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Case No: CL-2023-000401

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 21 May 2024

Before :

MR JUSTICE BRIGHT

- -

Between :

(1) Ziyavudin Magomedov
(10) Port-Petrovsk Limited
and Others

Claimants

- and -

(20) PJSC Transneft
And Others

Defendants

- -
- -

Stephen Houseman KC and Stephen Donnelly (instructed by Seladore Legal) for the Claimants
Graham Dunning KC, Tom Ford and Oliver Goldstein (instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP) for the Twentieth Defendant

Hearing dates: 8, 9 May 2024

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Approved Judgment

This judgment was handed down remotely at 9:30am on 21/05/24 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

Introduction

1. This judgment follows the hearing of the return date in respect of an anti-anti-suit injunction ("AASI") granted by Foxton J on 21 February 2024, against the 20th Defendant ("Transneft"). The 1st Claimant ("Mr Magomedov") and the 10th Claimant ("Port Petrovsk") applied for that injunction without notice. At the current hearing, they sought the continuation of that injunction until the hearing of Transneft's challenge to the jurisdiction of this court.

2. Shortly before the hearing, the Claimants proposed a draft order which contained additional terms, providing additional relief. The additional relief they thereby sought would amount to an Anti-Enforcement Injunction ("AEI"), which would prevent Transneft from enforcing anti-suit orders against Mr Magomedov and Port Petrovsk, made by a court in Russia on 11 and 25 April 2024 ("the Russian ASI Orders"). Moreover, this additional relief would prevent Transneft from relying in Russia on any actions by Mr Magomedov or Port Petrovsk in these proceedings – referred to by the parties as an Anti-Reliance Injunction ("ARI").

3. Transneft asked for Foxton J's order to be set aside, both on the basis that it was wrong for it to have been granted as matter of legal principle, and on the basis that, at the hearing on 21 February 2024, the Claimants did not present the case fairly and failed to make full and frank disclosure.

The parties

4. Mr Magomedov is a Russian citizen who formerly owned and controlled significant business interests in Russia. He was arrested on 30 March 2018 and on 1 December 2022 was convicted of crimes involving fraud, embezzlement and corruption. He is in prison in Russia, and I have been told that, in that country, he is considered bankrupt.

5. Port Petrovsk is a BVI company that was, and I believe still is in Mr Magomedov's ownership and control.

6. Mr Magomedov and Port Petrovsk were represented at the hearing by Mr Stephen Houseman KC and Mr Stephen Donnelly, instructed by Seladore Legal ("Seladore").

7. Transneft is an oil pipeline/transportation company, incorporated in Russia. It is owned and controlled by the Russian state. It is a significant business with very substantial assets, mainly in Russia. It is the subject of US and EU sanctions, as well as more limited UK sanctions.

8. Transneft was represented before me by Mr Graham Dunning KC, Mr Tom Ford and Mr Oliver Goldstein, instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis").

Procedural chronology

9. The procedural chronology that provides the context for this hearing is important. The essential steps were as follows.

10. Mr Magomedov and a number of companies associated with him (including Port Petrovsk) commenced proceedings in England against Transneft and a large number of other Defendants, by a claim form issued on 20 July 2023. The claim form and Particulars of Claim allege two conspiracies to injure Mr Magomedov and the other Claimants by unlawful means:

    (1) The "NCSP Conspiracy", by which Transneft and others are said to have conspired to wrest from Mr Magomedov and from Port Petrovsk the ownership and control of Port Petrovsk's interest in PJSC Novorossiysk Commercial Sea Port ("NCSP"), a Russian company which operated commercial ports in Russia, notably at Novorossiysk on the Black Sea. The NCSP Conspiracy is said to have taken place in 2018.

    (2) The "FESCO Conspiracy", by which various other Defendants are said to have conspired to deprive Mr Magomedov and other Claimants of their rights in relation to the 19th Defendant ("FESCO"). Transneft is not said to have played any role in the alleged FESCO Conspiracy, which is said to have taken place in 2019-2020 and did not affect Port Petrovsk.

11. On 4 September 2023, I made an order giving permission for service out of the jurisdiction, by alternative means, on various Defendants including Transneft. Transneft was served on 5 September 2023. It filed an acknowledgment of service on 5 October 2023, indicating that it intended to challenge English jurisdiction. It then sought and obtained various extensions of the time within which it had to issue its challenge.

12. On 13 December 2023, Butcher J made a notification order, which required Transneft to notify the Claimants' solicitors before re-organising its capital structure or disposing of assets in or outside Russia above certain limits. Butcher J also ordered that Transneft pay costs to the Claimants ("the Costs Order").

13. On 31 January 2024, Transneft commenced proceedings in the Arbitrazh (Commercial) Court in Moscow ("the Moscow Court") seeking the Russian ASI against Mr Magomedov. The Moscow Court accepted the claim by a decision on 1 February 2024, which fixed a preliminary hearing for 27 February 2024.

14. On 5 February 2024, Transneft commenced proceedings in the Moscow Court for an ASI against Port Petrovsk. The Moscow Court accepted the claim by a decision of 12 February 2024, which fixed a preliminary hearing for 13 March 2024.

15. The Claimants learned of the Russian ASI proceedings against Mr Magomedov on 5 February 2024, through public media reports. A few days later, they learned that Transneft was also bringing proceedings in Russia against Port Petrovsk; the first inkling being in a witness statement made by Transneft's solicitors in these proceedings, dated 7 February 2024.

16. On 14 February 2024, Transneft issued its jurisdictional challenge in the proceedings in this court, under CPR Part 11 ("the Transneft Jurisdictional Challenge"). All the other Defendants who have been served have also issued jurisdictional challenges, or (in some cases) summary judgment applications (on the basis that there is no real prospect of the Claimants' claims succeeding).

17. On 19 February 2024, Mr Magomedov and Port Petrovsk issued their application in this court for an AASI against Transneft. The application was heard by Foxton J, without notice to Transneft, on 21 February 2024 and resulted in an order that Transneft was not to pursue the Russian ASI proceedings until this return date hearing. Foxton J's order of 21 February 2024 also required Transneft to stay and/or adjourn the Russian ASI proceedings, pending determination of the Transneft Jurisdictional Challenge.

18. At a hearing in Moscow on 11 April 2024, Transneft asked the Moscow Court to adjourn its claims for the Russian ASIs. The Moscow Court refused the adjournment in the case against Mr Magomedov and granted the Russian ASI against him. It also ordered that, if Mr Magomedov failed to comply, Transneft would be entitled to recover the rouble equivalent of US$2.5 billion from Mr Magomedov. The outcome was given on 11 April 2024. The Moscow Court gave its reasons in a judgment issued on 17 April 2024.

