages and it can only be enforced by application in the action in which the injunction was granted."

27. Millett LJ , having approved the *Taly v Terra Nova* dictum of Parker LJ, concluded at 727D-E that proceeding in Order 23 meant an original proceeding.

28. Considering whether the applicant was in the position of a plaintiff (a question arising out of the swap-over provision in Order 23) at 728D-729B he readily accepted that the Defendant, in seeking an inquiry, "*certainly has the appearance of a plaintiff. It claims that it has suffered loss for which the plaintiff is responsible and it seeks compensation for that loss*", and that the plaintiff, in defending the inquiry, "*certainly looks like a defendant*".

29. However, he went on to explain that it was necessary to look at the whole litigation between the parties; if one looked at the proceedings as a whole, those appearances were deceptive and the parties had "*never exchanged roles*":

> "It was the plaintiff which chose to bring the proceedings and take the risk of failing to recover its costs even if successful. It was the plaintiff which chose to apply for interlocutory relief and to offer the court a cross-undertaking in damages as the price of obtaining such relief. It must have known that the injunction which it obtained might cause the defendant loss, that it might subsequently be established that the injunction should not have been granted, and that the defendant might seek to recover its loss by applying to enforce the cross-undertaking. It must have known that, if it chose to resist such an application, it might incur further irrecoverable costs. It did not qualify its cross-undertaking by making its enforcement conditional on the defendant providing security for costs. Had it attempted to do so, its cross-undertaking would have been rejected and its application for an injunction refused. Having offered the court an unqualified cross-undertaking, it now seeks to protect itself against a situation which it must have been able to foresee. That it should succeed is not an attractive proposition.
>
> As for the defendant, it has had no choice in the matter. It has done nothing beyond reacting to the steps which the plaintiff has taken against it. The plaintiff brought the proceedings; the defendant has been compelled to defend them. The plaintiff obtained an injunction against it which the defendant claims ought not to have been granted; the defendant has obtained its discharge. The defendant claims that the existence of the injunction caused it loss; it seeks to recover the loss. It seeks only to be restored, so far as compensation can achieve it, to the position it was in before the proceedings began. The defendant must counter-attack to recover ground lost by an earlier defeat, but it makes no territorial claim of its own; it cannot fairly be described as an aggressor.
>
> Although the defendant is claiming monetary compensation for loss which it alleges it has sustained as a result of the injunction, it has no independent cause of action to recover such loss. It cannot bring separate proceedings, whether by writ or counterclaim in the existing proceedings. Its claim arises out of and is wholly dependent upon the plaintiff's cross-undertaking. Its only remedy is to enforce the cross-undertaking by applying under the liberty to apply in the proceedings in which the cross-undertaking was given. Analogies tend to be imperfect, but the closest analogy which occurs to me is the enforcement by a successful defendant of an order for costs made in his favour. Security for the plaintiffs costs of resisting enforcement would not be ordered for other reasons, but I cannot think that such a defendant could properly be regarded as being in the position of a plaintiff."

30. This judgment gives rise to the relevant comment in the White Book Vol. 2, [15-34]: "*The court has no jurisdiction to require the applicant to provide security for the claimant's costs in relation to the determination as to whether the undertaking should be enforced and to the inquiry as to damages if ordered*." Mr Tugushev's submission is that this comment is incorrect.

31. The most recent leading case is *GFN SA and others v Bancredit Cayman Ltd (in official liquidation)* [2010] Bus LR 587. In *GFN*, creditors applied to the Grand Court of the Cayman Island to appeal against the rejection of their proofs of debt by the liquidators of the respondent bank. The Privy Council held that the creditors' appeals were in substance freestanding, originating applications which counted as an "*action, suit or other proceeding*" in respect of which security for costs could be ordered under Order 23(1) of the Grand Court Rules which used the same words as RSC Order 23(1), which in pre-CPR times covered applications for security for costs in the English High Court.

32. The following principles were posited by Mr Slade QC as being capable of being derived from *GFN* and were not in issue:

    i) "*The Court has an inherent jurisdiction to order security for costs. That jurisdiction is essentially discretionary, but must be exercised not merely in a generally judicial manner but in a manner which accords with the settled practice of the court as circumscribed or extended by … legislation*": Lord Neuberger at [30].

    ii) In deciding whether an application falls within the court's power to order security, the court must look at the substance of the application rather than its strict form: Lord Neuberger at [31].

    iii) Applications made within the forensic framework of other proceedings or for which other proceedings are the procedural launch pad can be essentially free-standing and originating proceedings in substance, and can be the basis for an application for security for costs: Lord Neuberger at [32].

    iv) An order for security for costs can be made against an applicant making an application which, although interlocutory in form, raises issues as to the rights of the parties which are in substance "*independent of the issues in dispute in the parent action*": per Lord Scott at [26].

    v) On the other hand, an application which constitutes a mere formulation of the applicant's defence or goes no further than is reasonably necessary to resist a claim cannot be the basis for an application for security for costs: *GFN* per Lord Scott at [22], per Lord Neuberger at [31] – based on the settled practice Defendants cannot be forced to produce security for costs.

33. The next case is *Dalnyaya Step LLC* [2017] EWHC 756 (Ch), [2017] 1 WLR 4264. In that case the claimant made an application for recognition as a foreign liquidator under the Cross Border Insolvency Regulation ("CBIR") declaring him to be the official receiver and ordering liquidation; and also applied to question the company's managers under s 236 of the Companies Act. The managers applied to set aside the order and applied for security for costs of the hearing of the set aside application and s 236 application.

34. The claimant's application was treated as, in substance, a "claim" within the meaning of CPR 25.12(1) because the CBIR conceived of such applications as putting in train legal proceedings giving rise to certain legal rights and obligations, as well as endowing the court with various functions, none of which made any sense unless the application for recognition was conceived of as a claim – see [64-65]. Rose J held that the managers' application was purely defensive and did not have an independent vitality.

35. This test of an application that has no independent vitality of its own, that is "*in substance a defensive measure*" or that forms part and parcel of the claim is also seen in *JSC VTB Bank v Skurikhin* [2018] EWHC 3072 (Comm). In that case the Claimant ("VTB") applied for security for its costs in respect of an application by a party for an order appointing receivers by way of equitable execution.

36. That was therefore a case where the main issues between the parties had already been determined in that the case was in the enforcement stage [18]. Andrew Henshaw QC (sitting as a High Court Judge) held that an application to discharge a receivership order was in substance a defensive measure [54].

Discussion

37. I consider the answer on this point is clear. Mr Tugushev is not entitled to security for costs. Even if it may not quite be technically right to say that the court lacks jurisdiction to grant security for costs in this case, the position is one which is akin to such a lack of jurisdiction. There is a clear line of authority setting out the limited circumstances in which the court will exercise its discretion. It continues pre and post CPR. To award security for costs in a case such as this would be to run counter to this long held and recognised rule of practice.

38. The obvious starting point is the decision in *Bowring.* On its face that case contains clear reasons (given by a strong Court of Appeal) for concluding that in general the received wisdom and right conclusion would be that a person making a claim under a cross undertaking is not thereby transformed into a claimant or plaintiff in his own right – because the application under the undertaking is all part of the working out of original claim for injunction.

