Bank St Petersburg PJSC, Alexander Savelyev v Vitaly Arkhangelsky, Julia Arkhangelskaya v Oslo Marine Group Ports LLC

Case No: HC-2012-000165

High Court of Justice Chancery Division

23 October 2015

[2015] EWHC 2997 (Ch)

2015 WL 6395282

Before: The Honourable Mr Justice Hildyard

Date: Friday 23rd October 2015

Hearing dates: 22 and 23 September 2015

Further written submissions 30 September, 9, 16 and 19 October 2015

Representation

Tim Lord QC , Simon Birt QC and Richard Eschwege (instructed by RPC) for the Claimants.

The Defendants appeared by their McKenzie friend, Mr Pavel Stroilov.

Judgment

Mr Justice Hildyard:

Scope of this judgment

1 After a two-day Case Management Conference heard in vacation on 22 and 23 September 2015 I reserved for further consideration certain issues relating to an application by the Defendants for disclosure which seemed to me to be of some complexity. In addition, in the aftermath of that hearing, there was disagreement between the parties on various points in relation to the drafting of the requisite minute of order. Further, a point canvassed at the hearing as to whether expert reports should be translated into Russian for the benefit of the Defendants remains in dispute. The purpose of this judgment is to address those issues and points of disagreement. Other points argued over the course of those two days have been resolved.

2 I do not think it necessary to set out the factual background of this dispute arising from the (so far successful) efforts by the Bank of St Petersburg ("the Bank") and its chairman Mr Savelyev (together, "the Claimants") to wrest a large group of companies in the Russian Federation known as the Oslo Marine Group ("OMG") from the control and ownership of the Defendants and Part 20 Claimants, Mr and Mrs Arkhangelsky ("the Defendants"). That background is summarised in a decision of the Court of Appeal [2014] EWCA Civ 593 and various previous judgments of my own in this matter. I can confine myself to the immediate factual context, as I describe it in addressing separately the various issues that now arise.

Disclosure

3 I start with the application for disclosure made by the Defendants and admirably argued on their behalf (with my permission, after the Defendants' previous solicitors, Withers, came off the record) by their McKenzie friend, Mr Pavel Stroilov ("Mr Stroilov").

4 The Defendants make their application primarily in the context of their counterclaim ("the Counterclaim"). The Defendants contend that the Claimants' existing disclosure is deficient and sheds practically no light, one way or the other, on any of the key events and issues alleged in the Counterclaim, such as:

(1) the arrangements between the Bank and OMG in December 2008 for the restructuring of OMG's indebtedness, partly recorded in a "Memorandum" dated 30 December 2008 recording at least some of its terms;

(2) the arrangements recorded in that "Memorandum" for OMG to transfer by way of security (for a nominal consideration) to seven "special companies" ("the Original Purchasers") nominated by the Bank (five in the so-called "Renord Group") of 100% of the shares in two of its group companies, namely Western Terminal (which owned a 7.4 hectare site with two berths in the Port of St Petersburg) and Scandinavia Insurance ("Scan"), a marine insurance and reinsurance company which also (together with another OMG entity, LPK Scandanavia) owned another terminal in the Port of St Petersburg, called the Onega Terminal, and the "repo" arrangements for such shares to be returned to OMG following repayment of the loans;

(3) the further arrangements also recorded in such "Memorandum" whereby the Bank agreed (a) not to interfere in the management of OMG, (b) not to increase interest rates on the loans or demand early repayment and (c) not to transfer the shares transferred as security ("the pledged shares") to any third party, provided that OMG complied with its obligations to the Bank;

(4) the alleged breach by the Bank of the terms of an alleged "Moratorium" apparently envisaged in the "Memorandum" in demanding repayment of the loans in March-April 2009, and the subsequent (a) removal of Mr Arkhangelsky as Director-General of Scan and Mr Vinarski as Director-General of Western Terminal and (b) immediate "sale" of the pledged shares for (allegedly) far less than market value to other companies ("the Subsequent Purchasers"), five in the Renord Group and the sixth a company called SKIF LLC ("SKIF");

(5) the part played by three individuals in the "repo" arrangements, namely (a) Mr Mikhail Smirnov ("Mr Smirnov") a former employee of the Bank and the owner (possibly on behalf of another) of the so-called Renord Group, (b) Mr Leonid Zelyenov ("Mr Zelyenov"), the owner and/or controller of the other two Original Purchasers and (c) Mr Valdimir Sklyarevsky ("Mr Sklyarevsky"), the legal owner of SKIF;

(6) the pledges in favour of the Bank of alleged valuable assets of OMG (in particular of Western Terminal and Scan);

(7) subsequent dealings (over the course of 2009 to 2012) with the assets of Western Terminal and Scan between various companies in the Renord Group, and then their sale at (what are alleged to be) gross undervalues at what the Claimants claim are public auctions, but which it is alleged by the Defendants were falsely so described and/or rigged.

5 The Defendants' case is that these various events, which the Claimants contend represented the lawful enforcement of pledges, demonstrate a conspiracy to steal OMG assets for a fraction of their value, and that they should be entitled to disclosure of all relevant documents, including those relating to the transfers of shares to and by Renord Group companies and dealings in OMG's assets within the Renord Group.

