Neutral Citation Number: [2024] EWHC 2573 (Comm)

Case No: CL-2021-000509

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, EC4A 1NL

Date: 14/10/2024

Before :

MR JUSTICE CALVER

- -

Between :

(1) FILATONA TRADING LIMITED **(2) OLEG VLADIMIROVICH DERIPASKA**	**Claimants**
- and -	
QUINN EMANUEL URQUHART & SULLIVAN UK LLP	**Defendant**

- -
- -

Thomas Grant KC and James Sheehan KC (instructed by **Quillon Law LLP**) for the **Claimants**
Antony White KC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendants**

Hearing dates: 02-03 October 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Monday 14 October 2024.

Mr Justice Calver:

A. Introduction

1. It is fair to say that the Claimants ("**the Deripaska Parties**") and Vladimir Chernukhin and his company Navigator Equities Ltd ("**Navigator**") ("**the Chernukhin Parties**") are not the best of friends. It is also fair to say that the honesty and integrity of both of Mr. Deripaska and Mr. Chernukhin has from time to time been found to be wanting in cases before the English Courts, not least in previous proceedings before this court under sections 67 and 68 of the Arbitration Act 1996.

2. By their Claim Form dated 3 September 2021, the Deripaska Parties seek *Norwich Pharmacal* relief against the Defendant ("**QE**"), the well-known city law firm. In 2018 QE began acting for the Chernukhin Parties in an advisory capacity, although Clifford Chance were their solicitors on the record in later proceedings before this court under section 68 of the Arbitration Act ("**the section 68 proceedings**") out of which the application arises.

3. As Tugendhat J observed in *United Company Rusal Plc v HSBC Plc* [2011] EWHC 404 (QB) at [6]: "*There are few reported cases in which a Norwich Pharmacal order has been sought against a law firm. Any form of claim by one litigant against the lawyers retained by an opposing litigant is rare*".

4. However, in this case, the Deripaska Parties do seek an order from the court that QE disclose the identity of an apparently well-known London based Business Intelligence Consultancy ("**the Consultancy**") which obtained a Russian language report, known as the Glavstroy Report ("**the Glavstroy Report**"), from an alleged wrongdoer which is said by the Deripaska Parties to be a forgery. The Consultancy then passed the report on to QE, independently of the Chernukhin Parties[1], whereupon it was subsequently used by the Chernukhin Parties in the section 68 proceedings.

5. QE has explained that it does not know the identity of the *ultimate* source of the Glavstroy Report and accordingly the Deripaska Parties no longer seek disclosure of the identity of that source. The Deripaska Parties maintain, however, that disclosure of the identity of "the middleman" (i.e. the Consultancy and the natural persons at the

[1] This is accepted by both parties, at least for the purposes of this application.

Consultancy who procured the report) is both proportionate and necessary as it will assist in their identification of the ultimate source, as armed with that information they can then seek a further order that the middleman should itself identify the ultimate source[2].

6. The case is unusual in that the fact of and the purpose of the engagement of the Consultancy has already voluntarily been disclosed by QE and Clifford Chance. Mr. Antony White KC, counsel for QE, submits nonetheless that the information sought on the present application (insofar as it is within QE's knowledge) relates to the identity of the Consultancy (and its representatives) that QE engaged and communicated with for the dominant purpose of seeking and/or obtaining evidence and/or information to be used in connection with actual or contemplated adversarial litigation between the Deripaska Parties and QE's clients, the Chernukhin Parties. The information sought will, he submits, be contained in confidential communications between QE and the Consultancy, and as such the communications and the information they contain are covered by litigation privilege which the Chernukhin Parties have not waived. Mr. White KC made that argument the centre-piece of his opposition to the application, and I address it below.

B. The History of the Dispute

7. I can take much of the history of the dispute from the summary contained in the parties' skeleton arguments as well as from the first witness statement of Mr. McGregor served on behalf of the Deripaska Parties at [8]ff, because there is no dispute about what follows.

8. The dispute stems from a joint venture formed in the early 2000s in respect of a Russian textiles manufacturer called OJSC Trekhgornaya Manufaktura ("**TGM**"). A shareholders' agreement was entered into in 2005, which named the Deripaska Parties as "Party 1" and Navigator and Lolita Danilina as "Party 2". Party 1 and Party 2 were the sole shareholders in a Cypriot Company called Navio Holdings Limited ("**Navio**"), which was the holding company of TGM and the joint venture (although there were other minority interests in TGM held by third parties which are not relevant to these proceedings).

[2] See *Kalmneft v Denton Hall* [2002] 1 Lloyd's Rep 417 at 423, [17].

9. Over a period of years the joint venture broke down, leading to deadlock in respect of TGM and Mr. Deripaska taking control in late 2010. Following this, Mr Chernukhin alleged unfair prejudice (or rather, its Cypriot law equivalent of "oppression") on the part of the Deripaska Parties and commenced an arbitration in 2015 seeking an order that the Deripaska Parties buy out the Chernukhin Parties' stake in TGM.

10. A key issue in the arbitration concerned the true ultimate beneficial owner of Navigator and whether or not Mrs. Danilina was a party to the shareholders' agreement as nominee for Mr. Chernukhin. Mr. Chernukhin claimed that he was indeed the UBO; the Deripaska Parties and Mrs. Danilina claimed the obverse. The arbitral tribunal found in favour of Mr. Chernukhin on this point in a first final partial award on 16 November 2016, rejecting the false case put forward by the Deripaska Parties. The Deripaska Parties challenged this finding (as well as others) in court proceedings under s.67(1)(a) of the Arbitration Act 1996, running the same case that Mrs. Danilina rather than Mr. Chernukhin was the true beneficial owner, and Mrs. Danilina supported the challenge through separate proceedings which were heard together.

11. In a second final partial award issued in July 2017, the arbitral tribunal found that the Deripaska Parties' conduct was unfairly prejudicial and ordered them to buy out the Chernukhin Parties. On the basis of the material before it, the tribunal assessed the price payable to the Chernukhin Parties at US$95,181,285. The Deripaska Parties later paid that sum plus accrued interest and the buy-out completed in October 2019. Hence they became the sole owners of Navio and so the majority owners of TGM.

12. On 18 January 2018 the Tribunal issued a Third Award in respect of interest and costs. The Deripaska Parties challenged the Second and Third Awards before this Court relying on various grounds under ss. 67 and 68 of the Arbitration Act 1996.

13. As I have already mentioned, in 2018 QE began acting for the Chernukhin Parties, although Clifford Chance were their solicitors on the record in the arbitration and civil proceedings.

14. On 7 February 2019 Teare J delivered his judgment ([2019] EWHC 173 (Comm)) dismissing the Deripaska Parties' challenges to the First, Second and Third Awards, rejecting the false case advanced by Mr. Deripaska and supported by Mrs. Danilina that

Mrs. Danilina rather than Mr. Chernukhin was the true beneficial owner of Navigator. The Court of Appeal upheld the Judgment of Teare J: [2020] 1 CLC 285.

15. Teare J found that the evidence of all of the core witnesses, including Mr. Deripaska and Mr. Chernukhin, was unreliable and in some cases dishonest. Teare J found that Mr. Chernukhin had dishonestly advanced a false case that his ownership of Navigator was demonstrated by the terms of a 2004 declaration of trust, when in fact his name had been added to an otherwise blank declaration in 2015, after he commenced the arbitration.

16. In the light of Teare J's findings on the 2004 declaration of trust, Mr. Deripaska, through his then solicitors RPC, commenced a private prosecution of Mr. Chernukhin for perversion of the course of justice. The DPP took over that prosecution in March 2020 and discontinued it, on the basis that, whilst there was sufficient evidence to provide a realistic prospect of conviction, a prosecution was not needed in the public interest.[3]

17. Separately, in May 2018 the Chernukhin Parties applied for a freezing order against Mr. Deripaska in aid of enforcement of the tribunal's buy-out order. That application was resolved by the giving of undertakings by Mr. Deripaska and others. In November 2019, after the buy-out had been completed, and so after the Chernukhin Parties had received the sums to which they were entitled under the second final partial award, the Chernukhin Parties issued a committal application against Mr. Deripaska for alleged breaches of his undertakings. The trial of that application came before Andrew Baker J in June 2020. He struck out the committal application as an abuse of process, including because it had been brought to "*vex and harass*" Mr Deripaska. He handed down a full written judgment on 17 July 2020, in which he also found that Mr Deripaska was not in breach of his undertakings in any event.[4]

18. In December 2021 the Court of Appeal allowed an appeal against Andrew Baker J's order and directed a retrial. Following a number of adjournments necessitated by the decision of the UK government to sanction Mr. Deripaska in March 2022, the retrial came before HHJ Pelling KC in March 2023, who again dismissed the allegations of

[3] See the judgment of Tipples J at [16]-[17] in judicial review proceedings challenging the DPP's decision.
[4] [2020] EWHC 1798 (Comm) at [104]–[124]

contempt. Despite this, the Chernukhin Parties pursued a yet further appeal, which was unanimously dismissed by the Court of Appeal in March 2024. The Chernukhin Parties sought permission to appeal to the Supreme Court, which the Court of Appeal rejected in July 2024.

