Neutral Citation Number: [2023] EWHC 3134 (Comm)

Case No: CL-2023-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 December 2023

Before :

THE HON MR JUSTICE BUTCHER

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Between :

(1) ZIYAVUDIN MAGOMEDOV
(2) SGS UNIVERSAL INVESTMENT HOLDINGS LIMITED
(3) INTIMERE HOLDINGS LIMITED
(4) HELLICORP INVESTMENTS LIMITED
(5) SIAN PARTICIPATION CORP (IN LIQUIDATION)
(6) MAPLE RIDGE LIMITED
(7) WIREDFLY INVESTMENTS LIMITED
(8) SMARTILICIOUS CONSULTING LIMITED
(9) ENVIARTIA CONSULTING LIMITED
(10) PORT-PETROVSK LIMITED **Claimants**

- and -

(1) TPG GROUP HOLDINGS (SBS), LP
(2) TPG PARTNERS VI, LP
(3) TPG FOF VI SPV, LP
(4) TPG PARTNERS VI-AIV, LP
(5) TPG VI MANAGEMENT, LLC
(6) TPG ADVISORS VI, INC
(7) TPG ADVISORS VI-AIV, INC
(8) DOMIDIAS LIMITED
(9) HALIMEDA INTERNATIONAL LIMITED
(10) LEYLA MAMMAD ZADE
(11) MIKHAIL RABINOVICH
(12) ERMENOSSA INVESTMENTS LIMITED
(13) KONSTANTIN KUZOVKOV
(14) FELIX LP
(15) ANDREY SEVERILOV
(16) KATINA PAPANIKOLAOU
(17) STATE ATOMIC ENERGY CORPORATION ROSATOM

(18) DP WORLD RUSSIA FZCO
(19) PJSC FAR-EASTERN SHIPPING COMPANY
(20) PJSC TRANSNEFT
(21) MARK GARBER
(22) GARBER HANNAM & PARTNERS LLC **Defendants**

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Daniel Saoul KC and Jessie Ingle (instructed by **Seladore Legal Ltd**) for the **Claimants**

James MacDonald KC and Ben Lewy (instructed by **Enyo Law LLP**) for the **Twentieth Defendant**

Hearing date: 10 November 2023
Further written submissions: 15 November, 4 December 2023

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APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 6 December 2023 at 10.00am

The Hon Mr Justice Butcher :

1. This judgment concerns the application by the Claimants for a notification injunction against the Twentieth Defendant ('Transneft').

2. As set out in my judgment of 27 October 2023 ([2023] EWHC 2655 (Comm)) ('the October Judgment'), with which this judgment should be read, the Claimants make claims in this action in respect of two alleged conspiracies. One of those is what has been called the 'NCSP Conspiracy', the other is the 'FESCO Conspiracy'. At the hearing on 10 October 2023, I adjourned the Claimants' application for a notification injunction against Transneft, which is the only Defendant who had been served with proceedings alleged to have been involved in the NCSP Conspiracy. The hearing of that application came back before me on 10 November 2023, and took a full day.

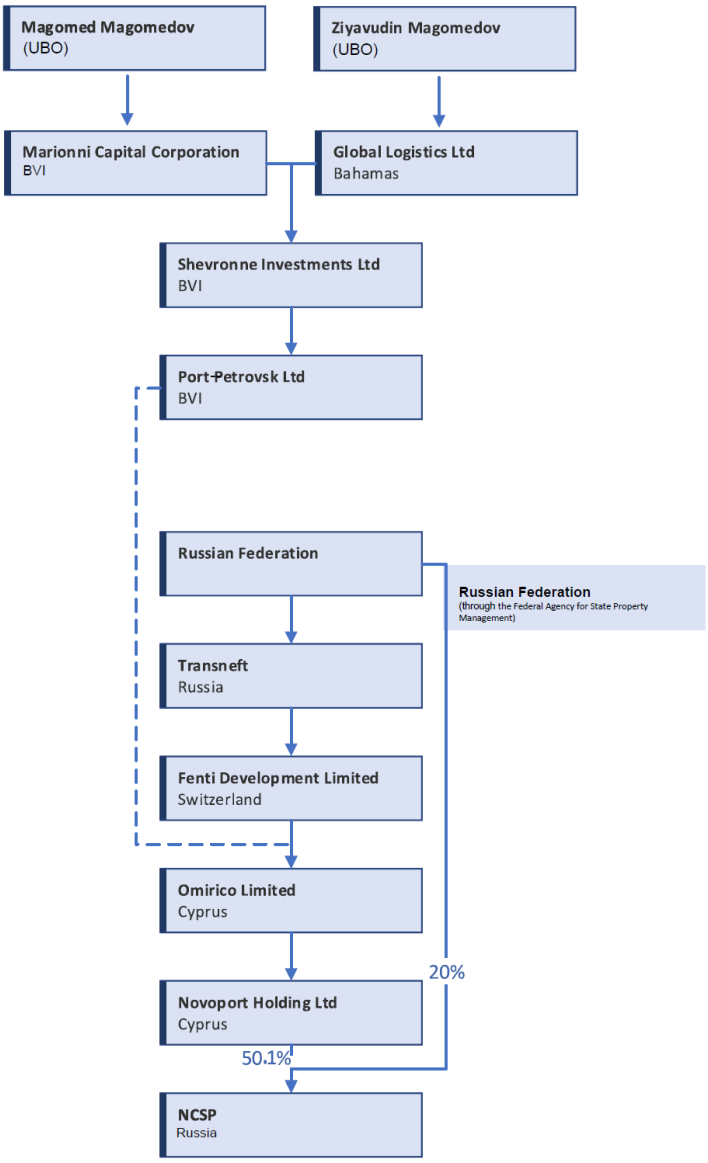
The Alleged NCSP Conspiracy

3. The October Judgment identifies the Claimants. Transneft is a Russian state-owned oil pipeline company. Its evidence is that it is the largest oil pipeline company in the world. The Claimants say that it is an entity run by individuals who have substantial political influence.