6 The Defendants contend that the disclosure in respect of these events and matters provided by the Claimants thus far is inadequate, to the point of being wholly lacking in relation to the issues particular to the Defendants' Counterclaim and OMG's third party claim.

7 The Defendants' application to remedy this deficiency can be (and in argument was) divided into two main parts: (a) disclosure sought of documents physically in the possession of the Claimants and (b) disclosure of documents not presently in the physical possession of the Claimants but said to be under their control.

8 As to (b), the Defendants seek disclosure of any documents held by, or by any company controlled by, three named individuals (Mr Smirnov, Mr Zelyenov and Mr Sklyarevsky) relating to its arrangements with the Bank with respect to the pledged shares or OMG assets, and any dealings in such pledged shares or assets.

9 The Defendants also seek disclosure of like documents from the liquidators of three companies in winding up in the Russian Federation, being principal subsidiaries in the OMG.

10 To assist discussion of the issues arising from the disputed parts of the Defendants' amended application notice ("the Defendants' Application") and its Schedules, a copy is attached to this judgment.

Part 1: Documents in physical possession of the Claimants

11 As indicated above, the Claimants confirmed at the hearing their agreement to carry out "reasonable searches" of files held by or in respect of the committees and departments of the Bank listed in paragraphs 1 to 5 of Schedule 1 to the Defendants' Application and of documents of E.M. Kolpachkov and Konstantin Solovyev held by the Claimants (as identified in paragraphs 6 and 13 respectively of that Schedule).

12 The Claimants also confirmed their agreement to make further reasonable enquiries of their identified custodians (if still employed by the Bank but including Mrs Irina Malysheva).

13 Further they confirmed their agreement to carry out further "reasonable" searches for the categories of documents listed in paragraphs 1 to 7 of Schedule 3 to the Defendants' Application and for documents relating to the Claimants' dealings with the persons identified in paragraph 8 of that Schedule in relation to the repo arrangements or shares or assets the subject of repo arrangements.

14 In the latter context (paragraph 8 of Schedule 2) I should record that in their application the Defendants sought any documents relating to the Claimants' dealings with the persons identified in (a) to (o) of that paragraph. The limitation by reference to the nature of the dealings was introduced at my suggestion. Mr Stroilov treated my intervention (which was intended to be constructive) as an order, which he would have to accept but indicated that he would not be happy about it. At the conclusion of the hearing he asked that I should explain in writing why I had proposed the limitation. The reason is simple, and is as I explained it at the hearing: I considered the unlimited request to be plainly too broad (since it would extend to myriad dealings having no or no sufficient connection with the matters in issue), and the search required, particularly at this stage in the proceedings, to be disproportionate. The wording I suggested was simply a proposal. I shall consider any alternative formulation which the parties may propose.

15 I should, before turning to the more generally disputed aspects of the Defendants' Application, also note that I quite understand both the importance attached by the Defendants to obtaining fuller disclosure of documentation to explain the *prima facie* somewhat disturbing train of events which is the subject matter of their Counterclaim and their concern as to the apparent insufficiency of disclosure thus far. Insofar as the Claimants have not yet disclosed documents physically in their possession and relating to that train of events (including documents described in Schedule 3 to the Defendants' Application), it is high time they did so.

16 I direct further, however, that the Claimants should explain in their verified further disclosure statement (a) what such "reasonable" searches entailed, (b) any restriction or limitation on the searches adopted on the grounds of reasonableness and (c) why the searches were not undertaken in the ordinary course of disclosure (which was undertaken by the Claimants' previous solicitors).

Part 2: Documents allegedly controlled by Messrs Smirnov, Zelyenov and Skylarevsky

17 By the second and more complex part of their application, the Defendants seek to extend the searches required to documents held by persons other than the Claimants, but said to be under

the legal or practical control of the Claimants.

English procedural test of control

18 “Control” is non-exclusively defined for the purposes of English procedural rules relating to disclosure in CPR 31.8(2) as follows:

> “…a party has or has had a document in his control if –
>
> (a) it is or was in his physical possession;
>
> (b) he has or has had a right to possession of it; or
>
> (c) he has or has had a right to inspect or take copies of it.”

19 As to the test of a “right to possession” for the purposes of CPR 31.8(2)(b) , both sides relied on *North Shore Ventures Limited v Anstead Holdings Inc [2012] EWCA Civ 11* , where the Court of Appeal held in para 40:

> “In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8 , the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of “right to possession” in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency. But even if there were on a strict legal view no “right to possession”, for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party within the meaning of CPR 31.8(1) . CPR 31.8(2) states that for the purpose of CPR 31.8(1) a party has or has had a document in his control if the case falls within paragraphs (a) to (c). It does not state that a party has or has had a document in his control if but only if the case falls within one of those paragraphs.”

Defendants' submissions

20 The Defendants contend that like the Original Purchasers, the Subsequent Purchasers and other Renord Group companies hold any documents acquired or generated in holding or dealing with the pledged shares and OMG assets, to the order of the Bank as its nominees and/or agents, and that the Bank is entitled to possession of such documents so as to require it to disclose them pursuant to CPR 31.8(2)(b) .

