Neutral Citation Number: [2014] EWHC 3102 (Comm)

Case No: 2005-534

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2014

Before:

MR JUSTICE ANDREW SMITH

Between :

Fiona Trust & Holding Corporation & ors	**Claimants**
- and -	
Yuri Privalov & ors	**Defendants**

Steven Berry QC and Nathan Pillow (instructed by **Lax & Co LLP**) for the **3rd, 4th, 14th 15th, 16th and 17th Defendants**
Michael Brindle QC, Dominic Dowley QC and Justin Higgo
(instructed by **Ince & Co**) for the **Claimants**

Hearing date: 28 July 2014

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW SMITH

Mr Justice Andrew Smith:

Introduction

1. In this judgment I adopt the abbreviated forms used in my judgment delivered on 10 December 2010 after the trial of these proceedings, [2010] EWHC 3199 (the "December 2010 judgment").

2. The applicants seek directions for an assessment of compensation to be paid under undertakings given to the court when it made freezing orders against them and other defendants. The claimants resist the application on the grounds (i) that the court should exercise its discretion not to enforce the undertakings because of conduct of or attributable to the applicants, and (ii) that the applicants have not shown a sufficient case that they suffered loss that should be compensated.

3. I do not need in this judgment to give a detailed explanation of the claims in the proceedings, and it is sufficient for present purposes to cite this description of the relevant schemes from paragraph 47 of my December 2010 judgment:

> "The schemes between defendants that are said to be corrupt ... are these:
>
> i) The "Sovcomflot Clarkson commissions" scheme, by which between 2001 and 2004 it was arranged that Clarkson should act as brokers for the Sovcomflot group, to buy and sell ships and should pay "commission" upon the purchases and sales to Mr. Nikitin or at his direction. It is said that as a result the Standard Maritime defendants and other companies ... have been paid over $30 million, ...
>
> ii) The "Tam commissions" scheme, whereby, when in 2001 the Sovcomflot group were buying in the so-called "Athenian transaction" (which was itself one of the purchases comprised in the Sovcomflot Clarkson commissions scheme) six ships which were being built by Hyundai Heavy Industries ("HHI"), address commissions paid by HHI amounting to $1.2 million were diverted to Milmont.
>
> iii)....
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> iv) ....
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> v) The "RCB" scheme, whereby, as the claimants allege, in 2001 Mr. Nikitin arranged for Meino to acquire a debt owed (or said to be owed) by the Sovcomflot group to the Russian Commercial Bank Ltd. ("RCB"), and Mr Skarga was party to arranging for the debt to be discharged on terms that improperly benefited Mr. Nikitin. The claim in respect of this scheme is about $3 million.

vi) The "SLB arrangements" scheme, whereby in 2002 the Sovcomflot group sold eight vessels, the Arbat vessels, to Standard Maritime defendants upon terms that they were to be leased back to the sellers on bareboat charters and re-purchased at the end of the charter periods. It is alleged that these arrangements (the sale and leaseback or "SLB" arrangements) were uncommercial and designed to benefit Mr. Nikitin and the Standard Maritime defendants at the expense of the Sovcomflot group. The compensatory damages claimed in respect of this scheme are some $17 million, and there is also a claim for an account of profits.

vii) The "termination of the SLB arrangements" scheme, whereby in 2004 the Standard Maritime defendants sold the eight Arbat vessels which were the subject of the SLB arrangements, and Sovcomflot were paid $20 million for their rights in respect of them. It is alleged that this was inadequate compensation for the rights that Sovcomflot relinquished. The claimants' primary compensatory claim is for some $159 million, and there is also a claim for an account of profits.

viii) The "newbuildings" scheme, whereby in 2003 and 2004 Sovcomflot entered into agreements with HHI and Daewoo Shipbuilding Marine Engineering Company Ltd. ("Daewoo"), and contracted to buy ships by way of newbuildings and acquired options to buy other vessels. It is alleged that they allowed some of the Standard Maritime defendants to acquire the benefit of options for no proper consideration, and also to acquire the benefit of contracts with HHI (by acquiring the vehicle companies who had entered into newbuilding contracts) at an undervalue. This gives rise to claims of some $212 million.

ix) The "Sovcomflot time charters" scheme, which relates to agreements that were made between 2001 and 2004 whereby certain of the claimants hired eight vessels to Standard Maritime defendants on time charterparties and also granted options to extend the period of hire of some of them. The charterparties and options are said to have been designed, at least in some cases, to benefit the Standard Maritime defendants and correspondingly to have been to the disadvantage of the claimants. The claimants claim some $219 million in respect of these allegations.

x) ..."