The s.68 proceedings

19. It was during this latter period, on 21 April 2020, that the Chernukhin Parties (acting by Clifford Chance) issued proceedings against the Deripaska Parties under s.68 of the Arbitration Act 1996, seeking to set aside the arbitral tribunal's buy-out award and remit the question of quantum to the tribunal. They alleged that the award was vitiated by a fraud committed by the Deripaska Parties, namely their deliberate suppression of the Glavstroy Report. The proceedings were supported by a witness statement prepared by Ms. Berard, a partner at Clifford Chance.

20. The Glavstroy Report was said to have been obtained by QE from the Consultancy, which was not named, but which had been retained by QE on the Chernukhin Parties' behalf.[5] (The Consultancy was later said to have obtained it from "*trusted source(s).*")[6]

21. On its face, the Glavstroy Report purported to be a feasibility study dated 18 May 2016, for the redevelopment of TGM's site in Moscow, produced by Glavstroy (a Russian construction company ultimately controlled by Mr. Deripaska until 2018). The Chernukhin Parties alleged that, had the Glavstroy Report been produced to the tribunal as it should have been, the tribunal would have ordered the Deripaska Parties to pay not US$95 million, but US$395 million for the Chernukhin Parties' interest in the joint venture. The Chernukhin Parties sought to use the Glavstroy Report to secure a further hearing before the tribunal and – ultimately – an award requiring the Deripaska Parties to pay up to a further US$300 million to them.

22. I agree with the submission of Mr. Thomas Grant KC, counsel for the Deripaska Parties (together with Mr. James Sheehan KC, who ably argued the privilege issue discussed below) that the set aside proceedings were of the utmost seriousness, both in terms of their value and in terms of the nature of the allegations made in them against the Deripaska Parties.

[5] Berard 1, para 68
[6] See QE's letter to RPC dated 5 June 2020.

23. In paragraph 68 of her witness statement in the section 68 proceedings, Ms. Berard stated that she understood from Mr. Greeno, the partner at QE who was advising the Chernukhin Parties, that:

    (i) QE had obtained the Glavstroy Report, in original Russian and in hard copy only from the Consultancy on around 27 September 2019. QE commissioned a translation of it by a London based translation firm which was received by QE on 2 October 2019, and then "*conducted their own enquiries*" over a period of around 10 weeks in relation to it before releasing it to Clifford Chance on 10 December 2019.

    (ii) Clifford Chance then conducted its own "*detailed analysis – in conjunction with our forensic accountancy team – in relation to all aspects of the document*" and made "*extensive enquiries…with various third parties…in order to verify and/or obtain further information in respect of certain aspects of the Glavstroy Report*".

    (iii) The Chernukhin Parties and their lawyers "*recognise[d] the gravity of the allegations*" they were making and their "*extensive enquiries (which necessarily took considerable time)…were a necessary step to enable [Clifford Chance] to discharge its professional obligations*" before making the serious allegations of forgery/fraud in the section 68 proceedings.

    (iv) The section 68 proceedings were issued some four months after the Glavstroy Report was provided to Clifford Chance.

24. The Deripaska Parties maintain that the Glavstroy Report is a forgery. Mr. Grant KC submitted that this is primarily apparent from the fact that, although it purports to be dated May 2016, it refers on page 3 to an official document dated April 2018. Other suggested indicators of forgery are set out in Mr. McGregor's 12th witness statement (which was made in the contempt proceedings) at paragraphs 11ff as follows:

    (i) The Glavstroy logo used in the report was not in fact in use until over a year after May 2016 (which was the ostensible date of the report).

    (ii) The report contained a repeated mistake in the name of its purported author, Glavstroy's General Director, Mr I.G. Bogatov (referring to him on the last page as I.A. Bogatov).

(iii) The report referred to various calculations said to have been carried out by two KPMG entities, both of which confirmed that they in fact had no involvement. It also referred to work done by project design entities and development contractors, each of whom again denied any involvement in it.

(iv) Upon enquiry, neither Glavstroy nor the addressee of the report (Sberbank) had any record of the report.

(v) The report duplicated a specific figure from TGM's 2016 annual report which was not produced until several months after May 2016.

(vi) The report referred to a cluster of buildings as having a specific cultural heritage status, which status was not in fact conferred until September 2017.

25. On 28 April 2020, seven days after the issue of the section 68 proceedings, the Deripaska Parties' then solicitors, RPC, wrote to Clifford Chance stating that preliminary enquiries had not identified a copy of the Glavstroy Report and its authenticity was doubted. In particular, in paragraph 8 of that letter RPC asked Clifford Chance to:

(i) confirm the identity of the Consultancy instructed by QE;

(ii) confirm when QE instructed the Consultancy;

(iii) explain the purpose for which QE instructed the Consultancy and the scope of their instruction;

(iv) explain precisely how the Glavstroy Report came into the possession of Clifford Chance's clients and/or QE in September 2019 including confirming how the Consultancy obtained the document and from whom and where;

(v) explain what steps Clifford Chance had taken to satisfy themselves that the Glavstroy Report is genuine;

(vi) explain why QE and/or Clifford Chance did not provide the Glavstroy Report to the Deripaska Parties immediately upon receipt to explain how it came to be in their possession and to ask the Deripaska Parties to confirm its authenticity and in any event why it was not provided prior to issuing the section 68 proceedings; and

(vii) provide (or procure that QE provides) the original copy or copies of the Glavstroy Report obtained by the Consultancy whether in paper or electronic copy. If in electronic copy provide (or procure that QE provides) the original

version of the document with all associated metadata preserved. To the extent that Clifford Chance does not have an original copy, explain what steps Clifford Chance took to obtain it from QE and/or the Consultancy and how Clifford Chance felt able to sign off on the section 68 proceedings (including Berard 1) without it.

26. These were all perfectly reasonable questions. However, neither Clifford Chance nor QE answered them. Instead, on 4 May 2020 Clifford Chance stated that neither they nor QE had any reason to doubt the authenticity of the Glavstroy Report and themselves posed questions as to why it was that the Deripaska Parties considered the Glavstroy Report not to be authentic.

27. RPC re-posed their questions about the authenticity of the report on 6 May 2020 but Clifford Chance refused to address them in its reply letter dated 11 May 2020, suggesting that the Deripaska Parties were "fishing for material". They added that QE had obtained the Glavstroy Report independently of the Chernukhin Parties.

28. On 30 May 2020 Mr. McGregor's 12th witness statement was served, which set out the alleged indicia of forgery in detail in section B, paragraphs 11-40.

29. Clifford Chance stated in a letter dated 2 June 2020 that they were looking into the matters raised as a matter of urgency. In a letter dated 5 June 2020, QE stated that they also were making "urgent enquiries" in relation to the Glavstroy Report in the light of Mr. McGregor's 12th witness statement. They also gave some more information about the circumstances in which they came to be in possession of the Glavstroy Report. They stated that:

> *"in the light of our clients' considerable concerns about the suppression of key evidence relating to valuation (amongst others) a business intelligence consultancy ("the Intelligence Firm") was engaged by our firm to provide investigative services and litigation support to the Chernukhin Parties. The Intelligence Firm is a UK based company which is routinely engaged by city law firms in the context of legal disputes such as the dispute between our respective clients. In ordinary circumstances, we would have no hesitation in revealing the name of the Intelligence Firm to you (as we have no doubt that it is a company that your firm is familiar with). However in the present case we are not prepared to do so. This is because both we and the Intelligence Firm*

have serious concerns about the safety of the ultimate source(s) of the Glavstroy Report given the identity of your client.

…

Strictly without waiving privilege, the Investigation Firm has confirmed to us that they obtained the Glavstroy Report via trusted sources that they have worked with for more than a decade. In the circumstances even if the Glavstroy Report is not authentic (which for the avoidance of doubt remains under investigation and is not accepted) there can be no suggestion whatsoever that the Chernukhin Parties were involved in any wrongdoing in relation to the Glavstroy Report.

…

Between receipt of the Glavstroy Report and the issuance of the section 68 proceedings both our firm and Clifford Chance LLP conducted detailed analysis in relation to the Glavstroy Report. Strictly without waiving privilege, we undertook a thorough and comprehensive analysis to ensure that the aspects of the Glavstroy Report which related to the valuation of TGM (including the extensive information regarding the properties referred to in the Glavstroy Report) supported the allegation that a fraud had been committed by Mr Deripaska in the arbitration given the very comprehensive nature of the Glavstroy Report (and our ability to check property details such as Land Registry numbers for example) neither we nor we understand Clifford Chance LLP had reason to doubt the authenticity of the Glavstroy Report.

