



Neutral Citation Number: [2019] EWHC 1400 (Comm)

Case No: CL-2016-000172

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

Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 05/06/2019

Before :

MR JUSTICE BUTCHER

Between :

PJSC TATNEFT

**Claimant/
Respondent**

- and -

- (1) GENNADIY BOGOLYUBOV**
(2) IGOR KOLOMOISKY
(3) ALEXANDER YAROSLAVSKY
(4) PAVEL OVCHARENKO

**Defendants/
Applicants**

Paul McGrath QC, David Davies and James Sheehan (instructed by **Akin Gump LLP**) for
the **Claimant**

Matthew Parker and Philip Hinks (instructed by **Enyo Law LLP**) for the **First Defendant**
Mark Howard QC, Ruth Den Besten and Tom Ford (instructed by **Fieldfisher LLP**) for the
Second Defendant

Kenneth MacLean QC and Owain Draper (instructed by **Mishcon de Reya LLP**) for the
Third Defendant

Tom Weisselberg QC and Harry Adamson (instructed by **Byrne & Partners LLP**) for the
Fourth Defendant

Hearing dates: 15-16 May 2019

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.

.....

MR JUSTICE BUTCHER

Mr Justice Butcher :

Introduction

1. This is an application by the Defendants for security for costs, made by application notices dated 10 and 11 September 2018.
2. Though it is an application for security for costs, which should ordinarily, in accordance with paragraph F10.3 of the Commercial Court Guide, have a time estimate of one hour, this hearing has taken one (very full) day of pre-reading, two days of oral hearings, with no time in those two days to permit the issues as to the quantum of any security to be argued, or the giving of judgment. Some 26 bundles of materials were put before me, with two bundles of authorities.
3. In the action the Claimant (“Tatneft”), which is an oil company incorporated in Tatarstan, one of the constituent members of the Russian Federation, claims against the four individual Defendants in respect of their alleged involvement in what Tatneft describes as an “Oil Payment Siphoning Scheme”.
4. The nature of the parties, and the issues in the action are described in some detail in the judgment of Picken J in PJSC Tatneft v Bogolyubov [2016] EWHC 2816 (Comm), in particular paragraphs [3-12], and it is not necessary to say very much about them. Tatneft’s allegations are, in summary, that during 2007 it sold oil to a company called PJSC Transnational Financial and Industrial Company ‘Ukratnafta’ (“UTN”), which was the owner and operator of the Kremenchug oil refinery in Ukraine, through a contractual chain of companies known as Kompaniya Suvar-Kazan LLC (“S-K”), Private Multi-Sector Production Commercial Enterprise AVTO (“Avto”), Taiz LLC (“Taiz”) and Tekhno-Progress Scientific and Production LLC (“Tekhnoprogress”). On 19 October 2007 Tatneft ceased to make delivery of the oil, and UTN ceased to make payment. In 2009, Tatneft alleges, the Defendants, who are all Ukrainian businessmen, procured that the value of outstanding oil payments was paid by UTN to Taiz and Tekhnoprogress and then siphoned them out of those companies. Tatneft claims that the siphoning off of these funds was a scheme effected by the Defendants. It contends that the Defendants are liable for damages of US\$334 million under Article 1064 of the Russian Civil Code. Tatneft brings these proceedings as assignee of what it contends was its commission agent, S-K. Tatneft’s claims are disputed by the Defendants on various grounds. I do not need to say more about them. There is no issue on this hearing that the claim and the defences are arguable, and the strength of neither is said to be relevant to my decision as to whether to order security for costs.

The Legal Basis for an Order for Security for Costs

5. CPR 25.13 provides, in part, as follows:
 - “25.13 (1) The court may make an order for security for costs under rule 25.12 if –
 - (a) It is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
 - (b) (i) one or more of the conditions in paragraph (2) applies

...

(2) The conditions are –

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982.”

6. There is no dispute that, given that Tatneft is a Tatarstan company, the condition set out in rule 25.13(2)(a) is met.
7. The Court therefore has jurisdiction to order security for costs. However, as explained by the Court of Appeal in Nasser v United Bank of Kuwait [2002] 1 WLR 1868, though the Court has a discretion because rule 25.13(2)(a) is met, that discretion must be exercised in a manner which is not discriminatory for the purposes of Articles 6 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. As it was put in paragraphs [62-64] of that case, per Mance LJ:

“[62] The justification for the discretion under rules 25.13(2)(a) ... in relation to individuals and companies ordinarily resident abroad is that in some – it may well be many – cases there are likely to be substantial obstacles to, or a substantial extra burden (eg of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state....

