Vladimir Anatolevich Chernukhin v Oleg Vladimirovich Deripaska

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	24 June 2020
Neutral Citation:	[2020] JRC 121
Date:	24 June 2020
Court:	Royal Court

Text

[2020] JRC 121

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, **Esq.**, Deputy Bailiff, **sitting alone**

Between
(1) Vladimir Anatolevich Chernukhin
(2) Navigator Equities Limited
Representors
and
(1) Oleg Vladimirovich Deripaska
(2) B-Finance Limited
Respondents

Advocate N. M. C. Santos-Costa **for the Representors**.

Advocate D. M. Cadin **for the First Respondent**.

Authorities

Royal Court Rules 2004.

Trigwell v Clapp [2016] JRC 197.

Larsen Oil and Gas Drilling Limited v Comptroller of Taxes [2015] (1) JLR 117.

A E Smith & Sons Limited v L'Eau des Iles (Jersey) [1999] JLR 319.

Leeds United AFC and another v Admatch [2009] JLR 186.

Chernukhin and others v Danilina and others [2018] EWCA Civ 1802.

Gee on Commercial Injunctions

FG Hemisphere Associates v Democratic Republic of Congo [2010] JRC 033.

Hughes v Clewley [1996] JLR 24.

CT Bowring & Co (Insurance) Limited v Corsi and Partners [1994] BCC 713.

Companies Act 1985.

Taly v Terra Nova Ltd [1995] 1 WLR 1359

GFN SA and others v Liquidators of Bancredit Cayman Limited [2009] UKPC 39.

Café de Lecq v R A Rossborough (Insurance Brokers) Limited [2011] JLR 31.

Costs and split trial — reasons

Deputy Bailiff

THE

1 On 15 th April 2020 I heard argument in relation to two summonses and thereafter invited the parties to file further written submissions on the Court, which they did.

2 I reserved my decision on the first summons and gave my decision on the second but reserved my reasons.

The first summons

3 The first summons in time is the summons issued by the Representors (also known as the Chernukhin parties) issued on 24 th January, 2020, seeking security for costs from the First Respondent, Mr Deripaska, in respect of the Representors' costs of and incidental to the First Respondent's claim brought under claim number 2020/004.

The second summons

4 The second summons was issued by the First Respondent on 18 th March, 2020, and sought an order that there be a split trial of the proceedings brought under claim 2020/04, with the Court first considering the question of whether there was a breach of duty and if so satisfied, thereafter giving directions in relation to the assessment of loss and damage. Various ancillary directions were sought.

5 At the end of the hearing on 15 th April 2020 I dismissed the application for a split trial but gave directions designed to bring the case on for hearing reasonably soon. Those directions were:

> (i) The parties shall apply to the Bailiff's Judicial Secretary within seven days to fix before the Bailiff for the trial of this action (not to be earlier 56 days hereafter, time estimate two days) and the pre-trial review (not to be earlier than 28 days hereafter, time estimate one hour);
>
> (ii) Unless otherwise ordered by the Bailiff, discovery between the parties shall not be required;
>
> (iii) Signed dated and sworn witness statements of fact standing as evidence in chief shall be simultaneously exchanged by close of business 35 days after the date of this judgment, witnesses to attend to be cross-examined, subject to the order of the Court at the pre-trial review;
>
> (iv) There be liberty to apply.

Background

6 Although the disputes between Mr Chernukhin and Mr Deripaska are complex and involve other jurisdictions, for the purpose of the applications before me they can be summarised reasonably briefly.

7 The litigation between the parties began with dispute over a valuable site in central Moscow which was the subject of a shareholder agreement dated 31 st May 2005. The dispute between the parties arose in 2009/2010. After negotiations failed, Mr Chernukhin

and his corporate vehicle Navigator Equities Limited ("Navigator") commenced an arbitration before the London Court of International Arbitration ("the LCIA") against Mr Deripaska and a company owned by him, Filatona Trading Limited.

8 The Arbitral Tribunal made awards on 16 th November 2016, 20 th July 2017 and 18 th January 2018.

9 The Chernukhin parties generally prevailed in the arbitration, and the Second Partial Award dated 20 th July 2017 ordered Mr Deripaska and Filatona Trading Limited connected entities to purchase certain shares for $95,118,285. Pursuant to the Final Award dated 18 th January 2018, the Arbitral Tribunal ordered Mr Deripaska and Filatona Trading Limited to pay the Chernukhin parties' costs exceeding £7m plus interest on the principal sum due pursuant to the 20 th July 2017 award and other ancillary costs.

10 On 6 th April 2018 the United States Office of Foreign Asset Controls ("OFAC") imposed sanctions upon Mr Deripaska which extended to the Second Respondent owing to, *inter alia*, Mr Deripaska's close association with the President of Russia.

11 Whilst the arbitration proceedings were ongoing, the Chernukhin parties sought and obtained a worldwide freezing injunction against Mr Deripaska from the English High Court on 11 th May 2018. The continuation of the worldwide freezing order was compromised on the basis of certain undertakings given by Mr Deripaska in respect of 45.5m certificated shares in EN+ Group Plc ("EN+") a Jersey company listed on the London Stock Exchange and Moscow Stock Exchange which held assets relating to aluminium production. These undertakings were given by Mr Deripaska and B-Finance Limited, the Second Respondent, and Mr Deripaska's London solicitors. The worldwide freezing order required Mr Deripaska not to dissipate assets up to a maximum of £87.5m. By this time Mr Deripaska had issued proceedings in the High Court contesting the arbitration award and in particular challenging whether the terms of the shareholders agreement precluded Mr Chernukhin from enforcing it. There were also various challenges to the arbitration proceedings themselves advanced by Mr Deripaska.

12 The English High Court proceedings were ultimately determined by Mr Justice Teare who heard evidence and argument over the course of 19 days between November 2018 and January 2019, leading to an extensive and comprehensive judgment dated 7 th February 2019. Mr Justice Teare when setting out his approach to the evidence said:

> ***"12. In this case the probabilities must be assessed, as best this court can, in the light of the collapse of the USSR, the emergence of private enterprise in Russia, the accumulation of huge wealth by a few individuals, the manner in which "oligarchs" do business with each other, the importance of support from those in power, the loyalties which huge wealth can generate and the use of offshore companies and trusts to hold***

(and hide) such wealth."

