Neutral Citation Number: [2021] EWHC 939 (Ch)

Case No: BL-2020-001416

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London
EC4A 1NL

21 April 2021

Before :

MRS JUSTICE BACON

- -

Between :

WWRT LIMITED	**Claimant**
- and -	
(1) SERHIY TYSHCHENKO **(2) OLENA TYSHCHENKO**	**Defendants**

- -
- -

Andrew Ayres QC, **Thomas Munby** and **James Mitchell** (instructed by **Rosling King LLP**) for the **Claimant**
John Machell QC and **James Mather** (instructed by **Clarion Solicitors**) for the **First Defendant**
The **Second Defendant** appeared in person

Hearing dates: 10–12 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mrs Justice Bacon:

INTRODUCTION

1. These proceedings are brought by WWRT Limited (**WWRT**) against Mr Serhiy Tyshchenko and his ex-wife, Mrs Olena Tyshchenko. The claim is founded on an allegation that the Defendants carried out an extensive fraud on the Ukrainian bank, JSC Fortuna Bank (**Fortuna Bank**), between 2011 and 2014, during which time the bank was (it is claimed) ultimately owned by Mr Tyshchenko. The fraud is said to have been carried out through the grant of multiple loans to borrowing companies that did not engage in substantial commercial activity and who had no intention of repaying the loans. The bank was subsequently declared insolvent and was liquidated, in the course of which a package of its assets, including the disputed loans, was sold to a Ukrainian company called Star Investment One LLC (**Star**). Star in turn sold those rights and assets to WWRT in March 2020. WWRT's case is that following those two assignments it has now acquired the rights to bring the claim relied upon in the present proceedings.

2. At a without notice hearing on 4 September 2020 I granted a worldwide freezing order in the sum of £65 million against the Defendants, in support of the claim that was then about to be filed in these proceedings: [2020] EWHC 2409 (Ch). WWRT's claim was filed later on 4 September 2020, with the Particulars of Claim following on 1 October 2020. The claim is pleaded as a claim in tort under Article 1166 of the Ukrainian Civil Code.

3. The freezing order was served personally on the Defendants on 5 September 2020. Mrs Tyshchenko was served at the family house, Tanglewood Villa, in Surrey. Mr Tyshchenko was served at his nearby golf club later in the day.

4. The return date had been listed for 18 September 2020, but was adjourned by consent to this hearing. On 16 October 2020 the Defendants filed and served an acknowledgement of service indicating an intention to contest jurisdiction. They subsequently applied for an extension of time to issue their application to contest jurisdiction and to file and serve their evidence opposing the continuation of the freezing order. At the hearing of that application before Meade J, the Defendants applied for the trial of a preliminary issue in relation to a range of Ukrainian law defences. That was rejected by Meade J, who instead gave directions for the Defendants to issue their jurisdiction application and to file their evidence in relation to the freezing order.

5. Following those developments the applications before me now are:

    i) Mr Tyshchenko's challenge to the jurisdiction of the court in these proceedings (Mrs Tyshchenko does not challenge jurisdiction).

    ii) WWRT's application to continue the worldwide freezing orders against both Defendants, which is opposed by both Defendants although on different grounds. Mr Tyshchenko opposes the continuation of the order primarily on the grounds of lack of jurisdiction, as well as making allegations of non-disclosure at the without notice hearing. Mrs

Tyshchenko's opposition is mainly based on challenges to the merits of the claim against her, but she also says that inaccurate statements were made in the evidence for the without notice hearing.

iii) WWRT's application for orders that both Defendants be cross-examined as to their assets as well as the source of funds for their living and legal expenses, and that they provide further documents in advance of that cross-examination. Again, that is opposed by both Defendants.

6. At the hearing of these applications, Mr Ayres QC and Mr Munby appeared for WWRT (neither of them having appeared at the original without notice hearing before me); Mr Machell QC and Mr Mather appeared for Mr Tyshchenko; and Mrs Tyshchenko made submissions as a litigant in person. The hearing was conducted remotely using Microsoft Teams.

PRELIMINARY COMMENTS

7. Before turning to the specific applications before me, it is necessary to make some preliminary comments on the evidence, the approach to Ukrainian law for the purposes of this hearing, and the status of various related proceedings.