[63] It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rule 25.13(2)(a) ... is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).

[64] The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases ... it may be incumbent on an applicant to show some basis for concluding that enforcement would face

any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. ...”

8. Consideration was given to the evidential threshold which an applicant for security for costs needed to surmount in Bestfort Developments LLP v Ras Al Khaimah Investment Authority [2016] EWCA Civ 1099. It was there held by the Court of Appeal that it is not necessary for such an applicant to show that it was more likely than not that there would be substantial obstacles to enforcement, but was sufficient for it to demonstrate that there was a real risk that it would not be in a position to enforce an order for costs. Gloster LJ said as follows:

“[73] Contrary to Mr Millett’s submissions, I do not accept that there is any need for the evidence to demonstrate ‘very cogent evidence of substantial difficulty in enforcing a judgment’ either in the non-Convention state where a claimant is resident, or where his assets are located.

...

[77] In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that ‘on objectively justified grounds relating to obstacles to or the burden of enforcement’, there is a *real risk* that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be ‘a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden’ but whether the evidence is sufficient in any particular case to satisfy the judge that there is a *real risk* of serious obstacles to enforcement, will depend on the circumstances of the case. In other words, I consider that the judge was wrong to uphold the Master’s approach that the appropriate test was one of ‘likelihood’, which involved demonstrating that it was ‘more likely than not’ (ie an over 50% likelihood), or ‘likely on the balance of probabilities’, that there would be substantial obstacles to enforcement, rather than some lower standard based on risk or possibility. A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents. ...

...

[79] Necessarily, at an interlocutory stage, in the absence of cross-examination and full enquiry, it may well be that the court cannot be satisfied at that time that an applicant for security has demonstrated *on the balance of probabilities*, that there will be substantial obstacles to enforcement, or even, in some cases, that there is a *real risk* of such obstacles. The judge at that stage may well not be in a position to resolve disputed issues arising on the

evidence. For that reason, I am against the articulation of any hard-line, inflexible test in relation to an evidential standard based on ‘likelihood’. ...

...

[86] ... What actually suffices to justify the making of an order will depend on the evidence adduced; ‘mere possibility’ of obstacles to enforcement in my view will usually be insufficient to justify an order for security; but (depending on the evidence) ‘real risk’ will usually, but not invariably, suffice.”

9. In In re RBS Rights Issue Litigation [2017] 1 WLR 4635, at [29], Hildyard J equated a real with a non-fanciful risk.
10. Further guidance as to the jurisdiction to order security for costs has been given by the Court of Appeal in Danilina v Chernukhin [2018] EWCA Civ 1802. At [51] Hamblen LJ summarised the relevant principles as follows:

“[51] Having regard to the guidance provided by these authorities the position may be summarised as follows:

(1) For jurisdiction under CPR r 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

(2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security of costs under CPR r 25.13(1) if ‘it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order’.

(3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of articles 6 and 14 of the Convention: see the Bestfort case [2017] CP Rep 9, paras. 50-51.

(4) This requires ‘objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned’: see Nasser’s case [2001] 1 WLR 1868, para 61 and the Bestfort case at para. 51.

(5) Such grounds exist where there is a real risk of ‘substantial obstacles to enforcement’ or of an additional burden in terms of cost or delay: see the Bestfort case at para. 77.

(6) The order for security should generally be tailored to cater for the relevant risk: see Nasser’s case at para. 64.

(7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings: see, for

example, the orders in De Beer's case [2003] 1 WLR 38 and the Bestfort case.

(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement: see, for example, the order in Nasser's case.”

11. In Danilina v Chernukhin, the Court of Appeal also disapproved of an approach to the quantum of security which used a ‘sliding scale’ as to the degree of risk of non-enforcement involved and discounted the costs figure accordingly. In rejecting such an approach, Hamblen LJ said this:

“[57] In principle, security should be tailored so as to provide protection against the relevant risk. On the judge’s findings the relevant risk is that of non-enforcement of any costs order obtained. The purpose of ordering security in such circumstances is to secure the defendant against the risk of non-recovery of those costs. Since that is the risk against which the applicant is entitled to protection, I agree with the appellants that the starting point should be that the defendant is entitled to security for the entirety of his costs.

[58] As a matter of authority, this court has held in the Bestfort case [2017] CP Rep 9 that the appropriate ‘threshold’ test when considering the issue of whether there are ‘substantial obstacles’ to enforcement is one of real risk rather than likelihood. Various reasons are given for reaching that conclusion, including the need for a simple and clear approach to issues which will be considered at an interlocutory hearing on the basis of what ‘necessarily and proportionately, will be limited evidence’: at para. 48.