…

In the event that the Glavstroy Report is not authentic (which is not accepted) we have not ruled out the possibility that it was deliberately leaked to the Intelligence Firm in an attempt to sabotage our clients…" (emphasis added)

30. At a hearing before Andrew Baker J fixed for 8-11 June 2020, the Court heard the application of the Chernukhin Parties, issued on 14 November 2019 (i) to have Mr. Deripaska sanctioned by the Court for alleged breaches of his undertakings to the court and (ii) for an order for payment of damages suffered by them as a result. In the skeleton argument of the Chernukhin Parties upon the application, they did not accept that the Glavstroy Report was a forgery and they again stated that the basis of that allegation was being explored by Mr. Chernukhin's legal team as a matter of urgency. This position was also adopted in QE's letter to RPC dated 8 June 2020 in which the Deripaska Parties' questions about the authenticity of the Glavstroy Report were said to

be an "*obvious attempt to distract from the relevant issues for the trial of the Committal Proceedings*".

31. On the first day of the hearing of the application before Andrew Baker J, Ms. Berard, a partner at Clifford Chance, was cross-examined by Nathan Pillow KC for the Deripaska Parties. She accepted in particular that:

    (i) She made no enquiries about the source of the Glavstroy Report, that is from whom the Consultancy obtained it;
    (ii) Neither she, QE, nor counsel spotted that the Glavstroy Report, supposedly produced in 2016, referred to a document dated 25 April 2018. Had she known that she would have realised that this was an indication that something was not right with this document;
    (iii) She made no checks as to which logo was in use by Glavstroy in 2016;
    (iv) She could put before the court no evidence of the authenticity of the Glavstroy Report.

32. On 10 June 2020 Andrew Baker J struck out the Chernukhin Parties' committal application. However, the section 68 proceedings were kept on foot.

33. The deadline for the filing of the Deripaska Parties' evidence in the section 68 proceedings was 8 July 2020. Accordingly, RPC wrote to Clifford Chance on 25 June 2020 again referring to Mr. McGregor's unanswered points about the Glavstroy Report being a forgery, as well as Ms. Berard's cross-examination and asking for an urgent response to Mr. McGregor's 12th witness statement, and whether the section 68 proceedings were to be pursued nonetheless. Clifford Chance responded the same day and again merely stated that it was necessary for them to conduct a careful and thorough investigation into the authenticity of the Glavstroy Report.

34. On 2 July 2020 Clifford Chance informed RPC that they were still investigating the position in relation to the Glavstroy Report and proposed a stay of the section 68 proceedings. They suggested that any further costs were at the Deripaska Parties' risk. RPC responded by letter dated 3 July 2020. They refused to agree to a stay and invited the Chernukhin Parties to withdraw the section 68 application forthwith.

35. On 8 July 2020 Mr. McGregor served his first witness statement in response to the section 68 proceedings and he set out again in detail why the Deripaska Parties contended that the Glavstroy Report was clearly a forgery, with the consequence that the proceedings should be withdrawn. He pointed out that the Chernukhin Parties had provided no evidence to the contrary despite being served with his 12th witness statement over 5 weeks earlier.

36. On 13 July 2020 Andrew Baker J handed down his draft written judgment on the committal application. At paragraph 162 of his judgment he said this:

> "*Although Ms Berard would not accept this when Mr Pillow QC put it squarely to her, and I am willing to accept from her that she indeed did not see it this way, in my judgment she had lost, or never had, that degree of objectivity and detachment from her client that a fair prosecution of this contempt application, with its quasi-criminal character, required. That lack of objectivity infected also the presentation of the case to the court through the skeleton argument. It was also confirmed by what cross-examination demonstrated to be a willingness on Ms Berard's part to allege dishonesty against Mr Deripaska in a new claim that has been issued by the claimants, under s.68 of the 1996 Act, seeking to reopen the arbitrators' finding as to the price that should be paid for the Navio buyout, on the basis of a document obtained by Clifford Chance in circumstances she had not investigated properly and in respect of which she could not say she had evidence for its authenticity. (I do not mean by that to indicate any view at all whether in that s.68 claim, if pursued, the claimants may ultimately be able to establish the authenticity of the document in question. The point for now is only that the launching of the s.68 claim, when examined, illustrates a lack of detached scrutiny in respect of allegations that Mr Chernukhin wishes to make*.)"

37. Neither Clifford Chance nor QE responded to Mr. McGregor's first witness statement. RPC sent a chasing letter on 13 July to Clifford Chance, copied to QE. QE did not respond. However, the following day Clifford Chance did respond, by serving upon RPC a draft notice of discontinuance of the section 68 proceedings. Whilst no admissions were made in respect of the allegations made by the Deripaska Parties, Clifford Chance subsequently agreed to an order for indemnity costs against the Chernukhin Parties.

Evidence served in respect of the present (Norwich Pharmacal) claim

38. On 3 September 2021 the Deripaska Parties issued this Part 8 Claim for *Norwich Pharmacal* relief. They rely on the first witness statement of Mr. McGregor dated 2

September 2021 in support of it. He again sets out in detail the indicia upon which the Deripaska Parties rely to support their case that the Glavstroy Report is a forgery. He refers in paragraphs 87-112 of his statement to previous leaks of documents and information from within TGM and Mr. Deripaska's wider organisation, albeit it is fair to state that these alleged leaks dated back to 2011-2018.

39. On 25 November 2021 Mr. Greeno of QE served a responsive witness statement in respect of the *Norwich Pharmacal* claim. He stated in particular as follows:

(i) QE does not know the identity of the ultimate source (i.e. the party or parties from whom the Consultancy obtained the Glavstroy Report).

(ii) The timing, reasons and circumstances of QE's engagement of the Consultancy are privileged and confidential.

(iii) The Chernukhin Parties do not authorise QE to waive their privilege and/or confidentiality in respect of the matters raised.

(iv) It has always been the position of the Chernukhin Parties that the valuation evidence submitted by the Deripaska Parties in the Arbitration relating to TGM was deficient and that highly significant documents relating to the valuation of TGM had been deliberately withheld by the Deripaska Parties, such that the Tribunal valued the Chernukhin Parties' stake in TGM at a gross undervalue. In that regard, the Tribunal concluded (at paragraph 198 of the Second Partial Final Award) that: "*We are satisfied that a substantial amount of documentary material which is relevant to quantifying the value of the site has not been produced*."

40. Mr. Greeno addressed the allegation that the Glavstroy report is a forgery in paragraphs 66-70 of his statement. He stated in particular:

(i) On the date discrepancy referred to in paragraph 24 above, "*With the benefit of hindsight, I of course accept that there is a clear discrepancy between those dates. I would, however, note that the Glavstroy Report is a seventeen-page document containing a substantial amount of detail relating to property and valuation information based on numerous development proposals. This*

property and valuation information (and the basis of the underlying calculations contained in the Glavstroy Report) was critical to the allegations made in the Glavstroy Report Proceedings, namely (i) whether the Glavstroy Report was responsive to the document production orders of the Tribunal in the Arbitration; and (ii) if so, what the impact of the Glavstroy Report would have had on the valuation of TGM (which was a matter investigated by, and reported on, by an independent expert). Moreover, the section in which the Extract is referred is in fact the only section of the Glavstroy Report that is wholly irrelevant to the allegations in the Glavstroy Report Proceedings."

He did not say, however, whether QE had made any subsequent enquiries about this apparently obvious discrepancy. In the course of argument, Mr. White KC suggested that a careful reader might have thought this to be a simple typing mistake, but there is no evidence before me that QE thought this; on the contrary, Mr. Greeno makes clear that they overlooked this.

(ii) On the logo discrepancy referred to in paragraph 24(i) above, he stated "*In circumstances where the Chernukhin Parties' legal team had no reason to doubt the date or authenticity of the Glavstroy Report (having not identified the apparent date error in the Extract), we saw no reason to investigate if (or indeed when) Glavstroy might have changed its corporate logo*."

He did not say, however, whether QE had <u>subsequently</u> checked this point.

(iii) On the various other errors or inconsistencies in the document, Mr. Greeno confirms that nobody within the Chernukhin Parties' legal team appreciated them at the time. In response to Mr. McGregor's suggestion that Clifford Chance or QE should have written to Glavstroy to ask whether this document was genuine, he suggested that "*given the sensitive nature of the enquiries, [QE] could not realistically have written to Glavstroy (a company formerly owned by Mr. Deripaska) as part of its investigations into the Glavstroy Report prior to issuing*" the Part 8 Claim.

However, I agree with Mr. Grant KC's submission that this was the obvious course to adopt, certainly after proceedings had commenced on 21 April 2020. Glavstroy was at that stage an independent company, having been sold by Mr. Deripaska; alternatively QE could have written to the recipient of the report, Sberbank CIB, and asked it whether or not this was a genuine report, of which it had a copy (it may have needed to obtain Glavstroy's consent in such a case, but there is no reason to think it would not be forthcoming if the document is genuine.