The factual and expert evidence

8. There is a considerable volume of evidence before me in relation to these three applications:

i) Ms Olga Gutovska, who is the managing partner of the Ukrainian law firm Gutovska and Partners and the ultimate owner of 80% of the shares in WWRT, provided an affidavit for the purpose of the without notice application and has provided a second affidavit for the purposes of the present application to continue the freezing order. She has also made a witness statement in relation to the jurisdiction application.

ii) Ms Georgina Squire, a partner in the firm of Rosling King LLP, solicitors for WWRT, and the ultimate owner of 20% of the shares of WWRT, provided an affidavit for the purpose of the without notice application, and has made two witness statements in support of the cross-examination application.

iii) Mr Tyshchenko provided an affidavit regarding his assets, as required by the freezing order, and has also made two witness statements in support of his jurisdiction application and opposing the continuation of the freezing order.

iv) Mrs Tyshchenko likewise provided an affidavit regarding her assets, as required by the freezing order, and has made three witness statements opposing the continuation of the freezing order and the cross-examination application.

v) Mr Richard Pughe, a forensic accountant at BTG Advisory LLP, provided a report for the purposes of the without notice application, which analysed

the banking records of seven of the borrowing companies who received loans from Fortuna Bank and the pattern of loans granted to those companies.

vi) Dr Vadim Tsiura, a practising attorney and Professor of Civil Law at Taras Shevchenko National University in Kyiv, provided an expert report on issues of Ukrainian law for the purposes of the without notice application, and has provided a further report responding to the various reports of the Defendants' Ukrainian law experts.

vii) The Defendants rely on a total of four expert reports on issues of Ukrainian law, from (in turn): Dr Anatolii Selivanov, a Professor at the National Academy of Legal Sciences of Ukraine; Dr Serhiy Berveno, a Professor of Civil Law at V.N. Karazin National University of Kharkiv and the Academy of Sciences of the Higher School of Ukraine; Mr Oleh Hontar, a Ukrainian lawyer; and Mr Serhiy Moroz, the managing partner of the Ukrainian law firm Moroz and Partners. The reports of Dr Selivanov and Dr Berveno were already before Meade J in support of the Defendants' application for a trial of preliminary issues of Ukrainian law; the reports of Mr Hontar and Mr Moroz have been provided since that hearing. All four expert reports are written in Ukrainian, with English translations provided for the court.

9. The order of Meade J did not formally give permission for any expert evidence to be relied upon for the purposes of the present applications. That was rectified by a consent order which I approved on the first day of the hearing, giving permission for WWRT to rely upon the BTG report and Dr Tsiura's two reports, and for the Defendants to rely upon the reports of Dr Selivanov, Dr Berveno, Mr Hontar and Mr Moroz.

10. The recitals to the order recorded, however, that this was without prejudice to any submissions that would be made as to the admissibility or weight of any of the expert reports. Submissions were duly made at the hearing by Mr Ayres (for WWRT), Mr Machell (for Mr Tyshchenko) and Mrs Tyshchenko objecting to the evidence set out in the various expert reports on specific grounds. It is therefore appropriate to make some preliminary comments about the expert evidence.

11. Starting with the BTG report, the only objection to this came from Mrs Tyshchenko, and was that the forensic accounting analysis described in that report had been carried out on the basis of banking records that had been "stolen" from Fortuna, since there was no legal basis under Ukrainian law for the provision of those records to WWRT. That objection can readily be dismissed. As explained in the two affidavits of Ms Gutovska, the banking records in question were obtained from Star upon the assignment from Star to WWRT. Star had itself obtained those records on the original assignment to it of the disputed loans. Dr Tsiura's second report explains that this was expressly permitted by Article 62(6) of the Ukrainian Banks Law, which permits a bank to disclose confidential records to an assignee of the bank's assets during liquidation. The Defendants have not disputed that analysis of Article 62(6), nor have the Defendants advanced any other objection to the BTG report.