4. I upheld the claims against Mr Nikitin in this action in respect of the Sovcomflot Clarkson commissions scheme and the Tam commissions scheme I rejected the claims in respect of the RCB scheme, the SLB arrangements scheme, the newbuildings scheme, the termination of the SLB arrangements scheme and the

Sovcomflot time charters scheme. The claimants appealed against my judgment, but the appeal was dismissed by the Court of Appeal on 26 March 2013. An application for permission to appeal to the Supreme Court was refused. The applicants sought directions for an enquiry as to what should be paid under the cross-undertakings on 4 February 2011, but by agreement between the parties the application was not pursued until the appellate process was concluded.

5. On 31 August 2005 Simon J made a worldwide freezing order against (inter alios) the applicants Mr Nikitin, Standard Maritime, Titanium, Pendulum, Accent and Severn in respect of assets up to a value of $225 million. The then claimants all gave an undertaking in these conventional terms: "If the court later finds that this order has caused loss to the respondent and decides that the respondent should be compensated for that loss, the applicants will comply with any order the court may make". The order was continued with immaterial changes by orders on 7 and 15 September 2005. The 2005 orders specifically provided that, while dealings by the relevant defendants "in the ordinary and proper course of business" were permitted, this did not cover the sale or purchase of vessels (including vessels under construction), the sale or purchase of shares in any company or corporation or the grant of security over vessels or shares. In response to these orders Standard Maritime provided security in the sum of $208.5 million, the balance being provided by a charge over Mr Nikitin's house.

6. These 2005 orders were based mainly on an affidavit dated 31 August 2005 and sworn by Mr Stuart Shepherd, a partner in Ince & Co, the claimants' solicitors. In it he said that Fiona and its subsidiary companies had been the victims of a conspiracy to defraud them, which had been perpetrated by and through Mr Privalov, Mr Skarga, Mr Nikitin and Standard Maritime, and which comprised the Tam commissions scheme, the SLB arrangements scheme, the newbuildings scheme and the termination of the SLB arrangements scheme, and as a result they had suffered losses at a "conservative estimate" of "well in excess of $200 million". As I have said, the claims about these schemes were mostly rejected at trial: the claimants succeeded only in respect of a claim against Mr Nikitin and Milmont about the Tam commissions scheme in the sum of $1.2 million (and interest thereon). Mr Shepherd had quantified the other claims as follows: the SLB arrangements scheme at some $3.39 to $6 million, the newbuildings scheme at some $167.7 million and the termination of the SLB arrangements scheme at some $65.24 to $76.94 million.

7. On 21 May 2007 David Steel J made a worldwide freezing order against (inter alios) the applicants Mr Nikitin, Standard Maritime, Remmy and Henriot. The same 21 claimants and 55 other claimants who had been joined in the proceedings gave undertakings in the same terms as those of the 2005 orders. David Steel J's 2007 order was in respect of assets to the value of $377 million in the case of Mr Nikitin, $315,583,119 in the case of Standard Maritime, $174,724,038 in the case of Remmy and $142,413,974 in the case of Henriot. It did not include the specific prohibition about the sale and purchase of vessels or shares or the granting of security that was in the 2005 orders, but it was not suggested before me that the applicants could reasonably have conducted such dealings despite the 2007 order without the court's sanction.

8. The application for the 2007 order was supported by further affidavit evidence of Mr Shepherd. By now the claimants had introduced claims in respect of the RCB

scheme, the Sovcomflot time charters scheme and the Sovcomflot Clarkson commissions scheme, and they had increased the amount that they claimed in respect of the SLB arrangements scheme, the newbuildings scheme and the termination of the SLB arrangements scheme. As I have said, of these claims only that in respect of the Sovcomflot Clarkson commissions scheme, which were against Mr Nikitin and Milmont, succeeded at trial, and it succeeded in the sum of some $16 million (the liability being reduced by what the claimants had recovered under a settlement with Clarksons).

9. The effect of the 2007 order was to freeze (in addition to the $208.5 million of security already provided by Standard Maritime) $262 million in bank accounts of Standard Maritime and certain of its subsidiaries, $8 million of Remmy and $8 million of Henriot.

