Neutral Citation Number: [2021] EWHC 1203 (Comm)

Case No: CL-2019-000122

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 14/05/2021

Before:

MRS JUSTICE MOULDER

- -

Between:

VTB BANK (PJSC)	**Claimant**
- and -	
MR DMYTRO FIRTASH	**Defendant**

- -
- -

Paul Stanley QC (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Brian Doctor QC and Tetyana Nesterchuk (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendant**

Hearing date: 23 April 2021

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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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MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the judgment of the court following a half day hearing on 23 April 2021 of the Defendant's application dated 18 February 2021, as amended by the application dated 5 March 2021 (as amended, the "Application") relating to a freezing order granted to the Claimant (the "Claimant" or "VTB") on 27 February 2019, as continued and amended on 26 March 2019 and 23 February 2021 (the "Freezing Order") in support of proceedings brought by the Claimant in Cyprus (the "Cyprus Proceedings").

2. The original application was supported by a witness statement of Mr Nicholas Marsh, a partner in the firm of Quinn Emanuel Urquhart and Sullivan UK LLP ("Quinn Emanuel") having conduct of the matter on behalf of the Defendant, Mr Firtash, dated 18 February 2021. The amended application was supported by a second witness statement of Mr Marsh dated 5 March 2021. Mr Marsh subsequently filed a third witness statement dated 26 March 2021.

3. In response Mr Georgie Kandelaki of VTB Debt Centre LLC, a Russian lawyer responsible for managing VTB's claim in Cyprus, provided a witness statement on 19 March 2021 and a further witness statement dated 8 April 2021. VTB has also provided a witness statement of Mr Matthew Bonye, a partner in the London office of Herbert Smith Freehills LLP ("HSF") whose particular area of expertise is said to be real estate litigation.

The Application

4. The application which is now before the court seeks an order that:

    i) The restrictions imposed on the Respondent's dealings with his property by paragraphs 4-7 of the Freezing Order, be discharged and substituted with the entry of a restriction on the title of the Defendant's property known as 8 Cottage Place.

    ii) The Claimant's representatives are ordered to take steps to procure the removal of the mortgage to the value of €7,609,335 over the property in France known as Chateau de Fompeyres-domaine de Guilhemanson (the "French Mortgage").

    iii) The Claimant provides further fortification of £10,000,000 in support of its undertaking to compensate the Defendant for any loss caused by the Freezing Order.

5. I propose to deal with each of these matters separately. However there is a dispute between the parties as to the scope of the Application to be determined by this court and it is necessary therefore to resolve this issue at the outset.

6. The grounds on which the Defendant relied in its application notice of 5 March 2021 (the "March Application Notice") were said to be:

    "In summary:

    1) The Claimant would be sufficiently protected by an appropriate restriction against the title of the property known as

> 8 Cottage Place and thus any continuation of the Freezing Order is disproportionate and unjustified.
>
> 2) The Claimant's claim in Cyprus is over-secured and the continuation of the French Mortgage is unjustified and is likely to lead to a loss of a potential buyer for the French property.
>
> 3) The continuation of the Freezing Order for over 2 years in the circumstances where the Defendant failed to take any substantial steps to progress its claim in Cyprus had already caused significant losses to the Defendant and, even if discharged and substituted with the restriction on the title of 8 Cottage Place, may lead to further losses. Thus any further order restricting the Defendant's dealings with his property should only be allowed to continue if the Claimant substantially increases the amount of fortification it has provided from £100,000 to £10 million.
>
> Full reasons are set out in the Second Witness statement of Mr Nicholas Dean Marsh."

7. On its face therefore the Application is an application that the Freezing Order should be discharged because the Claimant would be sufficiently protected by an appropriate restriction against the title of the property, 8 Cottage Place.

8. In his second witness statement referred to in the March Application Notice, Mr Marsh at paragraph 10 referred to an application to "*discharge the Freezing Injunction altogether*" and to the provision of the Freezing Order that the Defendant has liberty to apply to vary or discharge the Freezing Order without the need to show any change in circumstances. At paragraphs 14 and 15 of his second witness statement under the heading "Grounds to Discharge the Freezing Injunction" Mr Marsh stated that the Freezing Order was abusive and went beyond what was required to protect VTB's interest. He said:

> "14. As explained in detail in NM1, Mr Firtash's position is that the Cyprus Proceedings are misconceived and that no injunction should have been granted in Cyprus or England. However, even leaving aside the substantive merits of the Cyprus Proceedings, <u>in light of the new circumstances that have arisen since the Freezing Injunction was granted it is clear that the Freezing Injunction is abusive</u> and goes far beyond what is required to protect VTB's alleged interests in the Cyprus Proceedings.
>
> 15. <u>Accordingly,</u> Mr Firtash now applies for the Freezing Injunction to be discharged and replaced with an appropriate restriction over 8 Cottage Place to the effect that the property cannot be disposed of (i.e., sold or charged) without VTB's consent." [emphasis added]

9. Mr Marsh then stated that Mr Firtash relied on the following grounds to discharge the Freezing Order and set out those reasons under a series of headings as follows:

   i) VTB's continued failure to particularise the Cyprus Proceedings.

   ii) The Cyprus Set Aside Application.

   iii) VTB remains significantly over-secured.

   iv) VTB's refusal to release the French Mortgage.

   v) VTB's refusal to provide fortification.

