Neutral Citation Number: [2018] EWHC 1910 (Ch)

Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/07/2018

Before :

THE HONOURABLE MR. JUSTICE FANCOURT

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Between :

PJSC Commercial Bank Privatbank	**Claimant**
- and -	
(1) Igor Valeryevich Kolomoisky	**First Defendant**
(2) Gennadiy Borisovich Bogolyubov	**Second Defendant**
(3) Teamtrend Limited	**Third Defendant**
(4) Trade Point Agro Limited	**Fourth Defendant**
(5) Collyer Limited	**Fifth Defendant**
(6) Rossyn Investing Corp	**Sixth Defendant**
(7) Milbert Ventures Inc	**Seventh Defendant**
(8) ZAO Ukrtransitservice Limited	**Eighth Defendant**

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Mr Stephen Smith QC (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Mr Michael Bools QC and Mr Ben Woolgar (instructed by **Field Fisher LLP**) for the **First Defendant**
The Second to Eighth Defendants were not represented

Hearing dates: 3, 4 July 2018

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Approved Judgment

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

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Mr Justice Fancourt:

1. The issue raised by the application before me is whether various payments made by the First Defendant ("the respondent") or corporate bodies that he controls required the prior consent of the Claimant ("the applicant") or permission from the Court, or alternatively fell with the scope of the "ordinary and proper course of business" exception to the freezing order that has been made against the respondent.

2. The application is made in the context of a claim by the applicant against the respondent and seven other named defendants for compensation under the tort provisions of the Ukrainian civil code, the Ukrainian joint stock company law and law on banks and banking activity and the unjust enrichment provisions of the Ukrainian Civil Code in a total sum of US $1,911,877,385. The claim is complex and detailed but in essence the Defendants are alleged to have misapplied for their own benefit (or the benefit of those under their control) the assets of the applicant. Prior to its nationalisation in December 2016, the applicant was owned and controlled by the respondent and the Second Defendant.

3. On 19 December 2017 a freezing order was made without notice by Nugee J against all the Defendants. The terms of that order, subsequently varied by Snowden J on 9 January 2018, were continued by order of Roth J on 15 January 2018 ("the Order"). The Order includes a world-wide freezing injunction restraining dealing with or diminishing the value of the Defendants' assets up to (in the case of the respondent) US $2,600,000,000. The Order seeks to make specific and separate provision for the assets and businesses of trading companies and non-trading companies owned or controlled by the respondent, directly or indirectly. In this respect, the Order differs from the standard form of freezing order frequently used in the Business and Property Courts.

4. The Order forbids the respondent to dispose of, deal with or diminish the value of any of his assets up to the value of the "Relevant Maximum Sum", as defined, or:

> "In respect of bodies corporate which are directly or indirectly owned and/or controlled by the respondent and have no trading activities (including for the avoidance of doubt any bodies corporate which are directly or indirectly owned and/or controlled by such bodies corporate and have no trading activities) (a "**Non-Trading Company**"), [to] procure or permit those bodies corporate to dispose of, deal with or diminish the value of any of their respective assets whether inside or outside England and Wales up to the value of the Relevant Maximum

> Sum. For the avoidance of doubt, this sub-paragraph does not affect the assets of trading companies."

5. The definition of the assets subject to the freezing order is extended, by paragraph 5 of the Order, to assets that the respondent has the power to dispose of or deal with as if they were his own. It further provides that:

> "The respondent is to be regarded as having such power if a third party (which shall include a Non-Trading Company and a trustee, but not a trading company) holds or controls the asset in accordance with his direct or indirect instructions."

6. Paragraph 8 of the Order contains various exceptions to the freezing provisions. Paragraph 8(a) permits the respondent to spend a reasonable sum on his legal advice and representation in these or other proceedings anywhere, provided that the respondent first tells the applicant's representatives where the money is to come from. Paragraph 8(c) provides:

> "This order does not prohibit the respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business, but the respondent must give the applicant's solicitors two clear working days' notice of his intention of so doing in respect of any transactions exceeding £25,000 in value. For the avoidance of doubt, no such notification is required in relation to dealings or disposals in the ordinary and proper course of business by any trading company disclosed pursuant to paragraph 7 above."

7. In summary, so far as non-trading companies owned or controlled by the respondent are concerned, the respondent is prohibited from procuring or permitting them to dispose of or deal with their assets up to the specified maximum sum; their assets are treated as his assets, but subject to prior notification they may be disposed of or dealt with "in the ordinary and proper course of business". It is common ground that this includes the course of any such company's business and is not limited to the respondent's business personally.