[59] ... The consequence of adopting a sliding approach is in effect to require the defendant to establish likelihood of non-enforcement (if not more) if security for the entirety of the costs is to be obtained.

[60] Further, it would lead to the type of detailed evidentiary exercise which the court was keen to avoid through its decision in the Bestfort case. It would allow in via the back door all the evidence and evidential inquiries which the court in that case took care to shut out via the front door.”

Not a Case of Stifling

12. It should be noted at the outset that this is not a case in which it is suggested that any order for security for costs would stifle the proceedings. Tatneft’s evidence is that it has very significant funds. Specifically, it put in evidence that as at 31 December 2018 it had (a) total assets of approximately US\$18.5 billion; (2) total turnover for the year to 31 December 2018 of approximately US\$ 14 billion; (3) total profit for the year of

approximately US\$ 3.2 billion; and (4) cash and cash equivalents of approximately US\$ 1 billion.

The Issues Arising

13. The matters which the court has to consider are essentially two-fold and are as follows:

(1) Is it shown that there is a real risk of substantial obstacles to enforcement by reason of Tatneft's country of residence or the location of its assets? (ie is the Nasser condition met?)

(2) If it is, is it just to make an order for security for costs?

Is the *Nasser* Condition Met?

14. In relation to the question of whether there is a real risk of substantial obstacles to enforcement by reason of the country of Tatneft's residence or the location of its assets, there are two aspects. This is because, while Tatneft is resident in Russia, and the vast majority of its assets are undoubtedly located in Russia, it has pointed to certain assets which it says are located in Switzerland and Cyprus. Tatneft denies that there are any substantial obstacles to enforcement of a costs order in Russia; but it says that even if that is wrong, there are no substantial obstacles to enforcement of a costs order in Switzerland or Cyprus, and accordingly that there is no basis for an order for security for costs. I will have to consider these two aspects in turn. I do not consider that it greatly matters in which order they are taken, provided that they are both considered as necessary.

The Issue of Enforcement of a Costs Order in Russia

15. The Defendants say that the court can conclude without any difficulty that there is a real risk of substantial obstacles to enforcement of a costs order against Tatneft in Russia. They point to the fact that English courts have already, and recently, held that there is a real risk of non-enforcement of costs orders in Russia, in particular in Danilina v Chernukhin [2018] EWHC 39 (Comm). They also rely on the evidence of Dr Ilya Rachkov, an attorney at law, who has been practising in Russia since 1996, and an adjunct Professor at the Moscow State Institute of International Relations at the Ministry of Foreign Affairs of Russia. His overall view is that "it would be difficult for the Defendants (or any of them) to enforce a costs order in Russia. I consider that Tatneft could raise substantial obstacles to enforcement, and a Russian court would be unlikely to enforce an order for costs in favor of the Defendants in these proceedings."

16. Tatneft, for its part, contends that there has not been shown to be any real risk of substantial obstacles to enforcement. It says that the fact that the English court may have previously considered that there was such a risk, was not relevant. Those decisions were based on evidence not before the court on this occasion. The evidence of Dr Rachkov was answered by evidence of Professor Anton Asoskov, Professor of the Civil Law Department at the Law Faculty of the Lomonosov Moscow State University. His overall opinion is that "in my opinion there are no substantial obstacles in relation to the practice of enforcement of English court judgments and costs order in Russia, which would create a real risk of the Russian courts not enforcing against Tatneft's assets within the Russian Federation an order made by the English courts ordering Tatneft to

pay amounts to the [Defendants]”. The debate between Dr Rachkov and Professor Asoskov was contained in three reports of each expert served for the purposes of this hearing.