12. Both Defendants did, however, take issue with the evidence of Dr Tsiura on numerous grounds. Their procedural objection was that Dr Tsiura previously acted as a consultant to Ms Gutovska's law firm G&P between October 2019 and March 2020. I do not consider that this taints Dr Tsiura's independence. The fact of his consultancy arrangement with G&P was disclosed openly in Dr Tsiura's CV which accompanied his first report; the consultancy arrangement was for a limited period only; and Ms Gutovska's evidence confirms that Dr Tsiura had no prior involvement in this case (and was not even aware of the existence of these proceedings) before his instruction in July 2020. It is, moreover, not at all unusual for a solicitor to instruct an expert who the solicitor has previously worked with on other matters.

13. The Defendants also objected to the completeness and accuracy of the evidence that was given by Dr Tsiura for the purposes of the without notice hearing, and disputed the substance of his analysis of Ukrainian law. I will deal with these points in the course of addressing the issues arising from the present applications. At the outset, however, I note that Dr Tsiura's two reports were verified by an expert statement of truth as required by CPR PD 35, indicated the sources of information relied upon, and confined the analysis to the specified issues of Ukrainian law on which he had been asked to opine. In principle, therefore, I consider that it is appropriate to consider both reports and take them into account for the purposes of addressing the issues of Ukrainian law that arise in this case.

14. By contrast, I have serious concerns with the independence and reliability of three of the four expert reports adduced by the Defendants.

15. The reports of Dr Selivanov and Dr Berveno report contain no CPR-compliant statements of truth, nor do they otherwise comply with the requirements of CPR Part 35. In particular, both reports are mixtures of legal opinion, factual commentary and submissions as to the merits of the underlying claim advanced by WWRT. They are extremely difficult to read, and contain wide-ranging material that is of little or no relevance to the present applications. The skeleton argument filed on behalf of the Defendants for the hearing before Meade J (by Mr James Aldridge QC, who is not instructed for the present hearing) expressly recognised that these reports were not "presently" CPR compliant. Despite that acknowledgement, it appears that no steps have subsequently been taken to rectify the deficiencies in the reports. In those circumstances I do not consider that these reports can be given any material weight for the present applications.

16. Mr Hontar's report is verified by a CPR-compliant statement of truth, and it purports to comply with the other requirements of CPR Part 35. Mr Hontar cannot, however, be regarded as an independent expert, since he is currently acting as a lawyer in Ukraine either directly or indirectly for one or both of the Defendants in at least four claims related to the present proceedings. Perhaps unsurprisingly, in these circumstances, at the hearing neither Mr Machell nor Mrs Tyshchenko sought to rely on this report, and I do not consider that it can be given any weight for these applications.

17. That leaves the report of Mr Moroz, which does contain a statement of truth and does confine itself to matters of legal analysis relevant to these applications. I therefore consider that the conclusions of the report, as far as they go, can

properly be taken into account. As explained further below, however, Mr Moroz does not address various key issues of Ukrainian law that are discussed by Dr Tsiura. His evidence is therefore of rather limited value for the purpose of this hearing.

18. For completeness, I note that Mr Machell also referred in his skeleton argument to a report by Mr Evgen Pugachov, which was filed in the English bankruptcy proceedings to which I refer below, in support of Mr Tyshchenko's application to strike out those proceedings. Mr Pugachov's report was appended to Mr Tyshchenko's second witness statement for this hearing, but was not within the scope of the consent order for expert evidence in these proceedings. Following discussion on the first day of the hearing as to the admissibility of this as expert evidence for this hearing, and whether (even if admissible) the Pugachov report added anything of material substance to the report of Mr Moroz, Mr Machell confirmed on the second day of the hearing that he no longer sought to rely on the Pugachov report for the purposes of his submissions.

Approach to Ukrainian law

19. Issues of Ukrainian law were central to Mr Tyshchenko's case on jurisdiction, as well as Mrs Tyshchenko's case on discharge of the freezing order. Indeed, it was apparent that in large part the submissions advanced on behalf of both Mr Tyshchenko on the issue of jurisdiction and Mrs Tyshchenko on the discharge of the freezing order reflected the questions of Ukrainian law which the Defendants sought to have tried as a preliminary issue, at the hearing before Meade J.

20. It follows from my comments above that the expert reports to be taken into account for the purposes of these issues are the two reports of Dr Tsiura for WWRT, and the report of Mr Moroz for the Defendants.