39. I do not accept the submission that the analysis in *Bowring* was based heavily on the specific wording of the Companies Act provision, or of RSC O23; the attention given to those points is limited and is simply a product of the arguments addressed in that case.

40. *Bowring* however provides a number of important points which remain significant as one goes through the cases. The first is that (at least pre CPR) the rules form part of a continuum whereby the ambit of the permissible exercise of the discretion is from time to time codified. I have cited Dillon LJ on this point above. To similar effect is Millett LJ at 726A: "*The order represents a codification of the case law dealing with the power of the court to order security for costs which had formed the model for the statutory power conferred by the various Companies Acts*."

41. The second is that the Court regards the limits as jurisdictional even where they are based on rules of practice and will not exercise its jurisdiction outside ambit of these rules. As Dillon LJ said: "*I regard this rule of practice as of the same class as the rule*

of practice under which any litigant, other than the Crown or a public authority as law enforcer, who obtains an interlocutory injunction is required to give a cross-undertaking in damages. That is not a matter for discretion in the individual case."

42. The third is that the Court will not exercise its discretion in cases which are interlocutory or where the applicant is not in substance Defendant.

43. Further the case sets out very clearly the policy consideration which underpins this approach. See Lord Millett at 724H:

> "The purpose of the jurisdiction to order security for costs is to prevent the injustice which would result if a plaintiff who was in effect immune from orders for costs were free to litigate at the defendant's expense even if unsuccessful. Such an order can be made only against a plaintiff; it cannot be made against a defendant. That is because a plaintiff institutes proceedings voluntarily. If he chooses to bring proceedings against an insolvent company with limited liability, he does so with his eyes open; he takes the risk that he may not recover his costs even if successful, but it is his own decision to take that risk. The defendant, however, has no choice in the matter. He is compelled to litigate or submit to the plaintiffs demands. He must be allowed to defend himself without being subjected to the embarrassment of having to provide security for the plaintiffs costs."

44. The obvious point which formed part of the attack on *Bowring* was that that case preceded CPR and that the rule under CPR is differently worded. I will come back to the submission as it was advanced below, but note here that no reason has been given as to why that change of wording (largely the change from "action" to "claim") should have any change of effect. Given the continuum and consistent policy rationale it would be surprising if there were such a change without that being clearly signalled or explained.

45. It is perhaps worth noting that a rather similar argument was at the heart of the Court of Appeal's decision to trace the continuum in *Bowring* itself; Mr Gee for the applicant had made a spirited attempt to argue that s. 225 of the 1925 Judicature Act had somehow transformed the meaning of the word "plaintiff". That attempt was roundly rejected by the Court of Appeal in that case.

46. The line discerned in *Bowring* also seems to me to be broadly consistent with the more recent cases (I shall consider *GFN* – by reference to which Mr Slade attempted to distinguish *Bowring* – separately below). These bear out this distinction in *Bowring* – overall the key question remains: is the person in the position of a plaintiff? That is a question which was not relevant only because of the wording of O23, but because of the underlying policy rationale which led to that particular wording, and which has not changed. It was notable that these authorities were not grappled with by Mr Slade in his main submissions (though touched on in reply).

47. I start with *Dalnyaya*. That case raised squarely the question of what is a claim or a proceeding (see the subheading at 4275H). In considering that question Rose J

considered *GFN*, *Taly* and *Bowring*. There was no suggestion that any of these authorities were inapplicable to a question in relation to the wording of CPR. She also considered *Autoweld Systems Ltd v Kito Enterprises llc* [2010] EWCA Civ 1469, a case which concerned the issue which frequently arises as to whether the court should grant security for costs to a defendant who has brought a counterclaim against the claimant. Referencing (and emphasising) the same policy rationale noted in *Bowring* she proceeded, via the judgment of Bingham LJ in *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307, to posit the "independent vitality" test as a contrast to something which is "simply defensive to the claim".

48. Both lines of authority were therefore seen as partaking of the same rationale, and requiring reference to a similar test – the discernment of that which is not simply defensive by reference to the overall context and substance.

49. At paragraph 76 she held as follows:

> "in my judgment, the application to set aside the recognition order is part and parcel of the proceeding or claim that was commenced by Mr Nogotkov when he applied for the recognition order. The set aside application cannot be regarded as free-standing, entirely separate from the order which it seeks to challenge. Whether or not the Hermitage parties were defendants to Mr Nogotkov's claim or proceeding at the moment it was initiated, they have certainly become defendants now that they challenge the making of the recognition order. They should not be deprived of the status of defendants for the purposes of the security for costs jurisdiction by the fact that Mr Nogotkov failed to mention what he knew about the troubled history of DSL at the ex parte hearing before the registrar."

50. As Mr Pymont QC noted, that is a determination which has an obvious resonance in this case of proceedings which follow on from an injunction which has been set aside not just for lack of risk of dissipation, but also lack of full and frank disclosure.

51. Turning then to *Skurikhin*, the judge considered the law on whether VTB was a defendant to a claim for CPR 25.12 purposes from [38] of the judgment. Like Rose J, he cited *Taly*, *Bowring*, *GFN*, *Hutchison* and *Autoweld* – as well as *Dalnyaya* itself. Like Rose J he did not suggest that the pre CPR authorities were one whit affected by the change in wording of the rule. As I have done, he noted a parallel between the application he faced and the passage at [76] of Rose J's judgment.

52. The question which the judge posed to himself in order to answer the question was: is VTB in substance a defendant to a claim? [54]. He concluded at [54(iv)]:

> "Berenger's application has no independent vitality of its own, and is simply part and parcel of the claim or proceeding commenced by VTB in the form of the main action and/or the Receivership Application, in the same way as the set-aside application in Dalnyaya was part and parcel of the recognition application proceedings."

53. One point of particular interest in this case is that Berenger had only been joined after all substantive issues had been resolved – they were respondents to enforcement, not defendants. Therefore they were in a rather similar position to the Companies in this case, in not being defendants to the substantive claim. One might well say their position was weaker in that the substantive claim had been entirely determined by the time they joined the proceedings.

54. Thus far therefore the authorities speak with one voice. They suggest strongly that Mr Tugushev's application must fail.

55. Mr Tugushev says that *Bowring* is distinguishable on three main grounds.

56. The first is that in that case the court was considering the wording of RSC Order 23(1). He says that the Court attached importance to the reference in RSC Order 23(1) to "*action or other proceedings*", and it considered those "*other proceedings*" to be originating in nature (at pp.713B-D, 724C-F, 725F, 727A-B, 730H-731A). It drew a firm distinction between an interlocutory application and an originating application (at pp.727D-E, 730H). He submits that the wording in CPR 25.12(1) is significantly different and does not suggest the necessity for any originating process. Mr Slade also points out that CPR 3.1(3) contains a specific provision that where a court makes an order, it may make it subject to conditions, including payment into court. This power is not tied to any originating process and he contends is suggestive that a similar approach is now applicable under CPR 25.

57. I am not attracted by this argument. As I have noted, the cases indicate a consistent approach, and no basis has been advanced for suggesting that a change was intended – or why a change should have been intended. The change from "action" to "claim" in the rules is one of drafting style, not substance.