10. The applicants seek directions in respect of the undertakings under what they label the 2005 orders and the 2007 order. With regard to the 2005 orders, their primary case is that Standard Maritime, a company wholly owned by Mr Nikitin, should be compensated, but their alternative case is that compensation should be paid to Mr Nikitin, Titanium, Pendulum, Accent and Severn (these companies being subsidiaries of Standard Maritime) "in case it is found that the loss asserted by Standard Maritime was in fact suffered by any of them". As for the undertakings under the 2007 order, again the applicants' primary case is that Standard Maritime should be paid compensation under it, but they have an alternative case that compensation should be paid to Mr Nikitin and two other subsidiaries of Standard Maritime, Remmy and Henriot, if they suffered the loss asserted by Standard Maritime.

Should be cross-undertakings be enforced?

11. In Hoffmann-La Roche & Co. AG v Secretary of State, [1975] 1 AC 295, 361 Lord Diplock said this about enforcing cross-undertakings given in support of interim injunctions and assessing what should be paid under them:

> "The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would *not* prevent the defendant

> from doing that which he was restrained from doing by the terms of the injunction: see *Smith* v. *Day* (1882) 21 Ch.D. 421 *per* Brett L.J., at p.427."

12. Thus prima facie a person who has suffered loss as a result of an interim order being wrongly made against him is entitled to be compensated for his loss: indeed in Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd, [2006] EWCA Civ 430 Neuberger LJ said that he can normally expect an enquiry as to damages "virtually as of right" (at para 42).

13. The claimants rightly do not dispute that the 2005 orders and the 2007 order were wrongly made. This does not mean that they were necessarily improperly obtained: see Yukong Line Ltd v Rendsburg Investments Corp, [2001] 2 Lloyd's LR 113 at para 32. It simply means that they were made in respect of claims that failed, and that, even if the court would have made freezing orders in support of the successful claims, they would have been so much smaller in amount that this can be disregarded for present purposes. The applicants also say, however, that the 2005 orders and the 2007 orders were improperly made in that the claimants were guilty of misrepresentation and non-disclosure when they obtained them.

14. The claimants contend that the cross-undertakings should not be enforced because of conduct of Mr Nikitin. In response, the applicants submit that the conduct about which the claimants complain does not relate (in the words of Lord Diplock) to "obtaining or continuing of the injunction or the enforcement of the undertaking", and therefore is not a proper reason to refuse them an inquiry as to damages; and also that in any event, in all the circumstances of the case it is insufficient reason to do so. Hence, I must consider:

    i) What conduct is relevant in deciding whether an inquiry should be refused; and

    ii) Whether in any event it would be proper to refuse an inquiry.

15. The claimants also submit that Mr Nikitin's conduct should be attributed to the corporate applicants. I accept that submission. Mr Nikitin was the sole owner and had full control over them, and as far as is significant they acted only through him. To my mind it could not be equitable to enforce the undertakings for the benefit of the corporate applicants if it would be inequitable to do so for Mr Nikitin's benefit.

16. What did Lord Diplock mean in his obiter but authoritative statement of the governing principles that I have set out, and in particular did he intend to define the limits of what conduct might be relevant to a decision not to enforce undertakings? At the risk of oversimplification, Mr Steven Berry QC, who represented the applicants, submitted that he did, and Mr Michael Brindle QC, who represented the claimants, submitted that he did not.

17. Mr Brindle relied particularly on the decision of the Court of Appeal in Cheltenham and Gloucester BS v Ricketts, [1993] 1 WLR 1545, and an unreported decision of the Court of Appeal in Financiera Avenida v Shiblaq, 7 November 1990, which Neill LJ cited in the Cheltenham and Gloucester case. In the Financiera Avenida case Lloyd LJ had said that the decision whether the undertaking should be enforced depends on

"the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at trial, the subsequent conduct of the defendant and all the circumstances of the case". Having cited this, Neill LJ referred to what Lord Diplock said in the Hoffmann-La Roche case about the court retaining a discretion not to enforce the undertaking if it considers that the conduct of the defendant "in relation to the obtaining or continuing of the injunction or the enforcing of the undertaking" makes it inequitable to do so, and continued: "This dictum might be read as confining the exercise of discretion to the circumstances specified, but I regard Lord Diplock as merely giving examples of circumstances in which the court might exercise its discretion against ordering an inquiry".