21. I note, however, that important relevant points were developed in Dr Tsiura's second (reply) report, served on 26 February 2021, to which the Defendants have provided no expert evidence in response. While some complaint was made about the lateness of Dr Tsiura's second report, that report was included within the consent order for the expert reports made at the start of the hearing, and the Defendants did not seek permission to file further evidence from Mr Moroz (or indeed any of their other experts) on the points in Dr Tsiura's analysis that they disputed.

22. Instead, the Defendants sought to challenge Dr Tsiura's conclusions on the basis of submissions advanced variously by Mr Machell and Mrs Tyshchenko as to their interpretation of specific provisions of the Ukrainian Bankruptcy Code and (in the case of Mrs Tyshchenko) the Ukrainian Civil Code, as well as their interpretation of the Ukrainian judgments referred to in the expert evidence. Mrs Tyshchenko additionally sought to rely on a further judgment of the Ukrainian Supreme Court, sent to me on the evening before the last day of the hearing (after her submissions had concluded). Mr Machell said that it was open to me to dismiss various aspects of Dr Tsiura's evidence as being wrong or irrational on the basis of the other material before me; or alternatively that the other material showed at the very least that there was a serious argument that Dr Tsiura's conclusions were wrong.

23. My Ayres' position was that it was not open to me to take my own view of the interpretation of Ukrainian legislation or case-law; or in any event that considerably more weight should be given to the evidence of Dr Tsiura than to the submissions advanced by Mr Machell and Mrs Tyshchenko.

24. The proper approach to issues of foreign law was discussed extensively in the judgment of Simon Bryan QC in *The Kyrgyz Republic v Stans Energy Corporation* [2017] EWHC 2539 (Comm), §44 *et seq* which I referred to in *AM Holdings v Batten and Le Page* [2018] EWHC 934 (Ch), §§41–44. While in both of those cases it was necessary for the court to reach a definitive view as to the construction of a foreign statute, the same approach must apply to a case involving the exercise of a discretion, where a relevant factor in the exercise of that discretion is the strength of one party's case as to the effect of provisions of foreign law.

25. It follows that the questions of Ukrainian law that arise in this case must be considered in the first place by reference to the expert evidence. Absent expert evidence as to the approach to construction of Ukrainian statutory provisions or case-law, it is not for the court to interpret those materials as if they were English statutes or cases: see *Kyrgyz Republic* §§49, 51, 54 and 64. It is not, therefore, open to me simply to take my own view as to the reliability of the report of Dr Tsiura or indeed any of the experts, by reference to the parties' submissions on the relevant statutes or case-law. The fact that Mrs Tyshchenko is a lawyer qualified in Ukraine does not undermine that conclusion: without corroboration by independent expert evidence, her submissions as to the interpretation and application of Ukrainian law can carry no greater weight than the submissions of counsel for the parties.

26. That does not preclude the court, in an appropriate case, from rejecting expert evidence that is clearly and obviously wrong, or patently absurd, on the basis of the materials before it such as the English translation of statutory provisions on which the expert relies: see in that regard §9-016 of Dicey, Morris and Collins, *The Conflict of Laws* (15th ed), which was cited at §46 of *Kyrgyz Republic*. But the power to do so must be exercised with great caution, and it should certainly not open the door to the rejection of expert evidence on the basis of submissions as to the interpretation of materials that are ambiguous, incomplete or otherwise unclear.

Parallel insolvency proceedings and other related litigation

27. The parallel proceedings involving the Defendants that have been commenced in both the Ukrainian and English courts are of considerable relevance to the issues raised by these applications, and will be discussed further below. In summary, the main relevant proceedings are as follows:

    i) In November 2019, Mr Tyshchenko applied to the Kyiv Commercial Court to initiate personal insolvency proceedings under Article 115 of the Ukrainian Bankruptcy Code. The first hearing took place on 9 December 2019, at which the court determined the fact of Mr Tyshchenko's insolvency and opened insolvency proceedings under Article 119 of the Bankruptcy Code. As part of those proceedings, the court appointed Ms

Kateryna Deinegina as the debt restructuring manager. On 2 June 2020 the court gave judgment dismissing an application by Star (the original assignee of the disputed loans) to be recognised as a creditor in those proceedings (**the *Star* judgment**). The *Star* judgment is relied upon heavily by the Defendants in relation to both the jurisdiction application and their opposition to the continuation of the freezing order. I therefore address it separately below.