4. The claim made by the Claimants against Transneft, as I have said, is in respect of the NCSP Conspiracy. The Claimants contend that this was a conspiracy to deprive them of a significant and strategic asset, namely a major stake in PJSC Novorossiysk Commercial Sea Port ('NCSP'). NCSP is a Russian public company, which is said to be the third largest port operator in Europe and Russia's largest commercial seaport operator, controlling ports on the Baltic and Black Seas.

5. Before 2018 the First Claimant ('ZM') had a significant stake in NCSP through the Tenth Claimant ('Port-Petrovsk'), a company which he owned with his brother, Magomed Magomedov ('MM').

6. The ownership structure has been depicted graphically thus:



7. Omirico Limited ('Omirico') was a 50/50 joint venture between Port-Petrovsk and Fenti Development Limited ('Fenti'), established to acquire a majority interest in NCSP. Fenti is a wholly owned subsidiary of Transneft.

8. The Claimants' NCSP Conspiracy case is, in outline, as follows:

(1) That there were, from about November 2017, discussions about Transneft (via Fenti) acquiring Port-Petrovsk's stake in NCSP; and that an agreement in principle had been reached in March 2018 that Port-Petrovsk's shares in Omirico would be sold to Fenti for US$ 1.156 billion. It is also said that, as part of the same proposed deal, a loan of approximately US$ 150 million owed by Omirico to another company beneficially owned by ZM, Torresant Industry Ltd ('Torresant'), would be assigned to Fenti. A share sale and purchase agreement was produced. As the Claimants say, it was scheduled for execution in mid-March 2018, but was delayed by requests from Transneft for personal guarantees from ZM and MM.

(2) On 29 March 2018, ZM and MM met Mr Tokarev, the President of Transneft, to conclude the negotiations. The next day, on 30 March 2018, ZM and MM were arrested in Russia on what ZM contends to have been false charges of embezzlement. The Claimants contend that this arrest had been discussed at a meeting which occurred on 30 March 2018 between President Putin and Mr Tokarev, whom the Claimants say is a close ally of President Putin with an association going back to their days as KGB officers together in East Germany. The Claimants say that these two men discussed seizing control of NCSP, given its strategic importance to the Russian state. They say further that the sale of the shares in Omirico was delayed by Mr Tokarev by the device of asking for personal guarantees from ZM and MM, 'until the arrests of ZM and MM could be arranged'.

(3) As a result of the arrests, the proposed sale did not conclude. However, the Claimants contend that, in June or July 2018 the Tenth Defendant, Ms Mammad Zade, who had been CEO of ZM's corporate group and who, the Claimants say, effectively remained in control of substantial aspects of his business affairs, communicated a message to ZM in prison via his criminal lawyers. Ms Mammad Zade is said to have conveyed that Mr Tokarev had indicated that he would speak to President Putin to stop the prosecution of ZM and MM and would secure their release from prison, but only if they first agreed to sell Port-Petrovsk's shares in Omirico for a price of US$ 750 million. This the Claimants call 'the Threat'. The Claimants further contend that in making the Threat, Mr Tokarev, on behalf of Transneft, represented that he was capable of procuring the release of ZM and MM, that he intended to procure that release if ZM and Port-Petrovsk agreed to sell Port-Petrovsk's interest in Omirico for US$ 750 million, and that he understood that ZM and MM would be released if ZM and Port-Petrovsk agreed to sell that interest for US$ 750 million. These the Claimants call 'the Representations'.

(4) The Claimants say that ZM and MM did not agree to those terms. ZM conveyed to Ms Mammad Zade that he did not want to proceed with the reduced offer conveyed in the Threat.

(5) However, the transaction proceeded regardless. A SPA for the sale at US$ 750 million was signed, as the Claimants say without ZM's knowledge or approval, on 31 August 2018 by Mr Zaur Karmokov a director of Port-Petrovsk. It is said that this must have been as a result of a decision by Ms

Mammad Zade to allow the sale to proceed. This, the Claimants say, could only have been because either she was now acting in collusion with Transneft, or she was acting on the Threat that Transneft had made hoping to secure ZM's release from prison in return for doing the deal.

(6) The Claimants say that it is also significant that the Omirico SPA executed on 31 August 2018 included a term that did not appear in the March 2018 version, namely the identification of a specific bank account for the receipt of the proceeds of the sale at Sberbank. On 18 September 2018, following execution of the Omirico SPA but prior to completion, the Russian General Prosecutor sought and obtained, from the Tverskoy District Court of Moscow, an order that funds deposited or to be deposited in that account be seized. On completion of the transaction on 27 September 2018, the proceeds were seized. Those funds have ultimately been confiscated by order dated 27 May 2022. The result is that ZM and Port-Petrovsk have lost their interest in NCSP, in exchange for nothing.

(7) These alleged facts are said by the Claimants to give rise to causes of action in intimidation and duress (in relation to the Threat); misrepresentation (in relation to the Representations), and dishonest assistance (by Transneft of Mr Karmokov in his alleged breach of fiduciary duties as a director of Port-Petrovsk and of Ms Mammad Zade in her alleged breach of duties as a de facto director of ZM's corporate group).

The Claimants' Application

9. The Claimants contend that they have a good arguable case in respect of the NCSP Conspiracy and the causes of action which I have referred to. They

contend further that there is a real risk of dissipation of assets by Transneft. And they contend that, in the circumstances, it is just and convenient to make a notification order. The Claimants' position by the time of the hearing was that the order should require Transneft:

(1) to give 28 days' notice of an intention (a) to acquire or dispose of shareholdings in companies or stakes in partnerships anywhere in the world worth US$ 10 million or more, (b) to reorganise or alter its own capital structure, (c) to take on or pre-pay debt facilities in excess of US$ 50 million; (d) to commence, settle or discontinue litigation proceedings with a value in excess of US$ 10 million, or (e) to declare or pay dividends or otherwise distribute assets to shareholders or investors;

(2) within 10 working of service of the order to inform the Claimants' solicitors of all its cash balances exceeding US$ 1 million worldwide, and all other assets outside Russia exceeding US$ 10 million and all other assets within Russia exceeding US$ 50 million; and within 15 days after being served with the order should swear and serve an affidavit setting out this information.