10. Mr Marsh concluded (at paragraph 47 of his second witness statement):

> "In all the above circumstances, I believe that VTB would be sufficiently protected by an appropriate restriction against the title of 8 Cottage Place and that any continuation of the Freezing Injunction is entirely unjustified. The restriction should be confined to obtaining VTB's consent to any sale or other disposal, and I respectfully request the court to include in its order that any such consent should not be unreasonably withheld or delayed. On VTB's own valuation, the property is worth £35m, and Mr Firtash's advisers believe it is in fact worth £50m or more. As long as the property is sold for more than USD $22,854,931.085 and that that amount of the proceeds is deposited somewhere mutually acceptable, VTB could not withhold its consent. I make it clear that such offer is made without prejudice to Mr Firtash's contention that no Freezing Order or any restriction was ever justified or required, and that he reserves his rights to claim compensation for the losses which have already been caused to him by the wrongful application and grant of the Freezing Injunction." [emphasis added]

11. In my view it is thus clear from the grounds expressly set out in the March Application Notice and in the second witness statement of Mr Marsh that the Defendant sought the release of the Freezing Order to be replaced by a restriction on the title at the Land Registry. Further the grounds for seeking this relief were that the continuation of the Freezing Order was abusive for the reasons listed in the second witness statement. It was not an application which sought to set aside the Freezing Order on the basis that no freezing order was justified or required. In other words, the Application did not seek the discharge of the Freezing Order on the basis that the Claimant has no arguable case or has not shown a real risk of dissipation on the part of the Defendant or failed to make full disclosure to the court on the ex parte application.

12. In his second witness statement Mr Marsh dealt with the application in Cyprus to set aside the Cyprus freezing injunction, the writ of summons and service (the "Cyprus Set Aside Application"). He stated that the Cyprus Set Aside Application is made on a number of grounds including:

> "…lack of jurisdiction, improper service, VTB's failure to establish a good cause of action or prima facie good actionable right as against Mr Firtash, VTB's breach of the duty of full and frank disclosure and that the proceedings in Cyprus are abusive and issued with the intention to put pressure on Mr Firtash".

13. Mr Marsh stated (at paragraph 26 of his witness statement):

> "The Cyprus Set Aside Application, however, is yet to be heard and the present Application is made without prejudice to Mr Firtash's position in the Cyprus Set Aside Application."

He then went on to state that the evidence filed in support of the Cyprus Set Aside Application is "*inherently weak*" and provided brief details (two paragraphs) of why this is said to be the case.

14. Although therefore Mr Marsh on the one hand expressly relies on the existence of the Cyprus Set Aside Application as a ground for discharging the Freezing Order in this court, he appears to accept that the merits of that application are yet to be heard by the court in Cyprus.

15. In his submissions as to the scope of the Application, counsel for Mr Firtash also relied on the draft order referred to in the March Application Notice. However the draft order only contemplates the release of the Freezing Order to be replaced by an entry on the title register for 8 Cottage Place and it does not provide any explanation as to the grounds on which the application is made. The draft order merely cross refers, as one might expect, in general terms to the application notice and the amendment and to the evidence in support.

16. Whilst Mr Marsh in his second witness statement refers to the "weak evidence" before the Cyprus court, he does not advance as a reason for the discharge of the Freezing Order the absence of a good arguable case or the failure to show a solid risk of dissipation. This is consistent in my view with the fact that the Cyprus Set Aside Application is pending and that the Cyprus Set Aside Application is an application brought by the Defendant to challenge the merits of the underlying claim.

17. Mr Marsh then filed his third witness statement. At paragraph 7 he said:

> "<u>It is Mr. Firtash's position (as elaborated below) that, in the circumstances of this case as now revealed, the Freezing Order should be rescinded</u>. The facts which have emerged since it was granted show that <u>VTB would be more than adequately protected in the event that its Cyprus Claim ever came to trial and succeeded, by registering a restriction in its favour to prevent the sale of 8 Cottage Place without its consent</u>. The facts show that VTB has behaved, and continues to behave, abusively, that is, it is using its manifold legal proceedings in an attempt to pressurize Mr Firtash to meet a claim against two borrowers, rather than to obtain protection against any possible

> dissipation of assets by Mr Firtash as defendant in the actual claim against him…" [emphasis added]

18. Mr Marsh then set out the grounds on which Mr Firtash sought to discharge the Freezing Order as follows:

    i) VTB's continued failure to particularise the Cyprus Proceedings.

    ii) the weakness of VTB's claim in Cyprus as explained in the Cyprus Set Aside Application.

    iii) the complete lack of any real risk of dissipation.

    iv) the fact that VTB remains significantly over-secured under the Freezing Injunction in any event.

    v) VTB's outright refusal, without any reason, to release the French Mortgage.

    vi) VTB's refusal to provide fortification, and

    vii) The fact that a reasonable restriction registered against the title would provide more than sufficient protection in any event.

19. As is evident two new grounds have been added to those advanced in the second witness statement: the absence of any real risk of dissipation and the protection afforded by restriction on the title, although the latter was in my view already implicit from the second witness statement (see paragraph 47 of that witness statement set out above).

20. In relation to the underlying claim in Cyprus Mr Marsh referred back to his earlier witness statement and also refers to the Austrian proceedings brought by VTB to notify the English court of the Austrian freezing injunctions.