18. Accordingly Mr Brindle argued that the court is entitled to take account of, and should consider, all the circumstances of the case in exercising its equitable discretion whether an applicant should be refused compensation under an undertaking. He contended that therefore the applicants should not be allowed to enforce the undertakings because Mr Nikitin had by his impropriety brought on himself and his companies the proceedings and indeed the 2005 orders and 2007 order. He said that in these circumstances the court can properly conclude that it would be inequitable for them to recover damages, relying on the statement of Gee, Commercial Injunctions (5th Ed, 2004) at para 11-023 that "If the defendant has provoked the bringing of the proceedings or brought them on himself, it may be inequitable to enforce the undertaking", and an authority cited by Gee, the judgment of Swinfen Eady LJ in Modern Transport Co Ltd v Duneric SS Co, [1917] 1 KB 370, 380. I must explain this case in some detail because I do not consider that it supports the broad statement in Gee or assists the claimants for present purposes. Time charterers had refused to pay hire for a vessel that had been requisitioned by the Admiralty: they denied that they were liable for hire under the time charter in those circumstances. The owners were entitled to withdraw the vessel in default of regular and prompt payment of the hire. The charter included an arbitration agreement, and at the owners' insistence the dispute went to arbitration, although the charterers would have preferred it to be litigated: they thought that litigation would be less expensive because arbitrators would inevitably state a case. While the reference was pending, the Admiralty gave notice that the vessel was to be discharged from Government service, and the owners demanded payment of the hire that they claimed. The charterers objected that they were content to have their liability determined by the arbitrators or the Court, but the owners withdrew the vessel. The charterers contended that, whether or not they were liable for the hire for the period when the vessel was requisitioned, the owners were not entitled to take the law into their own hands and withdraw the vessel while the dispute was being arbitrated. In these circumstances they were granted an interim injunction whereby they obtained use of the vessel when the Admiralty released her, having given the usual undertaking to the court. As far as the substantive dispute was concerned, the owners succeeded in their contention that they were entitled to hire while the vessel was requisitioned, but the Court of Appeal upheld the Judge's decision not to direct an inquiry as to damages. As I understand the judgments of the Court of Appeal, this was because it was considered that the owners' conduct was such that "it was not open to them to ignore the arbitration proceedings and serve notice of withdrawal": Swinfen Eady LJ cited what Lord Cairns had said in Hughes v Metropolitan Ry Co, (1877) 2 App Cas 439, 448 . Thus, although the charterers had wrongly withheld hire under the charterparty and the injunction could not be sustained

at trial once the substantive dispute had been resolved in the owners' favour, the interim injunction had been rightly made.

19. Mr Berry also cited authority in support of his contention that Lord Diplock identified the only circumstances in which a court can properly refuse to enforce an undertaking of this kind, including the judgment of Nelson J in Eliades v Lewis, [2005] EWHC 2966, who referred to authorities that the undertaking would not be enforced in "special circumstances" and said this (at para 42): "The phrase 'special circumstances' ... means in my judgment no more than the test set out by Lord Diplock in Hoffman-La Roche, namely whether the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to enforce that undertaking". Thus, Mr Berry submitted, only this can properly be considered when deciding whether an undertaking can be enforced.

20. The most recent decision of the Court of Appeal that was cited to me on this point is Dadourian Group International Inc v Simms, [2009] EWCA Civ 169. Both Mr Brindle and Mr Berry relied on the judgment of Arden LJ. Mr Brindle relied on what she said at para 184: having referred to Lord Diplock's statement that the court has a discretion not to enforce the undertaking if it considers that the conduct of the defendants in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, Arden LJ continued, "But that statement is not an exhaustive statement of the circumstances in which the court can exercise its discretion to depart from the ordinary rule", and she cited the judgment of Lloyd LJ in the Financiera Avenida case. However, she continued at para 185 with this statement on which Mr Berry relied: "Where the defendant's conduct is relied on, there has to be a link between his conduct and the obtaining and the obtaining or continuing of the injunction of the enforcement of the undertaking ...". Thus, as I understand Arden LJ's judgment, although Lord Diplock's formula does not specify all the circumstances in which an inquiry might be refused, it does specify exhaustively when the conduct of the applicant will provide a proper basis for the court to do so.

21. So understood, Arden LJ's judgment is consistent with what Neill LJ said in the Cheltenham & Gloucester BS case, and reflects the ordinary application of equitable principles. The court might refuse an inquiry to a person who does not have clean hands or on some other principled basis (for example, because the applicant has been guilty of laches in seeking to enforce the undertaking). But equity never interpreted the "clean hands" maxim to preclude equitable relief whenever a person was guilty of misconduct: "The maxim does not mean that equity strikes at depravity in a general way; the cleanliness required is judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity used for....": Halsbury's, Laws of England (5th Ed, 2014) vol 47 para 112. The judicial authority commonly cited in support of this is Scrutton LJ in Moody v Cox and Hatt, [1917] 2 Ch 71, 78 and 87, but the expression "immediate and necessary relationship" goes back to Eyre CB in Dering v Earl of Winchelsea, (1787) 1 Cox Eq Cas 318. This is why in Universal Thermosensors Ltd v Hibben, [1992] 1 WLR 840 Nicholls VC ordered damages under an undertaking given when the Court had made an Anton Piller order which turned out to be excessively wide, notwithstanding he described the defendants' conduct as "outrageous and dishonest" (at p.858A), and they had stolen