10. For its part, Transneft opposed the application. In brief, its position was as follows:

(1) This is a case of extraordinary delay for which there is no credible explanation. On the Claimants' own case, ZM was aware of the facts comprising the alleged conspiracy by September 2018; but he had done nothing about it, and this claim had not been intimated, until the second half of July 2023.

(2) There is no good arguable case against Transneft. The allegations are not properly particularised, are based purely on inference, non-attributed multiple hearsay and circular reasoning and make factual allegations which are incoherent and illogical.

(3) There is no evidence which establishes a risk of unjustified dissipation.

(4) It would not be just and convenient to grant the relief sought, which would be extremely damaging to Transneft.

Legal Principles

11. I set out, in the October Judgment, the essential legal principles relevant to an application such as this. It is not necessary to repeat here all that is said there.

12. There are, however, two points which require expansion.

13. The first relates to the test of a 'good arguable case' on the merits.

14. At the October hearing, this was the subject of very little debate. I set out, in paragraphs [55] and [56] of the October Judgment what appeared, as between the parties who had then been represented, an essentially uncontroversial statement of the test, by reference, primarily, to the decision of Mustill J in Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The 'Niedersachsen') [1983] 2 Lloyd's Rep 600.

15. However, during the preparation for, and then after the present hearing, I identified two recent cases, on which I sought the parties' submissions. They are the decisions of Edwin Johnson J in Harrington v Mehta [2022] EWHC 2960 (Ch), and of Dias J in Chowgule v Shirke [2023] EWHC 2815 (Comm). In

each, the judge applied, as the merits test on an application for a freezing order, the test as to 'good arguable case' laid down in relation to jurisdiction gateways derived from Brownlie v Four Seasons Holdings Inc [2017] UKSC 80, and elucidated by the Court of Appeal in Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10.

16. In Harrington v Mehta, the judge addressed the test for a good arguable case in relation to freezing orders at [243]-[261]. Edwin Johnson J said that the basic test was that in The Niedersachsen ([243]), and referred to what was said in Kazakhstan Kagazy Plc v Zhunus [2014] EWCA Civ 381 at [25] by Longmore LJ ([244]), and by Nugee J in Holyoake v Candy [2016] EWHC 970 (Ch) ([246-247]). He then referred to the submission made to him that the law had 'recently moved on' by reference to the decision of the Court of Appeal in Kaefer v AMS. He noted (at [252]) that Kaefer v AMS had been concerned with a jurisdictional challenge, but referred to Lakatamia Shipping Co Ltd v Morimoto [2019] EWCA Civ 2203, and what Haddon-Cave LJ had said at [37]-[38] 'in the context of a dispute over whether a risk of dissipation had been shown in an application for a freezing order'; and to the citation of what had been said in Lakatamia v Morimoto in PJSC Bank Finance and Credit v Zhevago [2021] EWHC 2522 (Ch).

17. At [254]-[257] Edwin Johnson J said this:

> 254. The Claimants contended that it was wrong to conflate the test for good arguable case in the freezing injunction context with the test for good arguable case in the jurisdictional context. So far as good arguable case is concerned however, both Haddon-Cave LJ in *Lakatamia* and the Chancellor in *PJSC* do

not appear to draw this distinction, at least in the context of showing a good arguable case in relation to the question of risk of dissipation. It may be that any such distinction derives from the fact that the test of good arguable case in the context of jurisdiction had come to engage the concept of having much the better of the argument; whereas now the use of the word *"much"* in this formulation of the test of good arguable case has been discredited in the jurisdictional context.

255. Where does all this leave the test of good arguable case? I accept the submission of Mr Higgo that the law has moved on from a simple 50% test of good arguable case. It seems to me that, in applying the test of good arguable case, I should take account of the analysis of Green LJ in *Kaefer*, and the three limbed test as reformulated by Lord Sumption in *Goldman Sachs*.

256. It is not entirely clear to me, in my reading of the above test, how it applies to issues of law or construction, which may or may not depend upon the resolution of factual issues. It seems to me that the question of what view can be taken on issues of law or construction at this interim stage depends upon the nature of the issue. The overriding point is that it is for the Claimants to show that they have a good arguable case, both in respect of issues of fact and issues of law which arise in relation to the Claims. I add that, in relation to issues of law, it seems to me that it is not open to me simply to dismiss an issue of law as too difficult to deal with at this stage. I must, at the least, take a view on whether the Claimants have demonstrated a good arguable case on the issue.

257. It also seems clear that it is perfectly proper for a court, in applying the test of good arguable case, to adopt the yardstick of considering whether one party or the other has the better of the argument, both on a particular issue and on the relevant case as a whole. Returning to *Kaefer*, this is explained by Davis LJ, in his short judgment agreeing with the judgment of Green LJ, in the following terms at [119] (underlining added):

"119 I am in something of a fog as to the difference between an "explication" and a "gloss". But whatever the niceties of language involved, it is sufficiently clear that the ultimate test is one of good arguable case. For that purpose, however, a court may perfectly properly apply the yardstick of "having the better of the argument" (the additional word "much" can now safely be taken as consigned to the outer darkness). That, overall, confers, in my opinion, a desirable degree of flexibility in the evaluation of the court: desirable, just because the standard is, for the purposes of the evidential analysis in each case, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either)."

18. In Chowgule v Shirke Dias J said this, at [43]-[46]:

43. There was some debate before me as to what exactly the Claimants must demonstrate in order to show the requisite good arguable case. I was referred by Mr Salzedo to *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV,* [2019] EWCA Civ 10; [2019] 1 WLR 3514. This concerned a jurisdiction challenge where the judge at first instance had applied the same test of "good arguable case" in relation to the question of jurisdictional gateway. At paragraphs 57ff, the Court of Appeal discussed the nature of the test to be

applied in some detail and, in particular, whether it was absolute (such that the claimant need only meet a specified evidential threshold irrespective of whether its case was stronger or weaker than that of the defendant) or relative (requiring the claimant to show that its case was relatively stronger than that of the defendant).