ii) Mr Tyshchenko is also the subject of a bankruptcy petition presented to this court on 20 November 2020 by a creditor of a Russian judgment against him. On 11 February 2021 Ms Deinegina filed an application in those proceedings for recognition of the Ukrainian insolvency proceedings, and on 16 February 2021 Mr Tyshchenko made an application to strike out the bankruptcy petition. Neither of those applications have yet been determined.

iii) In Ukraine, Mr Tyshchenko has filed a criminal complaint against Ms Gutovska, Ms Squire and others with the Kyiv Main Department of the National Police, alleging criminal behaviour apparently related to the present proceedings.

iv) Mr Tyshchenko has also brought a civil claim against Ms Gutovska and Dr Tsiura in the Golosiivsky District Court of Kyiv seeking compensation in respect of moral and material harm, again related to the present proceedings.

v) A series of civil claims have been brought in the Ukrainian courts by Mr Tyshchenko and companies believed to be controlled directly or indirectly by him, seeking to annul the assignment of the assets of Fortuna Bank to Star as well as the subsequent assignment from Star to WWRT.

vi) In addition, Mrs Tyshchenko has filed an application for permission to bring a contempt of court application against Ms Gutovska on the basis of claims that Ms Gutovska provided false information and misled the court in her evidence filed for the purposes of the without notice hearing before me, as well as accusations that Ms Gutovska forged information on the Companies House register and provided the court with evidence that had been obtained illegally.

The *Star* judgment

28. Star applied to the Kyiv Commercial Court to be recognised as a creditor of Mr Tyshchenko in the insolvency proceedings that the court had opened on 9 December 2019. I have been provided with an agreed translation of the judgment of the court dated 2 June 2020 dismissing that application, as well as a translation of Star's application itself and Mr Tyshchenko's response.

29. Star's application for recognition as a creditor was brought under the provisions of Article 58 of the Ukrainian Banks Law, which (among other things) enables an action to be brought against a person related to the bank, whose actions or omissions lead to damage to the bank. Star's application was resisted by Mr

Tyshchenko on the basis that Star had not provided proper and admissible evidence proving the loss that it claimed. The application was also resisted by the Ukrainian Deposit Guarantee Fund, which is the entity in charge of liquidating insolvent banks in Ukraine, and thus the entity which sold the disputed loans to Star. It appears from the judgment that the basis of the Deposit Guarantee Fund's objection was that the rights to bring a claim against Mr Tyshchenko had not been transferred to Star under the sale of the package of assets that Star acquired.

30. The judgment of the Kyiv Commercial Court recited the provisions of Article 58 of the Ukrainian Banks Law, and noted that Star's claims were tortious in nature. The court continued:

> "From a systematic analysis of the above, the court came to the reasoned conclusion that Star Investment One LLC did not acquire the right to claim damages under the provisions of Article 58 of the Law of Ukraine on Banks and Banking, because under the contract of sale of property rights No. 09 from 22.02.2019 to the applicant passed exclusively property rights claims and other rights that have arisen/may arise from the contracts in the above list.
>
> At the same time, the court considers it necessary to note that for the application of such a measure of liability as compensation for harm, it is necessary to have all the elements of a civil offence, namely wrongful conduct, harm, causal link between the debtor's wrongful conduct and harm, the debtor's fault. … Star Investment One LLC did not provide the existence of the above-mentioned components of the civil offence with proper and admissible evidence."

31. It appears, therefore, that the court essentially upheld the objections advanced by both Mr Tyshchenko and the Deposit Guarantee Fund. The court accordingly refused Star's claim to be recognised as a creditor in the insolvency proceedings.

32. I will discuss the implications of the judgment further below. As a preliminary point, however, it should be noted that while both Mr Machell and Mrs Tyshchenko in their skeleton arguments for this hearing contended that the findings in the *Star* judgment gave rise to an issue estoppel in these proceedings, Mr Machell made clear in his oral submissions at the hearing that he no longer pursued that argument. Mrs Tyshchenko did not expressly disavow the point, but she did not make any submissions on this at the hearing.