13 Much was made by counsel for Mr Chernukhin as to the findings of Mr Justice Teare and the criticisms made of Mr Deripaska, whose claims were ultimately dismissed. However, Teare J said at paragraph 15 " ***As will become apparent from my comments upon the witnesses there are real grounds to doubt the honesty of each of the principal actors and of many of the other witnesses***." As to Mr Deripaska, the Judge said at paragraph 21 " ***He did not appear to me to be a witness who wished to assist the court in ascertaining the truth***." He continued " ***Moreover, some of this answers strained the court's credulity to breaking point***."

14 These findings were drawn to my attention during the application for security for costs on the footing that I should regard any claim advanced by or on behalf of Mr Deripaska with suspicion and that he may not satisfy an adverse costs order. Teare J's conclusion in relation to the credibility of Mr Deripaska was:

> ***"For these reasons I formed the view that it would be wholly unsafe to rely upon his evidence save where it was not disputed, was in accordance with the probabilities or was supported by the contemporaneous documents.*** As with Mrs Danilina it seemed to me that I should exercise great caution before accepting his evidence."

15 Mr Chernukhin also gave evidence, over some days. The judge said that his evidence too should be treated " ***With great caution***". He said:

> ***"Mr Chernukhin's late disclosure in the case (during the hearing and, indeed, during his own cross-examination) demonstrated that he was prepared to allow untrue statements to be made on his behalf in the arbitration."***

16 He went on to say " ***His conduct before the tribunal demonstrates a willingness to mislead a tribunal of fact***".

17 His conclusion in relation to the credibility of Mr Chernukhin was similar to that which he reached in respect of Mr Deripaska:

> ***"32. For all of these reasons I reached the conclusion that I should only accept Mr Chernukhin's evidence where it was consistent with the probabilities, was supported by the contemporaneous documents or was not in dispute. As with Mrs Danilina and Mr Deripaska I determined that I should exercise great caution before accepting his evidence*** .
>
> ***33. Thus, the depressing fact is that there was good reason to doubt the honesty of each of the principal actors in this case."***

18 The reason for reciting these findings in this judgment is that, as I observed to counsel in the course of argument, neither party covered itself in glory before the English High Court and in the circumstances it did not seem to me that I should dismiss Mr Deripaska's claims in the proceedings in this Court merely because of the findings of the English High Court, as the defence to these claims ought presumably, at this stage, to be treated with equal caution.

19 Prior to Teare J giving his judgment in the English High Court, an event occurred which lead to Mr Chernukhin issuing proceedings in Jersey in the summer of 2019. On 20 th December 2018 EN+ resolved to re-domicile the company from Jersey to Russia. Precisely when Mr Chernukhin became aware of this development is disputed. Certainly OFAC was notified so that EN+ could be removed from the ambit of the 2018 US sanctions. On 27 th January 2019 OFAC announced that it was removing EN+ and other companies from its list of Specially Designated Nationals (i.e. those who are subject to US sanctions). Further, on 17 th May 2019 the Jersey Financial Services Commission approved in principle the migration of EN + to Russia.

20 On 29 th May 2019, Mr Deripaska's London lawyers Reynolds Porter Chamberlain wrote to Clifford Chance, Mr Chernukhin's London lawyers, to inform them of all these matters. It did not appear to be disputed by either side that the proposed re-domiciliation of EN+ to Russia would remove the protection that the undertakings given by Mr Deripaska to the English High Court in connection with the worldwide freezing order in June 2018 provided. Those undertakings essentially provided that the shares in EN+ should be held pending final determination of the dispute between the parties and that if the Chernukhin parties were to prevail and the sums ordered pursuant to the LCIA awards were not paid then the shares would be sold in settlement of those accounts.

21 Mr Deripaska says that the plan to re-domicile EN+ to Russia was the subject of public announcements commencing on 2 nd November 2018, later referred to in an article published in the Wall Street Journal on 9 th November 2018 and in another public notice on 30 th November 2018 published on the websites of EN+ and the London Stock Exchange. Further, OFAC's announcement of the delisting of EN+ was itself subject to a public announcement on 27 th January 2019.

The June 2019 hearing

22 A month after formal notification through Reynolds Porter Chamberlain of the re-domiciliation, the Chernukhin parties served on Mr Deripaska's London lawyers an application to this Court made by way of Representation seeking leave of the Court, *ex-parte*, to enforce the arbitral awards over the shares in EN+ and the appointment of receivers in respect of the shares. At 1.21pm on Friday 29 th June 2019 the Chernukhin parties informed Mr Deripaska's London lawyers that the application would be heard by the

then Deputy Bailiff at 3pm that day. In the time available Reynolds Porter Chamberlain was able to arrange an advocate from Ogier to attend the hearing with a watching brief, although the advocate had no instructions and accordingly the hearing remained essentially an ex-parte application.

23 In advance of the hearing, Mr Deripaska's London lawyers asked Mr Chernukhin's London lawyers to withdraw the application.

24 It is accepted by the Chernukhin parties in their skeleton argument filed for the hearing before me that the order obtained on 28 th June 2019 was obtained " *ex-parte on short notice*".