44. After reviewing the authorities, the Court concluded that there could no longer be any doubt but that the three-limbed test first articulated by Lord Sumption in *Brownlie v Four Seasons Holdings Inc,* [2017] UKSC 80; [2018] 1 WLR 192 at [7] and subsequently endorsed by the Supreme Court in *Goldman Sachs International v Novo Banco SA*, [2018] UKSC 34; [2018] 1 WLR 3683 was now authoritative:

"In my opinion [the good arguable case test] is a serviceable test, provided that it is correctly understood. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice Horni A Hotni Tezirstvo v Korner *[1951] AC 869. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."*

45. The Court of Appeal did, nonetheless, give useful guidance on the application of this test in practice. As to limb (i), it held that this is a relative test which requires an evidential basis showing that the claimant has the better argument. Limb (ii) requires the court to seek to overcome evidential difficulties and arrive at a conclusion on any disputed issue of fact if it reliably can, applying judicial common sense and pragmatism. If, however, it is unable to decide which side has the better argument on the material then available, limb (iii) allows some flexibility for the court to move away from a relative test and assume jurisdiction provided there is sufficient plausibility of evidence to support it.

46. I approach the present application on that basis.

19. Mr Saoul KC, for the Claimants, submitted that both Harrington v Mehta and Chowgule v Shirke were wrong in law in applying the test derived from Brownlie in the context of freezing injunctions.

20. For his part, Mr MacDonald KC for Transneft recognised that the 'good arguable case' standard had historically been interpreted and applied differently in the separate contexts of applications to challenge jurisdiction and applications for freezing injunctions. He submitted, however, that Edwin Johnson J's approach in Harrington v Mehta and Dias J's approach in Chowgule v Shirke was sound, and, if it was a development of the law, it was one which should be followed. The words 'good arguable case' should mean the same in both contexts.

21. After careful deliberation, but without real doubt, I consider that Harrington v Mehta and Chowgule v Shirke are wrong insofar as they apply the three-limb test derived from Brownlie in the context of applications for freezing orders.

22. What may be called 'the Niedersachsen test', namely a case 'which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success' is a test which is long-established and has been applied very frequently. It was called 'the traditional test' by Elias LJ in Kazakhstan Kagazy v Zhunus, at [66], and by Newey J in Holyoake v Candy at [15]. It was cited with approval by Tomlinson LJ in Lakatamia Shipping Company v Su [2014] EWCA Civ 636 at [32].

23. That there have been developments in the law on the test to be applied in relation to jurisdiction gateways does not mean that there has or should have been a change in the law in relation to the test to be applied in relation to freezing injunctions. As Longmore LJ said in Kazakhstan Kagazy v Zhunus at [25]:

'But I see no reason why that test [viz that which was applicable in the jurisdictional gateway context] should apply to freezing injunctions where ex hypothesi (or subject to any jurisdictional challenge) the defendant is properly before the court.'

While it is correct that Longmore LJ was there considering a test in the context of jurisdictional gateways of 'much the better of the argument', which was subsequently refined to 'the better of the argument', that refinement is immaterial to the question here. What is significant is that in Kazakhstan Kagazy v Zhunus Longmore LJ identified that there was no reason why the test for those purposes should be that for freezing orders.

24. Moreover, in Kazakhstan Kagazy v Zhunus Elias LJ said, at [67]:

> 'It is true that in adopting the good arguable test Mustill J was following the decision of Lord Denning in Rasu Maritima S.A v Perusahaan Pertambangan Minyak Dan Gas Bumi Begara (The Pertamina) [1978] QB 644, and Lord Denning had in turn adopted it in the context of a freezing order because he thought that the jurisdiction test was appropriate, at least where the case involved a foreign defendant (see p.661G). But there have been developments in the law relating to jurisdiction since, and although a claimant in both jurisdiction and freezing order cases must establish a "good arguable case", the policy considerations are different in the two situations and it is far from obvious that this inherently flexible concept must have the same meaning in each context. *Indeed, even in jurisdiction cases the good arguable case test only goes to the question whether the claim falls within one of the grounds set out in PD6B para.3.1. We are concerned with the merits of the case, and so far as they are concerned, a claimant in a jurisdiction case has only to show that there is a serious issue to be tried: see Seaconsar Ltd v Bank Markazi [1994] 1 A.C.438, 457 per Lord Goff of Chieveley.*' (emphasis added)

25. The point made by Elias LJ in the sentences I have emphasized is significant. The test of 'a good arguable case' in relation to jurisdiction relates to the issue of whether there is an available gateway. It is not the merits test. There is no reason why the test in relation to gateways should be applied as the merits test in relation to freezing orders: it is directed to a different end.

26. In none of Brownlie, Goldman Sachs v Novo Banco or Kaefer v AMS was it suggested that the approach to the jurisdictional gateway question also applied or should apply in the context of freezing orders.

27. There appear to me to be good reasons why the three-fold test applied in those cases should not be applied in the context of freezing orders. That test, at least as to the first two limbs, involves a relative assessment of the parties' positions. The making of such a relative assessment is liable to draw the parties and the court into the conduct of 'mini-trials'. A relative assessment encourages the parties to bring forward at this early stage, every piece of evidence which might suggest that they have the better of the argument. This is likely to lead to more of the court's resources being absorbed in interlocutory hearings brought on, very often, on an urgent basis. This is deprecated in the authorities, and would place an even greater burden on the court, where the number and scale of urgent applications is already causing strains. Moreover, to apply such a test in the context of freezing orders would widen, without apparent reason, the gap between the merits test to be applied in relation to interlocutory applications for proprietary injunctions, which is the American Cyanamid test of a serious issue to be tried (see, for example Haque v Hussain [2020] EWHC 2739 (Ch), and *Gee on Commercial Injunctions* (7th ed), 2-022, 12-027), and that applicable to applications for freezing orders.

28. Further, I apprehend that to adopt a test which involves a relative assessment of the parties' positions, at least at the first two stages is to put the merits bar too high to serve the interests of justice. In the type of cases in which freezing orders are very often sought, including cases of alleged fraud, dishonesty, bad

faith and the like, it may be difficult for an applicant to demonstrate, at an early stage and prior to disclosure, that it has the better of the argument on the merits. While I fully recognise that the gravity of a freezing order requires a merits test markedly higher than simple arguability, I consider that there is a danger that the adoption of the Brownlie test in relation of freezing orders may deny to victims of wrongdoing the interim protection which the freezing jurisdiction is designed to provide.