33. In my view it was correct for this point not to be pursued. The issue before the Kyiv Commercial Court was whether Star should be recognised as a creditor of Mr Tyshchenko on the basis of Article 58 of the Ukrainian Banks Law, whereas the present proceedings are civil claims advanced under Article 1166 of the Ukrainian Civil Code. Accordingly, Dr Tsiura said in his second report that as a matter of Ukrainian law the *Star* judgment would not preclude the present civil claim by WWRT. He also opined that in so far as the *Star* judgment could be described as giving rise to *res judicata* at all (in circumstances where it was an interlocutory judgment in the insolvency proceedings), the only point that could be regarded as *res judicata* was the question of the recognition of Star as a creditor of Mr Tyshchenko. The Defendants did not put forward any expert evidence to

contradict that analysis. On the basis of the evidence before me, therefore, no issue estoppel arises.

THE JURISDICTION APPLICATION

The parties' submissions

34. It is convenient to start with the jurisdiction application advanced by Mr Tyshchenko, since if successful that will also be determinative of the other orders sought against Mr Tyshchenko.

35. Mr Machell accepted that the court has jurisdiction to entertain a claim against Mr Tyshchenko on the basis that he was validly served in England. He nevertheless submitted that the court should exercise its discretion to stay the proceedings against Mr Tyshchenko on various grounds:

    i) He contended that under Ukrainian law claims such as the present may only be adjudicated within the existing Ukrainian insolvency proceedings opened on 9 December 2019. On that basis, he submitted that these proceedings should be stayed as a matter of common law so as to prevent WWRT from circumventing the Ukrainian insolvency process. He relied in this regard on the principle of "modified universalism", which he said should apply irrespective of whether the court has jurisdiction under Article 4 of the Brussels Regulation (Recast) (**BRR**). In support of such a stay Mr Machell also referred to the pending English bankruptcy proceedings and the pending application by the Ukrainian debt restructuring manager for recognition by the English courts of the Ukrainian insolvency proceedings.

    ii) In the alternative, he suggested that a stay could be granted by analogy with Article 34 of the BRR.

    iii) He also submitted that Mr Tyshchenko is not domiciled in the UK, and that the court should therefore stay the proceedings in favour of Ukraine on *forum non conveniens* grounds.

36. The Claimant's submissions on jurisdiction were advanced by Mr Ayres and Mr Munby, as follows:

    i) Mr Ayres contended that Mr Tyshchenko is domiciled in the UK, giving the court jurisdiction under Article 4, and precluding any challenge on *forum non conveniens* grounds. He submitted that this would also preclude a common law stay on the basis of modified universalism.

    ii) Mr Ayres submitted that in any event the court should not exercise its discretion to stay the proceedings on the basis of modified universalism, since on a correct interpretation of Ukrainian law the English proceedings do not conflict with the Ukrainian insolvency proceedings. He also referred to other factors which he said weighed against the grant of a stay on these grounds. These included, in particular, the contention (developed by Mr

Munby) that Mr Tyshchenko had submitted to the jurisdiction by applying for a preliminary issue trial at the hearing before Meade J.

iii) Mr Ayres rejected any application of Article 34 of the BRR by analogy, both on the basis that bankruptcy/insolvency proceedings are expressly excluded from the BRR, and on the basis that there is no risk of irreconcilable judgments in any event.

iv) Mr Munby submitted that even if Mr Tyshchenko is not domiciled in the UK, any challenge on the grounds of *forum non conveniens* should be dismissed.

37. The issues are therefore as follows:

i) Whether Mr Tyshchenko is domiciled in the UK.

ii) If so, whether it is open to the court to stay these proceedings at common law, to give effect to and assist the Ukrainian insolvency proceedings.

iii) If it is open to the court to stay the proceedings, whether the court should exercise its discretion to do so.

iv) Whether a stay should, in the alternative, by granted by analogy with Article 34 of the BRR.

v) Whether the court should stay these proceedings on the basis of *forum non conveniens*, if Mr Tyshchenko is not domiciled in the UK.