25 The nature of the relief sought in the Representation has been described in different terms by the parties. The Representation says that the Representor seeks leave of the Court *ex parte* to enforce three London Court of International Arbitral Awards. The Representation provides the background to the dispute; refers to the arbitral awards; the High Court proceedings are summarised briefly; the worldwide freezing order obtained on 11 th May 2018 including the undertakings given by Mr Deripaska as ultimate beneficial owner of B-Finance, a British Virgin Islands company incorporated in the British Virgin Islands and the legal owner of 45.5 million unencumbered shares in EN+ are referred to. The Representation referred to the " *stringent sanctions*" imposed by the United States via OFAC and the removal by OFAC of EN+ from the Specially Designated National list in January 2019. Finally the Representation refers to the re-domiciliation of EN+ to Russia and the timetable anticipated by the letter from Reynolds Porter Chamberlain dated 29 th May 2019 to the effect that the Russian entity would be incorporated on or about 4 th July 2019 and re-domiciliation completed on 12 th July 2019. The Representation alleges that the Representors were at risk of " *irreparable harm*" as the consequence of re-domiciliation will be that the shares in the Jersey company would be cancelled and have no value. Accordingly the Representors sought " *ex-parte relief*" including that the arbitral awards be declared enforceable in Jersey and that the Representors shall have leave to enforce the awards by way of an immediate interim *arrêt entre mains* over the shares; that various UK receivers be appointed in respect of the shares with legal title of the shares immediately vested in them and that the parties cited (Intertrust) are ordered and directed to record the names of the receivers as the holder of the shares with the existing shares being cancelled and issued to the Receivers with the Receivers being empowered and authorised to sell sufficient quantity of the shares to raise the amount of £90,595,749; in the alternative that the Viscount be directed to put the interim *arrêt entre mains* into immediate effect.

26 The Court was furnished with the transcript of the hearing which took place on 28 th June 2019. It was clear from the transcript that the advocate for Ogier indicated that he was present but " *without instruction*". He had received the Representation 25 minutes prior to the hearing.

27 The Deputy Bailiff said that he was " *confused as to why this has not proceeded by way of an Order of Justice*". The advocate for the Representors said that " *a great deal of documentation has been filed*". The Deputy Bailiff said that the Court had been sitting since 9.30am that morning and he had had only had 45 minutes to read what he could, which was limited to the Representation and the skeleton argument.

28 The Deputy Bailiff said that this was an ex-parte application and emphasised the duty of the Representors to make full and frank disclosure. The advocate for the Representors said this was duly noted. Various complaints are made by Mr Deripaska's advocate as to what was and was not said by Mr Chernukhin's lawyers at this hearing. In particular, it is said that the mention by the Representors advocate of the " *sanctions issue*" at page 45 of the transcript was brief and inaccurate. Ultimately, the Court ordered that the shares in EN+ be vested in the Viscount in order to ensure that they remained available for enforcement of any award that might be given effect to in due course. When giving its decision the Court said that it had limited time to review the papers. The Deputy Bailiff made it clear that there was liberty to apply, and that the correspondence to be sent to the parties to be served should draw to the attention of those receiving it that they had liberty to apply at short notice.

29 I provisionally agree with the Deputy Bailiff (as he then was) that the proceedings begun by way of Representation in this case should have been issued by way of Order of Justice noting that this is a matter which will be further ventilated at trial. These were proceedings seeking *ex parte* injunctive relief on the grounds that if orders were not made in relation to particular assets then they would be dissipated and lost. Accordingly the Practice Direction in relation to Orders of Justice seeking freezing orders should have been followed. An undertaking in damages should have been given in relation to the damage that the defendants might suffer, and the usual undertakings in relation to the costs of the parties cited ought to have been given too. The judge's attention should have been drawn to the difference between the pleading drafted and the standard freezing Order of Justice set out in the Practice Direction. Some of the issues that have arisen in this case would not have arisen had the Representors followed the proper procedure.

30 At an *inter partes* hearing on 12 th July 2019, the orders made by the Royal Court at the *ex parte* hearing on 28 th June 2019 were confirmed. This included the direction that the Viscount hold the shares in EN+ to the order of the Court, and an injunction restraining the Respondents from disposing of or dealing with them in any manner whatsoever until further order. It is argued that the making of these orders (and other orders confirmed on the same day) and the fact that they were continued by consent prevents Mr Deripaska complaining now about the Representors' failure, on Mr Deripaska's case, to comply with their duties to the Court which it is alleged were breached at the time that the ex parte order was obtained. I shall return to this argument below.

31 On 6 th July, 2019, the Representors issued a summons (amended on 2 nd September 2019) for a hearing in which orders would be sought, including declarations that the arbitral

awards be declared enforceable in Jersey and that they be enforced by, *inter alia*, the sale of the shares in EN+, with the sale proceeds being remitted to the English High Court in satisfaction of an order made there on 3 rd July 2019, which would in turn effectively settle the Chernukhin parties' claims in that jurisdiction. The Court ordered that the summons be determined by the Inferior Number on 5 th November 2019.

32 This hearing did not take place. It was unnecessary as, between 23 rd September and 7 th October 2019, Mr Deripaska satisfied the Arbitral Awards. However, the English proceedings did not come to an end. Mr Deripaska appealed the order made by Teare J and the appeal was listed to be heard by the Court of Appeal on 3 rd and 4 th December 2019. The appeal was unsuccessful. There was also a hearing before the Court of Appeal on 21 st November 2019 after which Lady Justice Asplin dismissed an application by the Chernukhin parties for security for costs against the Deripaska parties in relation to the costs of the forthcoming appeal.

33 That hearing is of interest as some of the issues before me were also considered by Lady Justice Asplin. At paragraph 6 of her judgment she records that " ***The gateway [for security for costs] at CPR Rule 25.13(2)(a) is satisfied and that there is a risk of non-enforcement of the costs order made in the appeal in Russia"***. Lady Justice Asplin recorded that Mr Deripaska " ***Has recently made a substantial payment of around $106million to the Respondents in satisfaction of the arbitral award made against him and approximately £7.9million in respect of costs despite not being obliged to do so by an order of the Court."*** In those circumstances it was submitted on behalf of the Deripaska parties that there was minimal risk that Mr Deripaska would fail to pay a costs order in the region of £360,000 " ***having paid all costs orders against him promptly***". It was also submitted that the application for the security of costs was made very late.

34 At paragraph 13 of her judgment, Lady Justice Asplin detailed the steps which Mr Deripaska needed to take in order to pay the monies he owed to the Chernukhin parties and the involvement of OFAC in that process, as the payment could not be made without the consent of OFAC, and one consequence of their involvement was that the process of arranging payment took over two months.