58. Further this argument would seem to ignore the important substance/form distinction apparent in the later authorities – and the interpretation of *Bowring* in those cases. So Lord Scott observed at [20] of *GFN*, when the Court of Appeal in *Bowring* noted that security for costs could only be ordered in respect of an originating process, that "*should be taken to be referring to the substance of the application in question rather than to its strict form*". This is made clear by reason of the fact that they plainly regarded it as possible for the Court to award security for costs for a counterclaim, notwithstanding that it was not in form an originating process.

59. Further the reasoning of Millett LJ in the passage I have quoted above still holds good (and it is notable that Mr Slade also did not try to grapple with this in any detail). That key passage in Millett LJ's judgment placed no reliance at all on the wording of O23 of the RSC; it is about logic and substance – and the fundamental underlying policy rationale. It would follow that, as Millett LJ said there, an inquiry under a cross undertaking is not, in substance, a claim – it is a reaction to an injunction.

60. In dealing with Mr Tugushev's second ground of distinction I will deal in more detail with *GFN*. Before doing so I pause to note Mr Tugushev's first submission also sits rather ill with Mr Tugushev's reliance on *GFN*, which was itself not a case on CPR wording but rather a case concerning the Cayman Grand Court Rule 23(1), the terms of which were in the substantially the same form as the old RSC O23(1). So logically

unless the Court in *GFN* was intending to overrule *Bowring* that decision (on an inquiry into damages based on the same rule) should be unaffected.

61. As for *GFN* it is certainly true that in that case the result was that it was determined that there was jurisdiction to make an order for security.

62. However the case is still, in my assessment, very much within the continuum I have noted above. Lord Scott at [14] noted the basis of the jurisdiction in the Court's inherent jurisdiction. He cited both *Taly* and *Bowring*. He noted at [22]:

> "it is the substance of the "proceedings" rather than their form that is important. It is accepted that a counterclaim will qualify albeit that it is made in an existing action. If a defendant in proceedings commenced by originating summons were to make, by ordinary summons, a claim for relief that constituted, in effect, a counterclaim, and that was not, to borrow Dillon LJ's words in the C T Bowring case [1994] 2 Lloyd s Rep 567, 570, a mere formulation of its defence, I would regard as mere pedantry the proposition that a security for costs application could not be entertained because the ordinary summons was not a form of originating process."

63. The outcome of the decision is very firmly rooted in its facts, which relate to the nature of proceedings in a liquidation. The effect of that process is that the whole liquidation is before the court and anyone can apply within the liquidation even if there is a separate substantive dispute.

64. Critically in *GFN* it was conceded that the applications were in substance originating proceedings, As Lord Scott said at [27]: "*The applications are unquestionably in form interlocutory and not originating. But they are, equally unquestionably, as Mr Lowe very candidly accepted, in substance originating applications*." Similarly at [32] Lord Neuberger (with whom the remainder of the Court agreed) noted:

> "The winding up proceedings merely provided the forensic framework in which the applications were made, or the procedural launch pad from which the applications were issued. Indeed, in his engaging submissions, Mr Lowe QC realistically accepted that the applications were in substance originating proceedings. This concession must be right given that these applications would admittedly be originating proceedings if this was a voluntary or creditors' winding up and all the facts were otherwise identical."

65. This brings me to Mr Tugushev's second proposed distinction. He says the emphasis in *Bowring* on "*originating process*" is hard to reconcile with the Privy Council's decision in *GFN* and that Lord Scott in *GFN* refused (obiter) to confirm the correctness of *Bowring* [26]. The other Judges did not disagree with him, but preferred to leave the question open [34]. Mr Slade submitted that this showed that the Privy Council were not enthusiastic about that decision.

66. The first response to this is that for the reasons I have given on the facts there is no difficulty at all with reconciling the decision in *GFN* with *Bowring*. Further that case actually shows clearly that the exercise which is being performed is exactly the same as that indicated in the continuum of cases. There is nothing to suggest that the court intended to abandon its settled practice. Indeed one might say that Lord Scott was at pains to explain why his stress on the substance rather than form of the position was consistent with the decision in *Bowring* (see the passages at [20] and [27] to which I have referred above).

67. Against that background there is really nothing to be taken from the fact that Lord Scott stated that he must not be taken as "*necessarily agreeing*" with the conclusion reached in *Bowring* (see [26]). He certainly did not say that he thought the decision in *Bowring* was wrong. More to the point, the other four members of the Judicial Committee expressly refused to comment on the subject at all (see [34]):

> "I would prefer to leave entirely open questions such as whether and if so when it is possible or appropriate to order security for costs against a defendant who brings a counterclaim or defends by way of set-off, whether and if so when security can be ordered in the context of a committal application, or in connection with an application to set aside a compromise of an action, and whether the decision of the Court of Appeal in C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd [1994] 2 Lloyd's Rep 567 was correct. We did not hear much, if any, argument on any of those issues and it is unnecessary to resolve them for the purpose of determining this appeal. That is not meant to imply that I positively disagree with anything Lord Scott says on those issues in his admirable opinion: it is merely that I prefer to leave them for determination when they have been subject to fuller argument."

68. I am therefore not persuaded that this point takes the matter any further. There is nothing which grapples with, still less qualifies, the reasoning in *Bowring*. If a different result to *Bowring* is to be reached, there must be some logical basis for that to happen. This argument does not provide it, and nor, as I have noted, does the first argument.

69. The third and last main ground of distinction offered is that the *Bowring* decision does not apply to the inquiry in this case because the inquiry in *Bowring* was pursued by the Defendant to the action while, in this case, it is pursued by companies which are, in practical terms, wholly owned by the Defendant to the action but who are not actually parties to the action.

70. The way Mr Tugushev puts it is that "*The Companies are not defendants to the main proceedings. They are not parties at all. In this case, the Companies are bringing their whole claim in the inquiry. The Companies will have no more rights to be resolved in the Main Proceedings*". He submits that unlike in *Bowring* the Court need not begin to consider whether the parties have "*exchanged roles*". It need only decide that Mr Tugushev, who is Claimant in the main proceedings, is effectively a "*defendant*" to the Inquiry.

71. This ground offers slightly more pause for thought, but I am not persuaded by it. Plainly this argument could not avail Mr Tugushev *vis a vis* Mr Orlov. Why then is the position different as regards the Companies, which were the obvious likely "collateral damage" resulting from this freezing order?

72. If one goes through Millett LJ's reasoning line by line it still resonates strongly against these facts. Reading through that passage and substituting these third parties for the defendant, each of these points remains good.

73. There is therefore nothing in *GFN* which assists Mr Tugushev's submissions.

74. The other related point made at least partly by reference to *GFN* was that as in *GFN*, the issues for the Court to determine in respect of the inquiry are independent of the issues for the Court to consider in the main proceedings. Mr Tugushev submits that the Court is asked to determine two issues in respect of the inquiry: (i) whether the WFO actually caused the losses alleged by the Companies; and (ii) whether the Companies should be compensated for those losses. Neither of those issues arises for the Court's consideration in the main proceedings.