Whether Mr Tyshchenko is domiciled in the UK

38. Article 4(1) of the BRR provides that "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". Under Article 62(1) of the BRR, the issue of domicile is determined by the internal law of the Member State in question; and under the Civil Judgments and Jurisdiction Order 2001, Schedule 1, §9 an individual is domiciled in England if they are resident in England and the nature and circumstances of their residence indicate that they have a substantial connection with England.

39. Mr Tyshchenko accepts for these purposes that if he is found to be resident in England then the nature and circumstances of that residence would indicate a substantial connection with England. The dispute between the parties is therefore solely as to whether Mr Tyshchenko was resident in England on the relevant date, namely the date of issue of the claim form: see *Bestolov v Povarenkin* [2017] EWHC 1968 (Comm), §25. In this case the claim form was issued on 4 September 2020.

40. For the purposes of this application, it is for WWRT to establish that there is a good arguable case that Mr Tyshchenko was resident in England on that date: *Bestolov*, §26. In considering whether there is a good arguable case, the central concept is a requirement for a "plausible evidential basis": see *Kaefer*

Aislamientos v AMS Drilling [2019] EWCA Civ 10, [2019] 1 WLR 3514, §§73–80.

41. As to the factors to be taken into account in making that assessment, I gratefully adopt the propositions summarised by Simon Bryan QC (sitting as a Deputy High Court Judge) in *Bestolov*, §44. These are as follows, with additional references to the sources cited at §§27–43 of that judgment:

    i) It is possible for a defendant to reside in more than one jurisdiction at the same time: *Levene v Commissioners of Inland Revenue* [1928] AC 217, 222–3.

    ii) It is possible for England to be a jurisdiction in which a defendant resides, even if it is not their principal place of residence (i.e. even if they spend most of the year in another jurisdiction): *Levene* p. 223.

    iii) A person will be resident in England if England is for them a settled or usual place of abode, which connotes some degree of permanence or continuity: *Dubai Bank v Abbas* [1997] ILPr 308, §§10–11.

    iv) Residence is not to be judged according to a "numbers game". Rather, it is appropriate to address the quality and nature of a defendant's visits to the jurisdiction: *High Tech International v Deripaska* [2006] EWHC 3276 (QB), §24.

    v) Whether a defendant's use of a property characterises it as their "residence" is a question of fact and degree: *Varsani v Relfo* [2010] EWCA Civ 560, §27.

    vi) In deciding whether a defendant is resident here, regard should be had to any settled pattern of their life in terms of their presence in England and the reasons for that: *Varsani*, §§29–30.

    vii) If a defendant visits a property in England on a regular basis for not inconsiderable periods of time, in order to see their spouse and children (including where the centre of the defendant's relationship with their children is England), such property has the potential to be regarded as the family home or their home when in England, which may support the conclusion that England is for them a settled or usual place of abode, and that they are resident in England: *Varsani*, §§27–32.

42. It is common ground that Mr Tyshchenko was resident in England, where he lived at Tanglewood Villa with Mrs Tyshchenko and their children, from 2001 until around March 2013 when he separated from Mrs Tyshchenko. Since then, however, Mr Tyshchenko says that he has been resident in Ukraine rather than England and has (as Mr Machell put it in his skeleton argument) only a "residual connection" with England on the basis of his visits to his ex-wife and children.

43. I do not need to form a view about Mr Tyshchenko's residence throughout the period since 2013; rather, it is necessary to decide whether there is a good

arguable case of residence in England as at 4 September 2020. On the basis of the factors set out above, I have no hesitation in concluding that this is the case.

44. First, Mr Tyshchenko's evidence was that he has full visitation rights as part of his divorce, pursuant to which he visits his children at weekends whenever possible. He said that in 2020 he typically saw his children around twice a month for 2–3 days over each weekend. During the first national lockdown due to the Covid-19 pandemic, however, he remained in England continuously from March to May 2020. His evidence was that initially following his divorce from Mrs Tyshchenko he would stay at a hotel when visiting his children, but that "for more recent visits" he stayed at Tanglewood Villa. That evidence in itself indicates that Mr Tyshchenko is resident in England, since it demonstrates a settled pattern of visits to England for the purposes of spending time with his family, in circumstances where (on Mr Tyshchenko's own evidence) the centre of his relationship with his children is in England.