(iv) On the point concerning KPMG's supposed involvement referred to in paragraph 24.3 above, Mr. Greeno states that "*it would have risked compromising the Glavstroy Report Proceedings if enquiries had been made prior to them being issued*."

This seems questionable; but in any event, QE did not make such enquiries *after* the section 68 proceedings were commenced on 21 April 2020 and after the issues of authenticity were pointed out by RPC just 7 days later. The claim was only withdrawn on 14 July 2020.

41. As Mr. Grant KC pointed out, Mr. Greeno did not at any stage in his witness statement suggest that the Glavstroy Report was a truthful document.

C. Legal principles

42. The jurisdiction to allow a prospective claimant to obtain information in order to seek redress for an arguable wrong was recognised by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133. Its scope was described by Lord Reid at p 175:

> *"if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the*

> *person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."*

43. The requirements for *Norwich Pharmacal* relief are now well-established, and were summarised by Saini J in *Collier v Bennett* [2020] 4 WLR 116 at [35][7]:

(i) There must be a good arguable case that a form of legally recognised wrong has been committed against the applicant them by a person (the "**Arguable Wrong Condition**").

(ii) The respondent to the application must be mixed up in, so as to have facilitated, the wrongdoing ("**the Mixed Up In Condition**").

(iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ("**the Possession Condition**").

Requiring disclosure must be an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ("**the Overall Justice Condition**").

44. The first three of these conditions are often referred to as 'threshold' conditions, with the circumstances as a whole falling to be considered within the context of the Overall Justice Condition.

45. I turn then to the relevant legal test or tests for each of these "conditions", in order to determine whether each of them is satisfied in this case.

(i) Arguable Wrong Condition

46. First, what needs to be satisfied in relation to the Arguable Wrong Condition was helpfully explained by Popplewell J (as he then was) in *Orb v Fiddler* [2016] EWHC 361 (Comm) at [83]-[84], cited with approval by Flaux J (as he then was) in *Ramilos Trading v Buyanovsky* [2016] EWHC 3175 (Comm) at [12]:

> *"83. As the jurisdiction has developed there are three threshold conditions which must be satisfied.*

[7] Adopted by the Privy Council in *Stanford Asset Holdings Ltd v AfrAsia Bank Ltd* [2023] UKPC 35 at [36].

> *84. The first condition is that there must have been a wrong carried out, or arguably carried out, by an ultimate wrongdoer. The "wrong" may be a crime, tort, breach of contract, equitable wrong or contempt of court. It is not necessary to establish conclusively that a wrong has been carried out; it will be sufficient if it is arguable that a wrong has been carried out. The strength of the argument will be a factor in the exercise of the discretion, but an arguable case is sufficient to meet the threshold condition. The wrongdoing must be identified by the applicant at least in general terms: see Ashworth Hospital Authority v MGN Limited [2002] 1 WLR 2033 per Lord Woolf CJ at paragraph [60]."*

47. It seems clear now, therefore, that Lord Woolf's obiter view in *Ashworth Hospital Authority v MGN Limited* [2002] 1 WLR 2033 at [53] ("*If the law has developed so as to enable, in the appropriate circumstances, the wrongdoer to be identified if he has committed a civil wrong I can find no justification for not requiring the wrongdoer to be identified if he has committed a criminal wrong*") prevails over the obiter view of Sedley LJ in *Financial Times Ltd v Interbrew SA* [2002] EWCA Civ 274 at [28] to the contrary.

(ii) Mixed Up in Condition

48. Secondly, so far as the "Mixed Up In Condition" is concerned, Lord Woolf stated in *Ashworth* at [35]:

> "*Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion*."

49. In light of the passage in Lord Reid's speech in *Norwich Pharmacal* set out in paragraph 42 above in which he referred to the facilitation of the wrongdoing by the person mixed up in the tortious act of the wrongdoer, an issue has arisen as to whether it is necessary for the applicant to prove something more than mere involvement in the wrongdoing on the part of that person.

50. The Court of Appeal in *R(Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112 at [36]-[40] per Maurice Kay LJ, considered (obiter) that it was

sufficient to establish involvement or participation in the wrongdoing by the person in possession of the information and it is not necessary to establish that they also facilitated the perpetration of the wrong.

51. That was the approach taken by Tomlinson LJ in *NML Capital v Chapman Freeborn* [2013] EWCA Civ 589 at [25] in which he stated:

> 25. … *it is in my judgment clear that if the Norwich Pharmacal jurisdiction is not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing. King J put it well in Campaign Against Arms Trade v BAE [2007] EWHC 330 (QB) at paragraph 12 when he said:*
>
> *'The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered.'*

52. Had it mattered in the present case, I would have followed the approach of the Court of Appeal in *Omar* and *NML*[8] which I respectfully consider to be in keeping with the purpose and flexibility of the Norwich Pharmacal remedy. In other words, it is sufficient in order to engage the jurisdiction to establish that the person in possession of the information was *involved* in some way in the wrongdoing. The nature and extent of that person's involvement can then be taken into account in determining whether the overall justice of the case requires that the relief should be granted.

53. This means, as Tomlinson LJ recognised in *NML*, that it is necessary to analyse carefully the wrongdoing alleged and the nature of the involvement of the respondent in that wrongdoing.

54. Should lawyers always be considered to be mere onlookers or witnesses (who as Lord Woolf explained in *Ashworth* are not susceptible to *Norwich Pharmacal* relief by reason of a lack of involvement on their part)? That question arose for consideration by Tugendhat J in *United Company Rusal Plc v HSBC Bank Plc* [2011] EWHC 404 at [107]-[108] where the judge stated:

> *"107. Mr Dutton submits that lawyers must always be regarded as mere witnesses, and not as being involved in a wrongdoing there may be. He submits that this is so on grounds of policy. It is essential that lawyers can be freely*

[8] Followed by Nicklin J in *Davidoff v Google* [2023] EWHC 1958 (KB) at [104]-[105].

> *instructed by their clients. A person can be subject to a Norwich Pharmacal order only be reason of what he does, not by reason of what he knows.*
>
> *108. I accept Mr Dutton's submissions only up to a point. If a lawyer is provided by a client with a copy of a document upon which the lawyer is asked to advise, then it seems to me that he may be no more than a witness. But if the lawyer drafts the documents, then I do not see why he should be regarded as a mere witness, and not involved in any wrongdoing of which (unknown to the lawyer) the document forms a part. As to the reasons of policy, it seems to me that they are best addressed at the stage of discretion. As Lord Woolf CJ said in Ashworth at para 36, the requirement of involvement in wrongdoing is not the only protection for third parties*."

55. I respectfully agree with this analysis. It must depend on the facts of the particular case whether the lawyer is "involved" in the wrongdoing. Mr. Dutton's submission in that case was over-broad and is reminiscent of the flawed "zone of privacy" argument advanced by the claimant in seeking to resist disclosure on grounds of litigation privilege in *Loreley Financial v Credit Suisse Securities (Europe) Ltd* [2023] 1 WLR 1425 (as to which see further below).

(iii) Possession Condition

56. Thirdly, I turn next to the correct approach to the "Possession Condition". As to this condition, whilst the need to order disclosure will be found to exist only if it is a necessary and proportionate response in all the circumstances, the test of necessity does not require the remedy to be one of last resort: see *Rugby Football Union v Viagogo Ltd* [2012] 1 WLR 3333 at [16] per Lord Kerr. It follows that the concept of "*necessity*" does not mean that the applicant must show that redress would be impossible without the disclosure sought.

57. Moreover, it is not necessary that an applicant intends to bring legal proceedings against the wrongdoer; any form of redress, for example the bringing of disciplinary action or dismissal of an employee, will suffice: see *Viagogo* at [15] per Lord Kerr.

58. It may simply be that the applicant wishes to protect itself from future wrongdoing: *Ashworth Hospital Authority v MGN* [2022] 1 WLR 2033 at [45]-[47] and [53], citing with approval *British Steel Corpn v Granada Television Ltd* [1981] AC 1096 per Templeman LJ (as he was):

> *"In my judgment the principle of the Norwich Pharmacal case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employee in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress. In the present case BSC state that they will not finally determine whether to take legal proceedings or whether to dismiss the employee or whether to obtain redress in some other lawful manner until they have considered the identity, status and excuses of the employee. The disclosure of the identity of the disloyal employee will by itself protect BSC and their innocent employees now and for the future and is essential if BSC are to redress the wrong."*

59. Zacaroli J (as he then was) followed this approach in *Blue Power Group Sarl v ENI Norge AS* [2018] EWHC 3588 (Ch) at [29] in which he stated as follows:

> *"The defendants, however, can justifiably point to purposes for which they need the information which do not involve foreign legal proceedings, and thus to which the 1975 Act would be irrelevant. These include (1) isolating the wrongdoer, once identified, from access to any confidential or privileged information, (2) dismissing the wrongdoer and (3) taking disciplinary proceedings against the wrongdoer. There is no requirement for the purposes of the Norwich Pharmacal jurisdiction that the applicant intends to bring an action against the wrongdoer."*

60. Furthermore, and importantly for the purposes of the present case, an applicant for relief is not required to show that the information sought from the respondent will enable the applicant, without more, to seek redress. Relief may be granted to identify a person who may themselves, in turn, be able to identify the wrongdoer. I consider that it is sufficient in such a case for the applicant to establish that there is a *realistic prospect* that the information sought will assist in identifying the wrongdoer: see *Bushell, Disclosure of Information,* 3rd Ed. (2022) at 7.5.