21. It was submitted for the Claimant in its skeleton for the hearing that:

> "It remains quite obscure whether the Court is or is not being asked to decide (for instance) that there is no sufficiently good arguable case, a submission that seems somehow to be disavowed and sometimes advanced. The time estimate would plainly not allow one to be made, and the nature of the relief sought identified at (a) and (b) above seems to presuppose that protection of some sort should remain."

22. In its skeleton for the hearing, counsel for the Defendant stated:

> "38. This court is not asked to decide whether or not VTB's inferences in the Kandelaki Affidavit were justified when they were put before the court in February 2019, but <u>since then there is no question that VTB has had the benefit of all the material in the Theodorou Affidavit, and any tentative inferences it has previously made would have had to be re-assessed and revised in the light of that new material (assuming it was new) if they</u>

> were to be relied on to justify the continuing existence of the Freezing Order. Mr Kandelaki has made no attempt to carry out this exercise even though VTB has had the Theodorou Affidavit for over 1.5 years. Each and every inference, to the extent that any are actually drawn by VTB's witnesses, can just as easily be explained by reference to the extraordinary political and economic circumstances in which the Borrowers found themselves following the annexation of Crimea, where their business was located, a fact well known to VTB prior to it entering into the 2015 Refinancing, rather than to a nefarious conspiracy or "credit fraud" (whatever that may be).
>
> 39. As already stated, Mr Firtash is not asking the court to determine whether VTB has an arguable case, or whether Mr Firtash's response is strong or weak. That would only occur if VTB has actually pleaded a case, something it has had more than enough time to do. In the present circumstances it must be treated as having put up no case sufficient to justify the continuation of the Freezing Order, which would require, at the very least, some comprehensible, pleaded, statement of the basis of VTB's case, signed by counsel who takes responsibility for that." [emphasis added]

23. I agree with the Claimant's submission that it was unclear from the written submissions for the Defendant whether at this hearing of the Application, the Defendant sought to set aside the Freezing Order on the basis that there was no arguable case. However the thrust of the Defendant's oral submissions appeared to be that this court should infer that there was no arguable case by reason of the failure by the Claimant to particularise its claim in the Cyprus Proceedings and at the same time invited the court to consider the merits (and thus whether a good arguable case exists) by reference to the evidence now filed before the Cyprus court.

24. As counsel for the Claimant submitted, the fact that the application contemplated a restriction against the Defendant's property is inconsistent with an application to discharge the freezing order for want of a good arguable case to justify its continuation. The Defendant appeared to submit that, given that the Claimant had itself rejected the entry of a restriction as a viable legal option, the alternative was to discharge the Freezing Order in its entirety.

25. In my view the Application that was before this court was an application to discharge the Freezing Order and to replace it with a restriction on the title of 8 Cottage Place on the grounds set out in the second witness statement of Mr Marsh. That is the application which I propose to consider (before moving on to deal with the balance of the Application relating to the French property and the additional fortification). I do not propose to consider whether on the evidence currently available the Claimant has shown a good arguable case in support of continuing the Freezing Order. That is not an application which in my view was before the court.

26. I would also add that an application to discharge the Freezing Order on the basis of an absence of a good arguable case was not the application which the Claimant was prepared to meet at the hearing and it was not an application which could be fairly

considered by the court without full submissions on both sides on the evidence. The court was not taken by the Defendant to the detailed evidence in support of its submission that the Claimant has not shown a good arguable case on the evidence currently available and it is no answer for the Defendant merely to cross refer to numerous statements filed in evidence contained in the bundle of over 2000 pages without taking the court to the detail. It is for the Defendant to make its application and to support its application with evidence and tailored submissions. It is not for the court to try and work out the detail in support of its broad submission. I accept that the Defendant's submissions at the hearing were constrained by time but the time estimate of half a day was the Defendant's estimate and the Defendant did not seek an adjournment.

27. Accordingly I propose to confine this judgment to the application to discharge the Freezing Order and replace it with a restriction on the title on the grounds advanced by Mr Marsh in his second witness statement. It is not therefore necessary and I do not propose to set out or consider the events which led to the claim in Cyprus and/or the grant of the Freezing Order.

Application to discharge the Freezing Order and replace it with a Restriction

28. The proposal as set out in the Application is that the Freezing Order be discharged and substituted with the entry of a restriction at the Land Registry on the title of the Defendant's property known as 8 Cottage Place. However the evidence before the court is that of Mr Bonye. He stated that (paragraphs 5 and 6):

> "5. The current restriction on the title register for 8 Cottage Place (pages 1-2 of MJDB1) is a standard form restriction and provides as follows: "Under an order of the Commercial Court (QBD) of the High Court of Justice made on 26 February 2019 (Court reference CL-2019-000122) no disposition by the proprietor of the registered estate is to be registered except with the consent of VTB Bank (PJSC) of 29, Bolshaya Morkaya str., St Petersburg, Russian Federation or under a further order of the Court."
>
> 6. Having reviewed the relevant parts of Mr Firtash's application, I understand him to be asking the English Court to replace the freezing order and existing restriction with a new restriction on the title register which would read: "No disposition by the proprietor of the registered estate is to be registered except with the consent of VTB Bank, such consent not to be unreasonably withheld or delayed for longer than 21 days."

29. His evidence is that the wording sought is a "*bespoke restriction*" and according to the Land Registry Practice Guide 19, the Land Registry will only approve a bespoke restriction if the restriction is reasonable, the application of the restriction would be straightforward and the application of the restriction would not place the Land Registry under an unreasonable burden.