documents from the claimants and given dishonest evidence. Thus, as I see it, when Lord Diplock stated the circumstances in which the conduct of the applicant might make it inequitable to enforce the undertaking, he was not introducing any novel restriction on what conduct might be relevant to questions of equity, but observing how established equitable principles apply in such a case. I therefore consider that the applicants are right to say that the conduct on which the claimants rely is relevant only if and in so far as it relates to the obtaining or the continuing of the 2005 orders or the 2007 order or enforcement of the undertakings.

22. Some of the conduct of Mr Nikitin that the claimants criticised was directly linked to the applications for the 2005 orders and 2007 order and to them being granted. It is true that the claimants' case when the orders were obtained was of a more extensive conspiracy than they were able to establish: Mr Shepherd's evidence was that the fraud of Mr Nikitin, and Mr Skarga, extended "to virtually every facet of Sovcomflot's business in which Mr Nikitin was involved" and that "all the transactions in which Mr Nikitin was involved with Sovcomflot and their subsidiaries were either on 'soft' terms or simply vehicles for transferring money or assets to Mr Nikitin for no consideration". But the fact remains that Mr Nikitin was guilty of wrongdoing that the claimants were properly able to deploy, and did deploy when they applied for freezing orders. In particular, in his evidence in support of the 2005 orders, Mr Shepherd relied inter alia upon the facts that,

    i) Mr Nikitin had dishonestly conducted the Tam commissions scheme;

    ii) He had dishonestly bribed Mr Privalov to act against the claimants' interests, using secret offshore accounts and sham agreements to this end; and

    iii) He and Mr Skarga dishonestly created forged and backdated documents, including the Supplemental Agreement and what purported to be an employment contract between FML and Mr Privalov (see paras 1405ff of the December 2010 judgment).

    In support of the 2007 order Mr Shepherd also relied on Mr Nikitin's involvement in the Sovcomflot Clarkson commissions scheme. To my mind, the significance of his dishonesty in relation to the commissions schemes goes beyond the claims directly relating to them and his liability resulting from those schemes: more generally these allegations supported the claimants' case that he was involved in a wider conspiracy.

23. Mr Brindle also relied on my finding in the December 2010 judgment that Mr Nikitin had given Mr Skarga what would in English law be regarded as, or presumed to be, bribes in that he provided holidays for Mr Skarga and his family (para 1355 of my December 2010 judgment) and provided him with a credit card (para 1361). I explained in a supplemental judgment of 24 March 2011, [2011] EWCA 715 (Comm) at para 10 that I concluded that the provision of these benefits involved no dishonesty on the part of Mr Nikitin (or indeed Mr Skarga). These "bribes" (as English law would characterise them) seem to me of little if any significance for present purposes.

24. I therefore consider that Mr Nikitin was guilty of misconduct that was linked to the obtaining and continuation of the 2005 orders and the 2007 orders, and I must assess whether in these circumstances it would be inequitable to have an inquiry as to damages, and here I must consider whether the orders were not only wrongly obtained

(in that they were shown at trial to be unjustified or at least froze much larger amounts than were justified), but also whether in obtaining them the claimants were in breach of their duty to make proper disclosure and to avoid misrepresentation. In my judgment they were in material and culpable breach both in 2005 and in 2007.

25. The claimants did not disclose when they obtained the 2005 orders:

    i) That, as the board minutes recorded, many of the transactions of which they complained, had been considered by and were carried out with the approval of the Executive Board of Sovcomflot.

    ii) That Sovcomflot had had the wrongdoing of which they complained investigated by investigators who had, to their knowledge, used unlawful methods to obtain information: see paras 224 and 228 of the December 2010 judgment.

26. I accept that in a judgment of 24 February 2006 HHJ Mackie QC said that, while "with hindsight" the minutes should have been put before the Court, this failure did not amount to material non-disclosure that warranted the intervention of the Court, and David Steel J later regarded it as a matter of regret, but one that HHJ Judge Mackie QC had assessed and had been remedied. However, the claimants then presented the Executive Board approval as a mere "rubber-stamping" exercise, and, as I concluded in my December 2010 judgment, it was not. This non-disclosure was more significant and more culpable than HHJ Mackie QC and David Steel J could have realised. The claimants, for their part, must have been aware of its significance, as is evidenced by the extent of their efforts to present at trial (untruthful) evidence to explain away the minutes.