21 Mr Stroilov contended that under the English law of agency or nomineeship any documents acquired or generated by the agent or nominee in the conduct of business or affairs on behalf of his principal would be the principal's property; and even if agency or nomineeship could not be demonstrated, a situation “akin to agency” would suffice. In the latter case, the test to be adopted, in line with the North Shore case, was whether “as a matter of fact the documents were nevertheless within the control” of the Bank, whatever might be the legal relationship under the relevant law between the Bank and the holder of the disclosable documents. As to the relevant law, Mr Stroilov submitted that English law governed; though he added that the “precise position under the Russian law is likely to be similar, but is in any event irrelevant given the ultimately factual test prescribed by CPR 31.8 for determining ‘control’”. My impression was that, in the end, Mr Stroilov preferred to emphasise that factual test, rather than any strict legal right: put another way (and to adopt his own formulation) he relied on:

> “a relationship that is sufficiently akin to agency to come within the North Shore Ventures test”.

22 The Defendants rely on the following indicia of a relationship in which the Bank is entitled in law or in fact to the documents identified:

(1) the acceptance by Mr Smirnov, the CEO of the Renord Group (and in particular, its parent company Renord-Invest), in his witness statement dated 28 August 2015 that he understood the purpose of the "repo" arrangements to be to provide the Bank with a means to ensure effective security until repayment of the loan, at which time the shares would be transferred back to OMG, and that he

"did not see the "repo" transaction as a big deal. Renord-Invest would simply hold the shares on an interim basis and in accordance with the Bank's instructions";

(2) Mr Savelyev's confirmation in his first witness statement made on 27 August 2015 that such "repo" arrangements were in standard use by Russian banks at the time, and that their purpose was, by ensuring that the Bank would obtain an interest in OMG, to:

"safeguard assets held by [OMG companies] from being unlawfully dissipated or otherwise transferred in such a way as to prevent the Bank from enforcing its rights against those assets, in the event that the debts were not discharged";

(3) the evidence of Mr Sklyarevsky, General Director of the SKIF group in the Russian Federation, that (a) the "key motivation" of the transfers on to the Subsequent Purchasers was to frustrate any OMG claims in the Russian courts and to protect the Bank by making it more difficult for Mr Arkhangelsky to unwind the transfers and that (b) the management changes in Scan and Western Terminal after the alleged "default" and the transfers on to the Subsequent Purchasers were at the direction and on the instructions of the Bank (showing the Bank's continuing interest and control);

(4) Mr Smirnov's evidence that the onward transfers to the Subsequent Purchasers were directed by him "due to Renord-Invest's operational needs at the time" and to make any challenge by Mr Arkhangelsky to the legitimacy and effectiveness of the pledges of shares more difficult;

(5) Mr Smirnov's evidence that after the alleged "default", and "over time",

"Renord-Invest became interested in purchasing some of the assets for its own investment projects and did so at public auctions and for the market value…";

(6) Renord-Invest and SKIF between themselves controlled all Subsequent Purchasers, most of the intermediate holders of assets, and all ultimate purchasers of pledges at purportedly "public auctions";

(7) Renord-Invest is the majority shareholder of Baltic Fuel Company, which has ultimately acquired all Western Terminal assets (pledged or unpledged), and is now utilising them in a successful seaport business, allegedly broadly similar to Mr. Arkhangelsky's.

23 Further, the Defendants maintain that the Claimants' own evidence makes clear that the Bank dealt directly with Messrs Smirnov, Sklyarevsky and Zelyenov, and that "they, not their individual companies, were the Bank's agents".

24 The Defendants contend on this basis that all relevant documents held by any of the three

individuals or entities owned by any of them should be disclosed. Further, though specific entities are named, the disclosure sought goes wider still, on the basis that, given the changing corporate structure of the Renord Group, "it would be artificial and impractical to limit the search to specific companies". Mr Stroilov urged me to ignore the separate corporate personality of the bodies corporate comprising the Renord Group and to "look through the corporate veil" in the case of them all. He added:

> "Simply put, the Defendants say that the Bank and Renord is controlled by the same group of people and/or members of the same conspiracy, to the extent that, for practical purposes, it is unnecessary to distinguish between them. The Bank describes Renord, SKIF and Mr. Zelyenov as its well-established clients and independent parties; and has consistently emphasised that point."

25 Based on these assertions the Defendants seek an order to compel a search of any documents disclosable under English rules of procedure in the custody, possession or control of:

> (1) Mr Smirnov (or any corporate entities owned and/or controlled by him, including, but not limited to, Renord-Invest and any nominees of Renord-Invest);
>
> (2) Mr Zelyenov (or any corporate entities owned and/or controlled by him, including, but not limited to, Agetnstvo Po Upravleniyu Aktivami LLC, Gelios LLC, or any nominees of those companies);
>
> (3) Mr Sklyarevsky (or any corporate entities owned and/or controlled by him, including, but not limited to, SKIF and any nominees of SKIF).

Claimants' response

26 The Claimants, appearing through Mr Tim Lord QC and Mr Simon Birt QC with Mr Richard Eschwege, reject these submissions and object to the orders sought and any such disclosure.

27 The Claimants accepted that the English procedural rules, as part of the law of the forum, govern issues as to disclosure, and determine questions as to what rights in respect of documentation will constitute "control" over it. However, Mr Lord submitted (in effect) that if the rights in question were legal rights, then the law governing those rights would determine their existence and extent; whereas if the rights relied on were not strict legal rights, but said to exist as "a matter of fact", then the fact of that right had to be demonstrated specifically. It was not enough to show a relationship "akin to agency": if the right fell short of a strict legal right, the practical ability to obtain the documents without requiring the consent of another person (not itself being a puppet) had to be established.