75. But that is simply not a valid point. It will be rare indeed for the issues arising in an inquiry under a freezing injunction to be the same as those arising in the main claim. This point would have been a good one in *Bowring* if it were a good point at all. Further it is effectively an attempt to "sidestep" the holistic assessment of whether the party is in substance a defendant mandated by the authorities. It evades the "*part and parcel*" approach adopted by the most recent authorities.

76. The same point arises as to the submission that in the inquiry, the Court will not be making an interim determination. That was the case in *Bowring*. That would be the case if the inquiry were brought by Mr Orlov. There seems no good reasons why this should make a difference.

77. Mr Tugushev also says that in contrast with *Dalnyaya* and *Skurikhin*, the inquiry in these proceedings is not a purely defensive measure. The Companies ask the Court to determine the effect of the WFO on each of them and that is therefore an independent claim. Again, this will always be the case in a freezing order inquiry. These points simply lead to a submission that *Bowring* is not good law, which is not a conclusion open to me. Nor is it one I would be minded to reach if it were open to me, in the face of its authority and the careful and compelling reasoning.

78. There is also a considerable artificiality in saying that a different result should pertain for the Companies as opposed to Mr Orlov given his economic interest in those companies and given Rose J's approach in *Dalnyaya* where Rose J relied on the fact that it was foreseeable that the order would negatively affect the applicants' interests to hold that they were in substance defendants to the recognition procedure.

79. These same issues, and answers, apply to the submission made by Mr Slade that Gee on *Injunctions* does not take enough account of *GFN*, at [11.058] where Gee opines that "*the claimant's costs of defending the inquiry are not covered by CPR 25.12 – they are not the defendant's* '*costs of the proceedings*'" and at [11.059] where Gee expresses the view that the "*inquiry is merely part of the process of working out the consequences of the order obtained by the claimant, a process which was voluntarily agreed to by the*

claimant when he furnished his undertaking". His criticisms were both based on this "free-standing" analysis, as well as the point as to the wording of the rules.

80. Two final points were made for Mr Tugushev:

i) The first was that given CPR 44 and the general rule under CPR 44(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party it would be a strange anomaly if the Court had no jurisdiction to protect Mr Tugushev's position with an order for security for costs. This, however, is a massive conflation of two separate things. The right to costs is a contingent (but unsecured) right in every case, but security for costs is only available in a few cases.

ii) The second is that CPR 25(1) applies to inquiries and, the Court can, in principle, grant a freezing injunction in support of an application to enforce an undertaking in damages. He submits that if the Companies are entitled to remedies that are available to claimants, it is similarly right that Mr Tugushev be entitled to the remedies (including security for his costs) that are available to defendants to proceedings. This is again a bad conflation of two very different tools. Security for costs is there for defendants; freezing orders for all parties (where the conditions are met). Freezing orders do not provide security.

81. The relevant portion of the White Book does not require correction. It follows that this application for security for costs fails.

The discretion and obstacles to enforcement

82. I will however consider the question as to whether if there were jurisdiction I would have considered that the discretion was engaged.

The Law

83. The circumstances in which security may be granted are prescribed by CPR r 25.13, which relevantly provides:

> "(1) The court may make an order for security for costs under rule 25.12 if -
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) one or more of the conditions in paragraph (2) applies …
>
> (2) The conditions are -
>
> (a) the claimant is -
>
> (i) resident out of the jurisdiction; but
>
> (ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague

> Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982…"

84. The jurisdictional basis here is the condition in CPR r.25.13(2)(a)(i): that the Russian Companies are resident out of the jurisdiction and not resident any State to which subparagraph (2)(a)(ii) applies. It is not disputed that this jurisdictional threshold is met.

85. However, that is not of itself sufficient for an order for security. An applicant must show that it is just in "*all the circumstances of the case*" to make an order.

86. CPR r.25.13(2)(a) raises discretionary considerations that are specific to that ground, which require that there is some risk to enforceability of an adverse costs order: see *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 WLR 1868 at [58-65]. It follows from this that the essential question is whether "*there would be substantial obstacles to, or a substantial extra burden (such as costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state*".

87. In this respect it is important to note that the test is not one of likelihood; it only need be shown that there is a "*real risk of substantial obstacles to enforcement*". *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099, [2016] 2 CLC 714 at [73, 77, 79, 86]:

> "[73] …, I do not accept that there is any need for the evidence to demonstrate 'very cogent evidence of substantial difficulty in enforcing a judgment' either in the non- Convention state where a claimant is resident, or where his assets are located. …
>
> [74] I quite accept that, as Mance LJ stated in Nasser at paragraph 61, if the court is to exercise its discretion to order security it should be 'on objectively justified grounds relating to obstacles to or the burden of enforcement',… I also accept (see Nasser at paragraph 63) that, for the discretion to be exercised 'there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden'. In most cases, no doubt, such difficulties will satisfy the description of 'substantial'.
>
> [76] …where Mance LJ expressly states what must be shown by way of evidence if the discretion is to be exercised, he formulates the test as follows: 'there must be a proper basis for considering that such obstacles *may* exist or that enforcement *may* be encumbered by some extra burden …' (My emphasis). That articulation does not require evidence that such obstacles do indeed exist; on the contrary, it simply requires 'a proper basis for considering that' they might exist.
>
> [77] In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that 'on objectively justified grounds relating to obstacles to or the burden of enforcement', there is a real risk that it will not be in a position

> to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be 'a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden' but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case. …. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents. …
>
> [79] Necessarily, at an interlocutory stage, in the absence of cross-examination and full enquiry, it may well be that the court cannot be satisfied at that time that an applicant for security has demonstrated on the balance of probabilities, that there will be substantial obstacles to enforcement, or even, in some cases, that there is a real risk of such obstacles. The judge at that stage may well not be in a position to resolve disputed issues arising on the evidence. For that reason, I am against the articulation of any hard-line, inflexible test in relation to an evidential standard based on 'likelihood'. …
>
> [81] Two examples were referred to in the course of argument which underlined the difficulty which utilisation of Mr Millett's test of likelihood could lead: the first reflected the circumstances of this case: namely a situation where, on very limited evidence of the law of the foreign country, two experts disagreed as to whether any obstacles to enforcement existed at all; the second was a hypothetical scenario where the evidence showed that one in 20, or one in 100, foreign nationals ran the risk of kidnap, or ransom demands, if they attempted to enforce an English judgment. How, submitted the appellants, could it be said that in those circumstances they had established an over 50% likelihood that there were obstacles to enforcement? At best, all that could be shown was a 'proper basis for considering that such obstacles may exist' – i.e. a real risk.
>
> [86] … What actually suffices to justify the making of an order will depend on the evidence adduced; 'mere possibility' of obstacles to enforcement in my view will usually be insufficient to justify an order for security; but (depending on the evidence) 'real risk' will usually, but not invariably, suffice."

88. There may be additional factors to be taken into account because the Court's discretion is to be exercised "*in all the circumstances*". The list of relevant factors is potentially open-ended but they will typically include: (i) whether the claim is *bona fide*; (ii) in some cases, prospects of success; (iii) any admissions or open offers by the applicant for security; and (iv) whether the application would stifle a genuine claim. None of these are said to arise in this case. The focus of the argument is solely on whether the hurdle of "real risk" is cleared.