8. The respondent has a complex network of corporate bodies in various jurisdictions around the world that he owns or controls. Substantial disclosure of these was made pursuant to the terms of the orders of Nugee J and Roth J. This application is concerned with transactions between:

    1. Selantia Limited (a BVI company), A Co. (a Belizean company) and Atrasten Ventures Limited (a BVI company);

    2. Goiania Comercio E Servicos Internacionais LDA (a Portuguese company), Perkela Service Limited (a BVI company) and Redhill Limited (a Belizean company); and

    3. B Co. (a Ukrainian company) and Stalmag SP z.o.o (a Polish company).

9. From shortly after the date of Nugee J's order, Field Fisher Waterhouse LLP ("Field Fisher") acting for the respondent notified Hogan Lovells International LLP ("Hogan Lovells") acting for the applicant of various proposed payments to be made by or to these companies or by the respondent. Hogan Lovells reacted by asking for further detailed information about the proposed transactions and the companies involved. As a result, some further information was provided by Field Fisher, but not as much information as the applicant would have liked to see. Until May 2018 the applicant did not seek to challenge the payments notified. By 15 May 2018, when the application notice was issued, the respondent had notified 58 separate transactions with an aggregate value exceeding US$40,000,000. Several of the payments notified are repeated on a monthly or quarterly basis.

10. At that stage, therefore, the applicant wished the court to adjudicate, for the past and for the future, on whether or not these payments are properly made under the terms of the Order or whether the respondent needs to obtain the permission of the applicant or of the court before making them. The applicant seeks various declarations to the effect that the payments in question are not permitted under the terms of the Order without further permission or agreement. It was common ground before me that the applicant bears the legal onus of proving facts that justify the making of the declarations sought, and that the relevant facts have to be proved on a balance of probabilities and not merely (as would be the case on an application for an injunction) so as to establish a good arguable or strong prima facie case.

11. The individual transactions to be scrutinised all raise questions as to the nature and extent of the respondent's and his companies' businesses (if any), whether the payments made are in the ordinary course of any such business and whether they are in the proper course of that business. Those are, of course, fact sensitive questions but there is relevant authority on the purpose and effect of the "proper and ordinary course of business" exception to which I shall first refer.

12. It is well-established that it is no purpose of a freezing injunction to provide an applicant with security for his claim; only to prevent improper dissipation of assets (before or after) judgment. The purpose of the "proper and ordinary course of business" exception is to recognise that a respondent is not to be prevented, ahead of trial, from properly carrying on its business in the way that it did before, even if that involves disposing of assets. The exception evolved and has been considered judicially in the context of trading companies rather than non-trading companies, but the court has more recently had to consider its application to an individual.

13. In <u>Avant Petroleum Inc v Gatoil Overseas Inc</u> [1986] 2 Lloyd's Rep 236 at 243, Neill LJ said:

> "But it seems to me that the right test to apply is whether the party enjoined can show that the purpose for which he wishes to use the frozen assets is a purpose for which those or similar assets have been used by him in the course of his ordinary trading. If this can be proved, such a purpose could then be regarded as a bona fide purpose for the use of those assets. I consider that if the proposed purpose is bona fide and in accordance with ordinary trading, it would be a misuse of the *Mareva* jurisdiction to require the party concerned to change his

> method of trading or to require him, for the purpose of such trading, to use assets presumably designated for some quite different purpose."

That decision was approved in Normid Housing Association Limited v Ralphs (No2) [1989] 1 Lloyd's Rep 274, where it was held that the ordinary course of business of a firm of architects extended to compromising a claim against their professional indemnity insurers, even though it was a one-off transaction.

14. The Normid Housing Association case was itself referred to and approved in JSC BTA Bank v Ablyazov (No.3) [2010] EWCA Civ 1141; 2011 Bus LR Digest D119. In that case, the Court of Appeal was concerned with a freezing order that contained an exception for transactions carried out in the ordinary course of a business conducted by Mr Ablyazov personally. The issue was whether, in the light of previous authorities, any transaction that was non-dissipatory in nature should be regarded as being in the ordinary course of business. The business in question was claimed to be Mr Ablyazov's activity of holding and managing his assets and investments. The Court of Appeal considered that that test was too widely stated. Such an interpretation was inconsistent with the form and structure of the freezing order that deliberately does not limit the scope of the injunction to transactions carried out with the intention to dissipate. Rather, protection against the risk of dissipation is achieved by prohibiting all disposals of assets except those expressly permitted, or made with the further authority of the court. In that context, Maurice Kay LJ said:

> "This format points, in our view, to the standard exception about disposals in the ordinary course of business being given a narrower rather than a wide meaning. Transactions in the ordinary course of business in the case (eg) of a trading company will include all its usual purchases and disposals and the payment of its trade and other liabilities and they fall due. A regulated investment company which acquires and sells shares and other securities on behalf of its clients would be treated in the same way. But we do not consider that the concept of the ordinary course of business would, as a general rule, comprehend alterations in investments by a private investor however wealthy he may be. For them to qualify it would be necessary to show that the investor was himself running a business by making the changes in his holdings rather than merely re-organising his investments to obtain a better outcome. "

The decision of the court in that case is encapsulated in the following passage:

> "Nor do we accept that the injection of significant assets into a company by its controlling shareholder necessarily constitutes part of the ordinary course of a business carried on by Mr A personally. A private investor does not ipso facto carry on an investment business. Mr A does not in terms suggest that he does. He simply characterises his dealings as a shareholder with BTA Moscow as part of his business rather than his non-business activites. But on the evidence this is nothing more than the concentration by him of part of his assets in a particular business.