28 The Claimants deny any such agency, nominee or "puppet" arrangements between the Bank and the Original or Subsequent Purchasers, any Renord Group entity, or any of the three individuals. They contend that they have no right to possession of such documents and that such documents are not within their "control" for the purposes of CPR 31.8 . They point out and object also to the extreme width of the search sought.

29 Mr Lord submitted that the Defendants had not established either any strict legal right or any analogous or in practical terms equivalent right: on the contrary, he submitted, there was no basis for any finding that the Bank had any right to require the three individuals to produce documentation, still less documentation in the possession of any of the myriad companies in which they were interested. As he put it in his oral submissions:

> "No basis has been set out and no agency has been set out that ultimately drills down to some specific documents that the bank has the right to call for without more."

30 More particularly, the Claimants contend that:

(1) The individuals concerned (Messrs Smirnov, Zelyenov and Sklyarevsky) do not work for the Bank: each of them is an independent businessman.

(2) The fact that, as a favour to the Bank, they agreed that companies under their control would hold shares as part of the repo transaction does not change that. It did not give the Bank any entitlement to their documents.

(3) The Bank cannot be expected to conduct a disclosure search for documents held by " *any corporate entities owned and/or controlled by* " any of these three individuals, still less any held by unnamed " *nominees* " of particular companies. The Defendants' formulation does not even restrict the search to documents within the control of the Bank (it assumes that every document held by every one of the companies owned or controlled by these men can be searched for by the Bank); moreover, there is no explanation as to how the Bank is to know which companies fall into this category. Still further, it is not clear how and by what process the Bank is to obtain their documents.

(4) The orders sought would be impossible for the Bank to implement (or for the Court to police).

31 The Claimants also stress that the question of the relationship between the Bank and the Renord Group and other transferees of OMG assets is of great significance to the Counterclaim, as indeed the Defendants themselves accept and assert: the Claimants urged me energetically against its summary determination.

My analysis and proposed directions

32 It is the further application for documents not presently in the physical possession of the Claimants that causes more problems. As it seems to me, the principal difficulties with the Defendants' Application are the proposed characterisation of the three named individuals as agents or quasi-agents of the Bank whereby to reach into not only the Original Purchasers and the Subsequent Purchasers but all their companies as in effect their document depositaries, resulting in its extreme (and on any view excessive) width and scope, and the practical difficulties of enforcement.

33 As to the position of the three named individuals (Messrs Smirnov, Sklyarevsky and Zelyenov), I take it for present purposes that they were the individuals who dealt with the Bank in agreeing that (and determining which of the) entities under their control should hold and nominally exercise rights in respect of the pledged shares pending repayment (and their return to OMG) or alternatively default (and their transfer to or at the Bank's direction).

34 Further, it does seem to me to flow inexorably from the description given of the "repo" arrangements in the Claimants' own evidence that neither such individuals nor the entities thus selected were to have any personal interest in the pledged shares, and that they and any entities they nominated to the Bank for the purposes of holding the pledged shares as security would simply hold the pledged shares and any rights (including voting rights) attached to such shares to the order of either the Bank (in the case of voting) or possibly OMG (in the case of distributions etc) pending repayment or default (as the case might be).

35 However, since it is not suggested that the relationship between the Bank, the individuals and their companies was ever expressly defined in writing, the question arises what their rights *inter se* were (a) under the law governing the various relationships and/or (b) in fact or practical reality.

36 Four relationships have to be examined: (i) that between the Claimants and the three individuals; (ii) that between the Claimants and the Original Purchasers; (iii) that between the Claimants and the Subsequent Purchasers; and (iv) that between the Claimants and any subsequent purchasers of the pledged shares.

37 As to (i), and though the precise relationship between the Claimants and the three individuals was never expressly defined, it seems to me that the latter acted, and have accepted that they

acted, as intermediaries in arranging for and on behalf of the Bank to hold the pledged shares through entities they nominated. As to (ii), the nominated entities (the Original Purchasers) received and held such shares on behalf of and subject to the instructions of the Bank (which might be direct or given through such intermediary). The position as regards the Subsequent Purchasers is less clear; by that time, the Bank appears to have been treating OMG as being in default, so that on one view its own rights in respect of the pledged shares may have altered; but it seems to me that the Claimants must be taken to have accepted in their evidence that the Subsequent Purchasers stepped into the shoes of the Original Purchasers and as against the Bank acquired no different rights and were subject to no different obligations than they were.

38 If those relationships were governed by English law, I would accept that they would be, or be analogous to, agency or nomineeship and that (absent express contrary provision) documentation under the agent or nominee's control entrusted to him or brought into being in the course or conduct of the agency or nominee relationship (other than the agent/nominee's own working papers, see *Chantrey Martin v Martin [1953] 2 QB 286*) would be held to the order of the principal (see, for example, *Bowsted & Reynolds on Agency,* 20th ed. at 6-090). Whether the same would apply under the Russian law (which seems overwhelmingly likely to have defined and governed the relationships) I am not told and cannot know. I suppose I would be entitled, on usual principles, to assume, in default of other proof, that the Russian law and English law are the same. But given the timing of the process (and especially the imminence of trial), this assumption may be of little practical utility, since enforcement would depend on what the Russian law actually is.