89. In the context of an argument that there is real risk of non-enforcement altogether the line to be discerned from *Bestfort* and later authorities is perhaps not as clear as the Court of Appeal hoped that it would be:

    i) "Real risk" is analogous to the need to show a "real risk" of dissipation in order to obtain or continue a freezing order: *Bestfort* at [82]. It is "*not to be inferred lightly. Bare or generalised assertion of risk … is not enough. There must be solid evidence …*": *Tugushev v Orlov* [2019] EWHC 2031 (Comm) [49(i)];

    ii) [86] of *Bestfort* suggests that mere possibility will usually be insufficient to justify an order, which implies that solid evidence of mere possibility may in some cases suffice;

    iii) The same paragraph says that real risk will "*usually but not invariably*" suffice. However in *Danilina v Chernukhin* [2019] 1 WLR 758 at [52(1)] Hamblen LJ said that "*A real risk … will suffice*"*;*

    iv) In terms of the height of the "real" hurdle, real risk is equated, as in the summary judgment context, with non-fanciful risk: Butcher J in *PJSC Tatneft v Bogolyubov* [2019] Costs LR 977 at [9 and 20] citing Hildyard J in *In re RBS Rights Issue Litigation* [2017] 1 WLR 4635, at [29];

    v) Paragraph [81] of *Bestfort* suggests that a 1 in 100 risk is nonetheless a real risk.

The recent cases in cases concerning enforcement in Russia

90. Mr Tugushev relies on two recent cases concerning security for costs and risk of non-enforcement in Russia.

91. First, *Danilina v Chernukhin*. In that case the application had been made on the basis that Mrs Danilina was resident in a non-Convention state (CPR 25.13(2)(a)) and that there was reason to believe that she would be unable to pay the Defendants' costs (CPR 25.13(2)(f)). There were arguments both as to risks of non-enforcement and as to extra burdens involved in enforcement.

92. In my judgment ([2018] EWHC 39 (Comm)) I noted at [31] that each party had relied on Russian law evidence in the form of statements from law firms based in Russia. I identified a number of risk factors at [66], in particular:

> "(i) Risk of refusal for non-reciprocity (low but possible).
>
> (ii) Risk of refusal for public policy or other procedural grounds (not high, but demonstrated on the authorities).
>
> (iii) Disputes about enforcement resulting in further delay/expense/ legal proceedings (not high but demonstrated on the authorities).
>
> (iv) Further delay, cost and expense in the execution phase of the proceedings owing to the opacity of the position as to Mrs Danilina's assets and the potential need to take proceedings in

> multiple jurisdictions (likelihood and financial extent difficult to judge)."

93. The evidence adduced was mixed, with there being "*numerous examples of cases where enforcement has taken place with not one English judgment being turned down on the basis of reciprocity*".

94. I considered that it was relevant that there were no treaties and that reciprocity would be judged in Russia on a case-by-case basis. This added to uncertainty and risk. See [68]:

> "There are no treaties – this gives rise to uncertainty and an element of risk. That risk is supplemented by the evidence I have seen as to Russian courts refusing enforcement on the grounds of insufficient evidence of reciprocity, which is not an established fact but proceeds on a case by case basis, and may therefore be affected by factors peculiar to the case or such matters as the climate of juridical opinion at the time at which enforcement comes to be considered. That risk may be low, as indicated by the absence of any English judgment which has been found to fail on this ground, but is supplemented by the other bases for non-enforcement which it is apparent the Russian Courts have relied on. These risks are again, it seems to me, not high; but they plainly exist and have manifested in identifiable cases."

95. In light of these factors I concluded at [67] that there was a real risk of "*a complete failure of enforcement*" although it was not "*at the high end of probability*". The final conclusion was that "*there is (just) real risk of non-enforcement established, but the greater probability is that obstacles will not lead to a complete inability to enforce, but to still further cost, delay and difficulty*" (at [70]).

96. The second judgment is that of Butcher J in *PJSC Tatneft v Bogolyubov* [2019] Costs LR 977. The Judge in that case found that there were substantial obstacles to enforcement of a costs order in favour of the defendants in Russia.

97. Butcher J considered competing Russian law expert evidence. The applicant adduced evidence from Dr Rachkov, to the effect that there were substantial obstacles to enforcement of a costs order in Russia. The respondent adduced evidence from Professor Asoskov, who is the Companies' expert in this case. Professor Asoskov concluded (then as now) that there were "*no substantial obstacles in relation to the practice of enforcement of English court judgments and costs order in Russia*".

98. Butcher J concluded that the hurdle was cleared. He set out six reasons in support of his conclusion:

    i) Evidence (which is not before me) as to the numbers of judgments and awards by non-Russian Courts and tribunals in the period 2015-2018.

    ii) The absence of any relevant bilateral enforcement treaty between the UK and Russia. It is common ground that this remains the case.

iii) There were issues as to enforcement on the basis of reciprocity of judgments between English and Russian courts. The Judge noted that there was a non-fanciful risk that "*reciprocity might not be found to be established in the event of an attempt to enforce a costs award in the present case ... [and that this was] especially so given that no one has identified a case in which an English court has enforced a Russian costs-only judgment, and accordingly there might be an issue as to whether any relevant reciprocity could be shown in relation to the enforcement of such orders*".

iv) There were issues as to enforceability of costs-only orders. These arise in this case.

v) There was a possibility of non-enforcement by reason of considerations of public policy in a Russian court and a non-fanciful risk that a Russian enforcement court "*might apply the public policy exception to enforcement in an expansive way*".

vi) The existence of sanctions. This is not relevant here.

99. Butcher J summarised his conclusions at [38-9] by noting that each of the matters at (3)-(6) would independently constitute a ground for considering there was a "*real risk of substantial obstacles to enforcement in Russia*". When taken collectively and in light of points (1) and (2), the position was "*clear*". Butcher J noted that his conclusion was "*in conformity with the conclusion*" in *Danilina* and relied on the finding in that case as "*additional support*" for the (independent) conclusion he had reached.

100. Mr Tugushev naturally relied on these authorities - not the less because of the crossover of evidence – Prof Asoskov gave evidence in *Tatneft*.

101. These judgments however cannot be determinative and should be treated with some caution. They were interlocutory hearings some time ago (*Danilina* was in 2017; *Tatneft* was in mid 2019). As is apparent from a reading of each judgment the conclusions were reached on particular facts which then led to the specific evidence adduced. We do not know the exact details of that evidence and how it compares with the evidence before me.

102. Further as the Companies note, the rule in *Hollington v F Hewthorn & Co Ltd* as re-formulated and explained by the Court of Appeal in *Rogers v Hoyle* [2014] EWCA Civ 257, [2015] QB 265 at [39] prevents this case being decided on the basis of those previous cases conclusions on the evidence. That is rightly identified as a point of fundamental fairness. At best what one can take from those cases is that this decision does not proceed on the basis of a *tabula rasa* – I can take notice of the fact that previous decisions have found on the evidence that there was such a risk.