30. His evidence was that:

> "9. It is not obvious to me that the Land Registry would approve the restriction sought by Mr Firtash, because the Land Registry may conclude that the application of the restriction would not be straightforward and would place the Land Registry under an unreasonable burden. In particular, it is not clear how the Land Registry would be expected to assess whether VTB Bank has unreasonably withheld its consent to a registration."

31. The Defendant did not provide any evidence to contradict the evidence of Mr Bonye. It was submitted for the Defendant that since the Claimant had refused to accept the offer of a restriction as an alternative the restriction could be reworded to remove the qualification that the consent should not be unreasonably withheld or delayed or to provide for notice to be given.

32. The evidence before me is that the proposed restriction is not a viable proposal. As to the Defendant's submission made orally that the restriction could be reworded to dispense with the qualification that the consent should not be unreasonably withheld or delayed; it is unclear what this would achieve. It was said for the Defendant that it would remove the "stigma" of the Freezing Order. However it would still (on the Defendant's case) appear to hamper a sale of Cottage Place and it would dispense with the controls which the court can exercise in relation to the Freezing Order and thus impose a less flexible restriction on the Defendant and in circumstances where the Defendant would not have the benefit of an undertaking in damages or fortification.

33. In my view therefore on the evidence, it is not appropriate to order what is sought by the Defendant in the Application, namely the discharge of the Freezing Order and its replacement by a restriction at the Land Registry in relation to the property at Cottage Place.

34. That in my view is sufficient to deal with that part of the Application. As discussed above, in my view the Application is not an application to discharge the Freezing Order in its entirety leaving no restrictions in place. The Application was predicated on the basis that a restriction on dealing with the property at 8 Cottage Place would remain in force. In my view it cannot be said on the evidence that the Claimant would be sufficiently protected by the proposed restriction against the title of the property known as 8 Cottage Place such that any continuation of the Freezing Order is disproportionate and unjustified and there is no evidence which would enable the court to conclude that there is an alternative "appropriate" restriction.

35. Accordingly in my view there is no need for the court to consider the grounds advanced in support of replacing the Freezing Order with the proposed restriction. However for completeness I will deal with VTB's alleged continued failure to particularise the Cyprus Proceedings.

<u>VTB's continued failure to particularise the Cyprus Proceedings</u>

36. It was submitted for the Defendant that the English court hearing the application for the Freezing Order was told that VTB would particularise its claims in the Cyprus Proceedings 10 days after Mr Firtash (and the other defendants) filed their notices of

appearance (Mr Kandelaki's affidavit at paragraph 91). However it was submitted that the only step VTB had taken was to file an application to the Cyprus court for an extension of time for the submission of its Statement of Claim on 31 December 2019 and that application remains undetermined. It was submitted for the Defendant that VTB has given no explanation for the failure to produce the Statement of Claim, and the Claimant is bound to "get on with" the action: *Gee on Commercial Injunctions (Seventh Edition)* at 24 – 029:

> "The general principles are that:
>
> (1) a claimant who has obtained an injunction, search order or other interim remedy is bound to get on with his action as rapidly as he can;
>
> (2) he is not entitled to retain the relief except on the basis that the proceedings are progressed promptly and without unnecessary delay;
>
> (3) if there is delay, the relief may be discharged; and
>
> (4) in deciding whether to discharge the relief and not to re-grant it the court is exercising a wide discretion taking into account all the circumstances and bearing in mind the need to deter other litigants from delaying pursuit of proceedings in which an injunction has been granted. Therefore the exercise of the jurisdiction also has a disciplinary aspect."

37. There was a dispute as to the date by which the Statement of Claim was due as a matter of Cypriot law but even on the Claimant's evidence (paragraph 17 and 20 of Mr Kandelaki's first witness statement) it was due in early September 2019. However the evidence is that the Claimant has since made an application for an extension of time, as yet undetermined by the court in Cyprus, and as referred to above, the Defendant has made the Cyprus Set Aside Application which is also yet to be determined. The evidence of Mr Kandelaki in this regard (paragraphs 24 and 25 of his first witness statement) was that:

> "24. Mr Firtash has yet to file his formal opposition to the Extension Application and has asked the Cyprus Court to determine the Cyprus Set Aside Application and the Jurisdiction Challenge before determining the Extension Application. The effect of this is that VTB Bank has, to date, been unable to serve a detailed Statement of Claim against any of the Defendants.
>
> 25. Therefore, the fact that a Statement of Claim has not been filed yet is the result of Mr Firtash's dilatory conduct of the Cyprus Proceedings and not the result of any inability or unwillingness on behalf of VTB Bank to plead its case. I understand from Patrikios Pavlou that the Statement of Claim has been drafted (in Greek) and is in near final form, subject to the inclusion of the recent developments relating to the

> reduction of the value of the claim, which I discuss below…" [emphasis added]

38. It is unclear to me why Mr Kandelaki attributes VTB's inability to serve a detailed Statement of Claim to the Cyprus Set Aside Application. The absence of a detailed Statement of Claim some 18 months after it was due in the Cyprus Proceedings and over two years from the grant of the original Freezing Order can at best be described as remarkable. However it would appear that the Claimant's actions as a matter of Cypriot law are in accordance with the law and procedure in Cyprus, or, at least to the extent that it is in default the Claimant has taken steps to obtain an extension which remains to be determined. Further the evidence before this court is that the Defendant has asked the court to determine the Cyprus Set Aside Application before determining the Extension Application. In the circumstances, whilst there has clearly been a significant delay in the production of the Statement of Claim which in my view has not been satisfactorily explained, in my view it cannot be said on the evidence that the Claimant has failed to progress the proceedings in Cyprus "promptly and without unnecessary delay".