35 In her conclusions Lady Justice Asplin held that the merits of the application were " ***finely balanced***" and she declined the application. She noted that applications for security for costs should be made " ***promptly as soon as the facts justifying the application are known***" and that she should have regard to delay. She took into account the Chernukhin parties had stood by and watched Mr Deripaska make his application for OFAC consent and the day after OFAC was " ***stood down***" and matters had " ***gone cold***" the application for security for costs was issued. It was not asserted that the need for OFAC consent might " *stifle*" the appeal so far as Mr Deripaska was concerned: " ***It is now submitted that the complications with OFAC create real uncertainty and may well lead to a situation in which security will not be provided in time and, even if it were, would not be returned without serious complications if Mr Deripaska is successful on his appeal.***

Nevertheless, it is not suggested that an order would stifle the claim." However, owing to the lateness of the application Lady Justice Asplin ultimately refused the application for security for costs.

The November 2019 hearing

36 The Jersey proceedings by way of representation were effectively disposed of by an order made by the Royal Court on 19 th November 2019. What occurred at the hearing is of some importance to the outcome of this application.

37 The Bailiff recognised in his judgment given after the hearing on 19 th November 2019 that it was no longer necessary for the shares in EN+ to be preserved in the hands of the Viscount. However, he recorded that the matter was " ***complicated***" in one way and that was the issue of OFAC consent. The Bailiff said " ***Mr Deripaska is subject to sanctions imposed by the United States of America and although there was some reference to that when conservatory orders were obtained, in the interim period the matter has loomed somewhat larger***". In particular OFAC consent had not been obtained for the transfer by the Viscount of the shares that she may hold at the direction of Mr Deripaska. The Court was provided with expert evidence indicating that the risk of the Viscount breaching US sanction orders by transferring shares as required was " ***very slight***". Nonetheless, the Viscount was concerned as she thought that there should be ***"no risk"*** to her. It was said on behalf of Mr Deripaska that the draft order he had prepared for the Court would eliminate the risk to the Viscount as it did not require her to undertake any action but merely recorded the fact that the proceedings had been withdrawn and any conservatory orders previously granted had fallen away. The Court adopted this suggested wording in the order that was made. Accordingly, by Act of Court the relevant orders made on 12 th July 2019 were discharged and the Court " *confirmed an order that all claims to, encumbrances on and restrictions on the legal and beneficial enjoyment of the [shares in EN+] by the Respondents previously imposed by the Royal Court of Jersey are released*". Notwithstanding the withdrawal of the Representation or at least the discharge of the orders made upon it, by this time Mr Deripaska claimed to be troubled by what had been said to this Court on 28 th June 2019 and in paragraph 6 of the order made on 19 th November 2019 the Bailiff ordered a transcript of the hearing on 28 th June 2019 and further ordered:

> *"(a) Within 21 days of the provision of the transcript the Respondent shall file full particulars of all alleged breaches of full and frank disclosure on the part of the Representor's in relation to the said hearing, together with all evidence in support thereof; and*
>
> *(b) There shall be a directions hearing before the Bailiff on the first available date within 14 days of the said particulars being filed, time estimate of one hour."*

38 It is said by Mr Deripaska (although little may in fact turn on this) that by this order they

were being directed by the Court to advance the alleged breaches and they cannot be liable to provide security for the other sides' costs for simply complying with the Court's directions. However, it was the choice of Mr Deripaska to complain about the absence of full and frank disclosure on the part of the Representors, and indeed the judgment given on 19 th November 2019 recalls at paragraph 17, in relation to the part of the order set out above " ***I have no difficulty if that is the wish of Mr Deripaska***".

39 The directions hearing before the Bailiff, ordered on 19 th November 2019, was listed for 6 th January 2020 but directions were agreed. By that date Particulars of Claim had been filed by Mr Deripaska. The Particulars of Claim state that they were filed pursuant to the Act of Court dated 19 th November 2019 and list the parties in the same way as they were listed in the Representation i.e. the Chernukhin parties as Representors and Mr Deripaska and B-Finance as Respondents. The file number for the Representation is given at the top of the pleading i.e. " *2019/173*". I will return to certain of the contents of the Particulars of Claim when dealing with the merits of the competing arguments below.

40 On 6 th January 2020, the Royal Court ordered that the Particulars of Claim, dated 17 th December 2019 " *shall be deemed to be sufficient to institute proceedings and a separate number, 2020/004, shall be allocated; the said claim shall be placed on the pending list; and the Respondents shall file an answer by 13th February 2020 and thereafter the Royal Court Rules shall apply to the proceedings"*. An Answer was duly filed on 13 th February 2020 and the case reference on the first page of the Answer is given "File No: 2019/173 and 2020/004".

41 The reason for setting out the procedural history as extensively as I have is to put in context one of the key issues between the parties now; namely that the Representors say that Mr Deripaska is the Plaintiff in a new action against them, it being acknowledged that it is generally plaintiffs and not defendants (unless they are advancing an independent counterclaim) who are required to give security of costs.

42 Mr Deripaska does not accept that and argues that he is not truly the plaintiff at all, and that these proceedings are purely consequential upon by the Representation issued against the Respondents to which they were, in effect, defendants; and that their claims bring to the Court's attention breaches of the duties which the Representors owed to the Court, and seek consequential damages payable to Mr Deripaska on account of those breaches.

The parties' central arguments

The Court's jurisdiction to grant security for costs

43 The Royal Court has a wide inherent jurisdiction and in principle might order any party to provide security for costs. However, it is important that any jurisdiction is exercised, where appropriate in accordance with settled principles. In this regard the Royal Court Rules 2004

provide at Rule 4(1)(4):

> ***"Any plaintiff may be ordered to give security for costs."***

44 Pursuant to Rule 1/1(2) a reference to a "*plaintiff*" includes the reference to:

> ***"(a) … any party (howsoever described) for the moment in the position of plaintiff … in any proceedings."***

45 Pursuant to Rule 1/1(1) "***proceedings***" means "***any proceedings in the Court however commenced …***".

46 Accordingly, the Court looks to the substance of the matter rather than the form. So, for example, a representor in proceedings begun by way of representation can be ordered to give security for costs *Trigwell v Clapp* [2016] JRC 197, as may an applicant in judicial review proceedings *Larsen Oil and Gas Drilling Limited v Comptroller of Taxes* [2015] (1) JLR 117. The general principles governing the exercise of the Court's discretion were summarised by the Court of Appeal in *A E Smith & Sons Limited v L'Eau des Iles (Jersey)* [1999] JLR 319 as follows:

> ***"(1) The Court has a complete discretion whether to order security*** .
>
> ***(2) That the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security*** .
>
> ***(3) The Court must balance, on the one hand the injustice to the plaintiff company if prevented from pursuing a genuine claim by an order for security, and on the other hand the injustice to the defendant if no security is ordered, the plaintiff's claim fails, and the defendant is unable to recover its costs from the plaintiff.*** So the Court will seek not to allow the power to order security to be used oppressively, by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the circumstances underlying the claim and/or the failure to meet the claim may have been the cause or a material cause of the plaintiff company being indigent. The Court will also seek not to be so reluctant to order security that the impecunious plaintiff company can be enabled to use its inability to pay costs as a means of putting unfair pressure on the more prosperous defendant company .
>
> ***(4) The Court will broadly take into account the prospects of success in the action, and the conduct of the action so far*** .
>
> ***(5) The Court has a discretion to order security of any amount, and need not order substantial security*** .
>
> ***(6) If the plaintiff company alleges that the effect of an order for security***

would be unfairly to stifle its genuine claim, the Court must be satisfied that, in all the circumstances, the claim probably would be stifled. The test is one of probability, not possibility .

(7) The stage of the action at which security is sought is one aspect of the conduct of the action which the Court will take into account."

47 At the time that *Smith* was decided there was a general presumption in favour of ordering that plaintiffs resident outside the jurisdiction provide security for costs. That practice ceased with the decision of the Court of Appeal in *Leeds United AFC and another v Admatch* [2009] JLR 186. In summary, the Court of Appeal held that the indiscriminate practice of requiring security for costs from plaintiffs resident outside Jersey constituted discrimination on the ground of status under Article 14 of the European Convention on Human Rights in that it impeded their right of access to the courts under Article 6. The protection of the ability of a Jersey defendant to enforce a costs judgment in its favour was a legitimate objective, but the indiscriminate practice of requiring security from all non-resident plaintiffs was not a proportionate means of achieving it. Accordingly, the difficulty that any defendant before the Jersey court might have in enforcing a cost judgment needed to be considered, henceforth, on an individual basis.

48 Counsel for the Representors drew to my attention the Civil Procedure Rules in England and Wales, which are not applicable in this jurisdiction but provide:

"(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)(i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs .

(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;

…

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

49 The White Book 2019 says in relation to claimants resident out of the jurisdiction:

"If security is sought on the grounds that there will be obstacles to enforcement, the obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement."

50 This approach seems to equate to the proper approach for this Court after the *Leeds United* decision. That there is a real risk of non-enforcement is accepted as against the First Respondent. The First Respondent's advocates wrote to the Representor's advocates on 4th March 2020, and in order to narrow the issues before the Court stating, " *While our client does not accept that there is a real risk that a Jersey costs order would not be enforced in Russia, he will not dispute the issue for the purposes of your clients extent application*". This was a proper concession to make. Accordingly, if Mr Deripaska is to be regarded as the plaintiff for the purposes of these proceedings, there is a substantial real risk of non-enforcement of a costs order made against him.

51 I also heard submissions on the merits, which is a relevant consideration set out under (4) from the passage from *A E Smith & Sons Limited v L'Eau des Iles (Jersey)* cited above. It is quite difficult to make a proper assessment of the merits in a heavily contested case such as this. The Representors draw to my attention the English Court of Appeal decision in *Chernukhin and others v Danilina and others* [2018] EWCA Civ 1802 which approved the White Book 2018 note which said " *Parties should not attempt to go in to the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure…*" This is consistent with the approach taken in previous Jersey cases, and it is important on such applications that the court should not spend too long attempting to predict the outcome of heavily contested proceedings. It was contended on behalf of the Representors that the Respondents' claim, as set out in the Particulars of Claim, was hopeless because, in summary, the Respondents were claiming damages on the basis of duties owed to the court and not the Respondents; that the subsequent litigation in England in which the Respondents had been unsuccessful was further proof of the weakness of the Respondents' claims; that the Respondents had agreed to the continuation of the ex-parte relief obtained at the hearing on 12th July and did not seek to discharge the orders obtained at the hearing on 2nd September 2019. The claims are described as " *vexatious*", and it is submitted that the Court may safely conclude that there is a high degree of probability of failure of the claim.

52 In response, Mr Deripaska says that in directing him to proceed by way of issuing particulars of claim, the Court had already decided that there was a case to answer; that this was borne out by the transcript of the hearing that took place on 28th June 2019; that it

was self-evident that the Representors had failed in their duty to make full and frank disclosure prior to and at the hearing on 28 th June 2019; and that on analysis the claims made in the Particulars of Claim were strong ones.

53 The Representors drew my attention to paragraph 24–015 of Gee on Commercial Injunctions which deals with circumstances where a defendant belatedly seeks to discharge an injunction. The section within which paragraph 24–015 falls is entitled "*Application for variation or discharge based on a point available to be taken at an earlier inter partes hearing: abuse of the process*".

54 Paragraph 24–014 contains the following statement:

> "Accordingly, if the defendant wishes to preserve an unfettered right to apply to discharge or modify an undertaking, prior to the trial, he should expressly reserve the right to make such an application, orally before the judge, or by express wording in the undertaking."

55 Paragraph 24–015 reads:

> ***"The principle applies when there has been a consent order for continuance of an injunction, even if it includes an express liberty to apply to discharge or vary the order, or a contested inter partes application for an injunction or for a variation or discharge, and the defendant wishes to take a new point which was available to him at the time of the original application.*** The reason is that the defendant must take his point at the earlier hearing, if it was available to be taken by him at that hearing, and he cannot be allowed to delay taking it until later unless the point was expressly reserved by him."