39 In any event, even assuming the Russian law to be the same as English law, that would not entitle the Bank as principal to require its immediate agents (the three named individuals) to disclose all documentation relating to the principal: only to documentation relating to the course or conduct of the agency relationship. And even on the same assumption, wholly owned or controlled companies of the named individuals would not thereby become agents of the Bank: they would be agents (or perhaps more accurately sub-agents) only if and to the extent that they undertook the agency role primarily assigned to the relevant named individual.

40 Furthermore, and as I took Mr Stroilov eventually to accept, purchasers of the pledged shares from such entities would not thereby become agents of the Bank, even if the transaction might be called in question, and even if such purchasing entities were also owned or controlled (directly or indirectly) by one or more of the three named individuals. They would not take such shares as agents or sub-agents but as purchasers in their own right.

41 Turning then away from strict legal rights to consider whether the Bank might have a more amorphous right in practice (by reference to the North Shore case) to documents in the present possession of the three named individuals or companies owned or controlled by them, I must admit to finding it difficult to understand what might be relied on. Absent contractual right to the documentation (whether called agency, nomineeship or otherwise) I have not been told of any other basis for a practical right of “control” except perhaps the dominion that the three named individuals may in practice have over the companies they own or control. As to that, however, English law is quite clear that except in very exceptional circumstances (usually that of a one-man company) a shareholder does not “control” the company's documents, since the consent of the directors is required (see *Lonrho v Shell [1980] 1 WLR 627*); and I have been told of no Russian law to the contrary.

42 In combination, the effect of the analysis in paragraphs [33] to [41] above is to confine any possible obligation of disclosure to documents entrusted to, or brought into being by, the named individuals or the Original or Subsequent Purchasers in the course or conduct of their role in acting in respect of the pledged shares on behalf of or on the instructions of the Bank, and to which the Bank would, under the governing law of the agency or nomineeship, be entitled (thus, under English law, excluding the agent or nominee's own working papers).

43 Then (as already foreshadowed above) the question arises as to the practical prospects of enforcement in Russia of any order in the time available: for any order is ultimately discretionary, and must be proportionate, always having regard to the importance of proper disclosure (which Mr Stroilov repeatedly but understandably stressed and I accept).

44 Having regard to the practical difficulties (including difficulty and delays in enforcement) it seems to me that, in this uncertain and difficult situation, some practical solution must be found.

45 Subject to further argument if required, what I would propose is to direct that the Claimants (or their solicitors) should write to each of the three named individuals and each of the Original and Subsequent Purchasers explaining that for the purpose of these proceedings the Claimants require them within an appropriate defined period to provide a copy of any documents in their possession relating to the transfer, retention or sale by them of the shares, which were the subject of the repo transaction, or to the exercise of any voting rights or receipt of any distributions in respect of those shares whilst in their name or otherwise held for the benefit of the Bank. The form of the letter should be agreed by the parties and approved by the Court. I would propose then to direct production forthwith by the Claimants of any documentation provided, and a verified statement of any response from the three individuals and the Original or Subsequent Purchasers (or lack of it). I accept that this is a *via media* ; and, as indicated, I shall consider alternative proposals if advanced: any such proposals should of course be informed by and take into account the analysis that I have put forward.

Part 3: Documents held by liquidator(s)/administrators

46 The third outstanding issue arises in relation to the Defendants' Application (see paragraphs 10 to 12 of Schedule 1) for documentation held by the liquidator of Vyborg Shipping (paragraph 11) and the Administrators of Scan and Onega respectively (paragraphs 10 and 12), if indeed those are the correct appellations of the office holders in the Russian insolvency procedures concerned.

47 The basis advanced by the Defendants for such disclosure is that (according to Mr Arkhangelsky's 17th Witness Statement) the Bank is the “major creditor” of Scan and Vyborg Shipping and “the biggest creditor” (even if not “the majority creditor”) of Onega LLC. In that 17th Witness Statement, Mr Arkhangelsky also states that the Bank is in any event:

> “represented in the Assembly of Creditors and probably in the Committee of Creditors, and would therefore have a right to inspect at least some documents. The bankruptcies of those three companies are clearly highly relevant to the issues in these proceedings, and appropriate searches must be carried out.”

48 When I pressed Mr Stroilov as to whether he could provide any further support than these statements for the factual and legal propositions as to the rights of a large or major creditor with some presence on relevant committees, he rather disarmingly accepted that he could not and that he could only really rely on “common sense”.

49 Suffice it to say that I do not consider that the test for disclosure is made out in respect of these documents; a clear and presently enforceable right in the Bank would have to be established, and it has not been.

Points of detailed drafting of the Order in dispute

50 The remaining issues in respect of disclosure relate to the precise wording of the draft Order.

51 The first relates to the wording of a paragraph to require additional searches and a supplemental disclosure statement in respect of documents formerly held at the Bank's “subsidiary office Olymp” at 191167 St Petersburg, Ispolkomskaya (“the Olymp Branch”, which I am told was closed in December 2010) and now said to have been destroyed, archived or transferred to another branch. The Defendants seek additional wording requiring the Claimants to exhibit any documents within the Claimants' custody, possession or control evidencing such destruction. The Claimants object on the basis that I did not mention this when, in the course of the hearing, I declined to order a further search but did order clarification of the circumstances of such destruction.