Other grounds

39. In support of its submission that the Freezing Order should be discharged the Defendant also relied on the grounds that it asserts that:

    i) VTB remains significantly over-secured;

    ii) VTB has refused to release the French Mortgage;

    iii) VTB' has refused to provide fortification.

40. It seems to me that the issue of fortification is a separate one and if the Defendant makes out its case for additional fortification then such fortification will be ordered. However it is not the case that currently VTB have refused to provide fortification which has been ordered. The Freezing Order currently provides (paragraph 2 of Schedule B) that:

> "The Applicant will transfer the sum of £100,000 to the court within 10 business days by way of fortification of the undertaking in paragraph (1) of this Schedule B above."

41. It is common ground that that undertaking has been complied with. Accordingly the issue is whether to order additional fortification as sought by the Application and this is dealt with below.

42. As to whether VTB is "significantly over-secured" and its "refusal" to release the French mortgage, paragraph 3 of schedule B of the Freezing Order now provides that:

> "If the combined value of the Respondent's assets frozen under this order and any similar orders made in respect of the proceedings brought by the Claimant in Cyprus (whether in Cyprus or in any other jurisdiction) is known by the Applicant to exceed US$22,854,931.085 or such lower amount as

> constitutes the maximum value of the claim brought by the Claimant in Cyprus then the Applicant will, within 14 days after becoming aware of that fact, apply to the court for directions as to whether this order should be varied in any respect or discharged." [emphasis added]

43. The first thing to note is that the obligation of the Claimant if it is over secured is to apply to the court for directions; it is not obliged to release the property prior to seeking directions from the court. However if the Claimant knows that the value of the assets exceeds the maximum value of the claim in Cyprus it is obliged to seek directions.

44. The Claimant stated (paragraph 17 of the Claimant's skeleton) that it is common ground that in March 2019, VTB obtained a judicial provisional mortgage in respect of a property in France, Chateau de Fompeyre. The property is owned by an SPV, and indirectly by Mr Firtash, and has been valued at between EUR 7 million and EUR 7.5 million. The mortgage is for EUR 7.6 million and is in support of the Cyprus Proceedings. The present value of the property may be taken, on Mr Firtash's evidence (namely that there has been an offer to buy it) to be USD 6.3 million.

45. Mr Kandelaki stated in his second witness statement (paragraph 25) that he does not agree that the Claimant is overprotected in England as a result of the French Mortgage and that French Mortgage would not be sufficient to cover the sum that the Claimant is seeking to recover. In August 2019 the Claimant notified the court that, having obtained valuations of the two properties in England, 206 Brompton Rd and 8 Cottage Place, the net asset position was only marginally higher than the value of assets frozen. At that time it was said that the Claimant did not consider that it would be appropriate to apply to vary the Freezing Order given that the value of Mr Firtash's assets in France and Cyprus remained unclear. The evidence for the Claimant is that it has obtained a valuation of the Château in March 2019 but that the valuer did not have access.

46. Mr Kandelaki stated (paragraph 32 of his second witness statement) that the Claimant had not obtained access to the property for its valuer and thus had not been able to obtain a more informed understanding of the value of the assets in France. He stated:

> "I therefore do not believe that there has been a change in circumstances in relation to the French Mortgage since 2019 that would oblige VTB Bank to apply to the English court to vary the Freezing Injunction".

47. Whilst I accept that there may not been a change in the value attributed to the French Mortgage, there has been a reduction in the value of the claim in the Cyprus Proceedings. The terms of the undertaking in the Freezing Order require the Claimant to seek directions within 14 days after becoming aware that the combined value of the frozen assets exceeds the value of the claim. The reduction in the value of the claim was only agreed in the order of Foxton J of 23 February 2021 after the original application had been made on 18 February 2021.

48. Further it is said for the Claimant (paragraph 37 of Mr Kandelaki's first witness statement) that according to the Land Registry there is a restriction affecting 8

Cottage Place in favour of Brooksford Overseas Limited ("Brooksford") dated 15 March 2018 and that the restriction in favour of Brooksford means that any sale of 8 Cottage Place can only be registered with the consent of both Brooksford and VTB Bank. Therefore, it may not be straightforward for VTB Bank to enforce a judgment in the Cyprus Proceedings against 8 Cottage Place as VTB Bank would need to consult with Brooksford in order for any sale to be registered.

49. However the Claimant accepts (paragraph 11 of the Claimant's skeleton) that

> "… as things stand the injunction bites only on Cottage Place, which has a value in excess of the amount of the injunction."

50. It seems to me clear that the obligation to apply for directions was triggered following the order of Foxton J of 23 February 2021 (if not before) but in the circumstances where an application was then made on 5 March 2021 by the Defendant, it is difficult to see that any prejudice has arisen from any failure by the Claimant to apply for directions.

51. Turning to the substantive issue, the Defendant seeks an order that the Claimant's representatives are ordered to take steps to procure the removal of the French Mortgage.