19. By exchanges on 12, 15, 16 and 17 April 2024, the Claimants sought an undertaking and Transneft gave its confirmation that it would take no steps to enforce the Russian ASIs pending this hearing.

20. At a hearing on 19 April 2024 (the order is incorrectly dated 25 April 2024), I gave directions in relation to the hearing of the various Defendants' jurisdictional challenges. I ordered that the Transneft Jurisdictional Challenge was to be heard on 19-21 November 2024, with the jurisdictional challenges of most of the other Defendants (relating to the FESCO Conspiracy) scheduled to be heard in September 2024.

21. At a hearing in Moscow on 25 April 2024, the Moscow Court granted the Russian ASI against Port Petrovsk. It also ordered that, if Port Petrovsk failed to comply, Transneft would be entitled to recover the rouble equivalent of US$5 billion from Port Petrovsk.

22. A number of the points that arise from this chronology merit more detailed elaboration.

Natural forum and the Transneft Jurisdictional Challenge

23. The Claimants' case when they applied for permission to serve Transneft out of the jurisdiction was that England is the natural forum for the determination of the issues between the parties. This was primarily on the basis that Port Petrovsk's interest in NCSP was held via a Cypriot company, Omirico Limited ("Omirico"), and the NCSP conspiracy resulted in Port Petrovsk purportedly agreeing to sell its shares in Omirico by an agreement dated 31 August 2018 ("the Omirico SPA"). The Omirico SPA expressly provided that it and any non-contractual obligations arising out of or in connection with it were subject to English law.

24. The Claimants also relied on the fact that there were proceedings under way in this jurisdiction in relation to the FESCO Conspiracy, which they said was related to the NCSP Conspiracy.

25. At the hearing of the Transneft Jurisdictional Challenge in November 2024, Transneft will say that the natural forum is Russia, this being where most of the relevant parties and potential witnesses are situated, where all the relevant events occurred and where the harm is alleged to have been suffered. It will also say that there is no serious issue

to be tried and that there is no good arguable case that claims against it fall within a relevant jurisdictional gateway within CPR PD 6B 3.1.

26. The evidence relevant to the Transneft Jurisdictional Challenge is not yet all available. The Claimant's evidence was served shortly after the hearing before me, and I have not had the opportunity to read it. Transneft's reply evidence is not due until 31 July 2024. None of the submissions either way have yet been developed.

27. I therefore cannot and (in my view) should not attempt to form even a provisional view on whether England or Russia is the natural forum, prior to the hearing of the Transneft Jurisdictional Challenge in November 2024.

Mr Magomedov's difficulties in litigating in Russia

28. An important element of the Claimants' case that their claims should be tried in England is, they say, that they cannot get access to justice in Russia. They say that both the NCSP Conspiracy and the FESCO Conspiracy were part of a campaign against Mr Magomedov by people aligned with the Russian state. In particular, the NCSP Conspiracy arose because of the strategic importance of NCSP to the Russian state, and the desire that it should be owned and controlled by Transneft, as a state-owned company. The NCSP Conspiracy is said to have involved Mr Magomedov's arrest in 2018 and his subsequent prosecution, threats made against him and the confiscation by the state of the proceeds.

29. The Claimants say that the independence of the judicial process in Russia cannot be guaranteed, and that the judiciary are likely to hesitate before determining a significant claim in favour of a party whose interests are not aligned with the ruling elite of the Russian state.

30. Furthermore, in the specific context of Transneft and in relation to this hearing, the Claimants have said that they cannot get a Russian lawyer willing to act for them against Transneft. I understand this to be not merely because of the poor standing of the Claimants in Russia (in particular, Mr Magomedov), but also because of the high standing of Transneft.

31. Transneft takes issue with these points. I cannot decide them now. They will feature prominently at the Transneft Jurisdictional Challenge.

Transneft's difficulties in litigating in England

32. Transneft says that it has difficulties in litigating in England, which affect its access to justice here. This is essentially because of sanctions. Transneft is subject to comprehensive US and EU sanctions. It is not subject to similar sanctions in the UK (in particular, not asset-seizure or asset-freezing sanctions). However, the effect of the US and EU sanctions is that it is extremely difficult for it to transfer funds to the UK and thus to pay English lawyers. Furthermore, the fact that this does not arise because of UK sanctions means that the problem cannot be solved by applying for a UK licence.

33. Following service on it of these proceedings, Transneft instructed English lawyers. However, after the hearing before Butcher J on 13 December 2023, Transneft's counsel team withdrew their support and stopped working because they had not been paid

(subject to an isolated flurry of work in January 2024). In due course its English solicitors came off the record. New solicitors, Curtis, were instructed on 26 January 2024, and the present counsel team became involved. However, neither Curtis nor the counsel team have yet been paid.

34. I suspect that Curtis and the counsel team accepted their instructions, and continue to act, because there is some sort of plan to deal with Transneft's difficulties in paying its English lawyers. My experience of commercial litigation and of the motivations of those who practise in the field tells me that I would not have been treated to two days' argument unless those involved have a realistic basis for believing they will probably be paid. Indeed, I recently dealt with a security for costs application at which Transneft's estimate of its legal costs for the Transneft Jurisdictional Challenge (i.e., up to mid-November 2024) was excess of £2.5 million. Nevertheless, the fact that none of the current legal team has been paid, 4 months after they began acting for Transneft, shows that this is a real problem.

35. Once again, these points are likely to feature at the Transneft Jurisdictional Challenge in November 2024. I cannot decide them now, although I accept that Transneft's English lawyers have not been paid and that, if this problem is not solved, it is likely to imperil their ability to continue to act for Transneft (including at the hearing of the Transneft Jurisdictional Challenge).

36. Importantly, Transneft's case as to its difficulties in litigating in England were set out in reasonable detail in the 6th witness statement of Maxim Stepanchuk, made and provided to the Claimants on 16 February 2024.

Transneft's proceedings in Russia

37. By its proceedings in Russia against Mr Magomedov and Port Petrovsk, Transneft sought (in each case) an order prohibiting the continuation of the proceedings in this court and awarding a fixed sum of money (US$2.5 billion) in case of failure to comply.

38. No other relief was sought. That is, there was no positive claim by Transneft against Mr Magomedov or Port Petrovsk – nor even a claim for negative declaratory relief.

39. The proceedings were brought under Art. 248.1 and 248.2 of the Arbitration Procedural Code of the Russian Federation ("APC"; I should note that the Claimants' expert, Mr Drew Holiner, prefers the translation "Commercial Court Code of Procedure").

40. Art. 248.1 provides that the Russian arbitration courts (such as the Moscow Court used in this case) shall have exclusive jurisdiction over disputes involving sanctioned Russian parties. Art. 248.2 provides that such a party can apply for a Russian ASI, and, in the event of failure to comply, the court may award a sum of money up to the quantum of the claim brought outside Russia in breach of the Russian ASI.