56 It seems to me that this passage deals with a rather different point from the one that was being made to me by the Representors. These passages seem to indicate that if a party wishes to take a point which might lead to discharge or varying an order then they should do so swiftly. Mr Deripaska says that this is rather a different case. Now that the substantial payment has been made to the Representors the need for any consideration of the relief obtained on 28 th June 2019 has gone away, but Mr Deripaska argues he is still entitled to seek damages on account of the alleged breach of duty owed to the Court which occurred when those injunctions were obtained.

57 Mr Deripaska also rely on the fact that the period June – September 2019 was a particularly busy time for him on a number of fronts, not least the period leading up to the payment of the arbitral award on 7 th October 2019, the work required to arrange funding and deal with OFAC. There were also several hearings during this period before the English Commercial Court. In any event they say that this is not an application to vary or discharge an injunction, but to hold the Representors to account for failure to discharge

their duties to the Court.

58 Mr Deripaska accepts that the claims are pleaded as breaches of duty to the Court and not as breaches of duty to him. Much is made of the alleged failure to explain to the Court the fact and consequences of the US sanctions including, it is said, the risk posed to not only the Viscount but to members of the judiciary constituting the Court in that there was a risk that the Court was being asked to order that steps be taken which might lead OFAC to impose sanctions upon the judge, Jurats and the Viscount.

59 As to any suggestion that Mr Deripaska cannot seek damages in the Particulars of Claim as there was no undertaking in damages provided in this case, Mr Deripaska makes two points. First, there ought to be an undertaking in damages (I have dealt with this above) and in written submissions filed after the oral hearing the Respondents drew to the Court's attention the judgment of Bailhache DB in *FG Hemisphere Associates v Democratic Republic of Congo* [2010] JRC 033 (paragraph 31 of the judgment) from which it is clear that the Court proceeded, in the case of an application for interim conservatory relief including an *arrêt entre mains*, that it was essential for an undertaking in damages to be given, and that it would be inequitable for the injunction to be maintained if there were no material assets with which to meet the undertaking in damages.

60 Secondly, he relies upon the decision in *Hughes v Clewley* [1996] JLR 24 in support of the proposition that whether or not an undertaking or cross-undertaking in damages has been given then the Court may nonetheless be entitled to award damages. In that case an Order of Justice containing an interim injunction had not contained an undertaking in damages. The Court said " ***It is clear that if an undertaking in damages has been given or can be implied, it may at any stage in the proceedings be appropriate to determine whether the party giving the undertaking should be ordered to pay damages***."

61 The Court observed that there had been no express undertaking in damages given by the Plaintiff. It was argued that an undertaking in damages should be implied as being the natural and usual price of an interim injunction. At that time, as the Court noted, there was no Practice Direction requiring a judge in Jersey to insert such an undertaking in the order. That of course is no longer the position. The Court was not persuaded on the authorities cited to it that it had any power to imply such an undertaking in damages. However, the Court said:

> ***"That is not … the end of the matter because we should be very reluctant to hold that we had no power to order a person who had wrongly invoked the process of this court to pay damages for loss which resulted.*** Even before the enactment of the Bankruptcy (Désastre) (Jersey) Law 1990 it was the case that the court had asserted jurisdiction to order a creditor wrongfully declaring the goods of a debtor en désastre to pay damages for that wrongful act (see *D'Allain v De Gruchy*). ***We see no reason why that principle should not apply to any wrongful invocation of the court's process, particularly where the interlocutory relief is obtained ex parte.*** In our judgment, we have

> a discretion, irrespective of whether or not an undertaking or cross-undertaking in damages being given, to consider whether there has been a wrongful act which ought to be visited with damages."

62 It may be that the decision of the Royal Court in respect of whether or not an implied undertaking in damages is given in cases such as these needs to be re-visited in view of current practice, including the Practice Direction, in respect of the obtaining of freezing orders.

63 In extensive supplemental submissions filed after the hearing before me (I am not sure that I gave leave for such submissions but nonetheless I have read them) the Representors repeated and expanded upon their submission that Mr Deripaska's claims were " *utterly hopeless*", particularly on the footing that the Court's discretionary power to order an enquiry as to damages or award damages either on an express cross-undertaking or pursuant to its inherent jurisdiction is only engaged where the injunction is discharged prior to trial on the basis it should not have been made or the plaintiff fails in its claim at trial and (in both cases) there is no reason why, in the exercise of its discretion, an enquiry into damages should be refused.

64 I do not propose to set out the extensive further written argument in support of these contentions which may of course succeed at trial. But it seems to me that there are three points that can be made in respect of these arguments. First, the Representors have not sought the listing of an application to strike out the Particulars of Claim on the grounds that they are an abuse of process and/or hopeless in the four or five months since they were served. Secondly, owing to the payment made in October 2019, the proceedings begun by way of representation are in effect at an end and it would be difficult to set aside the orders obtained on 28 th June 2019. Thirdly, the Particulars of Claim were filed pursuant to the Court's direction contained in the Act of Court dated 19 th November 2019 referred to above. There was no appeal against that order, nor, so far as appears from the judgment of the Bailiff, any submission to the effect that such an order should not be made.

65 Accordingly as to the merits, although Mr Deripaska may face considerable challenges when his claims are determined, I cannot conclude that there is a high degree of probability of failure of those claims at this stage.

66 As to the risk that Mr Deripaska's claims set out in the Particulars of Claim claim might be " *stifled*", a matter which the Court ought to consider pursuant to the guidance in *A E Smith & Sons Limited v L'Eau des Iles (Jersey)*, it was submitted on behalf of Mr Deripaska that the process of securing OFAC consent so as to provide the security sought could be lengthy and ultimately impossible because these are funds which eventually might be re-paid to Mr Deripaska advocate and thereafter to Mr Deripaska. I heard lengthy submissions on this matter and was referred to affidavits sworn by the First Respondent's London lawyers, both for the purpose of this application and for the purpose of proceedings before the English High Court. I fully accept that the process of obtaining OFAC consent is challenging and

time consuming and can result in substantial delay. However, I find, as did Lady Justice Asplin in respect of a similar application, that there is no risk of the claim (in that case an appeal) being stifled – although there was a concession to that effect in that appeal. Mr Deripaska would, if he succeeds in any litigation, receive a repayment of costs that he has paid his advocates if costs orders are made and enforced against the Chernukhin parties. As the advocate for the Representors said, both Mr Deripaska and Mr Chernukhin are " *incredibly wealthy people*" and I do not accept, bearing in mind (so far as these parties are concerned) the relatively modest sum sought by way of security for costs, that the process of obtaining OFAC consent is a significant factor and ought to be taken into account in the exercise of the Court's discretion.