52 Until receipt, after I had circulated an earlier draft of this judgment, of a letter from the Claimants' Solicitors dated 21 October 2015, I was proposing to order that, as part of the clarification I have required to be given, the Claimants should exhibit any protocol or other documents that they have in their possession authorising and evidencing such destruction. However, that letter set out in more detail than had originally been provided the circumstances in which part of the documentation at the Olymp Branch had been archived at the Bank's storage

premises, part of it transferred to another branch (called DK-2) and part of it destroyed after the expiry of the Bank's document retention policies and regulatory obligations in accordance with the Bank's standard procedures. Emphasising that the Olymp Branch was not the branch which was responsible for managing the debts of Mr Arkhangelsky or the OMG companies' debts, and having provided that more detailed explanation, the Claimants' Solicitors have now proposed (in the same letter) that the supplemental disclosure statement which I have required should simply formally confirm the explanation given in that letter. By letter dated 23 October 2015, Mr Stroilov on behalf of the Defendants has responded negatively to this suggestion, and indeed has relied on what he has depicted as inconsistencies in the previous explanations given to support a renewed request for a further search of documents formerly held at the Olymp Branch. I shall finally determine the terms of my order in this regard after hearing further argument following the formal handing down of this judgment.

53 The second point of detail in issue on the draft Order relates to electronic devices held by Mr Savalyev (the second Claimant) and Irina Malysheva (who was until recently Deputy Chairperson of the Bank, who was centrally involved in the “repo” arrangements, and who it seems left in circumstances of some curiosity). The Claimants have revealed that these devices, which might have yielded disclosable material of some importance, have apparently been destroyed.

54 As I understand it, a further paragraph has been suggested to require an explanation of this, as discussed in correspondence between the parties, though the issue was not expressly referred to in the Defendants' Application or in submissions.

55 This is a matter which does cause me some concern. Subject to any issue of privilege, I provisionally consider that the Claimants should exhibit any documents under their control which authorise or record such destruction, and any documents evidencing the fact of it, and its revelation. However, given that this was not focused upon at the hearing, I shall consider any submissions in this regard which either side wishes to put before me in writing.

56 The third point of detail in dispute in relation to the draft Order relates to a provision requiring the Defendants to disclose any documents (unless legally privileged) referred to by Mr Mikhail Nazarov (a Russian attorney practising in St Petersburg who represents Mr Arkhangelsky in connection with criminal proceedings in Russia) in a witness statement dated 23 January 2014. At the hearing, the Defendants agreed to provide such disclosure subject only to an issue as to the extent of privilege and any waiver of it; but they now seek to limit a provision requiring such disclosure to documents “falling within the scope of standard disclosure”. The Claimants object, and cite CPR 31.14(a) and (b) , which provides for disclosure of any document mentioned in a statement of case or witness statement. I consider that the Claimants are right about this: the additional wording is an afterthought and should not be included.

Expert Reports: whether translation into Russian is required

57 The last matter I must address is whether expert reports must be translated into Russian, most especially for the benefit of Mrs Arkhangelskaya, whose English is very limited. As I understand the position, this was not thought necessary whilst the Defendants had the benefit of legal representation; but the withdrawal of Withers is an obvious change of circumstances necessitating a review of the arrangements for service of all documents.

58 The parties have made good progress in agreeing a process for service of documents, as the draft Order records and provides; but on the service of expert reports they remain disagreed.

59 The Claimants make the point that translation into Russian of long, technical and complex expert evidence is time consuming and expensive. They point out that the Defendants' own expert reports are in English. They suggest that, although Mrs Arkhangelskaya may well need to understand fully the factual evidence, and it has been agreed that these should be translated into Russian for her, the expert evidence is largely an exchange between experts on banking practice and Russian law and not likely to be a debate which she is involved in or can be cross-examined about.

60 Against this, the Defendants contend that it is an essential part of a fair trial that the parties to it should be informed of all aspects of the case against them in a language which they understand. Having joined Mrs Arkhangelskaya as a defendant it does not lie on the mouth of the

Claimants to seek to minimise her needs and rights, including rights under Article 6(1) of the European Convention on Human Rights (which has direct effect in France, where she resides), in this context. Whilst they may be more flexible as regards exhibits, which they suggest should be dealt with on an *ad hoc* or item by item basis, they insist that translations should be provided as a matter of fairness.

61 Mr Stroilov has also drawn my attention to Regulation (EC) No 1393/2007 (Service Regulation). This provides in recital (12) and in Article 8 that the addressee has a right to refuse service of a document if it is not " *either in a language which he understands or in the official language or one of the official languages of the place of service* ". Mr Stroilov accepts that this provision alone does not necessarily create a right for the addressee to elect between a requirement of a French translation and " *a language which [s]he understands* ". Technically, it may be possible for the Claimants to effect valid service in French and without a translation to a language which the Second Defendant understands. However, Mr Stroilov submits that:

> (1) In accordance with the settled EU rules of interpretation, the interpretation of the Regulation must advance its purposes. In the light of recitals (1) and (2), as well as the right to a fair trial, the purpose of Recital (12) and Article 8 is to validate service in a language which the addressee understands even if it is not an official state language. It is not an intention of the Regulation to limit an addressee's right to a fair trial by validating service of documents in a language which she does not understand.
>
> (2) In any event, in this case the Defendants have agreed to dispense with the requirement of a French translation and a number of other onerous requirements to service under the French law on the condition that the documents would be accompanied by Russian translations. Unless that condition is satisfied, the Defendants are not prepared to waive any of their rights under the French law, such as service by authorised bailiffs and accompanied by a French translation. Alternative service would have to be ordered by the Court if, and only if, the Court is satisfied that there are sufficiently good reasons to dispense with those requirements without the Defendants' consent.