17. In addition, Tatneft specifically denies any suggestion that the identity of the parties to the action will lead to a politically influenced result in relation to attempts to enforce any costs order in favour of the Defendants. It served evidence from Professor William Simons on this issue. Tatneft’s evidence in this area was answered by an expert report of Dr Vladimir Gladyshev.
18. At the hearing there was a debate as to which of the expert views should be accepted. I was taken to various decisions of Russian courts, and to a number of Russian legal instruments, with the aim of allowing me to take a view as to which of the side’s contentions were correct.
19. In approaching this area of dispute, I consider it important to bear the following in mind:
 - (1) I am concerned only to decide whether there has been shown to be a real risk of substantial obstacles to enforcement.
 - (2) One of the reasons why the threshold was set as a real risk, rather than a likelihood, of non-enforcement was that there should be a “simple and clear approach” (Danilina v Chernukhin [2018] EWCA Civ 1802, paras. [58], [60]).
 - (3) The issues are largely ones of Russian law and practice, where the evidence is given by experts who have not been cross-examined. In the circumstances, save in clear cases in which it can be plainly seen that one or the other expert lacks qualifications or reliability, or that there is no room for serious argument, it is unlikely to be possible to prefer one expert’s view on a disputed point to the other’s.
 - (4) If the court is unable to decide between the evidence of two experts as to whether there is a real risk of substantial obstacles to enforcement, that may itself lead the court to conclude that there is such a risk, because there is the possibility that the views of the expert who says that there is such a risk are correct. This sort of situation seems to be envisaged by Gloster LJ in paragraph [81] of Bestfort.
20. Having considered all the expert evidence submitted, and the arguments of each side, but with the points mentioned in the last paragraph in mind, I have come to the clear conclusion that it has been shown that there is a real, which I take to mean a more than fanciful, risk of there being substantial obstacles to enforcement of a costs order in favour of the Defendants in Russia.
21. My main reasons for reaching this conclusion are seven-fold, and I will briefly summarise each in turn.

(1) Evidence of Recent Enforcement Rates in Russia

22. An analysis has been conducted by Mr Knight and assistants at Fieldfisher who are fluent in Russian of publicly available sources of information on the enforcement by Russian courts of judgments and arbitral awards made by foreign (ie non-Russian) courts and tribunals in the period 2015-2018. These results can be summarised as follows:

(a) The proportion of decisions involving Ukrainian applicants or from Ukrainian courts which have been enforced has fallen from 60% in 2015 to 18% in 2018 (to 31 October 2018), by comparison with the figures for all decisions of 60% in 2015, 52% in 2018, and higher than the figure for Ukrainian cases in each of the years.

(b) Of judgments of English courts or arbitral tribunals, 7 out of 9 were enforced in 2015, 6 out of 12 in 2016, 3 out of 6 in 2017 and 2 out of 5 in 2018.

23. I have no doubt that there are methodological issues which can be raised in relation to the exercise which I have summarised, and further that, as Mr McGrath QC said, without knowing about the individual cases involved there is clearly a limit to how informative it is. I do not consider that this type of evidence on its own would establish a real risk of obstacles to the enforcement of a costs order in this case. However, I consider that, taken with other evidence, it does support the conclusion that there is a real risk of non-enforcement.

(2) No Enforcement Treaty

24. There is no dispute that there is no relevant bilateral treaty between the United Kingdom and Russia which requires the courts of each to recognise or enforce the judgments or costs orders made by the courts of the other. As Cockerill J said in Danilina v Chernukhin at paragraph [68], this of itself “gives rise to uncertainty and an element of risk”.

(3) Issues as to enforcement on basis of reciprocity

25. The basis on which it would most usually and cogently be put that there should be enforcement in Russia of an English judgment is, it appears, that it is required by comity, on the basis of reciprocity: ie because English courts recognise and enforce Russian judgments. There is a debate between Dr Rachkov and Professor Asoskov as to whether the existence of such reciprocity must be established before the Russian courts “on a case by case basis” (Rachkov) or whether there is now, and has been since 2012-2014, a “settled practice” of enforcement of English judgments based on a “presumption” of reciprocity (Asoskov).
26. Not least because of the Kekhman case (resolution No. F07-9292/2016 of the Arbitrazh court of the North-West district), and the absence of any mention of it by independent commentators, it appeared to me that there was at least uncertainty as to the existence and ambit of any such “presumption”. I therefore considered that the evidence indicated a non-fanciful risk that reciprocity would have to be established in any particular case. Further it appeared to me that there was a risk, which again could not be described as fanciful, that reciprocity might not be found to be established in the event of an attempt to enforce a costs award in the present case. This is especially so given that no one has identified a case in which an English court has enforced a Russian costs-only judgment, and accordingly there might be an issue as to whether any relevant reciprocity could be shown in relation to the enforcement of such orders.
27. Moreover, there was no evidence before me that any court in Tatarstan had enforced an English, or any foreign, court’s judgment on the basis of reciprocity.

28. Thus, it appears to me that there is a risk, which though not high is more than fanciful, of non-enforcement on the ground that reciprocity may not be established to the satisfaction of the putative enforcing court.