29. There is substantial support in the text books for the proposition that the merits test in relation to freezing orders is not the same as that for jurisdictional gateways. *Gee on Commercial Injunctions* (7th ed), para. 12-033 says this, in my judgment correctly:

'The test on the strength of the merits needed for Mareva relief is not the test used to ascertain whether the claimant has brought itself within a jurisdictional gateway. [footnote 147] That test is to be applied at the time that proceedings are commenced because depending on whether it is satisfied there either was or was not jurisdiction at that time, and there does not cease to be jurisdiction because of later developments in the facts. The test used for jurisdiction challenges has been considered in a series of cases and is a tri-part test … In Mareva cases the all-important question is whether, at the time of the hearing and determination of the application for the injunction, in the circumstances of the case, it is "just and convenient" to grant it. Because of the intrusion into the defendant's affairs resulting from a Mareva injunction there is a threshold test on the strength required on the merits, which is a "good arguable case". A requirement that a court must form the provisional view that the claimant will

probably succeed at trial would be inconsistent with an approach which enables the court to achieve "its great object viz abstaining from expressing any opinion upon the merits of the case until the hearing". Nevertheless, the court will take into account the *apparent* strength or weakness of the respective cases in order to decide whether the claimant's case, on the merits, is sufficiently strong to reach the threshold, and this will include assessing the apparent plausibility of statements in affidavits.'

Footnote 147 in that passage is a reference to Kazakhstan Kagazy Plc v Zhunus [2014] 1 CLC 451.

30. In the White Book 2023 (15-23), the Niedersachsen test is referred to as having been 'widely adopted' and 'is to be applied in all cases before the question of any freezing injunction relief can arise.' It is then stated that while the test of 'much the better of the argument' has been employed in relation to jurisdiction

'… the concept is reduced in scope when considered in relation to freezing order applications. No findings of the facts are required and the Court is astute to avoid resolving issues of fact which will fall to be determined at a full hearing later in the litigation.'

31. In *O'Hare & Browne on Civil Litigation* (20th ed), it is stated (at 27-020), the *Niedersachsen* test is set out, and the following is added:

'This test is easier for the claimant to pass than is the test applicable in the case of injunctions which will finally dispose of an action … and easier than the "good arguable case" test applicable on challenges to the jurisdiction of the English courts (see … Kaefer Aislamientos SA de CV v AMS Drilling Mexico

SA de CV [2019] EWCA Civ 10 and Kazakhstan Kagazy Plc v Arip [2014] EWCA Civ 381 at [25]).'

32. The basis on which Edwin Johnson J considered that the law had moved on in the context of freezing orders is principally the decision in Lakatamia v Morimoto. In my judgment what was said there does not establish that the Brownlie test is applicable in relation to freezing order applications.

33. The passage which is principally relevant is that at [33]-[38] in the judgment of Haddon-Cave LJ. That it was not intended there to effect any significant change in the tests applicable to the grant of freezing injunctions is strongly indicated by what Haddon-Cave LJ says at para. [33], namely 'The basic legal principles for the grant of a WFO are well-known and uncontroversial and hardly need restating.'

34. Furthermore, Haddon-Cave LJ referred, at [35], to *Gee on Commercial Injunctions* (6th ed), and to the merits test being 'not a particularly onerous one.' While he referred to the analysis of the concept of a 'good arguable case' 'in the context of jurisdictional gateways' at [38], he did not say that this was applicable to applications for freezing orders; and he did not set out the three-fold test. His concluding sentence, that 'the central concept at the heart of the test was "a plausible evidential basis"', is not, as I understand it, a disapproval of the 'Niedersachsen test'. It is rather, in my view, a recognition that in this context, in relation to disputed questions of fact, a case will not be more than barely arguable if there is no plausible evidential basis for it.

35. It does not appear that Kazakhstan Kagazy v Zhunus was cited. Furthermore, the issue of whether the merits test for a freezing order was or was not the same

as the test of a good arguable case in relation to jurisdictional gateways does not appear to have been the subject of argument, and was certainly not the focus of the appeal. The notice of appeal was concerned with challenging the judge's findings as to risk of dissipation (see [39]). The respondent's notice challenged the judge's findings as to a good arguable case, but Haddon-Cave LJ indicated that those points were probably not open to the respondent, and in any event were disposed of on the basis that appeals on jurisdictional issues are deprecated and the judge had not made a clear error of principle (see [71]-[76]).

36. Edwin Johnson J also referred to what was said by the Chancellor of the High Court in PJSC Bank Finance v Zhevago [2021] EWHC 2522 (Ch). The only relevant passage, however, is at [171]-[172] where the Chancellor quoted what was said in paragraphs [37]-[38] of Lakatamia v Morimoto, and said that he had indicated during the course of argument that applying that test, the claimants could show a good arguable case, and that counsel for the defendants had, 'taking a realistic approach', not sought to persuade him to the contrary.

37. The Niedersachsen test has been applied in a number of first instance decisions since Lakatamia v Morimoto, which include: Advanced Multi-Technology for Medical Industry v Uniserve Ltd [2023] EWHC 2147 (Ch), at [31]-[34]; AQR Capital Management v London Metal Exchange [2022] EWHC 3313 (Comm), at [27]; and 381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd [2022] EWHC 2244 (TCC) at [34].

38. Very recently, in Omni Bridgeway (Fund 5) Cayman Investment Ltd v Bugsby Property LLC [2023] EWHC 2755 (Comm), Jacobs J said, at [8]:

> 'The test of "good arguable case" is well-known in the context, for example, of freezing injunctions. The authorities in this area are summarised in *Gee: Commercial Injunctions* 7th edition, paragraphs 12-032 – 12-033 drawing on classic statements of Mustill J. It is not enough to show an arguable case, namely one which a competent advocate can get on its feet. Something markedly better than that is required, even if it cannot be said with confidence that the plaintiff is more likely to be right than wrong. It is therefore not necessary for the applicant to have a case with a better than 50 per cent chance of success.'