62 Thirdly, Mr Stroilov has drawn my attention to Article 688 of the (French) Civil Code , which precludes a French court from adjudicating the merits of a case against a party out of jurisdiction unless either (a) it is satisfied that the party had " *taken knowledge* " of the relevant documents or (b) valid service was attempted but there is evidence of evasion of service. The phrase " *has taken knowledge* " (*"a eu connaissance"*) implies that the document must be served in a language which the party understands. Mr Stroilov again accepts that Article 688 is not directly applicable to this case, but submits that "the principle of reciprocity is universal in international law on service, and therefore, the same requirements should apply to the service of foreign documents in France".

63 Finally, Mr Stroilov has drawn my attention to correspondence between the parties in September 2012 directed towards agreeing methods of alternative service. He has particularly cited the following exchange:

> (1) On 4 September 2012, M. Ameli of BEA Avocats, representing the Defendants in France, proposed the following relevant terms:
>
> "ii. Our clients agree to dispense with the requirement of translation into Russian of correspondence between the parties and of any court documents (orders, directions, allocation questionnaires).
>
> iii. Save for the dispensations in point (b) and the documentary exhibits with Russian originals, all other documents served on our clients must be accompanied by a Russian translation."
>
> (2) On 4 September, Baker & MacKenzie responded (para 4):

> "(b) On the basis that translations of all court documents (including application notices, draft orders and disclosure lists in addition to those listed by you) be dispensed with, out understanding is that only witness statements, including exhibits, and expert reports will require translation. Please confirm that the above is consistent with your understanding.
>
> (c) While our clients agree to translate exhibits as a general rule, there may be occasions where the translation of a certain document might be disproportionate (e.g. where the document is very large and only one page is relevant). In those cases the parties should cooperate to reach an agreement regarding the need to translate that document, but in the absence of such agreement the document should be translated (without prejudice to any claim for costs)."

64 Mr Stroilov informs me that to the best of his recollection the Claimants complied with this agreement when serving the respective expert reports of Mr Millard, Mr Popov and Dr Giles in February 2014. He tells me that a brief search of his computer has revealed the Russian translation of the valuation report of Mr Popov and various appendices and exhibits to both valuation reports served by the Claimants at that stage.

65 As already pre-notified to the parties by email dated 14 October 2015, in my judgment, the expert reports should be translated into Russian. Fairness and consistency seem to me to point clearly to this conclusion. Despite the admirable (and *pro bono*) assistance of Mr Stroilov, the Defendants are already at a disadvantage in not having legal representation, and in being unable to leave France to contest the matter closer at hand. I must accept that Mrs Arkhangelskaya wishes herself to have the opportunity to review the expert evidence in a language she understands; and that both Defendants may wish to consult with knowledgeable friends and *pro bono* experts whose English may be limited. Whilst I am not convinced that to deny them such opportunities would of itself result in a breach of any enforceable right, it seems to me that the balance plainly favours eliminating this potential source of apparent potential unfairness. Further, in light of the previous agreement evidenced by the correspondence to which I have been referred, the Claimants can have no real complaint; and consistency supports that result.

66 An immediate practical or logistical problem arises because, thus far, the Claimants have not arranged for translations to be made, in reliance on (a) what they understood to have been the dispensation of any requirement therefor whilst Withers were acting for the Defendants, so that such requirement now is "new (and unexpected)" and (b) their understanding that "expert reports to date have generally not been served with translations".

67 The Claimants tell me that from, as it were, a standing start, it would take at least a week to obtain translations if four individual linguists were to be instructed, and it would take three to four weeks to obtain translations from a single linguist, which they maintain would be preferable "for the sake of continuity and in light of availability at the translation agency".

68 Mr Stroilov, on behalf of the Defendants, does not accept any of this. Although on this particular occasion agreeable to a reasonable extension of time for the service of the translations, he contends that (a) it should have been obvious that such translations should be obtained, (b) the Claimants should have started earlier rather than assuming a dispensation and then presenting a *fait accompli* , and (c) a delay of three weeks or more would result in "the worst of both worlds: it places the burden of translating the reports on the Claimants, but deprives the Defendants of much of the benefit". Mr Stroilov suggests that one week should suffice.

69 I can understand Mr Stroilov's concerns. The trial is close. The most urgent and thorough efforts should be made to strive for a lesser delay. However, the Claimants' solicitors have (by email dated 19 October 2015) expressly confirmed that (a) they have been informed by their translation service that it will take "up to 21 days" to produce translations of the reports but (b) they will "of course use best endeavours to see that the translations are available as soon as practicable, and will serve them as soon as they are available." I cannot gainsay any of this. I accept the commitment to do all that can be done to accelerate the process; and at latest, the translations must be served by 4pm on 13 November 2015. On a more positive note, the

Claimants have confirmed also that the exhibits to the reports “are already in Russian”. I assume that these have already been served.