41. The Claimant's expert, Mr Holiner, gave evidence that Art. 248 was introduced because of the effect of Western sanctions on Russian parties, in particular the effect on such parties' ability to access justice in Western countries. The Explanatory Note to the bill laid before the Russian parliament said that such parties "are deprived of the opportunity to defend their rights in the courts of foreign states… located outside the territory of the Russian Federation."

42. It seems that Art. 248 has been interpreted broadly and applied widely. Mr Houseman KC, for the Claimants, criticised it, on the basis that it was an exorbitant jurisdiction, which (for example) runs roughshod over important international treaty obligations such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: cf. *Unicredit Bank GmbH v RusChemAlliance* [2024] EWCA Civ 64, per Males LJ at [22].

43. It may be that Art. 248 can be invoked and applied in circumstances that are a long way from those used to justify the introduction of Art. 248 in the Explanatory Note. However, in this case, there was no clash with international treaty obligations such as the New York Convention. On the contrary, on the evidence before me in relation to the very real difficulties that Transneft has experienced in litigating in this jurisdiction – difficulties that may very well be overcome, but had not yet been overcome on 31 January 2024 (when Transneft filed its proceedings in the Moscow Court) or on 11 April 2024 (when the Moscow Court granted the Russian ASI against Mr Magomedov) and still have not been overcome today – the invocation and application of Art. 248 were consistent with the justification in the Explanatory Note.

The Claimants' application to Foxton J for an interim AASI

44. The Claimants' application to Foxton J for an interim AASI was brought after Transneft had filed its proceedings in the Moscow Court, but before any relief had been granted in Moscow. It was an attempt to stop Transneft from obtaining the Russian ASIs.

45. The only relief sought was an AASI – the context being that the Russian ASIs had not yet been granted. The Claimants did not ask for an AEI or ARI, because at that time they were not yet necessary.

46. The application was made without any notice on the basis of urgency and on the basis that there was a risk of 'tipping off' – i.e., that if Transneft were given notice, it might seek to pre-empt the application in this court, by accelerating matters in the Moscow Court. Transneft therefore did not attend and was not represented before Foxton J. These circumstances meant that the Claimants were under a duty of full and frank disclosure.

The hearings in the Moscow Court on 11 and 25 April 2024

47. In the event, the proceedings in the Moscow Court were not accelerated. The hearing that had been fixed to take place on 27 February 2024 had been a preliminary hearing. It was postponed to 26 March 2024. At the preliminary hearing on 26 March 2024, the Moscow Court directed a further hearing to take place on 11 April 2024. The Claimants did not take part at any of these hearings and were not represented. Indeed, Mr Magomedov refused to accept service (with the result that the Moscow Court proceeded on the basis that he was deemed to have been served, because it was clear that he had notice of the hearings).

48. At the hearing on 11 April 2024, Transneft applied for the proceedings to be stayed. The Moscow Court rejected this application. Before me, the Claimants were somewhat critical, saying that Transneft did not provide the Moscow Court with the evidence that should have been proffered to support the application for a stay. However, no case was advanced that Transneft had not done enough to comply with the interim AASI granted

by Foxton J. It seems that, in effect, the same happened again on 25 April 2024, in the proceedings against Port Petrovsk. Thus, I have to approach matters on the basis that on both occasions the Moscow Court proceeded even though Transneft did not want it to.

49. It is clear from the reasons provided in the judgment of 17 April 2024 that the Moscow Court took into account the provisions of Art. 248 and the US and EU sanctions affecting Transneft. It seems to have thought that there were or might also be equivalent UK sanctions – on the basis that EU sanctions might still be part of UK law, even post-Brexit. If so, this was a misunderstanding. However, the judgment also notes that there are practical difficulties in the way of UK lawyers representing Russian and Belarusian parties, with licences being required; and that there may be other obstacles to engaging lawyers. This was at least partly true.

50. The court's conclusion was set out in paragraph [60]:

> "60. In view of the imposition of aforementioned restrictive measures by foreign States, in particular the United States of America and the United Kingdom, on the applicant, which have had the effect of limiting its access to justice in one way or another on the territory of England (the seat of the High Court of England and Wales), Transneft PJSC's request for an injunction to prevent the continuation of proceedings in Case No. CL 2023-000401 before the High Court of England and Wales appears to be legitimate insofar as, if the relevant claim is upheld, the interested party will be placed in a privileged position due to its limited ability to protect its rights acting in the foreign court in the capacity of a person subject to sanctions."

51. Thus, the crux of the decision was the Moscow Court's view that sanctions have had the effect of limiting Transneft's access to justice in England.

52. On the evidence before me, this view had some factual justification. I am certain that Transneft will be treated fairly by this court. However, I cannot be certain that Transneft will be able to pay for and retain the services of its chosen legal representatives. I suspect that it probably will; time will tell, as the hearing of the Transneft Jurisdictional Challenge approaches. Nevertheless, there is a real (i.e., more than fanciful) risk that Transneft may not succeed in overcoming the payment problems that it has experienced to date. If it does not, the current legal team may well stop acting.

53. An element of the Russian ASIs that is not considered or explained in the judgment is the decision to order that, in the event of non-compliance, Transneft is entitled to recover US$2.5 billion from Mr Magomedov; and, in the case of Port Petrovsk, US$5 billion. As I understand it, this is a fixed amount, so that the same sum will be recoverable irrespective of the gravity of the non-compliance.

54. Thus, even the Claimants' having attended and made submissions in response to Transneft's application for security for costs at the hearing before me on 3 May 2024 may mean that Transneft is entitled to recover these sums – even though that was a hearing that Transneft wanted to take place, and at which (broadly) Transneft succeeded, having costs awarded in its favour.

55. The same may be said of the Claimants' having attended and made submissions at the hearing with which this judgment is concerned – irrespective of the outcome.

Transneft's proceedings in the Moscow Court are effectively over

56. The Russian ASIs are (using the terminology that would be applicable in this jurisdiction) final orders. Given that the only relief sought by Transneft in the proceedings in the Moscow Court consisted of those orders, those proceedings are effectively over.

57. It is theoretically possible that the Claimants could appeal, but they must do so within one month. My understanding is that the time for them to lodge an appeal in respect of the Russian ASI against Mr Magomedov will have expired on 17 May 2024. I am not certain when time will expire for an appeal by Port Petrovsk, but I assume that it may be 25 May 2024 or some date thereafter.