> As such, he is no different from any private investor who, on his own behalf, decides where to put his money."

15. In Michael Wilson & Partners, Limited v Emmott [2015] EWCA Civ 1028, the Court of Appeal had to consider whether a respondent's repayment of a loan and payment of rent to related companies fell within an exception to a freezing injunction in standard terms ("this order does not prohibit the Respondent from dealing with or disposing of any of its assets in the ordinary and proper course of business"). At paragraphs 19-21 of his judgment, Lewison LJ said:

> "19. The issue was whether the payments made fell within the exception to the freezing order. In order to fall within the exception a disposal of assets (including a payment) must be both (a) in the ordinary course of business and (b) in the proper course of business. These are separate and cumulative requirements. They are also highly fact-sensitive questions. What is in the ordinary and proper course of business will, of course, depend on what business is carried on by the respondent in question, and how it is carried on. A payment which might be made in the ordinary and proper course of one business may not satisfy that description in the case of a different business. Likewise a payment which might be made in the ordinary and proper course of business carried on in one location may not satisfy the description in the case of the same kind of business carried on in a different location…."
>
> 20. Whether a payment is made in the 'proper course of business' is likely to depend on the purpose of the payment. If the payment is to be made to discharge a pre-existing liability of the business incurred in good faith, then it is difficult to see how that would not be the 'proper course of business' ….
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> 21. So the question then was: were the payments made 'in the ordinary…. course of business'. That is not necessarily the same thing as asking whether the payments themselves were 'ordinary': It is the course of business that the exception deals with. It is thus the course of business that must be 'ordinary'."

16. At paragraph 22, Lewison LJ held that the words of the freezing order must be given their ordinary meaning, but he accepted that the purpose for which freezing orders are made will influence that meaning. He deprecated the use of approximate synonyms for the actual words of the order requiring to be interpreted and applied.

17. Against that background, I turn to the facts of the first of the three categories of transaction in issue on the application.

The Selantia - A Co. – Atrasten payments

18. Selantia and A Co. have been identified in the respondent's disclosure as being non-trading companies controlled by the respondent. Although the applicant is sceptical about it, the evidence before me establishes that, on the balance of probabilities, Atrasten is not owned or controlled by the respondent. There are two relevant loan agreements. First, an agreement made on 12 October 2012 whereby Atrasten lent A Co. $50,000,000, to be repaid with interest at 11% per annum by 30 April 2013. $20,000,000 is said to remain outstanding to Atrasten. The second agreement is a loan agreement made between Selantia and A Co. dated 24 April 2017, under which Selantia agreed to allow A Co. to draw down up to $25,000,000 to refinance A Co.'s outstanding loans and to finance its business activity. The Selantia loan is repayable with interest at 11% by 24 April 2019.

19. There were, apparently, eight agreements supplementary to the Atrasten/A Co. loan agreement, under which the $20,000,000 outstanding should have been repaid by 31 January 2014. Repayment was not made, but in September 2016 the parties negotiated (but did not complete) a ninth supplementary agreement, intended to extend the loan repayment date. On 18 January 2017, Cypriot lawyers acting for Atrasten demanded repayment. The letter recorded that interest had been paid up to November 2016 but two monthly instalments were by that time outstanding. On 5 September 2017, the lawyers wrote a further letter demanding repayment. There is documentary evidence showing that with effect from June 2017 at the latest Selantia transferred to A Co. the precise amount of funds needed for A Co. to make each monthly payment of interest to Atrasten. At the date of the freezing injunction, therefore, there was an established course of business activity whereby A Co. drew down monthly amounts on the Selantia facility in order to pay monthly interest on the sum of $20,000,000 due to Atrasten.

20. After the date of the freezing injunction, a ninth supplementary agreement dated 14 February 2018 was made between A Co. and Atrasten, under which it was agreed that the outstanding principal would be repaid by 31 December 2018 and recorded that A Co. had paid interest falling due under the loan agreement.

21. Evidence on behalf of the respondent is contained in a witness statement of Richard David Waugh dated 15 June 2018. He says that he has had responsibility within a team at Field Fisher for assisting the respondent to deal with asset disclosure and advising him on compliance with the freezing orders. As a result, he says, he acquired knowledge of the respondent's business activities, which is the basis on which he makes the witness statement. Apart from that rather general description, there is no further evidence in his statement of the source of any particular facts that Mr Waugh states.

22. From what Mr Waugh states about Selantia and A Co., it appears that A Co. agreed in September 2012 to purchase 24% of the shares in C Co., which company owned (directly or indirectly) the shares of D Co.. The purchase of the shareholding in C Co. was funded by the Atrasten loan. Mr Waugh describes A Co.'s business as "including the purchasing and holding of the shares in C Co. (and thereby an indirect interest in D Co.) and the financing of that purchase, including the servicing of its debt to Atrasten." Mr Waugh does not identify any other business carried on by A Co..