61. In *Green v CT Group Holdings Ltd* [2023] EWHC 3168 (Comm)[9] Charles Hollander KC, sitting as a deputy High Court judge, considered the respondent's submission that the possession condition was not satisfied because it did not itself know the identity of the ultimate source, to be untenable. At [31] the Deputy Judge stated as follows:

> *"[31] I do not regard this as a tenable objection. In Interbrew, Goldman Sachs and Lazards prepared a presentation for Interbrew on a possible takeover of South African Breweries. A fraudster doctored the figures in the written presentation then sent a copy anonymously to all the Fleet Street newspapers who happily published the information in the presentation, the doctored figures suggesting Interbrew were intending to buy at a significant discount. In consequence Interbrew's share price plummeted. Interbrew sought delivery up of the originals sent to the newspapers with their envelopes so they could submit them to forensic examination hoping that would ultimately lead them to identify the culprit. None of the newspapers knew the identity of the culprit. Yet that did not prevent the applicant succeeding either before Lightman J or in the Court of Appeal. Thus where a Norwich Pharmacal order is likely to assist in identification of the culprit, this condition is satisfied."*

62. I respectfully agree with Mr. Hollander KC's analysis with one qualification. I consider that it is not necessary for the applicant to have to go so far as to show that the *Norwich Pharmacal* order is *likely to* assist in identification of the culprit; rather, I consider it is sufficient for the applicant to show that there is a *realistic prospect* that the information sought will assist in identifying the wrongdoer[10].

(iv) Application of these conditions to the facts

63. Before turning to the issue of privilege raised by Mr. White KC and the question of where the overall justice of the case lies, I shall consider the application of each of the foregoing three conditions to the facts of this case.

64. In my judgment each of the three conditions are satisfied in this case.

[9] In *Green,* whilst the Deputy Judge had considerable sympathy for the Claimant who wished to identify the person who was defrauding her, he refused to make the order sought because it would not serve a useful (and legitimate) purpose. That was because "*Whilst [the respondent] CT Group knows the identity of Person A, Person A is merely a middleman and no one in CT Group knows the identity of the ultimate source or wrongdoer. Person A is a former intelligence operative within the intelligence service of an eastern European country who is currently resident in the Russian Federation. Seeking to obtain an order requiring Person A to reveal their source looks fraught with problems, given that they seem to have nothing to do with this jurisdiction*."

[10] In *Ashworth* it was accepted by the respondent that "*knowledge of the [identity of the] intermediary would in all probability lead to the identity of the original source*", and so this point did not arise: see *Ashworth* at [13].

65. First, so far as the *arguable wrong condition* is concerned, it is strongly arguable that the Glavstroy Report is a forgery. Whilst Mr. White KC sought to argue that only parts of the report were false and that the property valuations may be genuine, it is significant that:

    (i) Neither QE nor Clifford Chance have ever taken issue with the indicia of fraud/forgery put forward consistently by Mr. McGregor in his witness evidence. They have never suggested that the Report is genuine.

    (ii) Mr. Greeno did not at any stage in his witness statement suggest that the Glavstroy Report was a truthful document.

    (iii) The Chernukhin Parties withdrew their section 68 claim and agreed to pay the Deripaska Parties' costs on the indemnity basis. If they considered that the report was a genuine document it would seem very unlikely that they would have done this;

    (iv) Ms. Berard accepted during her cross-examination by Mr. Pillow KC (in response to a question by the judge) that she could put before the court no evidence showing the authenticity of the Glavstroy Report.

66. In the course of argument, I asked Mr. White KC if it was his case that the Chernukhin Parties do not accept that the Glavstroy Report is a forgery, either in whole or in part[11]. His answer was that "*it seems to be inauthentic, in the sense that there are the incorrect pieces of information within it. What I submit is that the court cannot, on the evidence before it, say that it is other than a genuine document with certain alterations… We do not know whether it is an entirely concocted document or a document that started life as a genuine document in which certain alterations were made. That is an important distinction.*"

67. But whichever it be, the document is a forgery. It is the making of a false document in order that it may be used as a genuine document.

68. Indeed, Mr. White then accepted that the "alterations" in the document must have been made for a sinister purpose unless the alterations were made in order to sabotage the case of the Chernukhin Parties[12]. This was a reference to the unsupported speculation of

[11] Day 2/p. 183/6-8
[12] Ibid, p. 184-185

QE by their letter dated 5 June 2020 in which they stated: "*In the event that the Glavstroy Report is not authentic (which is not accepted) we have not ruled out the possibility that it was deliberately leaked to the Intelligence Firm in an attempt to sabotage our clients*."

69. There is no support for that speculation and I reject it. All of the evidence before me points to this document being a forgery designed to cause very considerable loss to the Deripaska Parties, by deceiving this court into granting section 68 relief and subsequently an arbitral tribunal into making an order requiring the Deripaska Parties to pay up to an additional US$300m to the Chernukhin Parties.

70. That being so, the Deripaska Parties contend that there is plainly a good arguable case that a form of legally recognised wrong has been committed against them and that those wrongs likely include:

(i) Unlawful means conspiracy, in that it is likely that there has been a combination between more than one person to gather the material for inclusion in the Glavstroy Report and then to produce the document itself; an intention to injure the Deripaska Parties; unlawful acts carried out pursuant to the combination, such as forgery; perverting the course of justice; criminal contempt of court and malicious falsehood; and which has caused loss to the Deripaska Parties.

(ii) Lawful means conspiracy, in that there was a predominant purpose to injure the Deripaska Parties;

(iii) Malicious falsehood, in that the wrongdoer(s) has/have published the Glavstroy Report concerning Mr Deripaska's business and economic interests. They have published it to the Consultancy and it contains false statements. Malice would be proven since the wrongdoer(s) must have known of the falsity (or, conceivably in relation to some wrongdoer(s), have been reckless in that regard): *Kaye v Robertson* [1991] FSR 62 at 67 per Glidewell LJ. Such conduct was inherently likely to cause damage to Mr. Deripaska and is accordingly actionable in any event.

71. Moreover, as explained above, it is not necessary that an applicant intends to bring legal proceedings in respect of the arguable wrong; any form of redress (for example disciplinary action or the dismissal of an employee) will suffice to ground an application for the *Norwich Pharmacal* order. In the present case that is particularly relevant. As Mr. Grant KC submitted, the Glavstroy Report purports to be a detailed appraisal conducted by one of Mr. Deripaska's then businesses (Glavstroy) in respect of another (TGM). QE and Clifford Chance both considered it to be sufficiently genuine to found section 68 proceedings and it contained sufficient material to allow an expert to produce a revised (and radically higher) valuation of TGM (and Navio in turn). There is a convincing case in these circumstances for inferring that the report was put together with the involvement and assistance of someone from within Mr. Deripaska's organisation. Accordingly, disciplining or dismissing any individuals concerned, or bringing criminal proceedings/criminal contempt proceedings against them are all potentially viable forms of redress for the Deripaska Parties in this case.

72. In his submissions, Mr. White KC did not seek to take issue with the Deripaska Parties' analysis of the legally recognised wrongs which had arguably been committed against them, nor with the forms of redress which they might seek, save only in one important respect. He submitted that the Deripaska Parties could not show that they had suffered any loss by reason of the alleged wrongdoing. He first took issue with Mr. McGregor's analysis of the Deripaska Parties' heads of loss contained in his 1st witness statement of 2 September 2021 at [78.1]-[78.5], namely:

    (i) TGM management time investigating the authenticity of the Glavstroy Report;
    (ii) Cost of investigation of possible leaks within TGM;
    (iii) Irrecoverable costs of the section 68 proceedings brought by the Chernukhin Parties;
    (iv) Costs of preparing Mr. McGregor's 12th witness statement, in so far as that witness statement includes evidence which Mr. McGregor would otherwise have addressed in his first witness statement in defending the section 68 proceedings; and
    (v) Costs of these *Norwich Pharmacal* proceedings.

73. Mr. White KC's criticisms of this analysis of loss were in summary as follows:

(i) TGM management time investigating the authenticity of the Glavstroy Report: This alleged loss is unquantified; it is not a loss suffered by the Deripaska Parties; and it is likely a question of foreign law whether the Deripaska Parties can recover such reflective losses.