58. When I asked Mr Houseman KC, he told me, having sought instructions, that the Claimants were considering appealing against both Russian ASIs. However, there was no evidence on this. On the contrary, the evidence that the Claimants submitted to me was that they could not find lawyers willing to act for them against Transneft. That, and their failure to attend or be represented at any of the previous hearings in the Moscow Court, persuades me that it is very unlikely that they will, in fact, appeal (even if they are still within time).

59. Apart from the possibility of appeal, the only element of the Russian ASI proceedings that remains effective is the continuing effect of the Moscow Court having ordered that Transneft is entitled to be paid (in total) US$7.5 billion by Mr Magomedov and Port Petrovsk, if they fail to comply. I understood it to be common ground that the obligation to pay does not arise automatically. To acquire the right to payment, Transneft would have to seek enforcement; as I understand it, by making an application to the Moscow Court.

General overview

60. There are relatively few English cases involving AASIs. They all apply the same general principles as the rather more numerous cases involving ASIs. However, it seems right to be more cautious about granting AASIs than ASIs, because they represent a greater interference with the work of foreign courts: Raphael 'The Anti-Suit Injunction' (2nd ed), §5.59; *Carlyle Capital Corporation Ltd v Conway* (Guernsey CA) [2013] 2 Lloyd's Rep 179, per Beloff JA at [68].

61. There are still fewer cases involving AEIs and ARIs. Such learning as there is suggests that an AEI or ARI will, in general, only be granted in conjunction with an ASI or AASI; or at any rate, only where the court would in principle be willing to grant an ASI or AASI. In this context, there is even greater reason for caution: Dicey, Morris & Collins 'The Conflict of Laws' (16th ed) §12-126, §12-139; *Masri v Consolidated Contractors International (UK) Ltd* [2008] EWCA Civ 625, per Lawrence Collins LJ at [94]; *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599.

62. There are many English cases involving ASIs, but the majority are contractual cases – i.e., where a contract includes an exclusive jurisdiction clause or an arbitration clause,

and the English ASI is granted to enforce the negative promise not to sue in a foreign jurisdiction. Most of the legal submissions before me therefore concentrated on the law on ASIs in non-contractual cases.

63. This was so even though, as I read the parties' positions, this hearing was not really about the AASI. In form, it was for the continuation of the interim AASI granted by Foxton J on 21 February 2024, until the hearing of the Transneft Jurisdictional Challenge in November 2024. However, the fact that the Moscow Court has granted Russian ASIs in final form means that no AASI granted by this court can now serve any real purpose. That is why the Claimants ultimately sought additional relief, i.e. the AEI and ARI. However, I understood Mr Houseman KC to acknowledge that he could not succeed in relation to the AEI or ARI, unless he was first able to show that, in principle (i.e., ignoring the fact that it was now pointless), the Claimants were entitled to the AASI.

The law on ASIs in non-contractual cases

64. A good starting-point for the law on ASIs in non-contractual cases is the opinion of Lord Goff of Chieveley in *Airbus Industrie G.I.E. v Patel* [1999] 1 AC 119. Lord Goff said that, as a general rule, an ASI will only be granted where the English forum has a sufficient interest; and, where there are two alternative fora, this will involve considering whether the English court is the natural forum; but this is a general rule, not to be interpreted rigidly: see at p. 138G-H and p. 140 C-E. Lord Goff illustrated the possible exceptions to the general rule as follows:

> "Indeed there may be extreme cases, for example where the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity, where no such limit is required to the exercise of the jurisdiction to grant an anti-suit injunction."

65. It is clear from Lord Goff's reasoning that the conclusion that England is the natural forum is not sufficient, by itself, to justify an ASI. The applicant must also show that further pursuit of the foreign proceedings would be vexatious and oppressive or unconscionable.

66. There have been many cases since *Airbus*, but a key text, frequently cited, is the careful summary crafted by Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725, at [50]:

> "[50] Leaving aside the provisions of the Brussels I Regulation and previous conventions, which are not relevant in this case, I would summarise the relevant key principles as follows. (1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do. (2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive. (3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it

is generally necessary to show that (a) England is clearly the more appropriate forum (the natural forum), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there. (4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity. (5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention. (6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive. (7) A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement. It does not follow that an alternative forum is necessarily inappropriate or inferior. (I will come to the question whether there is a presumption that parallel proceedings in an alternative jurisdiction are vexatious or oppressive). (8) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility."

The law on AASIs

67. By contrast, both parties told me that there are no appellate decisions on AASIs. Furthermore, neither of them was aware of any case where an AASI had been granted in a non-contractual case where the claimant was not an English resident/domiciliary.

68. I was taken to *General Star International Indemnity Ltd v Stirling Cooke Brown Reinsurance Brokers Ltd* [2002] EWHC 3 (Comm). All the parties were English, the subject-matter was reinsurance polices broked and entered into in England, the negligent acts and omissions and representations relied on all took place in England, all the witnesses were ordinarily resident in England and English law applied to all the claims (which were tortious). Langley J first decided that England was plainly the appropriate court to determine issues of proper forum. Then he decided that England was the natural forum. He then cited *Airbus* and considered whether the foreign proceedings were vexatious, oppressive or unconscionable, deciding that they were and

so granting what was in effect a combined ASI and AASI. Importantly, this was a case where the facts meant that the court had no difficulty deciding whether or not England was the natural forum: he said that England was "plainly" the natural forum, at [15].

69. I was taken to *Tonicstar Ltd v American Home Assurance Co* [2004] EWHC 1234 (Comm), where Morison J followed the ASI authorities as summarised in *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528, per Rix LJ at [42] (who, in turn, followed *Airbus* along with other authorities), as well as Langley J's decision in *General Star*. Morison J therefore considered whether England was the natural forum. Just as in *General Star*, this was not difficult on the facts of the case. It concerned a reinsurance contract made in England, through Lloyd's brokers, in Lloyd's form on a slip policy containing standard Lloyd's terms, subject to English law. Morison J was able to say that "unquestionably" the centre of gravity was London, at [11].

70. I was also taken to the recent decisions of Dias J in *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd* [2023] EWHC 2816 and of Mr Christopher Hancock KC in *Tyson International Co Ltd v GIC Re, India, Corporate Member Ltd* [2024] EWHC 236 (Comm). However, these were both contractual cases, in which the claimants relied (respectively) on a London arbitration clause and on an English exclusive jurisdiction clause. Having been satisfied that the clause in each case was applicable and had the effect contended for, the decisions for the court were relatively straightforward. Accordingly, neither judgment added much to the debate before me.

The difficulty with the natural forum requirement, in this case

71. This case raises in an acute way the question whether, and, if so, how, the normal ASI requirement that England is the natural forum should be applied, in the AASI context. In particular: is this requirement apposite, if the AASI is sought (i) when the English proceedings have not yet reached the point where it has been or can yet be decided whether England is the natural forum, and (ii) where the purpose of the foreign ASI (which the AASI is intended to forestall) is to prevent the English court from deciding whether it is the natural forum?