23. As to Selantia's business, Mr Waugh says that it is a service company, ultimately funded by the respondent, and:

> "Selantia engages legal and other professionals and pays their fees for advice and representation in relation to various Arbitration and court proceedings in which Mr Kolomoisky (or companies controlled by or affiliated with him) are a party or which Mr Kolomoisky has agreed to fund under arrangements with some of his business associates. Selantia also pays the invoices of various services providers on behalf of companies owned by Mr Kolomoisky, and provides day to day financing to other of Mr Kolomoisky's companies if required for their normal operations."

24. The relevant payments to be considered are accordingly the payment of monthly interest by A Co. to Atrasten pursuant to one loan agreement and the drawdown by A Co. under the Selantia loan agreement of the funds required to make the payments to Atrasten. Mr Stephen Smith QC, on behalf of the applicant, submits that neither Selantia nor A Co., on the evidence, have anything that can properly be described as a "business". A Co., he argues, is simply an asset-holding company, effectively a vehicle for the respondent; and Selantia, which is said to be a service company, is no more that the respondent's corporate vehicle for repayment of his debts. The arrangement between Selantia, A Co. and Atrasten was asserted to be "collusive", though that description would depend on establishing that either one or other of the loan agreements was not genuine or that Atrasten was in fact controlled by the respondent. Although the nature of the transactions may give rise to some suspicion about the true position, the applicant did not go so far as to say that either of the loan agreements was not genuine and, as I have held, the evidence does not establish, on the balance of probabilities, that Atrasten is controlled by the respondent.

25. The facts are therefore that, well before the first freezing order was made on 19 December 2017, A Co. entered into two loan agreements. Although capital remains outstanding under the Atrasten loan agreement, A Co. has fully met its interest liability for that loan. In order to fund its eventual repayment and the interest, it negotiated a facility with Selantia and has regularly drawn on that facility in order to pay interest to Atrasten. In my judgment, the supplementary loan agreement number nine made no difference in principle other than deferring the obligation to pay the $20,000,000 until the end of 2018.

26. A "business", in the context of paragraph 8(c) of the Order, is clearly not to be equated only with a trade or commercial undertaking. The same paragraph expressly provides that no notification is required in relation to dealings or disposals in the ordinary and proper course of business of any trading company. It must, therefore, have been contemplated that the respondent's assets, either held by him or by non-trading companies that he owns or controls, or both, could be dealt with in the ordinary and proper course of some business. In making the differential provision that it did for non-trading companies, the Order envisages that the respondent or other of the Defendants may have and control asset-holding companies or service companies, or the like, which are in principle capable of having an ordinary course of business even though they do not trade for profit.

27. Mr Michael Bools QC, who appeared with Mr Ben Woolgar on behalf of the respondent, submitted that the word "business" should be given a wide meaning, extending to any activity in which a company engages, whatever it may be. He referred,

by way of analogy, to the case of American Leaf Blending Co Sdn Bhd v The Director-General of Inland Revenue [1979] AC 676, a decision of the Privy Council on the meaning of a Malaysian tax statute. In that decision, the Board considered that, in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts any of its assets prima facie amounted to the carrying on of a business. The carrying on of a business was considered to require some activity on the part of the person carrying it on, though the activity might be intermittent. However, the Board also considered that not every isolated act of a kind authorised by a company's memorandum necessarily constituted the carrying on of a business.

28. Those observations, though of some relevance, do not really assist in connection with the meaning of "business" in the particular context with which I am concerned. What is, perhaps, more instructive is the need for a business to have an ordinary course, if a transaction is to fall within the exception to the Order, and the recognition that a non-trading company can have a business. In my judgment, in that context the business must have some commercial activity rather than merely corporate or regulatory arrangements necessary to keep the company in existence to hold assets. Further, there must be some course of commercial activity or activities before it can be said that a transaction or payment is in the ordinary course of a company's business. Beyond those broad generalities, it is a question of fact and degree whether what is done by any of the particular companies in consideration here amounts to an ordinary course of business.

29. Although A Co. apparently has only a very limited corporate purpose, it has entered into a series of financially significant commercial transactions, giving rise to rights and obligations, which it has performed and observed over an extended period of time. The business of A Co. was to fund, acquire and hold a shareholding in C Co. and thereafter to finance the purchase. Prior to the date of the freezing order, A Co. was both performing its obligations and exercising its rights under the two principal commercial contracts into which it had entered. Although the extent of its business was very limited, it nevertheless appears to me to have had an established course of business at the time of the first freezing order. On the evidence as it stands today, the commercial loan agreements appear to be genuine and appear to be being performed. Further payments of interest to Atrasten and further drawings on the existing Selantia facility therefore appear to me to be both in the ordinary course of A Co.'s business, such as it is, and in the proper course of its business, being bona fide payments made to honour existing contractual obligations and the bona fide drawing on an existing facility to fund performance of those obligations. This is more, by way of commercial activity, than the merely passive holding of shares, which Mr Bools QC was disposed to agree might not amount to a business, unless done for reward in the course of a trade or profession.