Discussion

103. It is common ground between the experts that:

i) There is no international treaty of reciprocal enforcement between the UK and Russia.

ii) Nonetheless Russian Courts can and do enforce English Court judgments particularly in reliance on the principles of comity and reciprocity.

iii) Russian Courts will not recognise and enforce interim orders of a foreign court.

iv) In accordance with the Resolution of the Presidium of the Supreme Commercial (Arbitrazh) Court of the Russian Federation dated 05.10.2010 in case No. A56-63115/2009 only orders finally resolving costs issues can be recognised and enforced in Russia.

v) Russian Courts are entitled to refuse the recognition and enforcement of foreign court judgments on grounds of public policy, in particular those in the Article 244(1) of the Commercial (Arbitrazh) Procedure Code of the Russian Federation ("APC").

104. The experts disagree as to:

i) Whether it is necessary to establish reciprocity on a case-by-case basis and what that would mean in the present case.

ii) Whether the public policy ground is interpreted and applied expansively.

iii) Whether there are grounds in the present case that would legitimately permit a Russian Court to refuse enforcement.

105. The Companies also pray in aid Mr Vaneev's opinion at the jurisdictional stage of this case, which they say was not entirely consistent with the opinion he has now given for the purposes of this application.

106. As the arguments have developed the issues have been addressed by reference to the following points:

i) Absence of a bilateral treaty;

ii) Reciprocity;

iii) Public Policy;

Absence of bilateral treaty

107. While there is no bilateral treaty in place I am not persuaded that this in itself creates risk, as Mr Vaneev contends. It is true that the Russian Court is operating without any treaty obligation to recognise an English judgment. However as Professor Asoskov points out, Russia and the UK are party to certain bilateral and multilateral treaties that have been interpreted as permitting the enforcement of English judgments. He singles out 1950 ECHR and AoEC 1992 as particularly important. Prof Asoskov says that this is the settled approach of the Russian Arbitrazh courts and cites a long list of cases (running from sub-paragraphs (a) to (m)).

108. Mr Vaneev made this very same point at the jurisdiction stage saying that "*the Supreme Court of the Russian Federation ruled that lack of a pertinent international treaty on mutual recognition of judgments between Russian and the issuing state (in that*

particular case – the United Kingdom of Great Britain and Northern Ireland) cannot be cited as grounds for refusal of a request for enforcement of a foreign judgment".

109. While these treaties do not deal specifically with enforcement and so do not oblige enforcement and it may well be the case that they are not consistently as treated as being enough (a number of the cases which refer to reciprocity cited by Prof Asoskov lists both treaties and reciprocity being considered) there is cogent evidence that at least on occasion they are in fact being used to fill the gap.

110. I am persuaded that this evidence does not equate to solid evidence of a real risk; it is no more than the inference of a possibility.

Reciprocity

111. The other basis for enforcement is reciprocity. Mr Tugushev says that there is real doubt that the requirement of reciprocity would be satisfied. This is for two reasons: (i) it is necessary to prove the necessary reciprocity in each case by reference to evidence; and (ii) it appears that it is necessary to prove reciprocal enforcement of judgments of the same or similar type to that the claimant is seeking to enforce in Russia.

112. Mr Vaneev states:

> "18. According to the practice of commercial (arbitrazh) courts, reciprocity, as an essential pre-requisite to enforcement, is something that must be proved by presenting evidence of the recognition and enforcement of similar Russian court judgments in the territory of the respective foreign state. The burden of proving the requisite reciprocity lies with the applicant seeking to enforce. Accordingly, there is no presumption of reciprocity. Both the courts and legal scholars have the understanding that reciprocity is a fact that must be confirmed by evidence and is not a legal presumption. There is no independent commentary indicating that there is a "presumption" of reciprocity. This is unsurprising and is, inter alia, because Russian law takes the view that reciprocity must be confirmed to be in place at the time when recognition and enforcement application is considered. It is not some fixed concept. So, in the case of the hypothetical Costs Order, the burden would be on Mr Tugushev to prove, as a fact, that sufficient reciprocity existed.
>
> 19. In other words, and importantly, the existence of reciprocity must be established before the Russian courts on a case-by-case basis, meaning that an applicant in each particular case must prove that English courts recognize and enforce similar Russian court judgements. Thus, in the *Kekhman* case, which has been widely discussed by legal practitioners and scholars, the Commercial (Arbitrazh) Court of the North-West district assessed the evidence of reciprocity presented by the applicant and deemed this to be insufficient to prove that such reciprocity exists. … [the] Russian court stated that "in the case files there is no evidence that English justice recognizes judicial

> acts of Russian courts on the recognition of a citizen (subject) of Great Britain insolvent (bankrupt) on the territory of the Russian Federation according to the rules of Russian law".
>
> 20. Further, and importantly, whether enforcement will be permitted in any given case will be affected by the specific circumstances of the particular case. This includes, for example, the nature of the judgment / order that the applicant seeks to enforce.
>
> 21. In this respect, in my view it may not be sufficient to prove that foreign courts recognize and enforce some Russian court judgments of whatever type. …"

113. This is met by a twofold response from the Respondents. The first refers back to the first point, and contends that where the evidence shows enforcement is taking place based on general treaties there need be no concern about reciprocity; that argument is in effect "*belt and braces*".

114. The second line of defence is to say that Mr Vaneev's evidence is wrong, that there is now a presumption of reciprocity and that there are no examples of non-enforcement on the basis of absence of reciprocity. Prof Asoskov cites a 2017 judgment in which the Commercial Court of the City of Moscow referred to these judgments in finding reciprocity.

115. While Mr Vaneev disagrees and says that it is necessary to prove reciprocity in each case, noting that in practice (as Professor Asoskov says) "*petitioners continue[] to present expert reports of English expert witnesses confirming the reciprocity between Russia and the UK*", that does not however take Mr Tugushev far, in that it does not seem to be in issue that (leaving aside considerations in particular types of cases) reciprocity can be proved by reference to for example, the cases of *Alfa Bank v Trefilov* [2014] EWHC 1806 (Comm) and *JSC VTB Bank v Shurikhin* [2014] EWHC 271 (Comm). Further his report at the jurisdiction stage Mr Vaneev said in terms that "*the established practice of recognition and enforcement of the judgments of English Courts was confirmed by the Supreme Commercial (*"*Arbitrazh*"*) Court*".

116. Mr Vaneev cites the *Kekhman* case as a post-2014 example that he says disproves (or at least does not fit with) Professor Asoskov's approach. However this example does not actually prove refusal to enforce on the basis of reciprocity, because that was a bankruptcy case where it is common ground that there is no recognition. What is more, the Russian Court did in that case recognise the English money judgment.

117. Another point which Mr Tugushev makes is that reciprocity is not fixed and immutable - where there has been a sea change there may be a sea change back. Mr Tugushev also relied on the passage from my judgment in *Danilina* where I said that: "*factors peculiar to the case or such matters as the climate of juridical opinion at the time at which enforcement comes to be considered*." Mr Tugushev refers to *PJSC* "*Rosgosstrakh*" *v Starr Syndicate Limited and ors* [2020] EWHC 1557 (Comm), as a case which might give rise to such a change. In that case Mrs Justice Moulder refused to grant summary enforcement of three Russian judgments in a commercial case, being (i) a liability

judgment, (ii) an interest judgment and (iii) a costs judgment. Moulder J found that there was an arguable case that the judgments were the product of bias.