72. That is the situation here. The English court normally decides whether it is or is not the natural forum in response to a challenge to its jurisdiction. Here, Transneft had indicated that it intended to challenge English jurisdiction on 5 October 2023, but the Transneft Jurisdictional Challenge was not filed until 14 February 2024 – roughly contemporaneously with the commencement of its proceedings before the Moscow Court.

73. The result is that the Claimants made their application to Foxton J for an AASI, and now ask for it to be continued, in circumstances where this court has not yet decided whether it is the natural forum and is not due to do so until November 2024. As matters currently stand I can see that there are obvious arguments either way, but I cannot pre-judge now the question that I will be deciding in 6 months.

74. It follows that, if it is a necessary precondition to the grant of AASI relief or any associated relief that the court should first conclude that England is the natural forum, then the Claimants' application must fail.

The Claimants' case as to the natural forum requirement

75. Although a number of kites were flown during submissions, Mr Houseman KC ultimately had two main arguments. His primary argument was that the natural forum requirement was not apposite in the context of AASIs, or at least was not apposite in the circumstances of this particular case. I therefore should not consider myself constrained by *Airbus* or the cases that have followed it, in so far as they appear to establish a principle that England must be the natural forum in non-contractual ASI cases. AASIs are different; or, at least, this one is.

76. In the alternative, Mr Houseman KC relied on Lord Goff's statement in *Airbus* at p. 140D, that the natural forum requirement is a general rule which should not be interpreted too rigidly; i.e., even in the ASI context, there can be exceptions. He said that this case fell outside the general rule.

No natural forum requirement for AASIs (or in these circumstances)

77. For his primary argument, Mr Houseman KC drew my attention to s. 24 of the Civil and Jurisdiction Judgments Act 1982 ("CJJA"), which provides as follows:

> "24 Interim relief and protective measures in cases of doubtful jurisdiction.
> (1) Any power of a court in England and Wales or Northern Ireland to grant interim relief pending trial or pending the determination of an appeal shall extend to a case where—
> (a) the issue to be tried, or which is the subject of the appeal, relates to the jurisdiction of the court to entertain the proceedings; …"

78. This provision confirms that Foxton J had, and I have, the power to make the order sought by the Claimants. However, it says nothing about how that power should be exercised. Indeed, the introductory words, "Any power of a court…", suggest that the intention is that the court's discretion should, so far as possible, be exercised in the same way as it would be if s. 24 of the CJJA were not involved and if the order were being granted pursuant to the power under s. 37 of the Senior Courts Act 1981 or the court's inherent jurisdiction. I therefore do not see that the application of s. 24 of the CJJA can, by itself, mean that it is neither appropriate nor necessary to have regard to *Airbus* and the subsequent cases such as *Deutsche Bank AG v Highland Crusader Offshore Partners LP*.

79. Next, Mr Houseman KC sought support from Raphael 'The Anti-Suit Injunction' (2nd ed), §5.62, which makes the following suggestion (I think tentatively, no authority being cited):

> "It is suggested, however, that in order for an anti-anti-suit injunction to be reconcilable with comity, the domestic court must be manifestly the appropriate forum for the determination of the question of forum. It would be inappropriate for an anti-anti-suit injunction to be deployed, in a case where there was a legitimate dispute as to the relative appropriateness of the different jurisdictions, merely because the domestic court had concluded that on balance it was the more natural forum for the trial of the merits."

80. Mr Houseman KC suggested that this indicates that, in the AASI context, the right question to focus on is not whether England is the natural forum as such, but whether England is the right forum to determine the question of the natural forum – or whether, as the Russian ASIs appear to require, the proceedings in England should stop before the English court has yet considered the natural forum.

81. However, in the preceding paragraph, Raphael §5.61 refers to *General Star and Tonicstar* (which I have already considered), rightly noting that they were cases where the court's grant of AASIs was founded both on its view that England was the right court to determine the question of forum and on its answer to that question – i.e., its view that England was the natural forum. Those cases offer no support for the contention that an AASI can be granted even if the English court is not persuaded that England is the natural forum, and that is not how I read Raphael §5.62.

82. Beyond this, Mr Houseman KC's argument essentially boiled down to saying that the natural forum requirement does not make sense in a case such as this one, where it is not possible at present for the court to decide on the natural forum. Sometimes, an AASI can only be effective if granted before the English court has been able to decide whether it is the natural forum. Sometimes, to wait might result in the English proceedings being derailed by a foreign ASI, which will then prevent the courts of this country from ever deciding whether England is the natural forum and whether the English courts should retain jurisdiction (including the jurisdiction to grant an ASI or AASI). In such a case, the effect of a requirement that the English court cannot act until it has decided on the natural forum will mean that the English court can never act. That could mean that a good claim for which the natural forum is England ends up being unfairly suppressed, or dealt with in a foreign forum in a manner that is unfair. This would license unconscionable behaviour.

83. Transneft's response was that Lord Goff's opinion in *Airbus* is categorical and has been followed in too many subsequent cases (many of them cited to me by Mr Dunning KC) to be ignored. However:

(1) None of the cases cited to me involved facts that resembled those of this case in any way. Certainly, none of them raised the difficulty that this case does with the natural forum requirement in the AASI context, as highlighted above. Indeed, there simply are not many cases that deal with AASIs at all, especially non-contractual cases.

(2) I do not think it realistic to suppose that Lord Goff in *Airbus*, or Toulson LJ in *Deutsche Bank*, or the judges in any of the similar authorities cited to me, had a case like this one in mind.

(3) However, I have no doubt that they were well aware it is difficult, and generally unwise, to lay down cast-iron principles that are intended to encompass factual situations not yet envisaged. I have in mind not only Lord Goff's comments in *Airbus* at p. 140C-E (as well as his repeated and deliberate insistence that he was expressing a "general principle" or "general rule"), but also Toulson LJ's proposition (8) in *Deutsche Bank* at [50] (see also at [65]:

> "(8) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of

flexibility."

(4) Earlier on in *Airbus*, at p. 133E, Lord Goff said that the broad principle underlying the jurisdiction to grant ASIs was that "it is to be exercised when the ends of justice require it." The natural forum requirement comes in because of what follows later in the same paragraph at p. 133F, i.e., that "in exercising the jurisdiction regard must be had to comity". However, just as the ends of justice must be served in a manner that maintains respect for comity, so respect for comity must not be allowed to lead to injustice.

84. I do not consider it desirable for me to attempt to lay down any general rule of my own in this difficult area. The difficulty that arises in this case results from what appear to be its somewhat unusual facts, and I suspect that any future cases are also likely to be highly fact sensitive. In this case, two features are of particular significance.