27. It was suggested that the claimants themselves were not responsible for any wrongdoing by the investigators. I do not accept that: Mr Sergei Frank, together with Mr Vladimir Mednikov, was directing the proceedings on the claimants' behalf, and (as I concluded, despite his denials: see para 228 of my December 2010 judgment) was well aware of the improper methods used in the Project Sturgeon investigation before the 2005 orders were obtained.

28. Further, in his evidence in support of the application for the order of 31 August 2005 Mr Shepherd said that it was "reasonable to infer that Mr Skarga ... received payments from Mr Nikitin through Sisterhood Participation Corporation". The Project Sturgeon investigators had told Sovcomflot on 1 June 2005 that "the previous indication that there was a connection between Mr Skarga and Sisterhood Participation Corporation would appear to be baseless". The Court was left unaware of this, and it should not have been.

29. The claimants again failed to observe their duties to the court when they obtained the 2007 order. The minutes of the Executive Board had now been disclosed, but their significance was, as I have explained, understated to the point of misrepresentation. The Court was also misled about the Project Sturgeon investigation: in his evidence in support of the application for the 2007 order Mr Shepherd stated in response to complaints about its methods that he could "assure the Court that at no stage have the Claimants or any individual associated with them instructed such investigators to use any unlawful means of obtaining information, nor has it been suggested to the

Claimants that information would be or has been so acquired. My clients have no idea whether the matters of which complaint is made ... have anything to do with the investigators that they have instructed or who have been instructed on their behalf ...". That assurance could not properly have been given to the Court.

30. These matters are sufficient to support my conclusion that the relevant claimants were seriously and culpably in breach of their duties when they obtained the 2005 orders and the 2007 order. In so concluding, I need not rely and do not rely on the applicants' complaint that in obtaining the 2005 orders they presented evidence of what Mr Privalov had said without disclosing the terms of the settlement agreement with him (see para 296 of the December 2010 judgment) and that in obtaining the 2007 order they relied on an account given by Mr Borisenko that was demonstrated at trial to be false. I can understand the applicants' suspicions that the claimants cannot have believed the accounts of Mr Privalov and Mr Borisenko were truthful, but there is not clear evidence of what the claimants knew in this regard.

31. The complaints made of Mr Nikitin that are relevant to the obtaining of the freezing orders against the applicants are serious, and his conduct is attributable to the other applicants. It might be that his conduct contributed significantly to freezing orders being made against them because claimants were genuinely led to think that they were the victim of more serious wrongdoing than was in fact the case. If in these circumstances they had properly presented their applications to the court, and had obtained freezing orders that turned out to have gone beyond what was justified, I would have seen a strong case for refusing an inquiry as to damages. But the relevant misconduct on the part of Mr Nikitin must be assessed in the context of orders that were improperly obtained by the claimants and the extent of the impropriety of the claimants in obtaining them. The court should not, in my judgment, readily refuse an inquiry as to damage when freezing orders, particularly for such large sums, are so obtained, and I am not persuaded that it would be inequitable to direct an inquiry in this case.

32. It may be that, as Mr Brindle observed, "there is no point in litigating against someone of Mr Nikitin's character in the absence of a freezing injunction, since a successful judgment would be wholly frustrated by the secreting and dissipation of assets". However, this does not mean that in a case such as this claimants can be less scrupulous in complying with their duties when applying for freezing orders and it is no reason not to enforce the undertakings. It is an integral part of the court's procedure to require undertakings when making such interim orders so that defendants can be compensated in appropriate cases, and it is no less important where the character of the defendant or the nature of the case apparently justifies a freezing order. In any case, the claimants' impropriety assisted them not only to obtain freezing orders but also to obtain orders that froze very large amounts.

33. What would be the position if I am wrong to have regard to Mr Niktin's conduct only in so far as it related to the obtaining and the continuing of the orders and I should take account of other misconduct on his part? In particular, it became clear at trial that his schemes of bribery and improper commissions arrangements were more widespread than alleged when the 2005 orders and 2007 order were obtained and included the hull no 1231 commission scheme, the Norstar commissions scheme, the NSC Clarkson commissions scheme and the Galbraith's commissions scheme.