(4) Issues as to enforceability of costs-only orders

29. By the Information Letter No. 78 of the Praesidium of the Supreme Arbitrazh Court of the Russian Federation dated 7 July 2004, it was stated that rulings of foreign courts on the application of “interim measures” are not to be recognised and enforced in Russia “because they are not final judicial acts on the substance of the dispute rendered in the course of adversarial proceedings”. Dr Rachkov’s evidence is that Russian courts would be likely to regard any order for costs made by an English court where that order was not part of a final judgment or was not at least accompanied by a final judgment as not being a “final judicial act on the substance of the dispute”, and thus not enforceable. Professor Asoskov disagrees, and has pointed to two cases in which he says costs-only orders of English or BVI courts have been enforced by Russian Courts (Metall Market v Vitorio Shipping, and Oslo Marine Group Ports v Bank of St Petersburg). Dr Rachkov considers that the first is not a case involving a costs-only order, and that the second “does not provide any kind of guarantee that a similar order would be made in this case”.
30. On the basis of the evidence it appeared to me that there was a more than fanciful risk of non-enforcement of a judgment for costs if it was unaccompanied by any determination of the merits of the dispute. In particular, I considered that there was such a risk in a case in which the costs order followed on discontinuance by Tatneft. I was also persuaded that, having regard to the nature of the limitation defence raised by the Defendants and of Tatneft’s answer to it, discontinuance was not such an unlikely eventuality that it should be disregarded as a possibility.

(5) The possibility of non-enforcement by reason of considerations of public policy

31. There is no issue that foreign decisions will not be enforced in Russia if they contradict the public order of the Russian Federation: Arbitrazh Procedure Code, Art. 244(1). Dr Rachkov’s evidence is that the concept of public order/policy has been interpreted expansively by Russian courts, and that it is difficult to predict when enforcement will be refused on such grounds. He refers to the Rosshelf, Protosan, and Sfera Agrokon cases, and to other legal commentary which has identified a broad approach to public policy as being adopted by Russian courts. This evidence is similar to views which have been expressed by Professor Karabelnikov, who was previously instructed by Tatneft as an expert on Russian law, which included that Russian courts misunderstand the notion of public policy, and that there has been no consistency in the application of the notion. Professor Asoskov disagrees, but it appears to me that the evidence establishes a non-fanciful risk that a Russian enforcement court might apply the public policy exception to enforcement in an expansive way.
32. Furthermore, there are features of the present case which might bring it within an expansive application of a public order/policy exception. These include the fact that the alleged non-payment for the oil which Tatneft supplied to UTN, and the apparent “financial machinations” connected with this, have been regarded by the Prime Minister, and now President, of Tatarstan, Mr Minnikhanov, as a matter of such importance that he sought in 2009 to take it up with the Prime Minister of Ukraine.

They also include the fact that the relations between the parties have become highly politicised by reason of the tensions between Russia and Ukraine including over Crimea. Mr Kolomoisky, as he contends because of his resistance to Russian expansion, has been the subject of public criticism from President Putin, and is the subject of pending criminal proceedings in Russia, brought by the Investigative Committee of the Russian Federation (“RIC”), in his absence. His evidence is that his Russian assets were frozen in 2014 and that the RIC announced that this was done in order to prevent Mr Kolomoisky using the proceeds to fund his activities in south-eastern Ukraine and that “the same destiny awaits the rest of the properties and other assets in Russia belonging to Kolomoisky”. He has also given evidence to the effect that other assets of his, or believed to be his, have been seized by the Russian government. The First and Third Defendants, Mr Bogolyubov and Mr Yaroslavsky are now amongst the list of individuals who have been made the subject of a Sanctions Resolution, to which I will return, published by the Russian government on 1 November 2018 in implementation of Presidential Decree No. 592, which freezes their assets within Russia. The Fourth Defendant, Mr Ovcharenko, is alleged by Tatneft to be a close associate of Mr Bogolyubov and Mr Kolomoisky. These matters give rise, to my mind, to a real risk that a Russian court, applying an expansive concept of public policy, might regard enforcing an order in this case in favour of these individuals against Tatneft, as being contrary to public policy.