52. It was submitted for the Claimant that this court has no power to order the release of the French Mortgage and should not sensibly entertain argument about the position under French law. Nor should it make an order which circumvents the French rules on sale. Those are properly matters for the French courts. It was therefore submitted that the real question should be whether the amount covered by the English injunction should be reduced by the amount covered by the French mortgage.

53. It was submitted for the Claimant that this is a completely academic question in that even if the amount of the Freezing Order was reduced Cottage Place will still be subject to the injunction and that this does not matter unless and until Mr Firtash wishes to sell or otherwise deal with Cottage Place.

54. It was further submitted that the contention that VTB is "over-secured" is misconceived. The injunction gives VTB no security over the English assets, and in the absence of evidence about Mr Firtash's overall financial position (it being clear that he has other creditors) it cannot be assumed, as Mr Firtash does, that Cottage Place would be entirely available to meet its claim.

55. Whilst I accept that the court cannot make an order which binds a French court and that a Freezing Order does not create security over the assets subject to the Order, there is no reason in my view why the court could not direct the Claimant to take steps to release the French Mortgage as a condition of continuing the Freezing Order. Whilst it may be that the Court might normally address this through reducing the assets which are subject to the Freezing Order and thus within the scope of this court's jurisdiction, there seems to me to be no reason why it should only take this course.

56. However the Court was not taken to evidence which demonstrated that (bearing in mind possible other creditors of the Defendant) the available proceeds of a sale of

Cottage Place would be sufficient to cover the Claimant's claim and in those circumstances in my view it would not be appropriate to order the Claimant to take steps to release the French Mortgage. Further I accept the submission for the Claimant that if Cottage Place is sold then the amount of the proceeds of sale to be caught by the Freezing Order will need to be determined but that it is not necessary for the court to determine the amount likely to be available to the Claimant today.

Additional Fortification

57. The principle that the Claimant should provide fortification was not resisted by the Claimant. Accordingly I do not propose to address the evidence of the Defendant which went to the issue of whether fortification was justified. I intend to focus on the Application to increase the amount of fortification to £10 million.

58. The purpose of the Application to increase the amount of the fortification is said (paragraph 46 of Mr Marsh's first witness statement) to be to cover the potential losses incurred and to be incurred by Mr Firtash as a result of the Freezing Order including "the significant costs of financing" which Mr Firtash is continuing to incur "as a result of his inability to sell his properties at market value whilst they are subject to the Freezing [Order]".

59. The Defendant has provided a schedule setting out the calculation of the £10 million additional fortification which is sought. The Defendant quantified the potential loss as follows:

    i) a sum of approximately £3 million is said to be attributable to the above average interest payable to Brooksford since March 2019;

    ii) some £8.9 million is said to be attributable to an alleged reduction in value of Brompton Road and Cottage Place; and

    iii) fees charged by Brooksford of some £1.775 million.

    The total of these losses is some £13.6 million against which the Defendant applies for £10 million by way of additional fortification.

Relevant law

60. The relevant law and the test for fortification is set out in *Energy Venture Partners v Malabu Oil & Gas Ltd* [2014] EWCA Civ 1295 at [52]-[54]:

> "52…it is only appropriate that if the defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the order, it should equally be protected…"
>
> 53. It is completely contrary to principle to require proof on the balance of probabilities on such an application and so to do would encourage wasteful satellite litigation. In my judgment Briggs J was correct in *Jirehouse Capital v Beller* [2008] EWHC 725 (Ch) to summarise the principles as he did at para 25:

> "Broadly speaking, they require an intelligent estimate to be made of the likely amount of any loss which may be suffered by the applicant fortification (here the defendants) by reason of the making of an interim order. They require the court to ascertain whether there is a sufficient level of risk of loss to require fortification. They require that the loss has been or is likely to be caused by the granting of the injunction."
>
> The three requirements are of course inextricably linked. The principles could equally be summarised, as Hamblen J did at para 31 of his judgment, as a requirement that the applicant for fortification show a good arguable case for it. In this interlocutory context, showing a sufficient level of risk of loss to require fortification is synonymous with showing a good arguable case to that effect. In some cases, the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific.
>
> 54 As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered, as Gibbs J put it in the High Court of Australia in Air Express Ltd v Ansett Transport Industries (Operations) Pty (1981) 146 CLR 249, 313. That was said in the context of an application to enforce the undertaking. At the stage of considering whether fortification of the undertaking is required, the proposition could be restated as it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered. That is the hurdle which the applicant must surmount. It is of course open to the defendant to demonstrate that it has not been surmounted, as by demonstrating that there is no causal link between the granting of the injunction or order and the loss in question"

61. The Defendant refers to the test as set out by Popplewell J (as he then was) in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at [14]. This reflects the test set out by the Court of Appeal in *Energy Ventures*.

Good arguable case that it will suffer loss in consequence of the making of the order

62. As noted above the three requirements of the risk of loss, causation and the amount of the loss are inextricably linked. However, it is helpful to consider first whether the Defendant has shown a good arguable case that it will suffer loss in consequence of the making of the order.

63. It is submitted for the Defendant that due to the existence of the Freezing Order Mr Firtash was unable to offer 8 Cottage Place as additional security for the Brooksford loan facility (a facility agreement entered into in March 2018) and consequently has

incurred substantially higher financing costs than would otherwise have been the case and was forced to agree an amendment letter with Brooksford in November 2020 for a very significant arrangement fee of £525,000.