30. Mr Smith QC objected that the conclusion that I have reached would effectively drive "a coach and four" through the protection intended to be provided by a freezing order. I do not agree that that is so, or that a well-crafted freezing order would be ineffective for that reason. A purely passive holding of property or investments would not in itself amount to a business, so any disposal of such assets would not fall within the exception to the Order. Even if there were a business, as is the case with A Co., a disposal of the investment would not fall within the ordinary course of that business, nor would it be likely to be in the proper course of A Co.'s business. The reason why the payments intended to be made by A Co. fall within the exception in this case is because a bespoke

exception has been provided to cover the proper and ordinary course of business of non-trading companies, and because A Co. is doing no more than performing bona fide pre-existing obligations and exercising pre-existing rights. In view of the purpose of a freezing order, as explained in the authorities I have referred to, these are exactly the type of transactions *of a non-trading company* controlled by a respondent to a freezing order that one would expect to see falling within the terms of this Order. An attempt by A Co. to sell, mortgage or otherwise dispose of the C Co. shares would clearly not fall within the ordinary course of A Co.'s business, however.

31. As for Selantia, this is a company that receives money from the respondent (or other entities controlled by him) and engages and pays fees to lawyers and other professionals in respect of arbitrations and court proceedings, and provides finance to and on behalf of other companies controlled by the respondent. In the course of doing so, Selantia therefore will necessarily enter into contracts with the professionals and perform those contracts and enter into funding agreements with other companies. It is not suggested that it does so merely as agent for the respondent. Accordingly, it seems to me that Selantia has a course of business of that description, albeit a limited one. In the course of that business, Selantia has entered into the loan agreement with A Co., which it has performed by allowing A Co. to draw down on the agreed facility. As a result, Selantia has accrued rights to future repayment and interest. A Co. had been drawing down on Selantia's facility for months before the first freezing order was made and has continued to do so since.

32. The honouring by Selantia of those drawdown requests and the provision of funds therefore appears to me to be in the ordinary course of Selantia's business as it was established by the date of the first freezing order. Further, the performance by Selantia of its obligations was in the proper course of its business. Mr Smith QC may or may not seek at trial to establish that the documentation before me is no more than "dressing up" and of no substance, and that all the relationships in issue are, as he put it, a "money-go-round" in which all the companies are mere conduits and have no substantial business. At this stage, however, he cannot establish on the balance of probabilities that that is the case.

33. For these reasons, I decline to make the first three declarations sought by the applicant, namely that past and future drawdowns by A Co. of the Selantia loan agreement, past and future interest payments by A Co. pursuant to the Atrasten loan agreement and the future repayment of the Atrasten loan principal are not permitted under the terms of the Order as it stands.

The Goiania-Perkela-Redhill transaction

34. The applicant accepts that Goiania is a substantial trading company. It is in the business of acquiring and leasing out aircraft on a commercial basis. Perkela is a non-trading company. Both are admitted to be owned and controlled by the respondent. Redhill is the parent company of Perkela.

35. In 2009, Perkela entered into an aircraft leasing agreement with an independent Swiss company called UBS AG. Redhill guaranteed Perkela's obligations under that agreement. The original lease was extended to 1 February 2019 under a second amendment agreement made between UBS AG, Perkela and the respondent as guarantor dated 12 January 2015. The aircraft in question is understood to be used by

the respondent for his own purposes. Monthly leasing and other fees are incurred under the terms of the UBS Agreement and operating and running costs for the aircraft are also payable.

36. On 14 December 2016, Goiania, Redhill and Perkela entered into an Agency Agreement. According to its terms, it was made upon Goiania pledging substantial funds to UBS by way of security for Perkela's obligations. Perkela engaged Goiania as agent for a term of 12 months from 14 December 2016, during which it agreed to arrange assistance for aircraft financing and other payments related to aircraft operations and maintenance on behalf of Perkela. Under clause 5, Perkela was to put Goiania in funds three business days before any payment fell to be made by Goiania. The Agency Agreement was extended for a further year by a written agreement made on 12 December 2017.

37. That further agreement does not refer to an earlier Amendment Agreement apparently made on 28 December 2016, only two weeks after the Agency Agreement was made. This document was not provided by Field Fisher at the time that the Agency Agreement was provided in response to questions from Hogan Lovells about the relationship between Goiania and Perkela. It was first seen by the applicant when exhibited to Mr Waugh's witness statement dated 15 June 2018. It states that if Redhill has not provided Goiania with sufficient funds for the purposes of clause 5 of the Agency Agreement, Goiania may elect to use its own funds to make payments on behalf of Perkela, in which case it is entitled to a fee at the rate of 7.5% per annum on funds used. The Amendment Agreement is apparently executed validly on behalf of the three parties.