39. I consider that that statement of the position is correct, and summarises the test which I should apply.

40. The other aspect of the legal principles applicable to the present application which I should refer to at this stage is the Claimants' argument that, in considering whether there is a risk of unjustified dissipation of assets, the court is concerned with whether the respondent is the 'type' of person who might engage in such activity. They referred to what was said by Flaux J in The Nicholas M [2008] EWHC 1615 (Comm) at [53], and in particular his statement that the alleged conduct '… revealed that these owners [were] the sort of people who [would] stop at nothing to frustrate the charterers from making any substantial recovery by dissipating their assets, unless restrained by freezing order.' They further referred to what was said by Haddon-Cave J in Baldwin v Sheikh Saud Al-Thani [2012] EWHC 3156 (QB) at [31(4)], namely that if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly 'or with unacceptably low standards of morality

giving rise to a feeling of uneasiness about the defendant … then it is often unnecessary for there to be any further specific evidence of dissipation…'

41. These statements, in my judgment, are simply applications of the principle that, in certain cases, the allegations made in the substantive case against the respondent may be a basis for concluding that there is a risk of unjustified dissipation. They are not support for an approach whereby, other than by reference to such an inference or other solid evidence, the court can or should form a general impression of the respondent and if it is adverse conclude that there is a risk of dissipation, and still less that a 'feeling of uneasiness' about a respondent or its standards of morality would be sufficient for such a conclusion.

Is an Order Appropriate?

42. As a preliminary point, it is important to observe that the present application is in very many respects different from that which I considered in October relating to the Claimants' claims in respect of the so-called 'FESCO Conspiracy'. In particular, the target asset of the two conspiracies was different, the most relevant events of the NCSP conspiracy are said to have occurred at a different, and significantly earlier, time than those relevant to the FESCO Conspiracy, the Defendants relevant to each are different (save for Ms Mammad Zade, who has not been served), the nature of the acts said to be relevant to each of the conspiracies are significantly different, and the NCSP Conspiracy has only just been alleged, while the FESCO conspiracy, or aspects of it, have been being pursued and litigated for several years.

Have the Claimants shown a good arguable case on the merits?

43. I have already outlined the nature of the Claimants' case on the merits.

44. In submitting that there was a good arguable case, Mr Saoul emphasised the following points:

(1) That NCSP is an asset of strategic importance to the Russian state.

(2) That the Russian state has a track record of seizing such assets, using corporate raids and criminal prosecutions to order. For this he relied on a report from Professor Bowring.

(3) Although the quality of the evidence about the Threat is criticised, it has to be appreciated that ZM is in prison and has to give instructions from there. It is not to be expected that a threat like this would be put in writing.

(4) The price which was ultimately agreed (US$ 750 million) represented an extraordinary reduction from the price agreed in March 2018. Transneft had produced no documentation showing negotiations between it and Port-Petrovsk leading to that price in the period between ZM and MM's arrests and the conclusion of the sale. Transneft's suggestions as to why the price was lower than that agreed in March do not account for the extent of the reduction in the price.

(5) Ms Mammad Zade remained in charge of the transaction in that period. She must have agreed to the price now proposed by Transneft either because 'she ha[d] now turned' and was colluding, in which case there is an unlawful means conspiracy, or because, knowing about the Threat, she thought it was in ZM's interests to do so, in which the Threat was operative and there were various causes of action against Transneft.

(6) Mr Karmokov had only been appointed sole director of Port-Petrovsk three weeks before he signed the SPA. He could not possibly have formed a view, in that time, of whether the deal was in the company's best interests. He must have relied on others, in particular Ms Mammad Zade.

(7) Ms Mammad Zade gave an interview to the press about a month after the completion of the transaction in which she said that the price of US$ 750 million was 'in the same category as it was originally', adding that it was 'fair and correct' and that 'Transneft behaved honestly and decently in the current situation.' The statement as to the 'same category' was, Mr Saoul said, obviously a lie.

(8) The case had to be looked at in the round.

45. Mr MacDonald mounted a sustained attack on this case.

46. In summary, he submitted:

(1) That the case was of an elaborate conspiracy involving a convoluted set of facts and a large cast of conspirators, which was inherently implausible.

(2) That the implausibility of the claim has to be seen in light of the 'extraordinary delay' in the Claimants' bringing it. The alleged facts occurred some 5 years ago, and yet no claim was intimated before this year. ZM is not, Mr MacDonald said, shy of bringing proceedings, as shown by the long-standing litigation in the BVI involving the alleged FESCO Conspiracy.

(3) That no conspiracy was needed to confiscate ZM's interest in NCSP to the Russian state. The Russian state could have done that much more simply, on the basis that ZM is a convicted criminal and his interest in NCSP was, as the Russian courts have said, the product of corruption.

(4) The Threat lacks a plausible evidential basis. What is said is that Mr Tokarev conveyed the Threat to an unnamed vice president of Transneft, who told Ms Mammad Zade, who told ZM's unnamed criminal lawyers, who told ZM, who told Mr Bushell who deposed to it. This multiple hearsay, unattributed in two respects, is unsupported by any documentary evidence.

(5) In any event, even if the Threat was made, ZM's own case is that he did not act on it. Accordingly it was nugatory. To overcome this, the Claimants have to bring in Ms Mammad Zade and Mr Karmokov as the instruments by which the conspiracy produced any effect. The problem with that, Mr MacDonald said, was that there was 'no evidence at all' to support it. As to the suggestion that Ms Mammad Zade instructed Mr Karmokov to agree to the SPA, the Claimants had themselves recognised that they did not know whether she gave him instructions. And even if she did instruct or encourage him to do so, it is entirely possible that she did so because she was acting in what were, or at least which she considered to be, Summa Group's commercial interests.

(6) Matters such as the Putin-Tokarev meeting on 30 March 2018 establish nothing. President Putin has annual meetings with Mr Tokarev and with

executives of other important Russian companies. The official transcript of this meeting does not indicate that there was any discussion of NCSP or ZM.