64. The evidence of Mr Marsh is that (paragraphs 32 – 34 of his third witness statement):

> "32. As I explained at paragraph 50 of Marsh 1, VTB's express refusal, when asked in 2019, to consent to the additional security on 8 Cottage Place which Brooksford requested resulted in Mr Firtash having to bear substantially higher financing costs than would otherwise have been the case.
>
> 33. On 6 March 2019, Mr Firtash signed an amendment letter to the Brooksford Loan Facility which provided a condition that Mr Firtash and Brooksford enter into a legal mortgage pursuant to which 8 Cottage Place would be secured in favour of Brooksford within 3 months of the date of the amendment letter. Mr Firtash's failure to execute a mortgage on 8 Cottage Place because VTB failed to consent to the mortgage represented an Event of Default under the Brooksford Loan Facility. The fact that Mr Firtash has continued to be unable to execute a mortgage on 8 Cottage Place has meant that Mr Firtash has had to enter several subsequent amendment letters to the Brooksford Loan Facility to avoid default and this has resulted in higher financing costs being incurred. The provision of a mortgage on 8 Cottage Place has remained a required obligation for Brooksford in the amendment letters to the Facility.
>
> 34. As VTB is aware, Mr Firtash is a politically exposed person. I am instructed by Mr Ian Bird, Mr Firtash's representative, that it has not proven easy for him to refinance his English properties (or to service the loans under them) and Brooksford, which is an aggressive lender, has taken advantage of this situation by imposing substantial fees, and increasingly high rates of interest, as a condition for its continuing waiver of its right to foreclose upon an Event of Default under the Brooksford Loan Facility. VTB's Freezing Order, and its refusal to vary it, have caused those substantial fees and increased interest to be incurred and have prevented Mr Firtash from refinancing the properties on more reasonable terms…"

65. It was submitted for the Defendant that Mr Firtash's failure to execute a legal mortgage over 8 Cottage Place in favour of Brooksford (due to VTB's refusal to provide permission, the need for which arose as a result of the Freezing Order) constituted an Event of Default under the Brooksford loan facility and directly resulted in the high refinancing costs that Mr Firtash had to pay Brooksford for the refinancing of the loans.

66. Further, it was submitted that the existence of the Freezing Order affected Mr Firtash's ability to refinance his Brooksford loan on more reasonable terms due to the reputational damage caused by the Freezing Order.

67. It was submitted for the Claimant that Mr Firtash had incurred high borrowing costs by reason of his status as a politically exposed person and not as the result of the Freezing Order. It was submitted that the Claimant has not got the Brooksford finance documents in their entirety and the only correspondence with Brooksford was a text message that "makes no sense".

68. The text message referred to stated that:

> "… Without prejudice to the demand letter sent today, and subject to contract [Brooksford] is prepared to consider extending the loan by six months, to give you time to refinance the loan or sell the asset, in exchange for a rollover fee charge that will be added to the loan of £1.25 million, and the loan will from the extension signing date run at an interest rate of 22% which will come due at the end of the loan in six months… Nothing else will be accepted, if not we will need repayment in full by Monday or a receiver will be appointed to take over the property…"

69. This message is not however the only evidence before the court and cannot be read in isolation. It was an exhibit to the first witness statement of Mr Marsh as to which the relevant sections in this regard are as follows:

> "49. I am informed by Mr Bird that the Brooksford Loan Facility is due for repayment on 6 March 2021 and is currently the subject of an express threat of foreclosure by the lender if its "take it or leave it" refinancing terms referred to in paragraph 51 below are not accepted.
>
> 50. I am further informed that due to the existence of the Freezing Injunction Mr Firtash was unable to offer 8 Cottage Place as additional security for the Brooksford Loan Facility, as demanded by Brooksford, and consequently:
>
> a. has been in default of the Brooksford Loan Facility for failing to provide the additional security and has had to bear substantially higher financing costs than would otherwise have been the case in the absence of the Freezing Injunction, including default interest rates of between 17.5% and 20%; and
>
> b. was forced to agree an amendment letter with Brooksford in November 2020 which purported to extend the period for repayment until 6 March 2021 for a very significant arrangement fee of £525,000. Mr Firtash has not yet been able to pay this fee.

> 51. Further, there is no certainty that the Brooksford Loan Facility will be extended on its current termination date of 6 March 2021. I am informed that the present state of negotiations between Brooksford and Mr Firtash is that Brooksford have offered to extend the repayment date of the Brooksford Loan Facility for a further 6 months in exchange for a further fee of £1.25 million and at a default interest rate of 22%. If these terms are not agreed by Mr Firtash and no repayment is made on 6 March 2021, Brooksford have indicated that they will take steps to enforce their security. It goes without saying that any forced sale of 206 Brompton Road is very likely to yield a sale price far below the property's market value."

70. I note that the amendment letter of November 2020 referred to in paragraph 50b of Mr Marsh's witness statement is also exhibited to Mr Marsh's witness statement as evidence in support of the arrangement fee of £525,000 which is expressed to be payable before the facility becomes effective.

71. As referred to above, it is sufficient for the court to be satisfied that the making of the order is or was a cause without which the relevant loss would not be or would not have been suffered. I bear in mind that the Defendant is not required to prove its case on loss on the balance of probabilities and the court is not to be led into satellite litigation at this interlocutory stage. I note the observations of Tomlinson LJ in *Energy Ventures* at [54]:

> "…If however, disproving the asserted causal link as to which a good arguable cause is shown requires the deployment of extensive contentious evidence and argument, that is not an exercise to be attempted at the interlocutory stage. That was the approach of Floyd J, at paras 18 and 25 of his judgment in *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), set out at paras 49 and 51 above, and I agree with it."