38. The evidence of Mr Waugh establishes, on the balance of probabilities, that Goiania has been making payments to UBS AG and other suppliers on behalf of Perkela in connection with the aircraft since the date of the Agency Agreement, and has paid for the operation and maintenance of the aircraft. The monthly rental of the aircraft is in the region of US $250,000. UBS invoices Perkela and Goiania makes the payment.

39. The applicant's original complaint about these payments was that they could not be in the proper and ordinary course of Goiania's business, either because Goiania had no business of making payments on behalf of other companies or as a commercial agent or because the Agency Agreement only required Goiania to do so if put in funds by Perkela or Redhill. The Amendment Agreement first disclosed in Mr Waugh's witness statement, if taken at face value, has an impact upon that second argument. Although Goiania is not obliged to pay, it may elect to do so in its own commercial interests.

40. Dealing first with the argument that Goiania has no relevant business, the applicant contends that there is no evidence that it has a commercial agency agreement with any other company. Although Mr Waugh says that he is informed that Goiania has similar agreements with other companies, no such agreement was exhibited or detail provided. I accept the applicant's argument that, in the absence of a proper source for Mr Waugh's stated belief, there is no sufficient evidence that Goiania has a commercial agency agreement with anyone other than Redhill and Perkela. However, the Agency Agreement is a commercial contract under which Goiania has substantial obligations and rights. Goiania was entitled to an annual fee, a Security Fee at a rate of 7.5% per annum and a commission of 1.5% of the total amount paid by it using moneys from Perkela/Redhill. Accordingly, in my judgment, Goiania's business at the time of the first freezing order was a commercial aircraft leasing business and a business of acting

as commercial agent for Perkela and Redhill. The fact that the agency business was limited to one particular case does not mean that it was not part of Goiania's business at the relevant time.

41. Although the applicant is suspicious of the genuineness of the Amendment Agreement, I cannot find on the balance of probabilities, on the evidence before me, that it is not genuine. That being so, Goiania had a right for commercial reward to make payments on behalf of Perkela relating to the aircraft. On the evidence, it has done so for a period of 12 months before the freezing injunction was granted. Further payments since the date of the Order are therefore in the ordinary course of (a part of) Goiania's business. The purpose of making further payments is both to discharge a liability of Perkela and to earn for Goiania the funding fee specified in the Amendment (7.5%) rather than the commission of 1.5% on handling funds provided by Perkela. Discharge of Perkela's liabilities with its own funds is therefore in Goiania's own commercial interests. Goiania had made equivalent payments for a period of some 18 months by the date of this judgment. In those circumstances, further such payments will also be in the proper course of Goiania's business. Different rights or obligations acquired after the date of the Order may give rise to a different conclusion, but no such rights or obligations fall to be considered on this application.

42. For these reasons, I decline to make a declaration that past and future payments made by Goiania in connection with the leasing, crew, servicing and other costs of maintaining and operating the aircraft pursuant to the Agency Agreement are not permitted by the terms of the Order.

The B Co. - Stalmag transactions

43. Aeroport B Co. LLC ("B Co.") is accepted to be a non-trading company. It owned a commercial passenger terminal at B Co. Airport, Ukraine, which it lost (physically) as a result of the annexation of Crimea by Russia in 2014. B Co. had no other business at the time of the annexation. Its sole asset has therefore been replaced by a different asset, namely a claim for compensation for its loss. The respondent and B Co. have jointly issued BIT arbitration proceedings claiming compensation from the Russian Federation. The law firm Hughes Hubbard & Reed LLP is acting for the respondent and B Co. in those proceedings. The respondent's own reasonable expenditure on legal fees in relation to those arbitration proceedings is an exception to the freezing order under paragraph 8(a) of the Order. Payments in respect of B Co.'s fees are not excluded under paragraph 8 unless they amount to a dealing by the respondent or B Co. in the ordinary and proper course of business.

44. On 22 February 2018, Field Fisher notified Hogan Lovells that substantial sums were to be disbursed in connection with the respondent's legal fees of various proceedings, including these proceedings. To fall within the exception in paragraph 8(a) of the Order, the respondent had to notify the applicant of the source of the funds to be used. Field Fisher stated that the funds would be taken from the bank account of Stalmag SP z.o.o. ("Stalmag") held with IMG Bank Slaski. They stated that Stalmag was indebted to the respondent in the sum of US $7.2 million under a loan agreement dated 23 November 2016 and that the respondent had directed Stalmag to pay various sums in partial repayment of that indebtedness. They asserted that Stalmag was a trading company. Further similar notifications were subsequently made including (on 19

March 2018) an intention to direct Stalmag to pay €1,810,640.55 to Hughes Hubbard & Reed in respect of the BIT arbitration legal fees and expenses.