(ii) Investigation of possible leaks within TGM: Mr. McGregor said these costs would be particularised in due course but they have not been particularised, even approximately. The same points as in (i) apply.

(iii) Irrecoverable costs of the section 68 proceedings: An order for indemnity costs has already been made in favour of the Deripaska Parties. There are no further legally recoverable costs to which they are entitled as against the Chernukhin Parties. They can seek to enforce that order if they wish; the costs order has not yet been paid by the Chernukhin Parties because Mr. Deripaska is subject to sanctions.

(iv) Costs of preparing Mr. McGregor's 12th witness statement. These are not recoverable. The Chernukhin Parties were successful in the Court of Appeal in overturning the judgment and order of Andrew Baker J (striking out the committal application) and they were awarded their costs against the Deripaska Parties. The costs of Mr. McGregor's 12th witness statement accordingly cannot be recovered by the Deripaska Parties.

(v) Costs of these *Norwich Pharmacal* proceedings: the Deripaska Parties cannot seek *Norwich Pharmacal* relief to recover the cost of the Norwich Pharmacal proceedings themselves.

74. However, whilst there is force in Mr. White's criticism of points (i), (ii), (iv) and (v), as Mr. Grant KC submitted regarding point (iii) in particular, the fact that a litigant has incurred costs and not recovered those costs in its litigation against litigant X does not mean that he cannot claim those costs in different civil litigation against litigant Y (here, the ultimate wrongdoer) in so far as Y's wrongdoing has caused the litigant to incur those unrecovered costs: see *McGregor on Damages*, 22nd Edn, at 22-035; 22-066 and 22-67.

75. But more fundamentally, the Deripaska Parties' claim in malicious falsehood does not fail even if they arguably cannot point to any specific pecuniary loss. Mr. White KC accepted in answer to a question from the court[13] that, applying section 3(1) of the Defamation Act 1952, if a party pleads a malicious falsehood claim (upon which the Deripaska Parties rely here), then it creates a presumption of law that the words complained of have caused financial loss. If at trial the judge concludes that no financial loss has actually been caused, that will result in the claimant being entitled to nominal damages: see *George v Cannell* [2024] UKSC 19 at [51]. Moreover, it is arguable that the circumstances in which the tort was committed in this case give rise to a claim for aggravated damages: *ibid* at [117].

76. There is also a good arguable case that a crime or criminal contempt has been committed in this case by reason of the forgery; and that the Deripaska Parties wish to seek relief not via a civil claim but by way of disciplinary redress against the wrongdoer in so far as they are a "mole" within the Deripaska Parties' organisation. I agree with Mr. Grant KC that it is unlikely that the Glavstroy Report could have been produced without the involvement and assistance of someone from within Mr. Deripaska's organisation. The source of the wrongdoing may very well still be *in situ*. In the circumstances, I am satisfied that there is a good arguable case that a form of legally recognised wrong has been committed against the Deripaska Parties in this case.

77. Second, so far as the "*Mixed Up In Condition*" is concerned, I am satisfied that QE has become involved in the wrongdoing in this case and indeed has unwittingly facilitated it. The reason that I so find is as follows.

78. QE's involvement took the following form (see in particular Mr. McGregor's first witness statement of 2 September 2021):

    (i) QE stated in their letter of 5 June 2020 that they had engaged the Consultancy to "*provide investigative services and litigation support to the Chernukhin Parties*";

    (ii) following receipt of a Russian language copy of the Glavstroy Report on or around 27 September 2019, QE sent the report to a London-based translation

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firm and received the English translation on 2 October 2019;

(iii) between 2 October and 10 December 2019, QE conducted “enquiries” in relation to the Glavstroy Report before providing it to Clifford Chance on 10 December 2019, which Clifford Chance then deployed in the section 68 proceedings via the first witness statement of Ms. Berard dated 21 April 2020 (see in particular paragraph 6 thereof);

(iv) QE's 5 June 2020 letter confirmed that both they and Clifford Chance conducted "detailed analysis" in relation to the Glavstroy Report before the Glavstroy Report Proceedings were commenced on 21 April 2020.

79. The very purpose of the Glavstroy Report appears to have been to deploy it via QE and then Clifford Chance in the section 68 proceedings and then (if successful) before an arbitral tribunal. QE’s involvement in passing it on for use in litigation gave it the imprimatur of authenticity. As Mr. Grant KC put it in argument, QE were critical to every stage of the life and propagation of the report. The arguable wrongdoing was the utilisation of the report to seek to pervert the course of justice and QE became unwittingly involved in that wrongdoing.

80. Mr. White KC sought to rely upon *United Company Rusal Plc v HSBC Bank Plc* (supra) to argue that QE were a mere witness, being simply a lawyer provided with a copy of a document upon which they were asked to advise. I do not accept that submission. QE were not a mere onlooker or witness, advising on a document. As set out in paragraph 78 above, they were actively involved in the (unwitting) verification and deployment of that document in legal proceedings, which it is strongly arguable was a forgery. They were accordingly mixed up in the alleged wrongdoing and enabled the purpose of that wrongdoing to be furthered. The fact that counsel for the Chernukhin Parties also failed to spot the fact that the document was arguably a forgery does not in any way detract from this conclusion. Counsel’s precise role in the process, whether merely advisory or otherwise, is in any event unknown.

81. Third, I consider that the *Possession Condition* is also satisfied in this case, in that QE is likely to be able to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued.

82. QE accept that they are in possession of all of the information sought in the draft order save for the identity of the persons from whom the Consultancy obtained the Glavstroy Report[14], which the Deripaska Parties accept. The Deripaska Parties accordingly recognise that, so far as the ultimate wrongdoer's identity is concerned, a further application against the Consultancy itself may be necessary if the Consultancy is not willing to disclose this information voluntarily.

83. Mr. McGregor and Ms. Healey give evidence that extensive internal investigations have been conducted by the Deripaska Parties in an attempt to identify the wrongdoer(s)[15] but the information sought pursuant to this application remains unknown. I accordingly accept that there is no realistic prospect of the Deripaska Parties being able to seek redress unless the court makes the order sought.

84. I also consider that in this case there is a realistic prospect that the information sought from QE will assist in identifying the wrongdoer. Indeed, as was the case in *Ashworth*, I consider that knowledge of the identity of the intermediary will in all probability lead to the identity of the original source. Armed with the identity of the London-based consultancy and those persons who obtained the Glavstroy Report, that may in itself be sufficient to lead to the identity of the wrongdoer(s). But if not, the Deripaska Parties will be able to apply for *Norwich Pharmacal* relief against the Consultancy (and any named individuals), and there is no reason to believe that an apparently reputable London-based Consultancy will not comply with any subsequent order which this court might make to the same end[16].

85. Finally, I turn to the *Overall Justice Condition*, namely that requiring disclosure must be an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction.

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[14] Greeno 1 para 12.2.
[15] McGregor 1 para 78; McGregor 2 para 14.3; Healey 1 para 69.
[16] The position in *Green v CT Group* was very different: Person A, the relevant "middleman", was a former intelligence operative, currently resident in the Russian federation, with nothing to do with this jurisdiction. The Deputy Judge considered that making an order against him would serve no useful purpose.

Privilege?

86. I shall deal here first with Mr. White KC's argument that the information sought is privileged and accordingly this court should not make the order sought.

87. I consider this argument, based as it is upon *China National Petroleum Corp v Fenwick Elliott Techint International Construction Company* [2002] EWHC 60 (Ch) and *Loreley* (supra), to be flawed.

88. In *China National Petroleum*, the claimants were concerned that the opposing party's solicitor was obtaining confidential information from one of their employees or former employees with whom the solicitor was in contact as a potential witness. They sought disclosure of the witness's identity. Sir Andrew Morritt V-C was not satisfied that there was any evidence that confidential or privileged information of the claimants had been obtained in this way. He held, therefore, that there was no basis for disclosure of the witness's identity by way of *Norwich Pharmacal* relief. But he went on to state as follows:

> *"45. In the normal course of proceedings a solicitor will interview and obtain proofs of evidence from all manner of potential witnesses for use in actual or prospective litigation. Both the information given and the identity of the person supplying it are confidential and privileged unless and until the privilege is waived by that person giving evidence in the proceedings or some other equivalent action…*
> *46. … Even if the information given by the potential witness indicated some earlier breach of a duty of confidence by him or another that cannot preclude privilege for the communication between him and Mr Fenwick Elliott. Frequently information given by a potential witness to a solicitor indicates the past commission of a crime or fraud but that is no ground for denying privilege in the communication; quite the opposite. If, as I conclude, the communication between the potential witness and Mr Fenwick Elliott is privileged then it must follow that the identity of the person giving the proof is similarly privileged."*

89. Mr. White KC relied upon this passage and argued that the present case is the same: the information and identity of the Consultancy are confidential and privileged.