72. The passage referred to in the judgment in *Bloomsbury* and approved by Tomlinson LJ was as follows:

> "18. In the case of a freezing order, it may be necessary to distinguish between the harm caused by the existence of the litigation and the harm caused by the fact that the freezing order has been made. This consideration is important in the present case, because Mr Holyoake relies on a number of instances where his standing has been called into question by bankers and business associates since the grant of the order, and the question may arise as to whether this is damage which he would have suffered in any event. But it is very difficult on the limited evidence which is available to be sure whether or not it is the litigation or the order which is giving rise to the prospect of harm."

73. This appears to me to be the answer to the submissions for the Claimant in this case that the losses are not caused by the Freezing Order. In my view the Defendant has shown a good arguable case that it will suffer loss as a result of the Freezing Order and the Freezing Order is a cause of the additional costs incurred in relation to the Brooksford facility.

74. As to the quantum of the loss in relation to the additional interest the evidence of Mr Marsh is as follows (paragraph 63 of his first witness statement):

> "In particular, Mr Firtash has already incurred (or is about to incur) the following additional costs of financing the Brooksford Loan Facility consisting of:
> …
>
> c An average interest rate of approximately 17.38% since March 2019 (which is proposed to be increased to 22 per cent. from 6 March 2021) amounting to a loss since March 2019 to date of approximately £3,003,497.15 (when compared to the usual market rate of 5% in respect of secured loans). I am informed of these figures by Mr Firtash's accounting team"

75. There is no reason in my view for the court to reject this evidence.

76. As to the alleged loss of a potential buyer and fall in the value of the two London properties, the evidence of Mr Marsh (paragraph 53 of his first witness statement) was that a sale of 206 Brompton Road had been unable to proceed due to the terms of the Freezing Order. His evidence was that in December 2018 Mr Firtash received an offer to purchase 206 Brompton Road for £50 million. Between August 2019 (sic) and January 2019 Mr Firtash was in discussions with a Dubai developer who offered £48 million for 206 Brompton Road but who withdrew the offer upon learning of the Freezing Order. After the Freezing Order was granted Mr Firtash received an offer for £30 million in July 2019 because it was viewed as a distressed asset. Mr Marsh stated:

> "With the Freezing Injunction, those responsible for marketing the property believe that Mr Firtash would only be able to achieve a very low offer of approximately GBP 30,000,000 (and that it is possible no offers will be received at all)."

77. As Brompton Road has now been released from the Freezing Order it seems to me that any fall in the value of Brompton Road caused by the existence of the Freezing Order is unlikely to be sustained. I therefore find that the Defendant has not established a good arguable case that it will suffer loss in relation to 206 Brompton Road.

78. In relation to Cottage Place the evidence is that Mr Firtash received an offer to purchase in October 2018 for £51 million and in January 2019 for £52 million. The evidence of Mr Marsh is that these offers could not proceed because of the Freezing Order. It is further said (paragraph 54 (xii) and (xiii) of Mr Marsh's first witness statement) that:

> "Those responsible for marketing the property believe Mr Firtash could now obtain offers in the region of GBP 50,000,000 were 8 Cottage Place no longer subject to the Freezing Injunction.
>
> "With the freezing injunction those responsible for marketing the property believe that Mr Firtash would only be able to achieve a very low offer of approximately GBP 32,000,000 (and that it is possible no offers will be received at all, because it is viewed as a distressed asset)."

79. It was submitted for the Claimant that the Defendant has not explained why the Freezing Order prevented offers being pursued and why no request was made for a variation or how loss has been suffered by not accepting the offers.

80. The Defendant only needs to show a good arguable case that it will suffer loss in consequence of the making of the order. Mr Marsh's evidence is based on the evidence of Mr Bird described as one of Mr Firtash's legal representatives. Mr Marsh states (paragraph 54 of his first witness statement) that Mr Bird has "either first-hand knowledge or has discussed achievable prices with those now and historically responsible for marketing them".

81. Again, I bear in mind that the test to be applied is not the balance of probabilities. In my view the Defendant has shown a good arguable case that it will suffer loss in consequence of the making of the order in relation to Cottage Place. Whilst there is a mechanism for consent to be given by VTB to a sale, the relations between the parties to date would support an inference that it might not be readily given within a prompt timeframe and this could cause a sale to be lost or a price reduction as a distressed asset.

82. As to the amount of the potential loss I note that an intelligent estimate will be "informed and realistic although it may not be entirely scientific". The amount of the loss for Cottage Place claimed by the Defendant in the appendix to its letter of 23 February 2021 and now relied on before the court is based on the Claimant's valuation in August 2019. The Defendant estimates a 10% reduction since February 2019 and then a further 10% reduction from February 2021. On the basis of the evidence referred to above even if the figure of £50 million (for a sale without the Freezing Order) is optimistic, the estimated loss of £7 million in respect of Cottage Place is conservative given the VTB valuation of £35 million.

83. Taking the estimate of losses in the aggregate I estimate them to be in excess of £10 million. I therefore order that fortification should be provided in the amount sought of £10 million.