Is Mr Deripaska really a "Plaintiff"?

67 Ultimately this is the central issue that the Court must determine for the purposes of this application.

68 As set out, in summary, the Representors argue that Mr Deripaska has brought a separate free-standing claim which does not purport to enforce a cross-undertaking in damages.

69 He contests this. He also relies upon the decision of the English Court of Appeal in *CT Bowring & Co (Insurance) Limited v Corsi and Partners* [1994] BCC 713. In this case the plaintiffs obtained a Mareva injunction against the defendants on the usual cross-undertaking in damages. The injunction was discharged by consent. The action did not proceed to trial, the defendants having paid the plaintiff a certain sum. The defendants sought an enquiry into damages under the cross-undertaking, claiming substantial damages even though the injunction was only in force for just under two months. The plaintiffs sought security for costs in relation to the defendant's application for an enquiry into damages. This was refused at first instance and the plaintiffs appealed to the Court of Appeal.

70 The relevant provision for awarding security for costs relied on in the summons arose under section 726 of the Companies Act 1985 which provided " ***Where in England and Wales a limited company is plaintiff in an action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in its defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given***." Dillon LJ said " ***In the present case we are not concerned with whether or not the defendant will, if unsuccessful, be able to pay the plaintiff's costs of its application for the enquiry as to damages, or the plaintiffs costs of the enquiry, if ordered.*** Before the judge, the case did not reach that stage; he held the defendant was a defendant and not a plaintiff and so it cannot be ordered to provide security for the plaintiffs costs."

71 Dillon LJ traced the legislative antecedents of section 726 to an Act of Parliament from 1857 and said " **There was, even before 1857, a power which the court's exercise, 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". He went on to say that although the word " **counterclaim**" is not used in section 726, it was clear that an impecunious company which makes a counterclaim " **which is more than a mere formulation of its defence can be ordered to give security for the plaintiffs costs of the counterclaim**".

72 Dillon LJ then referred to the Rules of Supreme Court, as then provided, in respect of security for costs and set out the relevant rule (Order 23 Rule 1). He added " ***To add a new category, not covered by an enactment, to those listed in Rule 1/1 in which a plaintiff can be ordered to give security would now be a matter for the Rules Committee, and not for the discretion, as a matter of inherent jurisdiction, of the individual judge in the individual case***."

73 He noted that the statutory definition of "plaintiff" as follows " ***Plaintiff includes every person asking for relief (otherwise than by way of a counterclaim as a defendant) against any other person by any form of proceedings, whether the proceeding is by way of action, suit, petition, motion, summons or otherwise."*** This definition did not, however, extend to interlocutory applications within proceedings. Accordingly, Dillon LJ said that he agreed " **respectfully and emphatically**" with the passage in the judgment of Parker LJ in *Taly v Terra Nova Ltd* [1995] 1 WLR 1359 where the latter said:

> ***"I will deal first with the suggestion that the application for specific discovery and leave to deliver interrogatories should be regarded as proceedings within the rule.*** I have no hesitation, myself, in coming to an opposite conclusion. 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 costs of this application." One has only to examine that to see that it cannot have any foundation whatever."

74 The key passage of the judgment for the purposes of this application is at page 11:

> ***"Mr Gee accepts, as I have mentioned, that 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 injuction 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 crossundertaking 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. See generally the observations of Neill LJ in *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 ***at pp. 1550H–1552G.*** Therefore the general rule as to not awarding security for costs against a defendant is applicable .

Mr Gee submits alternatively that the rationale of the immunity of a defendant from giving security for costs is that the defendant is not to be hampered in his defence of the action by having to give security. Mr Gee therefore submits that the rationale ceases to apply, and the immunity should cease to apply when because the action has been tried or *722 for some other reason there is no longer any claim outstanding against which the defendant needs to defend himself. He submits that in the present case there is no subsisting lis, except the application by the defendant for an inquiry under the cross-undertaking. I do not, however, find that line of argument persuasive. It is often the case that an interlocutory injunction is discharged before trial, but the court cannot know enough to decide whether to order an inquiry as to damages until after judgment at the trial. Moreover if a plaintiff, having obtained an interlocutory injunction, terminates the proceedings by serving notice of discontinuance, it will inevitably happen that the question of ordering an inquiry as to damages will only be brought before the court at a time when there is no longer any outstanding claim by the plaintiff-see *Newcomen v Coulson* (1878) 7 ChD 764. ***I prefer the view that as the interlocutory injunction will have been obtained against the defendant as a defendant (or potential defendant) and as the damage in respect of which he claims to be compensated will have been suffered by him while the injunction was in force and thus while he was still a defendant, it is only fair and just that his immunity against having to give security should continue until all matters under the cross-undertaking have been worked out.*** Such matters are part of the defendant's defence to the claim for the interlocutory injunction, even if not — particularly in the case of a cross-undertaking in a Mareva or Anton Piller order — part of his defence to the substantive issues in the action.

In theory, as the courts originally ordered security for costs under their inherent jurisdiction, there must be still inherent jurisdiction in the court to order security in cases not covered by s. 726 or any other statutory provision or by O. 23 or any other rule of court. But the issues of policy involved are such that I find it difficult to envisage the court creating a new category of case in which a plaintiff or defendant can be required to give security, without leaving that to the Rules Committee or Parliament."

75 Millet LJ gave slightly different reasons for dismissing the appeal. At paragraph 40 of the judgment he said:

"Policy considerations support the same conclusion. 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 .

...