90. I do not agree. The starting point is that litigation and legal advice privilege is concerned with communications, and not merely facts or information. The privilege means that the content of the communications is protected from disclosure, as is

secondary evidence which would tend to reveal the content of such communications: see *Three Rivers (No 6)* [2005] 1 AC 610 per Lord Carswell:

> *"86. Determining the bounds of privilege involves finding the proper point of balance between two opposing imperatives, making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves. The practice which has developed is a reconciliation between these principles…*
>
> *102. The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case law is that communications between the parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."* (emphasis added)

91. It follows that, as Males LJ stated in *Loreley*:

> *"38 I conclude, therefore, that in order to determine whether litigation privilege extends to the identity of the persons communicating with a solicitor in relation to litigation, it is necessary to consider whether disclosure of that identity would inhibit candid discussion between the lawyer and the client (or the person communicating on behalf of the client). If so, the identity of such persons should be privileged. But if not, to extend privilege to the identity of such persons is unnecessary and may deprive the court of relevant evidence needed in order to arrive at a just determination of litigation.*
> *39 In my judgment, at least in general, there would be no such inhibition. The content of the communications would be privileged, but disclosure of the existence of such communications or the identity of the person communicating on behalf of the client would reveal nothing about the content of those communications. To apply Lord Rodger's test in Three Rivers (No 6) at para 52, disclosure of the identity of those giving instructions would not affect Loreley's ability to prepare its case as fully as possible and would not enable the Bank to recover the material generated by its preparations.*
> *40 I would allow the possibility that, in what is likely to be an unusual case, identification of the person giving instructions to the solicitor may tend to reveal something about the content of the communication or the litigation strategy being discussed, but that would need to be explained as the basis of a claim for privilege.*

> *41… Rather, litigation privilege attaches to communications (including secondary evidence of such communications) rather than information or facts divorced from such communications. Indeed it is commonplace for the identity of a person giving instructions to a solicitor to be revealed, for example in a witness statement made by a solicitor on instructions in which he is required to set out the source of his information and belief, or in a disclosure statement under CPR r 31.10, without it ever having been thought that this discloses privileged information."* (emphasis added)

92. It follows that so far as the decision in *China National Petroleum* is concerned, as Males LJ explained in *Loreley* at [43]:

> *"The case confirms that the identity of a potential witness contacted by a solicitor in the course and for the purpose of litigation is privileged, but that is readily explicable: to identify a potential witness would necessarily tend to reveal advice which the solicitor has given or will give as to litigation strategy and information about the solicitor's preparation for trial. The case says nothing about any zone of privacy within which litigation is to be conducted*."

93. But that is not this case. The provision of the identity of the Consultancy and of the persons who procured the Glavstroy Report will reveal nothing about the content of any privileged communications, nor will it reveal anything about the litigation strategy of the Chernukhin Parties, not least because the Chernukhin Parties have themselves already deployed the contents of the Glavstroy Report in the section 68 proceedings. Nor will revealing the identity of the Consultancy or the relevant employees inhibit candid discussion between Mr. Chernukhin and QE.

94. It follows that this is not a case of waiver of privilege leading to the loss of the privilege; rather, the identity of the Consultancy and those who procured the report is not privileged information at all.

95. It also follows that, whilst both parties addressed the issue in argument, there is no need in the present case for the Deripaska Parties to invoke the iniquity exception to a claim of privilege, as there are no privileged communications of which they seek disclosure.

96. Mr. White KC nonetheless submitted (see paragraphs 70-72 of his skeleton argument) that "*if, contrary to the above submissions, privilege is not a complete answer to the application, it must nevertheless be a very important factor in the Court's consideration of the Overall Justice Condition… This would be consistent with factor*

(vii) identified by the Supreme Court in Viagogo Ltd at [17] ("the degree of confidentiality of the information sought"), since privileged information is the category of confidential information to which the law affords the highest level of protection".

This submission confuses two concepts. Either the information concerning the identity of the Consultancy (and its relevant employees) is privileged or it is not. Since it is not, a claim to privilege cannot be brought back into the court's consideration of the application in the overall exercise of its discretion. There is a possible separate argument to the effect that the identity of the Consultancy is confidential to QE and its clients and that this factor should be taken into account in considering the overall justice of the application. Mr. White KC rightly did not press this point, and I do not consider that the identity of the Consultancy *per se* is confidential information. But even if that were wrong, I consider that any claim to confidentiality is far outweighed in this case by the factors which support disclosure.

Relevant factors as to where the overall justice lies

97. So far as that is concerned, namely whether the remedy should be granted in the light of the circumstances of the case as a whole, the Supreme Court gave some helpful guidance as to how to approach this question in *Viagogo at* [15]-[17] per Lord Kerr as follows:

> "*15. Later cases have emphasised the need for flexibility and discretion in considering whether the remedy should be granted: Ashworth Hospital Authority v MGN Ltd [2002] 1WLR 2033, para 57, per Lord Woolf CJ… It is not necessary that an applicant intends to bring legal proceedings in respect of the arguable wrong; any form of redress (for example disciplinary action or the dismissal of an employee) will suffice to ground an application for the order: British Steel Corpn v Granada Television Ltd [1981] AC 1096, 1200, per Lord Fraser of Tullybelton.*
>
> *16. The need to order disclosure will be found to exist only if it is a "necessary and proportionate response in all the circumstances": the Ashworth Hospital case [2002] 1 WLR 2033, paras 36, 57, per Lord Woolf CJ. The test of necessity does not require the remedy to be one of last resort: R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2009] 1WLR 2579, para 94.*
>
> *17. The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various*

factors have been identified in the authorities as relevant. These include: (i) the strength of the possible cause of action contemplated by the applicant for the order… (ii) the strong public interest in allowing an applicant to vindicate his legal rights…(iii) whether the making of the order will deter similar wrongdoing in the future …(iv) whether the information could be obtained from another source …(v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing … or was himself a joint tortfeasor; (vi) Whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons would suffer any harm as a result; … (vii) the degree of confidentiality of the information sought …"

I have only recited in paragraph [17] of Lord Kerr's judgment above those factors to which the parties referred in this case as potentially having relevance to the question of where the overall justice lies in determining whether or not to make an order.

98. In the present case and applying *Viagogo*, in my judgment the following factors strongly support disclosure of the identity of the Consultancy (and its relevant personnel).

99. There is a strongly arguable case here that the compilation and production of the Glavstroy Report amounts to serious wrongdoing (including the commission of a crime or criminal contempt), which was calculated to deceive the court and an arbitral tribunal in an attempt to impose a wrongful additional financial liability on Mr. Deripaska of some US$300 million. In these circumstances, there is a strong public interest in allowing the Deripaska Parties to vindicate their legal rights.

100. Moreover, I consider that the making of an order will be likely to deter similar wrongdoing in future, certainly by the wrongdoer(s) concerned if, as the Deripaska Parties reasonably suspect, the content of the Glavstroy Report is derived from a "mole" from within the Deripaska Parties' organisation.

101. The information concerning the identity of the Consultancy and those who procured the report cannot be obtained from another source; despite their best efforts, the Deripaska Parties have been unable to identify the source of the presumed leak.

102. As to whether QE knew or ought to have known that they were facilitating arguable wrongdoing, Mr. Grant KC pressed a submission upon me that QE ought to have realised the truth, namely that the report was a forgery. He refers to (i) the facts set out in paragraph 24 above; (ii) the findings of Andrew Baker J contained in paragraph 36 above concerning the lack of serious enquiry undertaken by Clifford Chance (which he submits must apply equally to QE); and (iii) QE's failure to engage with the concerns immediately raised by RPC about the Glavstroy Report set out in paragraph 25 above. Particularly since Clifford Chance were, at least in part, relying upon QE's investigations into the report, Mr. Grant KC submits that it was incumbent upon QE to undertake proper enquiries in respect of it before making the very serious allegations in the section 68 proceedings. Had proper enquiries been undertaken, he maintains that that would quickly have revealed serious discrepancies in respect of the report, the section 68 proceedings would never have been pursued, and the consequential harm to Mr Deripaska would not have occurred.

103. In response, Mr. White KC submitted that the Glavstroy Report is not an obvious forgery and that if Mr. Grant is correct then not only QE but also Clifford Chance, leading and junior counsel and the forensic accountants all missed the alleged indicia of fraud.

104. Mr. White KC further submits that what QE were concerned about was the valuation of the relevant TGM properties (under redevelopment proposals) referred to in the Glavstroy Report and there is no obvious suggestion that that information is false. QE and Clifford Chance were likely focussing on that information and they consequently overlooked the matters referred to in paragraph 24 above. Some support for that submission may be found in QE's letter to RPC of 5 June 2020, set out above.