(7) Equally, the point about Transneft seeking personal guarantees is misplaced. The case was originally that personal guarantees had been sought in mid-March and that had delayed execution of the SPA. However, in fact, personal guarantees had been sought since February 2018. The Claimants' case had therefore evolved to suggest that Transneft put forward certain revised terms for the personal guarantees in order to delay execution. But, Mr MacDonald said, the proposed revisions were entirely consistent with a normal commercial negotiation.

(8) There is no plausible evidence that there was anything wrong with the sale price. The SPA was signed by Mr Karmokov, in the presence of four other members of the management of the Summa Group: Mr Kant Mandal, Mr Mironov, Ms Medvedeva and Mr Economou. They apparently thought it was in the interests of the Summa Group: there is no evidence that they did not. There were a series of reasons why the sale price was lower than had been settled on in March 2018. NCSP's share price had fallen noticeably between 1 April and 1 July 2018, associated with a change in exchange rates and loss of market confidence related to ZM's imprisonment; there were additional losses anticipated from possible tax charges; and the fact that there would not be the anticipated personal guarantees from ZM and MM itself had an effect.

(9) It is only ZM who says that the price was too low; and his credibility in this respect is undermined because his current case is that Port-Petrovsk's share

in Omirico was worth some US$ 5 billion (POC para. 253) and yet he himself was prepared to sell it for some US$ 1.3 billion. Furthermore, why should Transneft have agreed too low a purchase price if, as is implicit in the Claimants' case as to the conspiracy, whatever was paid was going to be seized by the Russian state anyway?

(10) The Claimants got nothing out of Ms Mammad Zade's interview. She had denied that there was anything wrong with the transaction. The Claimants were trying to 'cherry pick' the parts they wanted to rely on and say other parts were untruthful. There were various possible explanations for what she had said and meant as to the price being in the 'same category' as previously.

47. My conclusion, applying the test which I have referred to above, is that the Claimants have shown a case which, albeit with little to spare on the present material, passes the threshold of good arguability. Clearly in saying this, I am judging only the current appearance of the case; and am not saying that that case will or is likely to succeed at trial. In those circumstances, it is necessary and appropriate for me to say only the following as reasons for this conclusion.

(1) There is material suggesting that the Russian state may previously have engaged in conduct analogous to that alleged here.

(2) The case is founded on ZM's evidence as to the Threat. While that evidence is based on multiple and in part unattributed hearsay, those points have to be considered in light of the nature of the evidence and the fact that ZM is in a Russian prison.

(3) ZM's account of the Threat can be said to be corroborated by the fact that the transaction subsequently completed for US$ 750 million (ie the price which had been mentioned in the Threat). While of course it might be that ZM had tailored his account of the Threat to accord with the price of the concluded transaction that would be a matter for trial.

(4) There is at present before the court no documentation or evidence relating to how the price was actually negotiated between Port-Petrovsk and Transneft after ZM's arrest. One might have expected, if there were documentation or evidence of a commercial negotiation, that it would have been produced or at least summarised, even at this stage in the proceedings.

(5) There are at least serious questions as to why the price had dropped so significantly in the period between March and when the price of US$ 750 million was agreed.

Is there a real risk of dissipation of assets?

48. I turn to the question of whether there has been shown to be a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets.

49. The Claimants' case is that they have shown such a risk. They relied in particular on the following:

(1) The nature of their case on the merits. This, they said, was 'ample evidence of the type of deliberate, immoral and wholly untrustworthy conduct which supports a conclusion that there is a real risk of dissipation here.'

(2) Evidence of what they described as 'actual and recent dissipation' of assets. They referred to the redomiciliation of CPC Investments Company (Cayman Islands).

(3) An incident of October or November 2022, before ZM's and MM's convictions. This concerned the debt of US$ 150 million which Omirico had owed to Torresant. Omirico had not paid, and as a result Omirico, a Cypriot company, was placed in provisional liquidation. Mr Tokarev then intervened, in October or November 2022, by writing to the Russian Deputy Minister of Internal Affairs to say that Omirico had an irrevocable deposit with Sberbank PJSC in the amount of US$ 150 million which the liquidator of Omirico planned to use to pay Torresant. Mr Tokarev said that given that Torresant might be associated with ZM and MM one of the liquidator's goals might be to transfer funds in favour of ZM and MM 'currently defendants in criminal case number […], whose property may be of value for repaying the damage caused to the Russian Federation as a result of crimes.' He continued: 'Please take into account the information provided as part of resolving the issue of seizing funds placed with Sberbank in order to pay off property damage caused to the Russian Federation, as well as preventing their exit (under the guise of liquidating and repaying a loan) in favour of the beneficiaries of the group "Summa".' As a result of that letter, the Claimants say, the Sberbank funds were frozen, and ultimately confiscated by the Russian courts.

50. Transneft submitted that there was no real risk of an unjustified dissipation of assets by Transneft. It made the following points:

(1) That it had put in detailed evidence as to its asset position in Stepanchuk -1.

(2) What this indicated was that Transneft is the largest oil pipeline company in the world. It is a holding company for a corporate group which holds in aggregate some US$ 40 billion of assets. Nearly all of Transneft's and the Transneft Group's assets are in Russia. Most are of a nature which could not be dissipated, comprising largely oil pipeline infrastructure and ancillary assets. Transneft itself has only very limited non-Russian assets, namely representative offices in Hungary, Poland and Belarus, and bank accounts holding c. £80,000. The Transneft Group, whose assets are in any event irrelevant because the order sought is only against Transneft, holds limited assets outside Russia, which are either of no value, or not of a type which could be dissipated (such as the Transneft Group's 7% interest in CPC-K JSC which owns the Kazakh section of the Caspian Pipeline Consortium pipeline network).

(3) The redomiciliation of CPC Investments Company (Cayman Islands) was unconnected to the Claimants' claim and was for legitimate reasons.

(4) The nature of the claim itself was not evidence of a risk of dissipation. Even if the Claimants had a good arguable case, Transneft had arguable defences to it. Moreover, its nature was not such as to be evidence of a risk of dissipation.

(5) There was no reason to believe that Transneft's evidence in relation to its assets had been in any way incorrect.