85. First, this has all been caused by Transneft's own deliberate choice, and in particular by Transneft's timing and the asymmetry of the relief it sought in the two jurisdictions.

(1) It filed its claim for the Russian ASI against Mr Magomedov in the Moscow Court on 31 January 2024.

(2) It filed the Transneft Jurisdictional Challenge in these proceedings on 14 February 2024.

(3) I have to assume that Transneft intends to proceed with the Transneft Jurisdictional Challenge in these proceedings. But it intends to do so having arranged matters so that the Claimants have to choose between (i) not resisting the Transneft Jurisdictional Challenge and so losing the chance to claim in this court, without any further contest, or (ii) resisting the Transneft Jurisdictional Challenge and facing the peril of having to pay (in total) US$7.5 billion.

(4) I acknowledge that Transneft complied with Foxton J's order and asked the Moscow Court to postpone dealing with its applications for the Russian ASIs. However, the fact remains that the Russian ASIs would not have been granted if Transneft had not previously taken the steps it did, in Russia and here. Those steps set matters up for what happened in the Moscow Court on 11 April 2024 (and again on 25 April 2024), for the dilemma this posed to the Claimants and for the conundrum now facing me.

(5) This was behaviour that, in my view, can properly be characterised as unconscionable.

86. Second, the specific terms of the AASI relief being sought by the Claimants are calibrated so as to minimise the offence to the Moscow Court and any collateral damage to comity.

(1) The Claimants do not seek a permanent AASI. They ask for Foxton J's order to be continued only until the determination of the Transneft Jurisdictional Challenge.

(2) If the Transneft Jurisdictional Challenge succeeds – and, certainly, if I conclude in November 2024 that England is not the natural forum – the AASI will then come to an end, in accordance with *Airbus*.

(3) If the Transneft Jurisdictional Challenge fails – in which event I will have decided that England is the natural forum – I will then have to consider whether to continue the AASI: perhaps on a permanent basis, perhaps until trial. If so, it will then be necessary to take into account whatever factors may be relevant to the court's discretion. What those factors may be, and what outcome they will point to, cannot be predicted.

(4) For present purposes, what matters is that the AASI being sought is an interim order of very limited duration, intended only to 'hold the ring' and allow the English court to make its own assessment of its own jurisdiction; just as (ex hypothesi) the Moscow Court has already done.

87. In the course of his submissions, Mr Houseman KC drew my attention to the species of ASI developed in the Family Division and termed *Hemain* injunctions, after *Hemain v Hemain* [1988] 2 FLR 388. I am indebted to Mr Houseman KC for alerting me to this jurisprudence, with which I was not previously familiar. (I suspect that Mr Houseman KC is indebted, in turn, to Mr Donnelly.)

88. *Hemain* injunctions are interim ASIs of limited duration, which are intended not to bring the foreign proceedings to a permanent end, but only to make them pause while the English court deals with a jurisdictional challenge issued by the defendant in this country. Their purpose is to ensure that the parallel proceedings in the foreign jurisdiction, which have been commenced by that party as the claimant, do not steal a march over the English proceedings. The objective is simply to ensure that the challenge to English jurisdiction is not used unconscionably, as a way of delaying matters in England and so obtaining an unfair advantage. The *Hemain* injunction is a temporary device, designed to prevent injustice without a disproportionate effect on comity.

89. There is no direct parallel between the *Hemain* injunction and the kind of interim AASI that the Claimants seek here. However, the *Hemain* injunction is, necessarily, granted before any decision in England on jurisdiction – and so before the court has made any decision on natural forum. This is because the *Hemain* injunction is treated as different from the typical ASI dealt with in cases such as *Airbus*, on account of the very restricted circumstances in which it arises and, above all, because of its interim nature. See for example the explanation given by Munby J in *Bloch v Bloch* [2002] EWHC 1711 (Fam) (where, ultimately, the injunction was refused) at [88] to [90]; and again in *R v R* [2003] EWHC 1113 (Fam) (where the injunction was granted), citing his earlier judgment and concluding at [54] that, in all the circumstances, it was not necessary for the court to be persuaded that England was the natural forum:

> "[54] In my judgment, when all that is sought is a *Hemain* injunction, in contrast to a permanent anti-suit injunction, there is no need to show that England is the natural forum. Typically the application for a *Hemain* injunction is made at a time when the court has yet to decide the issue of forum (non) conveniens. A *Hemain* injunction is merely an interim injunction to maintain the status quo, to preserve a level playing field, pending the determination of the application for a

> stay; in other words, pending the determination of the very question of forum. To require the applicant for a *Hemain* injunction to show that England is the natural forum would thus be to require her to demonstrate the very thing that, ex hypothesi, has yet to be determined and that may very well not yet be ready to be determined. To impose such a requirement would be to make the jurisdiction self-stultifying."

90. On a similar basis, in my judgment, in an appropriate case, the court must be able to grant an interim AASI, to last until the English court is able to decide on its own jurisdiction. This is particularly important where not to do so would expose the claimant in England to an ASI granted in a foreign jurisdiction, which might have penal consequences if the claimant resists the defendant's challenge to English jurisdiction.

91. In a nutshell: the English court must have the power to give itself the chance to decide the natural forum.

92. It does not follow that it will be appropriate to grant an interim AASI in every case where an ASI is sought in a foreign court. However, where this is coupled with a challenge to the jurisdiction of the English court, and where the foreign ASI is intended to stymie the proper determination of the jurisdictional challenge in England, that may be the appropriate course.

93. Accordingly, I consider it right in principle to continue the AASI granted by Foxton J, on an interim basis until the determination of the Transneft Jurisdictional Challenge or until earlier order.

<u>Exceptions to the Airbus natural forum requirement</u>

94. Turning to Mr Houseman KC's alternative argument, Lord Goff's language in *Airbus* at p. 140D suggests that the exceptions are confined to "extreme" cases, notably: "where the conduct of the state is such as to deprive it of the respect normally required by comity."

95. On this point, Lord Goff's opinion was indebted to the judgment of the Supreme Court of Canada in *Amchem Products Inc v British Columbia Workers' Compensation Board* [1993] 1 SCR 897, (cf. *Airbus* per Lord Goff at p. 135D and at p. 139A-E), in particular per Sopinka J at pp. 931-932 as follows:

> "The first step in applying the *S.N.I,* analysis *[Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak* [1987] AC 871] is to determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. I would modify this slightly to conform with the test relating to forum non conveniens. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognisance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there

> was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. Where there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles. In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to forum non conveniens and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the *[Aerospatiale]* test"—i.e., whether to grant an injunction on the ground that the ends of justice require it."