If attention is concentrated on the defendant's application to enforce the plaintiffs cross-undertaking in damages, the defendant 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. If the plaintiff recognises that it is likely to be ordered to pay something, though not as much as the defendant claims, it can protect its position by making a payment into court. It certainly looks like a defendant. But as the cases which I have cited in this part of my judgment demonstrate, it is necessary to consider the whole litigation between the parties in order to determine which of them is really in the position of a plaintiff and which a defendant. If the proceedings are considered as a whole, then it is apparent that the parties have never exchanged roles, and that the defendant has done nothing to justify being treated as a plaintiff .

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 plaintiffs 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."

76 *CT Bowring v Corsi* has been considered in a Privy Council decision on appeal from the Court of Appeal in the Cayman Islands, which counsel for Mr Deripaska quite properly drew to my attention. In *GFN SA and others v Liquidators of Bancredit Cayman Limited* [2009] UKPC 39, the court considered an appeal against an order for security for costs. The principal judgment of the Privy Council given by Lord Scott. He expressly agreed with the proposition, as explored by the judges in *CT Bowring v Corsi*, that the rule that an order for security for costs will not be made against the defendant was now settled practice. However Lord Roger, Lady Hale and Sir Jonathan Parker agreed with the short speech of Lord Neuberger (who also agreed with Lord Scott that the appeal should be dismissed). However, at the end of his judgment Lord Neuberger said:

"34. For my part, 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. This 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."***

Decision on summons seeking security for costs

77 I have decided that Mr Deripaska cannot properly be described as a " *plaintiff*" for the purpose of Royal Court Rule 4/1. These proceedings arose out of the Representors' representation and in the Particulars of Claim Mr Deripaska seeks and only seeks damages arising from the alleged breach of duties owed by the Representors to the Royal Court arising from the Representors' alleged failure to make full and frank disclosure. I found the judgment of Dillon LJ in *C T Bowring v Corsi* compelling. This is a case where there is no separate cause of action for damages; they can only be sought by application in the action in which the injunction was granted. This is akin to an enquiry in damages under a cross-undertaking when an injunction has been discharged. There ought to have been a cross-undertaking in damages given in this case and the injunctive orders have in fact been discharged owing to the payment made. Dillon LJ specifically envisaged this sort of situation where proceedings have been terminated " ***for any reason***" and the enquiry as to damages is brought ***"at a time when there is no longer any outstanding claim by the plaintiff"***.

78 Had I concluded that Mr Deripaska was a true plaintiff in these proceedings then, owing to the substantial impediments in respect of enforcement, which are admitted in this case, and the absence of any other special circumstances having regard to the discretionary factors considered above, I should have ordered that security for costs be provided.

79 Although it may be unnecessary to do so, as I heard arguments in respect of quantum and received submissions I will now address that issue.

Quantum of security

80 The sum by way of costs sought by the Representors on account of security total approximately £298,000. Collas Crill's costs incurred to date applying the relevant factor A rates and a factor B uplift of 50% come to approximately £85,647. Projected costs of Collas Crill, on the same basis, run to £147,278. The balance, principally the costs of Clifford Chance and counsel, run to £65,077.

81 Various points were made about these claims. Certain claims ought not to have been made at all in accordance with the Practice Directions – for example photocopying at £175 per hour, plus 50% uplift. There ought never to be claims for such matters as photocopying contained in the schedules particularising costs on such an application. Some of the other costs seemed high, e.g. in excess of £13,000 for " *pleadings*" which could only extend as far as seeking a request for further particulars according to the schedule. Overall the costs seemed high when the time estimate for the trial is just two days. Any security should be limited to the sum which the Court considers the applicant would be likely to recover on taxation. I note that in *Café de Lecq v R A Rossborough (Insurance Brokers) Limited* [2011] JLR 31 the Royal Court, Commissioner Clyde-Smith, presiding, held on a security for costs appeal in relation to a claim that " ***cannot be described as unusually complex***" that " ***we do not think it fair in the exercise of our discretion at this stage and absent the detailed examination that would take place on taxation to order security for the costs of two firms of lawyers and of a Queen's Counsel (in addition to junior counsel)***." In that case the sums of solicitor and counsel (totalling £61,029) were deducted and, on the footing that the remaining balance " ***is not likely to emerge unscathed after taxation***", a further discount of 20% was applied.

82 Had I been minded to order that security be provided, I would have at this stage disallowed the fees of English solicitors and counsel and, taking into account the sums claimed and the likely effect of taxation, ordered security in the sum of £155,000, which is just under two thirds of the Collas Crill costs to date, together with anticipatory costs to the end of the hearing.

Respondents' summons seeking a split trial

83 I dismissed this application at the end of the hearing. I now give reasons for that decision.

84 Mr Deripaska argued that to determine the issue of breach of duty and consequential damages together would be not an effective use of court resources, particularly as the former question could be resolved by considering what was said to the Royal Court in the hearing that took place on 28 th June 2019 together with documents filed at that stage. The Representors argued that this was an artificial approach, particularly regarding their case that no duty arose and that Mr Deripaska had no consequential right to damages. They point to the overriding objective at Rule 1/6(6)(i) of the Royal Court Rules which provides that " ***active case management includes … dealing with as many aspects of the case as it can on the same occasion***".

85 It is clear from the authorities and indeed good sense that in general liability and quantum should be tried together. There should only be separate trials of liability and quantum if there is a clear line of demarcation between the issues and there is a very good reason for so doing, for example in a personal injury action where the issue of damages cannot be determined now owing to uncertainty regarding the plaintiffs prognosis and where liability ought to be determined now whilst recollections of the circumstances — for example a road

accident — are fresh. But, generally, the starting point should be a single trial of all issues, and the Court should be wary of the risks of a split trial in terms of additional costs, delay and the possibility of different tribunals of fact determining separate aspects of the same dispute. I have no doubt that this dispute should be tried in the usual way in a single hearing, particularly having regard to the agreed time estimate of two days.

Other points

86 It was submitted in the Court of argument that the Representors ought to have specifically asked for a stay of the proceedings pending payment of security for costs. It might have been better had such relief been specifically claimed in the summons but, in my view, it is axiomatic that the Court will order the proceedings be stayed pending a payment on account of security for costs being lodged in Court, absent special circumstances.

87 The parties are invited to provide written submissions within 14 days as to the incidence of costs, which I propose to determine on the papers.