70 As to further expert reports, the Claimants' solicitors have stated in the same email that they are not in a position to say how long will be needed for translation but that they will provide an indication once the length of the reports is known. I assume that arrangements have already been made with the translation service providers. Even though I understand that the task is of uncertain quantity, now that the requirement is clear, I should expect the translations to be available within seven days at most. Any more than that must be carefully and particularly justified.

71 A further logistical difficulty may arise in respect of any exhibits to such further reports which are not already in Russian. I proposed in my email to the parties, in line with what I understood to be the Defendants' willingness to be reasonably flexible, that the Defendants should within seven days after service make specific requests for translations to be made, explaining the reasons for any such request, and that then they be at liberty to restore any dispute to the Court (for which purpose I shall, if necessary, make myself available before or after ordinary Court hours). However, Mr Stroilov has adopted a harder line: he now submits that such an arrangement would be “wrong in principle with regard to an element of the second defendant's right to a fair trial, but it is also impractical in the final three months before the trial”. He proposes that where the Claimants seek the Defendants' consent to dispense with a translation of exhibits, they should write to the Defendants in advance and identify the nature of the relevant exhibits. That description may be in broad and generic terms, but must be sufficiently clear to enable the Defendants to identify whether (1) it is necessary for Mrs Arkhangelskaya to read the exhibit and (2) it is necessary to ask any other person who only reads Russian to read the exhibit.

72 I am, on reflection, concerned that my original proposal for the identification of exhibits requiring translation after service of the English version will simply lead to delay. In my view, the default position should be that the exhibits should be translated. In line with that, the Claimants should proceed on that basis, unless they can persuade the Respondents otherwise on a case by case basis. I invite the parties to seek to agree a process.

Postscript

73 After I had completed most of this judgment in draft, I received from the Claimants' Counsel a Note I had requested on a further issue which arose in the course of the hearing as to the Court's power to grant a right of audience on an *ad hoc* basis to a party's McKenzie friend when that party is a body corporate rather than an individual acting in person.

74 Though no authority has been found, that Note (for which I am very grateful) helpfully sets out the applicable framework as regards McKenzie friends. It suggests the conclusion that, given that CPR 39.6 does now allow an employee of a body corporate duly authorised to do so by it to appear at trial on its behalf with the permission of the Court, the Court does have jurisdiction to allow a body corporate the assistance of a McKenzie friend, and in appropriate (and exceptional) circumstances to allow that McKenzie friend a right of audience on an *ad hoc* basis. The Note also identifies a case where it appears that the Court assumed that to be so: namely, Tracto Teknik GmbH v LKL International [2003] EWHC 1563 (Ch) ;

75 I agree that the Court has such jurisdiction, as part of its power (in the absence of specific restriction) to regulate its own proceedings and, in circumstances where otherwise the body corporate would have no-one capable of speaking for it, to prevent a failure in the administration of justice (and see also *A.L.I. Finance Ltd v Havelet Ltd [1992] 1 WLR 455* at 460-461). I agree further that the Legal Services Act 2007 at Schedule 3 assumes and recognises such jurisdiction (as did its predecessor, the Courts and Legal Services Act 1990) even if it does not expressly confer it. Thirdly, I consider that since the jurisdiction is inherent, neither Rule 39.6 nor Practice Direction 39A is an exclusive and complete code, so that the Court may give permission in exceptional cases even where neither that rule nor the Practice Direction (which prescribes the form of the evidence of authority which must be provided where a company or corporation is to be represented by an employee) has been complied with.

76 In that latter context the Note provided to me very properly referred me to two cases in the Court of Appeal which might be read as having assumed the contrary (that is, that CPR 39.6 and

PD 39A provide a complete code): see *Watson v Bluemoor Properties Ltd [2003] BCC 382* (particularly paragraphs 7 and 11-15) and *Avinue Ltd v Sunrule Ltd [2004] 1 WLR 634* (particularly at paragraph 25). However, it does not seem to me that in either case the issue whether the Court retains jurisdiction in exceptional circumstances to permit someone other than a director or employee to represent a body corporate was directly addressed. I note that it does not appear that the A.L.I. Finance case was cited in either of the two cases. In my view, there is nothing in either of those cases which binds me to hold that the jurisdiction of the Court, as propounded in the A.L.I. Finance case at a time before the CPR , has been restricted by rules intended to introduce, not less but greater, flexibility. I also consider that it is unlikely that the jurisdiction should be so limited in the case of a body corporate, but unconfined in the case of a litigant who is an individual.

77 Nevertheless, it is for obvious reasons essential that the Court should know with some particularity on what basis it is invited to give permission, and how and on what basis it is invited to hear the proposed representative. I shall consider submissions from the parties as to whether, in particular, the authority of the Defendants to represent OMGP, and for that purpose to seek permission for Mr Stroilov to speak for them, has sufficiently been demonstrated. I shall also consider the scope of Mr Stroilov's role, in light of the Claimants' recently expressed concerns in that context.

Conclusion

78 I would ask the parties to seek to agree a revised draft Order in conformity with this judgment. If there remain drafting points in dispute I shall deal with these after this judgment is formally handed down. The other matters which I have identified above as requiring further submissions can be dealt with at the same time.