Further, I rejected as untruthful much of his evidence at the trial and found his explanations for many aspects of transactions with the claimants in which he was involved to be incredible or unsatisfactory. The claimants also rely on the finding of Christopher Clarke J in [2012] EWHC 3586 Comm at paras 325 to 328 and 365 to 366, in which it was held that Mr Nikitin lied in his evidence in the trial in these proceedings about payments to Amon. However, again the dishonest evidence given by Mr Nikitin and other witnesses for the defendants, including Mr Skarga, was matched by dishonest evidence at trial given by many of the claimants' important witnesses, including Mr Frank. In any case, in my assessment the impropriety of the claimants who obtained the 2005 orders and the 2007 order was such that it would be wrong not to enforce the undertaking even if I take account of all the misconduct of which the claimants complain.

Is there sufficient evidence that the applicants may have suffered loss?

34. In the Yukong Line case Potter LJ said (loc cit at para 35) that "So far as evidence of loss is concerned, upon an application for an inquiry, the applicant must adduce some credible evidence that he has suffered loss as a result of the making of the order. The Court will not order an inquiry if it appears pointless to do so because the intended claim for damages is plainly unsustainable". The claimants argued that the applicants have not adduced sufficient credible evidence to justify an inquiry. The question is whether the orders caused loss: it is not, of course, whether loss was caused by the litigation against the applicants.

35. The damages to be paid on an application of this kind are, the authorities say, to be assessed "by analogy" on the same basis as damages for breach of contract: Hone v Abbey Forwarding Ltd, [2014] EWCA Civ 711. Thus, the order must be an effective cause of the loss, and damages cannot be recovered if they result from a failure to take proper steps to avoid or to mitigate loss, including taking reasonable steps to apply for a variation of an order, for example to allow a business to continue: see Gee on Commercial Injunctions (5th Ed, 2004) at para 11.028. However, McCombe LJ said in the Hone case that there may be cases in which the analogy would be applied with some flexibility as far as concerns the principles about remoteness of damages. Here, as it seems to me, that the analogy is imperfect in that:

    i) The rules in Hadley v Baxendale are presumably applied by reference to the knowledge of or attributed to those who obtained the interim relief and gave the cross-undertaking, and not that of both parties to the undertaking (the applicants and the court) or both parties to the subsequent inquiry (not least because the interim order might have been obtained without notice to the other party to the inquiry).

    ii) The principles are to be applied (and in Hone were applied in relation to the "marble" head of claim: loc cit at paras 91ff) not only by reference to knowledge at the time that the undertaking was given but also by reference to knowledge while the interim order was continuing.

36. Mr Nikitin's evidence was that, had Standard Maritime not had to provide the security of $208.5 million in 2005, they and their subsidiaries would have "been free to re-invest its money back into shipping and would have done so by ordering further newbuildings". He said that vessels would probably have been ordered at prices

prevailing in autumn 2005 and they would have been sold at the much higher prices prevailing in the spring of 2008. In 2008 Standard Maritime would have looked at opportunities both in shipping apart from the newbuilding market (which had become unstable) and outside shipping. As it was, the $208.5 million earned interest between September 2005, when it was provided as security and 21 January 2011 of only some $33.5 million. As for the 2007 order, Mr Nikitin's evidence was that, but for the order, "the Standard Maritime companies would have been looking for opportunities to invest its money, probably in the shipping business", but not in further newbuildings, except possibly by way of financing newbuildings ordered earlier.

37. The claimants contended that Mr Nikitin's evidence about this is not credible. I certainly view his evidence circumspectly simply because throughout this litigation he has apparently been prepared to tell any lies that he considers will assist him. I need refer only to my December 2010 judgment, but the claimants have more specific reasons to challenge Mr Nikitin's evidence about how the money that was provided as security and the funds that were frozen would have been used. They say that it is inconsistent with what was said on his behalf and on behalf of other defendants earlier in the litigation:

i) In a witness statement dated 22 December 2005 served in support of an application that the undertaking in damages given in support of the 2005 orders should be fortified with security, Ms Imogen Rumbold, a solicitor and then a partner in Messrs Lawrence Graham LLP, who were solicitors for some defendants including the applicants, did not suggest that the 2005 orders were preventing or hampering investment in newbuildings or that loss was being so caused. On the contrary, she indicated that loss from the $208.5 million being provided as security might be quantified either on the basis of Standard Maritime's historical average return on capital or by reference to evidence of investment opportunities in high risk financial projects.

ii) In a letter dated 18 January 2006 Laurence Graham said that the $208.5 million came primarily from the sale of three newbuildings and continued, "Mr Nikitin had been looking for projects in which to invest the proceeds of sale but had not finalised anything by the time [the claimants] started their legal action".