Analysis

105. It is no secret that the litigation between the Deripaska Parties and the Chernukhin Parties is bitter, protracted and hard fought, with no holds barred. Both parties were found by the arbitrators to have put forward false evidence in the arbitration (see paragraph 10 above). This fact carried with it a heightened duty on the part of those law firms instructed to act on behalf of these parties to take all reasonable steps to ensure

that the case of the party whom they were representing was presented fairly and, particularly, to ensure that the Court was not misled.

106. On balance and taking all of the circumstances into account, I am not willing to make the serious finding that QE ought to have known that they were facilitating arguable wrongdoing at the time when the section 68 proceedings were issued in reliance upon the Glavstroy Report. However, I do find that (i) after they submitted the report and RPC raised serious questions about its authenticity just 7 days later, and (ii) after Mr. McGregor set out in his 12th witness statement served on 30 May 2020 the indicia of the alleged forgery in detail, QE failed to make the urgent enquiries which they ought to have made at that stage to satisfy themselves as to the authenticity of the report. (That was particularly so in circumstances where they accept that they did not know the ultimate source of the Glavstroy Report, and therefore how it came into being).

107. I consider that this failure is a factor, but no more than that, which it is legitimate for me to take into account in the exercise of my overall discretion as to whether to order QE now to assist the Deripaska Parties by divulging the identity of the Consultancy.

108. Mr. White KC also submitted that the order might reveal the names of innocent persons who could suffer harm. He folded this argument, together with an argument that the Deripaska Parties (i) had unreasonably delayed in seeking this relief and (ii) are suffering no continuing prejudice as a result of QE withholding the identity of the Consultancy, into a general submission that Mr. Deripaska's real purpose in bringing this application is his desire to open a new front in the war against Mr. Chernukhin in order to vex him and to interfere in the solicitor/client relationship between Mr. Chernukhin and QE.

109. I do not accept this submission for a number of reasons.

110. First, as I have stated, there is a strong argument in this case that the Glavstroy Report is a forgery, brought into existence in order to cause Mr. Deripaska serious financial damage and to attempt to pervert the course of justice. This is very serious conduct indeed. In these circumstances, there is a strong case for saying that it is a necessary and proportionate response to order the identity disclosure sought in order to do justice to the Deripaska Parties.

111. Second, it is unsurprising that Mr. Deripaska should want to identify the ultimate wrongdoer(s), particularly since they may very well still be involved in his organisation. It is wholly artificial merely to assert that there is no ongoing prejudice to him because there has been no further leak of information of which he is aware since the events concerning the Glavstroy Report and so he should just treat this serious wrongdoing as amounting to water under the bridge.

112. Similarly and third, to assert that this is simply Mr. Deripaska opening up a new front in the ongoing battle between him and Mr. Chernukhin (see paragraph 77-78 of the Chernukhin Parties' skeleton argument) is to make light of the seriousness of the wrongdoing in this case and I do not accept the assertion. Indeed, this assertion is undermined by the fact that QE state that they obtained the Glavstroy Report from the Consultancy *independently of Mr. Chernukhin*. But if that is so, it is difficult to see how the bringing of this application can be said to be another step in the ongoing battle between Mr. Deripaska and Mr. Chernukhin, brought to vex Mr. Chernukhin.

113. Fourth, so far as alleged delay in bringing this application is concerned, RPC (on behalf of the Deripaska Parties) raised the issue of the authenticity of the Glavstroy Report almost immediately, and just 7 days after the Glavstroy Report was deployed in the section 68 proceedings on 21 April 2020. The Chernukhin Parties did not take that issue sufficiently seriously, and nor did they engage with Mr. McGregor's 12th witness statement of 30 May 2020 setting out the indicia of fraud. Instead, it was only on 14 July 2020 that they discontinued the section 68 proceedings after Andrew Baker J's critical judgment concerning Clifford Chance's failure to investigate properly the Glavstroy Report.

114. Detailed investigations were then conducted at TGM in respect of the Glavstroy Report and any possible leaks within the organisation. The evidence is that this was seriously hampered by the Covid-19 pandemic, which was at its height in 2020 and early 2021. As the Deripaska Parties point out, during this time Mr. Deripaska and the Chernukhin Parties were also involved in various other pieces of heavy litigation, in respect of the committal proceedings, proceedings in Jersey and the private prosecution. This claim was brought on 3 September 2021. The original listing of the hearing of this application was July 2022. However, that hearing had to be adjourned in light of the sanctioning of Mr Deripaska by the UK government in March 2022.

115. Accordingly, whilst it is fair to say that there was (between 2020 and the bringing of this claim in September 2021) some delay in the bringing of this application, it does not seem to me that that ought, in a strongly arguable case of malice and forgery such as this, to outweigh the need to do justice to the wronged party[17].

116. Fifth, so far as the submission is concerned that the order might reveal the names of innocent persons who would suffer harm, that is obviously a submission which the court takes very seriously. QE relies upon a number of past incidents to make this submission.

117. In particular, Mr. Greeno states in paragraph 76 of his first witness statement that "*the Court has the benefit of numerous factual findings from the Tribunal and the Court in respect of (i) violent acts conducted on Mr Deripaska's behalf in the TGM Dispute including the intimidation of employees; and (ii) attempts by the Deripaska Parties to deny such acts after the event.*" He refers to those findings in paragraph 78 of his statement.

118. Furthermore, Mr. Greeno refers in paragraph 79 of his statement to the US Office of Foreign Assets Control ("OFAC") press release concerning the sanctions imposed on Mr. Deripaska and companies associated with him by the US Department of the Treasury on 6 April 2018 which reads as follows:

> *"Oleg Deripaska is being designated pursuant to E.O. 13661 for having acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation, as well as pursuant to E.O. 13662 for operating in the energy sector of the Russian Federation economy. Deripaska has said that he does not separate himself from the Russian state. He has also acknowledged possessing a Russian diplomatic passport, and claims to have represented the Russian government in other countries. Deripaska has been investigated for money laundering, and has been accused of threatening the lives of business rivals, illegally wiretapping a government official, and taking part in extortion and racketeering. There are also allegations that Deripaska bribed a government official, ordered the murder of a businessman,* and *had links to a Russian organized crime group."*

[17] This case is very different on its facts to that which obtained in *Nikitin v Richards Butler* [2007] EWHC 173 (QB) at [29]-[32], in which the applicants also had another route to obtain the required information.

119. At this point I should mention that this press release was subsequently referred to in the Memorandum Opinion of Judge Mehta in the US District Court of Columbia in the case of *Deripaksa v Yellen* (Case No. 19-cv-00727 (APM)), in which Mr. Deripaska unsuccessfully challenged the sanctions imposed on him. That judgment was upheld on appeal in the US Court of Appeals for the District of Columbia Circuit, No. 21-5157. Mr. Grant objected to Mr. White's reliance, which was not foreshadowed in his skeleton argument, upon these two US Court judgments.

120. However, it is clear that the US Courts were not considering the merits of the allegations in the OFAC press release and nor did Mr. White rely upon them for that purpose. He made clear that he referred to them simply to update the court to the effect that Mr. Deripaska's challenge to the sanctions imposed upon him had failed. As such, they have little or no bearing upon the exercise of my discretion as to where the overall justice lies. So far as the OFAC press release is concerned, that is not *evidence* of serious misconduct on Mr. Deripaska's behalf which could lead me to conclude that there is a risk of harm to innocent individuals in this case were I to grant the order sought.

121. Indeed, I consider that is so in respect of each of the matters upon which Mr. Greeno relies in paragraph 76 of his first witness statement in support of the suggestion that innocent persons may be harmed. The violent takeover of TGM to which Mr. Greeno refers took place in April 2010, being 14 years ago. This provides insufficient evidence from which the court could infer a present-day risk of harm to the Consultancy, its source(s) or anybody else.

122. In short, I accept the submission of Mr. Grant KC that (i) these are largely historical allegations/events; (ii) no harm has been inflicted on Mr. Chernukhin or anyone supporting his case despite the long-running feud; (iii) there is no reliable evidence to support any suggestion that the Consultancy or its relevant employees would be at risk of physical harm.

D. Conclusion

123. Ultimately and in conclusion, I come back to the same overriding consideration: the Deripaska Parties wish to discover the identity of the persons who, it is strongly arguable, forged a document designed to deceive this court and an arbitral tribunal, and

to defraud them of some US$300m. I consider that the granting of the relief sought in this case is a necessary and proportionate response to this serious wrongdoing in all the circumstances. I consider that the Deripaska Parties are genuinely seeking lawful redress of a serious wrong for which they cannot otherwise obtain redress. As Mr. Grant KC pithily stated, if Mr. Chernukhin had anything to do with the wrongdoing, it is right that his involvement should be exposed. If not, he has nothing to fear from disclosure.

124. In the circumstances, I grant the claim for *Norwich Pharmacal* relief in the terms set out in paragraphs 11.1 and 11.2, but not 11.3 of the Part 8 Claim form.

125. The parties should seek to agree (i) the wording of an order reflecting the terms of this judgment, and (ii) the costs of the application.