(6) Sanctions

33. The existence of the sanctions imposed by the Russian government merits separate consideration, though it contributes to the risk of non-enforcement of a costs order by reason of considerations of public policy.
34. As has already been alluded to, on 22 October 2018 President Putin signed Decree No. 592 on the imposition of “special economic measures” in respect of certain Ukrainian companies and individuals. The decree stated that it was “In response to Ukraine’s unfriendly actions, which, contrary to international laws, imposed restrictive measures against citizens and legal entities of the Russian Federation” and was “to protect the national interests of the Russian Federation”. The second paragraph of the Decree instructed the Russian Government to establish lists of companies and individuals in respect of which the special economic measures would apply and determine what such measures would be imposed. On 1 November 2018 the Russian government issued Resolution No. 1300. This also stated that it was “in response to the unfriendly actions of Ukraine”. It listed 322 individuals who were to be the subject of sanctions. The list included Mr Bogolyubov and Mr Yaroslavsky. The sanctions to be imposed were to consist of “Blocking of moneys, securities and property in the territory of the Russian Federation, as well as a prohibition for transfers out of the territory of the Russian Federation”.
35. It is Dr Rachkov’s evidence that, in light of Resolution No. 1300, Russian courts would deny recognition to foreign judgments in favour of sanctioned individuals, on the basis of public policy. If, however a court were formally to recognise such a judgment, it would not actually be enforced because all federal executive bodies in Russia are required to act in accordance with the Decree and the Resolution, and this would include the Federal Service of Court Bailiffs. Further he gives evidence that Russian banks would not make payment voluntarily, and would risk penalties from the Central Bank of Russia if they did. Professor Asoskov takes issue with these views, but I consider

that the evidence establishes a real risk of non-enforcement of a costs order in favour of the First and Third Defendants by reason of the existence of the Decree and Resolution.

36. I should add the following. Even if a costs order were recognised and enforced, with the result that funds were credited to the First and Third Defendants in Russia, there seems no doubt, and I did not understand Tatneft to dispute, that those funds would be indefinitely frozen within Russia and could not be used in or transferred out of Russia by the First and Third Defendants. I am inclined to think that this of itself constitutes a risk of a “substantial obstacle to enforcement” for the purposes of considering whether an order for security for costs may be made. The submission to the contrary seemed to me to lose contact with reality. In this regard, I did not regard the comparison which was made by Mr McGrath QC with a party who was the beneficiary of a costs order in this country, but was subject to a freezing order here, as being compelling. No individual-specific reasons are given for the imposition of the Russian sanctions on the persons listed. They are imposed by the Russian state for avowedly political purposes on individuals and entities of a particular country, and they are not imposed by reason of a liability which the person whose assets are frozen is alleged to owe. I do not, however, need to decide anything on this point, given that I consider, as I have said, that there is a real risk that a costs order in favour of a sanctioned individual would not be enforced by a Russian court in the first place.
37. The Second and Fourth Defendants are not themselves at present subject to the Russian sanctions. It appears that they could be added at any time. Given what the evidence indicates to be the very poor relations between the Russian government and Mr Kolomoisky, and the connexions between Mr Ovcharenko and the other Defendants, it appeared to me that there was a real risk that this would happen. While Mr McGrath QC said that this was merely speculation, he gave no particular reason for considering it would *not* happen.

(7) Overview

38. I regard the points in (3) - (6) as each representing a real risk of substantial obstacles to enforcement in Russia. Taking them collectively, and in light of the points in (1) and (2), I regard the position as clear.
39. My conclusion that there is a real risk of substantial obstacles is in conformity with the conclusion reached by Cockerill J in Danilina v Chernukhin. While I have reached my conclusion independently on the basis of the considerations I have set out above, I consider that her finding in that case, which lacked many of the features which might be said to contribute to the risk of non-enforcement in the present case, provides additional support for my conclusion.

The Issue of Enforcement in Switzerland and Cyprus

40. The second aspect of the case argued before me concerned Tatneft’s contention that, because it has assets within the CPR 25.13(2)(a)(ii) zone, it is inappropriate or unnecessary for there to be an order for security for costs.
41. The assets which Tatneft says that it has within the zone are as follows:

(1) Tatneft states that it is the 99% owner of Tatneft Oil AG (“TOAG”), which is a company incorporated in Switzerland. TOAG, it says, is principally an investment holding company, with a total shareholder equity as at 31 December 2018 of CHF 453,273,431. Tatneft’s shares in TOAG are held in bearer form in Switzerland. Tatneft has stated that the bearer shares are held in a safe deposit box at the branch of USB in Zug, Switzerland, under an arrangement between USB and TOAG. TOAG’s major assets are said to include its largest subsidiary, Vamolero Holdings Ltd (“VHL”). VHL is also a holding company, whose principal assets are securities in Tatneft. Tatneft’s shares in TOAG are said to be unencumbered.