118. There are two problems with this argument. Dealing with the authority first, it is not a relevant example in my judgment, because it was not a refusal to enforce, simply a refusal to grant summary judgment on enforcement. It follows that Mr Vaneev (and Mr Tugushev's legal team) are not able to point to any examples of non-enforcement.

119. The second point is that all of this again amounts to no more than a possibility of what may happen in the future. A possibility is not a real risk.

120. I therefore conclude that subject to the point which follows, there is no demonstrated real risk of non-enforcement on the basis of reciprocity.

121. Turning then to the question of the need to show that similar judgments have been enforced, here there is also a division between the experts on what sort of similarity is needed: is it a similarity as to the stage of the process (interim versus final) or one which deals with the field of legal relations.

122. As to the first part of this I am not too troubled, since (as I note below) the evidence seems to suggest that problems might occur as regards interim judgments rather than final judgments, as this would be. The more troubling issue is as regards the field of legal relations. Certainly the evidence does seem to show that certain types of judgments (such as insolvency) are not recognised reciprocally.

123. This leads to what seems to be a real issue as to costs only judgments.

124. Mr Tugushev says that there is no example of an English Court enforcing a Russian costs-only judgment, nor of the English Court enforcing any Russian judgment resembling anything like one following an inquiry on an undertaking in damages. Mr Vaneev explains that this "*creates a significant risk that a Russian Court could conclude that the requirement of reciprocity is not met*". He notes that Butcher J in *Tatneft* was of the same view as regards the risk of non-enforcement of a costs order. He adds that none of the cases that Professor Asoskov cites post-date Butcher J's judgment.

125. There are two examples of what are said to be costs only orders being enforced. The first is the decision in *Metall Market OOO v Vitorio Shipping Company Limited*. This is said by Prof Asoskov to be an example of an English Court's costs only order being enforced. In *Tatneft* Butcher J considered the *Metall Market* case on the basis of evidence from inter alia Prof Asoskov. He noted that the expert evidence in that case from Dr Rachkov was that it "*is not a case involving a costs-only order*". He concluded that there was a more than fanciful risk of non-enforcement on this basis.

126. I accept the submission that that was not a case of a costs only order. In *Metall Market* the Russian court enforced the English Court of Appeal's Order that overturned the first instance Judge's Order varying an arbitral award. The judgment thus upheld the substantive award on the merits of the arbitrator and constituted an end to the action and the final judicial act on the substance of the entire dispute.

127. As for the second case, *Oslo Marine Group Ports v Bank of St Petersburg* concerning enforcement of a BVI Order. It is tacitly accepted that this is a costs only case. Mr Tugushev says that the fact that isolated examples can be found do not mean there is no real risk. That is similar to the evidence of Dr Rachkov in *Tatneft*.

128. On the material before the court, I conclude that the Companies have the better of the argument on this issue. Mr Vaneev's evidence on this matter is couched in terms of personal belief with little citation of case in which the Russian courts have demanded evidence of a specific type of commercial judgment in order to establish reciprocity. The cases cited by Prof Asoskov show the Russian courts will enforce a judgment for costs where no other relief has been granted in a commercial case.

129. Further I am not persuaded that the costs only cases are of significant help to Mr Tugushev in any event. What would be in issue here is not a costs only order, but a determination of the merits of the dispute. That would be analogous to the *Metall* case. It also appears that Butcher J would not have been satisfied of risk in *Tatneft* had there been merits to join to the costs element (see [30]).

130. I am therefore unpersuaded that reciprocity in this case gives rise to a real risk. This is consistent with the submission of Ms Davies QC for Mr Tugushev on the jurisdiction battle: "*we say there is no good reason to consider that a money judgment of the English court would not be enforceable on the basis of comity*".

Public Policy

131. Mr Vaneev contends that an expansive notion is (or can be) given to the public policy exception. He points to the Russian *Rosshelf* case, in which the enforcement of an arbitral award was refused by the Russian courts on the basis that to do so would harm the budget of a strategically important company. Prof Vaneev also points to the *Nortel* case, in which a Russian first instance court refused enforcement on the basis of public policy without explaining how public policy was engaged.

132. Against this Prof Asoskov contends that this misrepresents the conclusions of the Russian courts in *Rosshelf*, which was that the enforcement of the award would have the effect of illegally transferring title of shares in a strategically important company. Professor Asoskov says that the Courts should not use public policy in the expansive way Mr Vaneev suggests; he says that it is an exceptional principle not a universal one. Prof Asoskov points out that the Russian Supreme Court issued guidance on public policy in 2019, limiting its application to exceptional cases. Prof Asoskov further points out that the first instance decision in *Nortel* was overturned with respect to the findings on public policy on appeal.

133. Mr Vaneev agrees that he considers as a matter of Russian law "*it ought to be rare*" that a judgment in an ordinary case "*should be refused enforcement on grounds of public policy*"; he says that the problem is that is not what is happening in practice.

134. Mr Tugushev then says that there are specific factors in this case that might be taken up by a Court sympathetic to the Russian Companies, including (i) that the Companies are (as is common ground) part of a group of companies that is legally classified as one that operates in an industry of strategic importance for the defence and security of the Russian state; (ii) that Mr Tugushev is a convicted criminal in Russia; and (iii) that Mr

Tugushev's claim is being funded by a commercial third-party funder, such as would not permit him to be compensated in Russia for costs he did not himself expend – in which connection Mr Slade prays in aid the occasionally less than enthusiastic approach of the courts here to third party funding.

135. I will take the "strategic industry" point first. In *Tatneft* Butcher J found particular factors which positively increased the public policy risk. But that was a case where there were exceptional quasi-state interests. I do not consider that to be the case here. The facts of that case were rather different. The fact that this industry is a strategic industry does not make the question one which is particularly vulnerable to arguments of public policy, particularly when all that is in issue is a money claim – there is no issue as to ownership for example. I therefore do not think I need to take anything in particular from the nature of these proceedings, but the nature of these proceedings cannot deduct from any risk which is established.

136. I am also not persuaded that Mr Tugushev's conviction, or the third party funding of these proceedings are points which raise more than an entirely speculative risk. Mr Vaneev's evidence on these points was well-described by Mr Pymont as "tepid".

137. That therefore leaves the underlying question of risk of non-enforcement on the ground of public policy generally. In *Danilina* I found such a risk on the evidence. In *Tatneft* Butcher J concluded that "*the evidence establishes a non-fanciful risk that a Russian enforcement court might apply the public policy exception to enforcement in an expansive way.*" [31].

138. It seems to me, as it seemed to Butcher J on the evidence before him in *Tatneft* that the thrust of what the experts say is that while in theory public policy ought to be treated as a narrow gateway, it has not consistently been treated that way by Russian courts. Absent consistent application it will be difficult to predict when enforcement will be refused on this ground. There are, as I noted in *Danilina*, examples of enforcement being refused on this ground. That is at least capable of being "solid evidence" which would amounts to what is referred to in *Bestfort* at p 787 as "*a proper basis for considering that such obstacles may exist*".