45. Hogan Lovells asked for further information about Stalmag's business and details about the Stalmag loan. In response to Field Fisher's assertion that the payment of B Co.'s fees was in the ordinary and proper course of the respondent's business, Hogan Lovells asked for a full explanation of the nature of the respondent's business. Field Fisher replied that through his substantial interest in B Co. the respondent's business in this instance was the operation of a commercial passenger terminal at the airport. By a further letter dated 24 April 2018, Field Fisher explained that the nature of Stalmag's business was the trading of ferroalloys and other related raw materials and they enclosed a copy of the Stalmag loan agreement. This is dated 23 November 2016 and apparently made in Cyprus. By it, the respondent personally lent Stalmag US $7,200,000 and Stalmag undertook to repay it no later than 23 November 2018. The agreement incorporates various provisions of the Polish Civil Code, with the consequence (it was agreed) that interest on the loan was payable at the rate of 6% per annum.

46. The declaration that is sought in relation to B Co. is that the Order does not permit:

> "past and future payments in connection with legal fees and other expenses incurred by B Co. ("B Co.") in respect of an investment treaty arbitration claim instituted jointly by the First Defendant and B Co.."

47. The applicant does not accept that Stalmag is a trading company. In his original disclosure pursuant to the Order, the respondent did not identify whether Stalmag was a trading or non-trading company but indicated that he held half the share capital ofE Co., which owned 100% of the shares in Stalmag, which in turn owned 99.99% of the shares of Stalmag Properties SP z.o.o. Stalmag was estimated to have a value of US$15 million. That disclosure was provided on 10 January 2018. On 19 January 2018, the respondent provided additional disclosure, identifying Stalmag as a trading company. Mr Smith QC contended that, under the terms of the Order, the disclosure should have identified the nature of Stalmag's business but did not do so. In my judgment, that is a misreading of paragraph 7(c)(iv) of the Order. In the case of disclosure of shares at the top of a corporate chain holding a trading company, it requires the structure by which the trading company is held and the nature and estimated value of the shares and (if different) the trading company to be stated. However, the asset that was disclosed was Stalmag, the trading company. Its holding company, E Co., was also identified and the value of the shares was given. There was no requirement to provide detail of the business of the trading company. The fact that it held all the shares of Stalmag Properties SP z.o.o. does not mean that it is not a trading company.

48. Publicly-accessible documents appear to support Mr Waugh's evidence that Stalmag is a trading company. The Stalmag loan agreement shows that, presumably for the purposes of its business, it borrowed US $7.2 million from the respondent. It could not therefore be suggested that repayment of the loan, when due, was other than a payment made in the ordinary and proper course of Stalmag's business. What the applicant says is that pre-payment in March or April 2018 rather than November 2018, at the request of the respondent, was not in the ordinary or proper course of its business. Had there been clear commercial benefit to Stalmag in deferring repayment until November 2018

(e.g. if the loan were interest-free) it would have been obvious that the purpose of the pre-payment was to confer a benefit on the respondent and that accordingly the payment was not in the proper course of Stalmag's business. It is obvious that a request for early repayment must have originated from the respondent, given his need to pay legal fees. However, prepayment is in fact capable of giving Stalmag some commercial benefit if it either did not need the loan or could obtain one more cheaply elsewhere. But there was no evidence about this.

49. Given that the partial repayment was to be used to meet the lender's personal needs, the evidential burden in my view lay on the respondent to prove that the purpose of the repayment was to benefit Stalmag rather than to accommodate the respondent. He has not discharged that evidential burden. It is therefore right to conclude on the balance of probabilities that the partial repayment was not made in the proper course of Stalmag's business, since its purpose was to benefit the lender. The same conclusion could probably not be reached as regards repayment of the loan when due.

50. At the direction of the respondent, Stalmag made its repayment directly to lawyers acting either for the respondent or (in the case of the BIT arbitration) to lawyers acting for the respondent and for B Co.. It is not suggested in the evidence or by the respondent in submissions that this was a loan to B Co. so that B Co. was making a payment in respect of its own fees. It was a payment made by the respondent in discharge of B Co.'s and his fees. The first question is therefore whether or not the respondent himself had a business, within the meaning of the exception to the Order, and if so, second, whether the payment to Hughes Hubbard & Reed for B Co.'s share of the fees was made in the ordinary and proper course of that business.

51. What Mr Waugh says about the respondent's business is as follows:

> "First, Mr Kolomoisky has a wide range of 'businesses'. As both his asset lists make clear, he owns assets in at least the following sectors: ferro alloy mining and trading, passenger air travel, media and television (through what is referred to as the 'TV holding'), property holding, oil trading and trans-shipment, oil and gas generally, telecoms, investments in financial services, metals, and aircraft leasing.
>
> Second, Mr Kolomoisky does not have a single, dominant asset or corporate vehicle for the purpose of holding and managing his assets – although the Ukrainian media occasionally referenced the 'Privat Group', there is no such legal entity or holding structure. Instead, over time, a decentralised approach to holding and managing his wealth and business interests has gradually evolved.
>
> Third, Mr Kolomoisky is not exclusively a passive <u>investor</u> in assets. He is also involved in the <u>management</u> of a number of his businesses. Although Mr Kolomoisky does not personally manage each of the businesses in which he has an interest, he does (in his capacity as an investor, shareholder or beneficial owner of such interest) engage with those responsible for the management of his businesses, for the purpose of:

> (a) Monitoring and reviewing the asset's performance;
>
> (b) Where he deems it necessary, giving direction or advice in relation to that business for the purpose of maximising his returns thereon;
>
> (c) Making decisions about further investment in a particular business and the source of funding of any such investment;
>
> (d) Considering the business requirements and providing them with capital or other necessary assistance.
>
> The level of Mr Kolomoisky's engagement naturally varies depending on various factors, for example the size, nature, market and financial situation or location of the relevant business. Mr Kolomoisky also has various people who work with him or are engaged to assist in those activities.
>
> Fourth, it is from time to time necessary to move liquidity from one of Mr Kolomoisky's businesses, or his and his joint venturer's business, to another. This is often done by the means of one such company making a loan to another. The obvious reason for such loans to be made is that Mr Kolomoisky holds little cash in his own right, such that he cannot simply make an injection of capital into a business. Those loans are formally documented, but it is not uncommon for them to be extended in order that the liquidity remains in the part of Mr Kolomoisky's businesses where it is required."

52. This evidence is second-hand, unattributed and in the nature of a summary of what Mr Waugh had either observed from documents or been told by someone, who may or may not have been the respondent himself. There is no detail of any particular instance of the respondent's alleged activities. In particular, there is no detail of whether the various people who "work with" the respondent are employed or paid, or have specific duties to perform, or on what basis any persons are "engaged" to assist the respondent, or what they do. There is no evidence of any income received by the respondent personally or any costs that he incurs.

53. It is clear that the respondent has a very substantial range of investments and assets. Many of the companies that he controls have an active business in their own right. Other companies are non-trading and hold assets or provide some services. But does the respondent, as he claims, have a business of organising and managing these assets and investments? Mr Smith QC submits that there are no indicia of a business, such as clients, fees, accounts, or even a name. What the respondent appears to be doing is managing his own assets, investments and investment vehicles, using the resources of one to benefit another, as he sees fit.

54. The concept of a "business" in such a case is an elusive one. If one asked whether the respondent was a "businessman", the answer would probably be in the affirmative and comparisons could be made with well-known entrepreneurs and investors who have a substantial number of business interests. But the question is rather whether he has a

"business" within the meaning of the Order, such that a freezing order designed to prevent dissipation of assets should not prevent him from carrying on his ordinary and proper activities in that regard. In the Ablyazov case, the Court of Appeal relied on Mr Ablyazov's own evidence, which effectively admitted that he managed his investments rather than carrying on a business.

55. It seems to me that the respondent can plausibly be said to be involved in the provision of funding, as necessary, to various of the companies that are used to trade or to carry on other business-related activities. The Stalmag loan agreement is evidence that he is sometimes the lender; on other occasions, one controlled entity lends to or invests in another. The respondent appears to organise the sourcing of funding from various parts of his "group" and decide himself where and how that is to be done.

56. But the activities carried on by the respondent, as described in Mr Waugh's statement and summarised in the previous paragraph, are not the kind of activity to which the ordinary and proper course of business exception is intended to apply. It applies, in this context at least, to the businesses of the trading or non-trading entities that the respondent controls. The nature of the respondent's commercial and financial activity is not to have a business himself but to invest in and organise business activities through corporate entities. The respondent's own investment and management activity cannot reasonably be described as the ordinary course of a business, at least in this context. If it were, everything that the respondent chose to do in terms of managing, dealing in and disposing of his assets and investments would be excluded from the effect of the freezing injunction. If, on the other hand, the respondent did have a personal business, there would be real issues to address about what was and what was not in its ordinary and proper course. The conclusion that the respondent invites the Court to reach would effectively deprive that important distinction of having any real application in his case.

57. Although argument was addressed at the hearing to the question of whether B Co. still had an ordinary course of business, following the Russian annexation of Crimea, the question does not arise for decision. B Co. was not advancing any of its own funds to Hughes Hubbard & Reed; the respondent directed Stalmag to repay part of its debt to that firm on account of his and B Co.'s fees of the BIT arbitration claim. The relevant question therefore concerns the ordinary and proper course of the respondent's business, not B Co.'s business.

58. Accordingly, I conclude that the respondent was not funding B Co.'s legal fees in the ordinary and proper course of his business and will make the declaration sought in relation to the B Co. legal fees, subject to the qualification that it is past and future payments made "by or at the direction of the respondent" that are not permitted by the Order. That does not of course mean that it is unreasonable or inappropriate for the respondent to fund B Co.'s fees, whether using funds repayable by Stalmag in November 2018 or other funds available to him. It means only that the respondent needs the applicant's agreement or the Court's permission to do so. I have no evidence at all about the value or strength of the BIT arbitration claim and therefore say nothing about it.