96. To this, I would add Toulson LJ's observation in *Deutsche Bank AG v Highland Crusader Offshore Partners LP*, [50] at proposition (5), that, in non-contractual cases:

> "… the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention."

97. It is convenient to begin with Sopinka J's suggestion that the court should consider whether, if the foreign court had applied a forum non conveniens test, it could reasonably have concluded that it was the most appropriate forum. I have already said that in this judgment I will not form my own view as to the natural forum, even on a provisional basis. However, it is not necessary to do so in order to see that the number of factual and evidential connections between this case and Russia, and the depth of those connections, make it at least conceivable that a court could reasonably conclude that Russia is the natural forum. When I come to my own conclusion on the natural forum, it may be entirely different. But I do not see, and Mr Houseman KC did not really attempt to persuade me, that it could ever be regarded as perverse to find Russia the natural forum.

98. Also relevant here is Toulson LJ's point that an English court must recognise that foreign courts operating under different legal systems may legitimately arrive at different answers from ours. So too is his caveat: "… without occasioning a breach of customary international law or manifest injustice…" Toulson LJ shed further light on this at [53] to [62], including reference to *Barclays Bank plc v Homan* [1993] BCLC 680, where Hoffmann J gave further examples of breach of customary international law or manifest injustice.

99. Mr Dunning KC pointed out that, in some situations, English law protects English residents/domiciliaries from foreign proceedings in a way that (he said) can be compared to Art. 248 of the APC. He drew my attention to the protection afforded to employees, under EU law and now under post-Brexit UK law, such that if an employee is domiciled in the UK, the employer may only sue the employee in the relevant part of

the UK; and an ASI may be granted to restrain the employer from suing elsewhere: *Samengo-Turner v J&H Marsh & McLennan (Services)* [2007] EWCA Civ 723; *Petter v EMC Europe Ltd* [2015] EWCA Civ 828; *Gagliardi v Evolution Capital Management LCC* [2023] EWHC 1608 (Comm). I am not sure that the analogy with Art. 248 of the APC is at all close, but I accept the general point that there are some circumstances where it is regarded as legitimate for a state to take the view that its nationals, residents or domiciliaries may not be dealt with fairly in foreign jurisdictions and therefore must be sued in their home jurisdiction. In this country, the statutory protection of the rights of consumers may provide another example.

100. In the light of the Explanatory Note and on its face, Art. 248 of the APC was introduced with the intention of addressing a real juridical problem, namely that Russian parties cannot get access to justice because of the impact of sanctions. It may well be that Art. 248 has been applied very broadly, including in situations where no such juridical problem really arises; and/or that it has been applied in a manner that is inconsistent with Russia's obligations under treaties such as the New York Convention; and/or that it can be used so as to circumvent or frustrate UK sanctions. All of those applications may be contrary to international norms or to English/UK public policy; in which case, Toulson LJ's caveat could come into play. However, that is not the position here.

101. On the contrary, this appears to be a case where Art. 248 was invoked precisely because of the peril identified in the Explanatory Note, i.e., that Transneft might be "deprived of the opportunity to defend [its] rights" in England. That is reflected in the reasoning of the Moscow Court in its judgment or 17 April 2024, at [60], which stated that the Russian ASI against Mr Magomedov was granted because of the effect of sanctions in limiting Transneft's access to justice in England.

102. The right of access to justice is a principle that every court is entitled to uphold and protect, according to its own lights. Doing so is not contrary to customary international law and is certainly not contrary to our public policy. Furthermore, on the evidence presented to me, the Moscow Court was entitled to be concerned about Transneft obtaining access to justice in England; so, it cannot be said that its conclusion in paragraph [60] was a manifest injustice. I hope and trust that the problems affecting Transneft's ability to pay its lawyers will be resolved by November 2024, but I do not take that for granted and I do not criticise the Moscow Court for applying Art. 248.

103. I have more misgivings about the imposition of fixed penalties totalling US$7.5 billion, which seems disproportionate. However, that is a separate point from Mr Houseman KC's arguments to the effect that Art. 248 is offensive in principle. It is more relevant to the AEI than to the AASI.

Fair presentation to Foxton J/Full and frank disclosure

104. I understood it to be common ground that the law as to the duty on a party applying without notice for an injunction of this kind is the same as that applicable in the context of freezing injunctions, as set out in the well-known judgment of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, at pp. 1356F to 1357F.

105. Most of the points relied on by Transneft under this heading had no merit and can be dealt with briefly:

(1) Urgency: The Claimants' expert, Mr Holiner, had said in a report that there was a risk that, at the hearing due to take place in the Moscow Court on 27 February 2024, Mr Magomedov would be deemed to have been duly notified (in particular, because his solicitors had made it clear in correspondence that he had notice of the case against him and of that hearing date), in which case the Moscow Court might proceed directly to grant the relief claimed. This risk was fairly explained to Foxton J

(2) Tipping-off: In the skeleton argument for Foxton J (even if not orally) the main reason given for proceeding without notice to Transneft was the risk of tipping-off – i.e., that if Transneft were given notice, it might seek to accelerate proceedings in Russia. Mr Holiner again had said that this was possible in theory, albeit unlikely. His evidence was fairly presented to Foxton J, being quoted in paragraph 40 of the skeleton argument.

(3) The law as to AASIs: While the law as to AASIs was not set out to Foxton J at great length, it is apparent from the transcript of the hearing before him that this was because he was already familiar with much of it. His short oral judgment makes it clear that he appreciated that the Claimants' case was legally novel.

(4) The connections with Russia and the strength of the Transneft Jurisdictional Challenge: This was all self-evident and was fairly presented to Foxton J.

(5) The existence of a funder: I did not understand why Transneft argued that it had been incumbent on the Claimants to tell Foxton J that their claim was supported by a funder (always assuming that this is the case); and Mr Dunning KC was unable to explain this to me.

106. However, some of Transneft's criticisms were significant. At the heart of them is the fact that the Claimants knew at least from their receipt of Mr Stepanchuk's 6th witness statement on 16 February 2024 that Transneft had been experiencing serious problems in paying its lawyers in England, as well as in paying the Costs Order (the parties were discussing various methods by which Transneft might pay the Costs Order). Furthermore, Transneft had explained in correspondence that this lay behind its reasons for needing extensions for the Transneft Jurisdictional Challenge.

107. None of this information was provided to Foxton J. On the contrary, the Claimants' skeleton argument for Foxton J implied that Transneft did not have any good reasons for seeking time extensions. Similarly, some emphasis was placed before Foxton J (both in writing and orally) on the fact that Transneft had failed to comply timeously with Butcher J's Costs Order. Part-way through the without notice hearing, Foxton J was eventually told, in somewhat Delphic terms, that it was no longer necessary for Transneft to apply for relief from sanctions in this regard. He was not told why, nor was he ever told that Transneft had explained why it had not been able to pay promptly. He will have been left with the impression that Transneft simply chose not to pay when it should have.