51. I consider that the Claimants have shown a real risk of dissipation.

52. It is right that Transneft is an organisation which has very considerable assets. However, most of those assets are in Russia, and there are at least serious doubts as to whether an English judgment in favour of ZM would be enforceable there. The difficulty of enforcing against assets because of their location does not, of itself, provide evidence of a risk of dissipation (see October Judgment, para. 62). But the fact that a judgment might not be enforceable in Russia does mean, in my view, that the size of its Russian assets, and the fact that they are of a nature which could not easily be dissipated, cannot be relied upon by Transneft as a complete answer to the case on risk of dissipation. It is necessary to consider whether there is evidence that Transneft might dissipate any assets which were more amenable to enforcement.

53. I consider that there is. I do not, in this regard, place a great deal of weight on the nature of the case on the merits. While it is right that I have concluded that the Claimants have a good arguable case on the present material, it is also right to say that my assessment is that that threshold has not been surpassed by very much. In addition, there appear to be a number of arguable defences available to Transneft, as outlined in para. 64 of Mr MacDonald's Skeleton Argument. Furthermore, the nature of the allegations against Transneft as to what it did in 2018 are not of conduct the same or closely analogous to moving or hiding assets to avoid liabilities or prevent enforcement against them.

54. Of more weight is the evidence of the redomiciliation of various of Transneft's assets located outside Russia. In particular there is evidence that there has been the elimination of intermediate layers of foreign ownership of Russian assets. I accept that the redomiciliation of CPC Investments Company (Cayman Islands)

was initiated in February 2023, before the present claim was made or intimated, and that it was not, itself, an attempt to make Transneft more effectively judgment-proof in respect of the current claim. Nevertheless it would be consistent with Transneft's redomiciliation strategy to remove further assets located outside Russia, back to Russia, if they were threatened with effective enforcement.

55. What most weighs with me, in concluding that there is solid evidence of a risk of dissipation, is neither of the two previous matters, but the letter from Mr Tokarev to the Deputy Minister of Internal Affairs of October or November 2022. This was a step taken to ensure that the provisional liquidators of Omirico could not obtain the assets earmarked to pay an undisputed debt owed to Torresant, on the basis that those assets might otherwise go to ZM and MM.

56. Mr MacDonald said that that could, without the Claimants' 'tunnel vision' of a conspiracy, be regarded in effect simply as the responsible act of a good corporate Russian citizen, given that ZM and MM were accused (and shortly afterwards convicted) of embezzlement and corruption. It is not, however, unreasonable to think that Transneft may equally, and acting from the same motives, seek to prevent the enforcement of a future judgment in favour of ZM and MM, given that they will still be convicted criminals in Russia. This constitutes, in my view, solid evidence of a risk that Transneft may seek to frustrate the enforcement of a judgment against it and that it may dissipate or otherwise deal with its assets to that end.

57. Unlike in the case of the alleged FESCO conspiracy, ZM's case as to the NCSP conspiracy has only recently been made. Here, unlike there, it cannot be said

that the absence of evidence of dissipation of assets in the face of a known claim counts against the existence of a risk of dissipation. This is, rather, a case in which the Claimants have delayed bringing their claim. That may be of forensic significance in relation to the merits of that claim, but the delay does not, in my view, count strongly against the grant of a notification injunction, for the reason referred to in paragraph 64 of the October Judgment.

Is it just and convenient to grant the order?

58. I turn to the question of whether it is just and convenient to grant a notification injunction. In considering this, I have taken into account the views I have formed as to good arguability and risk of dissipation.

59. I have also considered the balance of prejudice between the parties. I recognise that a notification order can be very onerous and potentially damaging to the party injuncted and, in the case of an entity of the size of Transneft, can be practically difficult to comply with and to monitor. I consider, however, that these features can be met in this instance, to a large degree, by a properly tailored order, which will be one which does not impose obligations on Transneft unjustified by their utility to the Claimants. While I will receive further submissions on the precise terms of the order, my current views as to the terms of the order sought are:

(1) I do not consider that there should be an order that Transneft give advance notice of its intention to acquire shareholdings in companies or stakes in partnerships. It may be that there should be a requirement for any such acquisitions to be notified after the event. In relation to the disposal of shareholdings/stakes in partnerships, there should be a separate, and higher,

threshold, in relation to shareholdings/stakes in partnerships in Russia, as opposed to elsewhere in the world in relation to which the threshold of US$ 10 million appears appropriate.

(2) I do not consider that there should be an order that Transneft give advance notice of its intention to take on or pre-pay debt facilities; or of its intention to commence, settle or discontinue litigation proceedings. But there should be advance notice of an intention to reorganize or alter Transneft's own capital structure.

(3) There should be a financial threshold in relation to the requirement to notify an intention to declare or pay dividends.

(4) In relation to the matters summarised in paragraph 9(2) above, the order should be confined to the provision of information as to assets outside Russia.

(5) There should be provisions for a 'confidentiality club' or other confidentiality measures.

Cross Undertaking

60. There was argument as to whether, if an order were to be granted, the Claimants' cross-undertaking in damages should be fortified. Transneft sought that the court should order the Claimants to pay a sum of US$ 250 million into court, on the basis that the quantum of loss which might be suffered by Transneft 'is incalculable but potentially enormous.' The Claimants contended, for their part, that there should be no order for fortification because Transneft had not put in any solid evidence of a risk of loss or any material which would allow an

intelligent estimate to be made of the likely amount of any loss which may be suffered.

61. Given that the nature of any injunction which the court might be willing to grant will not have been clear until this judgment, I think in fairness to Transneft it should have a further opportunity of putting in evidence as to what damage it says may be caused by an injunction of the sort I have indicated in this judgment that I am prepared to grant. I will give directions at the time of hand down of this judgment as to the service of any such evidence. I should emphasise that I will expect any further evidence which is served to be realistic. Once any such evidence has been served I will revisit the question of whether there should be fortification of the cross-undertaking.

Conclusion

62. Taking all the circumstances of the case into account, I consider that there should be a notification injunction. I will, as already indicated, receive further submissions as to the precise terms of the order to be made, unless they are agreed.