(2) Tatneft has recently stated that it also holds 100% of the shares in a Cypriot company, Tatneft Finance (Cyprus) Limited (“Tatneft Finance”). Tatneft’s evidence is that Tatneft Finance had, as at 31 December 2018, total current assets of about US\$ 9 million, and total non-current assets of about US\$ 170 million. Its principal assets are said to include its wholly owned subsidiary, Colima Associated SA (“Colima”), a BVI company, whose main assets are ordinary shares in Tatneft.

42. The existence of these assets was said by the Defendants to provide no real assurance that, at the point at which they sought to enforce a putative costs order in their favour, there would be anything of substantial value to enforce against. They made the following points, in part in reliance on the expert evidence of Dr Mossaz, partner in Ochsner & Associés of Geneva, Switzerland:

As to the Swiss assets

(1) It is unclear who owns the other 1% of shares in TOAG, and whether there might be a shareholders’ agreement with that other shareholder which might affect or restrict the way in which Tatneft could exercise its rights. More generally, it is unclear why there is the structure of Tatneft holding shares in entities which, in effect, hold shares in Tatneft.

(2) Swiss bearer shares are freely movable and transferable. TOAG might move the bearer shares, including out of Switzerland, or it might sell those shares, even without moving them.

(3) Tatneft might borrow money against the bearer shares in TOAG.

(4) There is no evidence that the shares in TOAG have a present or likely future market value.

(5) TOAG is merely a holding company. It might itself dispose of its assets. Given their nature, this might be done with relative ease. Equally TOAG might accumulate liabilities.

(6) Equally, VHC might dispose of or borrow against its securities in Tatneft.

As to the Cyprus assets

(7) Again, there is no explanation given for the structure of Tatneft holding shares in a company which owns shares in a company which holds shares in Tatneft.

- (8) Tatneft might sell its shares in Tatneft Finance. Or Tatneft Finance might sell its shares in Colima, or Colima its securities in Tatneft.
- (9) There is no evidence that the shares in Tatneft Finance or Colima have a current or likely future market value.
43. Tatneft gave essentially two answers to these points.
44. In the first place, it argued that there has been no showing that it is a company which lacks probity. It said that it has paid previous costs orders against it in this case, and no evidence had been produced that it defaulted on its obligations. There was accordingly no reason to consider that it would deal with the assets in the zone in such a way as to prevent enforcement. It relied on the decisions of Leyvand v Barasch (The Times, 23 March 2000), and Naghshineh v Chaffe [2003] EWHC 2107 (Ch). Tatneft referred, in particular, to the statement of Lightman J in the former that “The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgment for costs unless there is reason to question the probity of the claimant”; and that of Mr Crow, sitting as a Deputy High Court Judge, in the latter (at [14.7]) that: “... the mere fact that a non-Convention resident’s assets are readily transferable does not, of itself, constitute a ground for exercising the court’s discretion to order security. However, it might well be a relevant factor if there are grounds for doubting the claimant’s probity and/or for believing that he is willing (as opposed to merely being able) to frustrate the enforcement of a costs order by transporting assets out of reach.”
45. Secondly, Tatneft stated that, if the court would otherwise order security, it was willing to give certain undertakings to the court, and that because of this security should not be ordered.
46. I was not persuaded by either of these arguments.
47. As to the first, the question which I have to answer at this point, as it seems to me, remains whether there is a real risk that there will be substantial obstacles to enforcement by reason of Tatneft’s residence and the location of most of its assets. If there is a real risk that the assets which it has identified within the zone will not be available or not available in sufficient amounts, and that, in consequence, enforcement will need to be attempted in Russia, then, given my conclusions as to the position in Russia, the test laid down in Nasser is satisfied.
48. I consider that there is a real risk that the assets within the zone will not be available, or not available in sufficient amounts, if and when there arises an issue of enforcement of a costs order. The shareholding arrangements within the Tatneft group are neither fully transparent, nor fully explained. The assets relied on are ones which might readily cease to be available, and this might happen for legitimate reasons. Moreover, this is very hard-fought litigation between parties which are on opposite sides not just of this case, but of wider issues. Looking at those realities I see no good reason to think that if there was a course of conduct which Tatneft was advised was open to it which diminished the assets which would be available to the Defendants to enforce against, that course would not be taken. Indeed, the way in which every point has been taken on this application tends to suggest it would be.