108. Furthermore, Foxton J was given the impression that Transneft had sought to act without giving notice to the Claimants. The Claimants' skeleton argument said at paragraphs 26 to 27 that Transneft had sought the Russian ASI against Mr Magomedov without prior notice and that its behaviour was in this regard even worse than that of

the defendant in *Tonicstar*. This was not the case. The normal procedure in Russia is that a claimant files its case with the court, and the Russian court then effects service on the defendant, so as to give notice of the first hearing. The Claimants had no basis for believing that Transneft intended to do anything different or that the preliminary hearing fixed for 27 February 2024 was, without an AASI, likely to proceed without prior notice to Mr Magomedov.

109. This all matters because a prominent part of the Claimants' case before Foxton J and before me was that Art. 248 of the APC, and Transneft's invocation of this in the Moscow Court, was exorbitant, unjustifiable and (in the words of the skeleton for Foxton J) "comity-busting". Foxton J was told what the purported justification for Art. 248 was said to be (i.e., per the associated Explanatory Note) but with some emphasis on the word "purported": the clear implication was that this was a sham. This was all crucial to the Claimants' case that Art. 248 was offensive to comity, and that Transneft's reliance on it was a breach of what Lord Goff and Toulson LJ referred to as "customary international law". The broader criticisms of Transneft's behaviour (e.g., the allegation that it was proceeding without notice to Mr Magomedov) was relevant to the overall theme that the proceedings in the Moscow Court were underhanded.

110. Before me, Mr Dunning KC advanced a powerful case to the effect that this is a gross distortion. I have not accepted every aspect of his submissions, but I have accepted that the use of Art. 248 in this case was consistent with international customary law and, in itself, did not give rise to manifest injustice.

111. At the hearing on 21 February 2024, the Claimants should have told Foxton J that Transneft had stated that it had experienced chronic difficulties in paying English lawyers, and that this was said to be at least partly responsible for its delay in filing the Transneft Jurisdictional Challenge and in paying the Costs Order. If the Claimants had done so, I think it inevitable that they would then have had to moderate their submissions in relation to Art. 248. To this extent, I accept Transneft's criticisms and agree that the Claimants failed to make a fair presentation or to make full and frank disclosure.

The appropriate remedy for the Claimants' failure

112. In assessing how to deal with this, I have had regard to points (v) to (vii) of Ralph Gibson LJ's judgment in Brink's Mat:

> "(v) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains … an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty …" : per Donaldson L.J.: *Bank Mellat v. Nikpour* at page 91 citing Warrington L.J. in the *Kensington Income Tax Commissioners* case.
> (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends upon the importance of the fact to the issues which were to be decided by the judge upon the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty upon the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally "it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded" : per Lord Denning MR: *Bank Mellat v. Nikpour* at page 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. "Where the whole of the facts, including that of the original non-disclosure are before (the court), it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed" : per Glidewell L.J.: *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings plc* : Court of Appeal: 18th March 1987 page 12G."

113. In this case, the failure was significant. The full facts, as presented to me, have resulted in one of the Claimants' two principal arguments being rejected; whereas the partial facts presented to Foxton J were not capable of leading to that conclusion. On the other hand, the failure was not decisive. Even with knowledge of the full facts, my own decision (were I considering the position without the blemish of a previous failure to make a fair presentation) would still be to grant the AASI, on the basis of the Claimants' primary argument.

114. I do not believe that the failure was deliberate or intentional. It resulted from a combination of not having fully absorbed all the information received from Transneft, not focussing fully on what Transneft might have said if it had been represented and excessive haste. However, it was culpable. If proper thought had been given to the questions that should have been addressed, the presentation to Foxton J would have been significantly different. I have reached that view despite reminding myself not to be affected by hindsight and to appreciate that it is easier to see what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than at the time. Above all, the information in Mr Stepanchuk's 6th witness statement was obviously material; and the allegation that Transneft was proceeding in Russia without giving notice to Mr Magomedov was baseless.

115. I have in mind the many authorities that emphasize the importance of the obligations on those who apply for such orders without notice, the fact that setting aside an order where there has been a material breach is a useful penalty both to punish defaulters and 'pour encourager les autres', and that setting aside therefore should be the starting-point in a case such as this. I also have in mind the many authorities that emphasize that the overriding question is the interests of justice, and that it is important to preserve a due sense of proportion.

116. I have found the exercise very finely balanced. Ultimately, I am swayed by the fact that, if Foxton J's order is set aside, with the result that there is no AASI and no AEI, these Claimants will be exposed to a penalty in Russia of US$7.5 billion, merely for proceeding with this case to the extent of resisting the Transneft Jurisdictional Challenge. While the Claimants' failure was serious, it was not so serious as to warrant exposing them to the risk of having to pay US$7.5 billion. That would be utterly disproportionate.

Conclusion

117. The AASI granted by Foxton J on 21 February 2024 will be continued on an interim basis, until the determination of the Transneft Jurisdictional Challenge or earlier order.

118. I will also grant the AEI sought by the Claimants, again on an interim basis until the determination of the Transneft Jurisdictional Challenge or earlier order. On that interim basis, this will prevent Transneft from seeking to enforce the sums of US$2.5 billion and US$5 billion that the Moscow Court ordered to be available to Transneft in the event of the Claimants' failing to comply with the Russian ASIs. I have in mind the authorities referred to in paragraph 61 above. However, in this case an AEI is essential if the AASI is to be effective. Furthermore, the caution that would otherwise be necessary is somewhat tempered by the fact that, in the event, the Moscow Court awarded these sums as penalties, despite having been asked by Transneft not to proceed.

119. By contrast, I will not grant the ARI, which was sought on a permanent basis and which, I think, Mr Houseman no longer pursued by the end of his submissions.

120. I will discuss the precise terms of my order with counsel. I will also deal with costs. The corollary of my decision not to set aside Foxton J's order is that the Claimants' failure to make a fair presentation to Foxton J will be marked in costs.

121. In this regard, and in anticipation of the submissions that I will receive on costs, it is relevant to note that, in the course of the hearing, Transneft made an open offer not to enforce its right to payment under the Russian ASIs until the determination of the Transneft Jurisdictional Challenge, on terms that there would be no order as to the costs of this hearing. The Claimants rejected that offer, essentially on the basis (i) that they wanted me to rule on Transneft's criticisms of their presentation to Foxton J and (ii) that they did not regard there being no order as to costs as acceptable. This was not an offer within CPR Part 36, but I have no doubt that the parties will wish to make submissions as to its effect on costs.