iii) In a witness statement dated 18 September 2006 served in opposition to the application for the 2007 order, Mr Michael Lax, who also is a solicitor and formerly was a partner in Lawrence Graham, said this: "Apart from the charters of vessels, and the sale of some vessels since September 2005 ... and the continuation of the existing shipbuilding order for Hull 5274 ... Mr Nikitin currently has no other business nor plans for other business until this litigation has concluded. ... it is not his intention to embark on new adventures until this dispute has been disposed of, and his funds and other assets released from the undertakings which have been given". The statement was not directly about what Mr Nikitin would have done but for the orders, but it might be interpreted as suggesting that he was not pursuing new ventures because of the litigation rather than because of the freezing orders.

38. There is no documentary evidence that corroborates Mr Nikitin's claim that Standard Maritime would have entered contracts for more newbuildings in late 2005 or at any relevant time. Nor did Standard Maritime in fact invest in newbuildings when, after the 2005 orders were made and security had been provided, they received substantial sums ($80 million on 10 October 2005, $88.5 million in about April 2006, $95.5 million in May 2007), and apparently had large sums in their accounts.

39. Thus, the claimants submit that there is no sufficient evidence that the applicants suffered damage of the sort that they claim. If the applicants' contention that they suffered loss as a result of the undertakings depended on the credibility of Mr Nikitin as a witness, I would have hesitated to direct an inquiry, but it is put on a broader basis: Mr Berry submitted that, even if the court rejects Mr Nikitin's evidence that the funds would have been invested in newbuildings, it can readily be inferred that the applicants would have used their funds more profitably if they had not had to use them to provide security in response to the 2005 orders and they had not been frozen by the 2007 order. I accept that: if freezing orders are obtained against an entrepreneur such as Mr Nikitin and his companies, such loss naturally results. The applicants adduced evidence from Mr David Croft, whose background in banking and the financial world qualified him to give expert evidence about what returns might have been made on the $208.5 million (i) had it earned interest calculated at 3 months US$ LIBOR, which is a conventional but conservative estimate of what return can be earned from lending to shipping interests, and (ii) had it been invested with reasonable caution in investments that a UK based financial adviser might reasonably have advised. He concluded:

    i) That, if it had earned interest calculated at 3 months US$ LIBOR, during the period to 17 December 2010 (the date of my December 2010 judgment) it would have earned interest of some $71.39 million, or some $37.90 million more than it in fact earned while it was held to provide security pursuant to the 2005 orders.

    ii) That, if it had been invested with reasonable caution in investments that a UK based financial adviser might reasonably have advised, the $208.5 million would have earned a return of $69.12 million, or some $35.43 million more than it in fact earned while it was held to provide security pursuant to the 2005 orders.

40. It is wholly credible that, but for the orders, Mr Nikitin would have continued to invest in shipping. He had done so for many years with success and there is no evidence or reason to infer that he would have ceased to do so but for the orders. Mr Croft's evidence was directed to the loss from the 2005 orders, but it really does little more than illustrate the common-sense proposition that a businessman with Mr Nikitin's entrepreneurial flair, which he undoubtedly has although it is overlaid by his dishonest conduct, would have made profits from the shipping sector had he been free to deploy his funds. I accept that it also supports the application in respect of the undertaking in the 2007 order.

41. The claimants also submitted that:

i) In view of what was being said in the evidence and by the solicitors' correspondence, any such damage from the continuation of the freezing orders is too remote to be recoverable; and

ii) If the applicants did suffer such damage, it was because they did not mitigate their loss by seeking that sufficient funds be released to enable them to conduct their business by contracting to buy newbuildings and making payments for them.

I am not persuaded by these submissions. Even if there is some tension between Mr Nikitin's evidence and what was said by Ms Rumbold, Mr Lax and Lawrence Graham, there is no direct contradiction, and there is ample scope for argument about what significance is to be attached to what they said. The claimants would certainly have opposed vigorously any application to release the security or the frozen funds, and the argument that the applicants did not mitigate their loss seems to me a difficult one.

42. I conclude that the applicants have adduced sufficient evidence that the orders caused them loss to justify an inquiry. As I see it, it is neither necessary nor desirable that I should anticipate the evidence that might be presented on the inquiry by saying more at this stage.

Conclusion

43. I shall make directions for an inquiry about the damages that the applicants suffered as a result of the 2005 order and the 2007 order. I invite the parties to reach such agreement as they can about suitable directions and will, if necessary, resolve any remaining issues about them.