49. I do not regard either Leyvand v Barasch or Naghshineh v Chaffe as establishing any rule that, if a non-Convention resident has assets within the zone then, in the absence of a showing of lack of probity, security will not be ordered. Instead, it appears to me that the approach of Gross J in Texuna International Ltd v Cairn Energy plc [2004] EWHC 1102 (Comm), especially at [27-28], is one which focuses on whether, despite there being evidence of assets in a jurisdiction where enforcement will not be subject to significant obstacles, there is a real risk of there nevertheless having to be attempts to enforce in a jurisdiction where there may be substantial obstacles. Gross J's assessment is not limited to whether such risk arises from steps taken by a claimant which lacks probity to move assets out of a jurisdiction where enforcement will not be subject to substantial obstacles, though obviously a lack of probity would be highly relevant.
50. As to the second, the undertakings which Tatneft had indicated, at the start of the hearing, that it was willing to give if the court were otherwise minded to order security, were superseded by a revised set during the course of Mr McGrath QC's submissions. The Defendants objected that both the first and revised set of proposed undertakings was inadequate to give assurance that there would be adequate assets within the zone to be enforced against.
51. In my judgment, if the court considers, as I do, that because of the nature of the assets in the zone and the circumstances of the case, there is a real risk that enforcement will have to take place somewhere else where there may be substantial obstacles to enforcement, and the claimant seeks to eliminate that risk by offering undertakings, the court is unlikely to be persuaded not to order security unless those undertakings clearly and satisfactorily eliminate the risk. If they do not, then it will usually, at least in a case in which there is no question of stifling, be preferable to order security, which will provide certainty.
52. Here, the proposed undertakings do not clearly and satisfactorily eliminate the risk. As Mr Howard QC pointed out, the undertakings proposed still leave open the following: (1) Even if the existing shareholdings are preserved, the assets of VHL and of Colima are essentially liabilities owed to them by Tatneft, especially given that those entities bank with Bank Zenit, which is majority owned by Tatneft. Were enforcement actually to be required it would be likely to involve an attempt to enforce the rights of the subsidiaries (VHL and Colima) against Tatneft, probably in Russia. (2) The assets of the subsidiaries which might be outside Russia are the Tatneft ADRs, but there is no undertaking proffered to keep those ADRs in any particular jurisdiction. (3) The proposed undertaking to ensure that VHL and Colima have "shares, ADRs and other liquid assets such that the combined net asset value of VHL and Colima remains above US\$100 million" could be met by those entities having a debt owed to them by Tatneft in Russia, or having cash in Russia. (4) The proposed undertakings could not be readily enforced. Tatneft is not domiciled in the jurisdiction, has no assets here, and none of its officers is resident here. And as Mr Weisselberg QC and Mr Parker added, there is no evidence before the Court as to whether the undertakings could be enforced in Switzerland or Cyprus.
53. For these reasons I have concluded that the Nasser condition is satisfied.

Is it just to make an order for security for costs?

54. The fact that the Nasser condition is satisfied does not of itself mean that it is just to make an order for security for costs. It is necessary to consider all the circumstances of the case. Nevertheless, the fact that the condition is satisfied is a strong consideration in favour of an order for security.
55. Among the other factors which might point in a different direction are the points which Mr McGrath QC made as to Tatneft being a reputable and solvent organisation, which does not have a record of defaulting on its obligations, and which has stated to this court that it intends to satisfy any costs order which may be made against it by this court and that it would suffer in its commercial reputation if it did not do so.
56. While all these points deserve consideration, they do not persuade me that it is not appropriate to order security, which is the course which is suggested by the fact that the Nasser condition is met. When it is ordered, security for costs is required in order to deal with the situation where an order for costs has not been complied with. There may be many reasons why a party which, although reputable, and fully intending during the proceedings to pay an order for costs, subsequently decides that it will or should not do so. As Longmore LJ said, albeit in a somewhat different factual context in Premier Motorauctions Ltd v PricewaterhouseCoopers LLP [2017] EWCA Civ 1872 at [27], the landscape after trial may look different from how it looks on an interlocutory application. In the present case, especially given the nature of the claims, and of the defences, it is not difficult to conceive – although of course I am expressing no view at all as to the validity or strength of either claims or defences – of a situation in which Tatneft considered that it may have been successful on the overall merits of the claim and yet have failed. That might, especially if a Russian court might regard any adverse costs order as being contrary to public policy, lead to a situation where Tatneft did not pay a costs order.
57. Overall, in circumstances where the Nasser condition is met, where Tatneft is able to put up security and has not pointed to any other specific prejudice it will suffer if ordered to do so, and where the Defendants will potentially be prejudiced if security is not put up, I consider that it is just to order security for costs. Prima facie, security should be for the entirety of the Defendants' costs. That does not mean, however, that it should be in the amounts which the Defendants have sought. If there cannot be agreement on the appropriate amount of security then there will have to be a further hearing to resolve any differences.