139. However on the evidence before me in this case and at this time I prefer the view that the risk is not sufficiently evidenced to reach beyond the level of possibility. I note in particular the fact that Mr Vaneev's reliance was placed on *Rosshelf* which turned on special strategic industry factors, making it a properly exceptional case and *Nortel* where the decision on public policy was not upheld on appeal. It follows that there is no real evidence base for the conclusion of the reality of the risk absent special factors.

140. Further since both my judgment in *Danilina* and Butcher J's judgment in *Tatneft* there has been the publication of Section 51(5) of the Resolution of the Plenary Session of the Russian Supreme Court "On Exercise of the Functions of Assistance and Control in Respect of Arbitral Proceedings and International Commercial Arbitration by the Courts of the Russian Federation" No. 53 dated 10 December 2019 which states:

> "Contravention of public policy as a ground for setting aside an arbitration award or refusing to enforce an arbitration award shall be applied by the court in exceptional cases."

141. That this resolution can be taken to have some authority is supported by Prof Asosokov's opinion, and by Mr Vaneev equally using another part of it as a source for the definition of public policy.

142. The effect of the distinctions which can be drawn between this case and *Rosshelf*, the outcome in *Nortel* and the strong steer given by the Resolution is that I am persuaded that the risk of non-enforcement on public policy grounds in this case is not such as to meet the hurdle of real risk.

Final/interim judgment

143. Mr Tugushev contends that there is real doubt as to whether a Russian court would consider that a costs order following a dismissal of the Inquiry (or part of it) would constitute or contain a final judgment on the merits, as opposed to being an interlocutory or interim process. Mr Vaneev notes that the Companies themselves do not consider themselves to be 'claimants' or having brought a 'claim' (that is the premise of their jurisdiction argument). Moreover, the Order Mr Tugushev would be seeking to enforce would not have resolved any of the issues in the Main Proceedings in which the Inquiry is taking place. Mr Vaneev explains that there is a risk that a Russian Court would take precisely this view and refuse enforcement.

144. Professor Asoskov disagrees that Russian law would characterise the relevant judgment as interim. He says that the Russian courts apply a three stage test, as approved by Letter No. 78:

    i) First, the Russian court considers whether the relevant judgment is final in the sense that it cannot be amended or repealed save by appeal. Obviously, a costs order made at the trial of the inquiry would have this quality;

    ii) Secondly, the relevant judgment must be rendered in the course of proceedings on the merits of the case. He considers a costs order in the inquiry will be within the course of proceedings on the merits of the case, whether one regards the relevant "*case*" as the inquiry or the main action itself;

    iii) Thirdly, the relevant judgment must have been rendered as a result of adversarial proceedings. This will plainly be so in respect of any costs order made on disposal of the inquiry.

145. The Companies further state that the three stage test is met in the present case as: a costs judgment in this case would not be subject to revision otherwise than on appeal; a judgment discontinuing the inquiry and ordering costs would conclude the proceedings brought by the Companies against Mr Tugushev; and a costs judgment in this case would result from adversarial procedures.

146. I accept Prof Asoskov's evidence. This approach has not been commented on by Mr Vaneev and was not really engaged with by Mr Slade for Mr Tugushev. Mr Vaneev's evidence is entirely speculative.

Conclusion

147. As is apparent from the foregoing I do not agree that there is cumulatively quite a high risk of non-enforcement. Any risk in this case is low, but it is obviously of central importance to assess the nature and extent of that risk. I agree with the submission that I must beware of elision and must focus on the specific risks identified.

148. Once one does this the very marginal nature of the decision becomes apparent. For the majority of the grounds I have no difficulty in concluding that the risk identified is no more than speculative or fanciful. Most of what is raised tends more to be theoretical possibility rather than real risk in the sense of a risk supported by solid evidence.

149. At the end of the day what troubled me most is the public policy ground, but ultimately I conclude that the hurdle is not cleared.

150. Accordingly the quantum arguments do not arise, but I deal with them briefly for completeness.

Quantum

151. Mr Tugushev's estimated costs of the Inquiry are £853,898. He seeks security for 60% of that sum to allow for any reduction on a detailed assessment. So the security sought is £512,339.

152. The Norebo Companies dispute the quantum of the claim on a number of grounds, and contend that appropriate amount for any order of security is £121,481.

153. Mr Tugushev contends that while there is no estimate from the Norebo Companies, based on past form, it is to be expected that their costs will far outstrip those of Mr Tugushev. He notes that Mr Orlov's costs have previously been around three times that of Mr Tugushev's e.g. for the jurisdiction challenge, when Mr Orlov sought security for his costs for a 2-3 day hearing, he did so in the amount of £3.389m (being 80% of the total).

Costs on Common issues

154. The Norebo Companies says that there should be no award of security for awards of costs on issues which are common between the Applicants because such awards will be on the basis of joint and several liability between the Companies, and Mr Tugushev can enforce against the English and Hong Kong applicants. Mr Tugushev submits that this is a fallacious approach. In reality the scope for common issues is limited (each Company will be alleging separate losses caused by the WFO on differing evidence). After trial, even if the Court were minded to make a joint and several costs order on common issues, the Companies would try to minimise its percentage. There is no reason in principle why the Russian Companies should be entitled to render their own joint and several liability irrecoverable, particularly where their claims are by far the biggest heads of loss alleged, accounting for some 94% of the total.

155. On this I tend to agree with Mr Slade – there is no guarantee that the English and Hong Kong companies are deep pockets. It follows that not to give security effectively minimises the effect of the joint and several award.

Costs distinct to English/ Hong Kong applicants

156. The Norebo Companies contend that costs distinct to the English and Hong Kong applicants will not be recoverable against the Russian applicants, so no security is required for such costs. Mr Tugushev says that is more than catered for in the 60% recovery percentage conceded by Mr Tugushev.

157. The Norebo Companies estimate that roughly only 50% of Mr Tugushev's assessed expenditure will be recoverable solely from the Russian applicants. Mr Tugushev contends that the figure of 50% is too low because it does not take proper account of the overwhelming financial importance that the claims of the Russian applicants bear to the total claims in the Inquiry. If the applicants' claims converted into US dollars, the claims by the Russian applicants make up 94% of the total. It is very likely that the evidential focus and investigation at the Inquiry will be on the claims by the Russian applicants more than on the much smaller claims.

158. I agree with the Respondents on this – logically there must be a reduction for this. However given the nature of the claims of the English and Hong Kong claimants a reduction of 10% seems ample, though I note that there is no guarantee that the amount of time spent on these smaller claims will actually be smaller. However there comes a point where a view has to be taken in a fairly rough and ready fashion as to likelihoods.

Specific complaints

159. The Norebo Companies make some more specific criticisms of the breakdown. For example as to the time spent by a Peters & Peters Partner in the pleading process, too much time is estimated for evidence, Counsel's fees for the Inquiry (totalling £575,000 for 4.5 days) are too high, and so forth.

160. These are all the kinds of points which inform the level of recovery on assessment and are reflected in the percentage overall given. I am not persuaded that these points have sufficient substance to take the percentage reduction beyond the usual range.

Conclusion

161. Accordingly, bearing in mind these points, if contrary to my main finding, I were to conclude that I could or should order security for costs, I would have done so in the amount of £470,000.

Conclusion

162. For the above reasons, the application is dismissed.