45. Secondly, although Mr Tyshchenko said that he returned to Ukraine from May to June 2020, he was then apparently back at Tanglewood Villa from 16 June to 9 July 2020 while Mrs Tyshchenko was at a clinic in Germany. Mr Tyshchenko was then observed at Tanglewood Villa on 4 September 2020 and was served with the freezing order at his nearby golf club on 5 September 2020. That confirms Mr Tyshchenko's continued regular residence in England up to and including the relevant date of 4 September 2020.

46. Thirdly, a record of Mr Tyshchenko's air travel to and from Ukraine based on Ukrainian border control documentation (which Mr Tyshchenko has not disputed) and analysed by Ms Gutovska indicates, according to her evidence, that Mr Tyshchenko spent around 247 days in the UK between 27 August 2018 and 23 August 2020, and that from September 2018 until the start of 2020 Mr Tyshchenko consistently flew to London for between 2 and 5 weekends a month, typically remaining for 3–4 days each time. That suggests that if anything Mr Tyshchenko's evidence understated the frequency of his visits to England during that period.

47. Fourthly, in the course of the proceedings which led to the UK bankruptcy petition that I have referred to above, Mr Tyshchenko's solicitors confirmed in correspondence on 31 July 2019 that Mr Tyshchenko was "a UK resident" and repeatedly stated that Tanglewood Villa was his "home address". In related proceedings in Ukraine, Mr Tyshchenko filed an application on 13 August 2019 which stated unequivocally that (in translation): "The place of residence of the Defendant is the United Kingdom. Now, the Defendant is in the process of waiving Ukrainian citizenship." There is nothing in the evidence before me to indicate a material change in Mr Tyshchenko's position in this regard between July/August 2019 and September 2020; on the contrary it appears that the Covid pandemic led him to spend even more time in England during 2020 than he might otherwise have done.

48. Fifthly, data from searches linked to the UK electoral roll register indicate that Mr Tyshchenko has been registered on the electoral roll at Tanglewood Villa from 2016 to at least February 2021 (when the most recent search was conducted), with an Experian credit search indicating various active credit accounts listed in his

name at that property including a credit card, current account, utilities and two accounts described as "communications".

49. All of the above indicates that as at 4 September 2020 Mr Tyshchenko had a settled pattern of residence at Tanglewood Villa, which was and remains the family home. As the case-law indicates, his residence at that property is not undermined by the fact that he also spent substantial periods of time outside the UK. Even if England were not to be regarded as Mr Tyshchenko's principal place of residence (as to which I do not reach any conclusion) the facts indicate that it is at the very least one of Mr Tyshchenko's places of residence.

50. It follows that Mr Tyshchenko is domiciled in England for the purposes of Article 4 of the BRR.

Availability of a stay at common law if domicile is established

51. The next question is therefore whether, once the provisions of Article 4 are found to have been engaged, the court may nevertheless stay these proceedings at common law, in order to give effect to and assist the pending Ukrainian insolvency proceedings.

52. Mr Machell submitted that this court could and should do so. He accepted that jurisdiction under Article 4 would exclude any challenge on *forum non conveniens* grounds, following the judgment of the CJEU in *Owusu v Jackson* EU:C:2005:210, [2005] QB 801. He said, however, that the CJEU in that case had not addressed the question of whether a domestic court could nevertheless stay its proceedings in favour of insolvency proceedings that had already commenced in another Member State. The principle at work in such a case was not, he said, an argument of *forum non conveniens*, but rather the common law principle of modified universalism, which carries with it the requirement to provide active assistance to a foreign insolvency proceeding.

53. The principle of modified universalism was articulated by Lord Hoffmann in *In re HIH Casualty and General Insurance* [2008] 1 WLR 852, adopting the label devised by Professor Jay Westbrook, an American writer on international insolvency. At §30 Lord Hoffmann commented that:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

54. Lord Sumption cited that passage in *Singularis Holdings v PriceWaterhouseCoopers* [2015] AC 1675, §16, continuing at §23:

> "The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of

> foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. … The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can."

55. There is no dispute that a stay on the basis of this principle is (as Mr Machell submitted) conceptually different from a stay on the basis of the principle of *forum non conveniens*. The question is whether this difference allows the present situation to be distinguished from that in *Owusu*.

56. *Owusu* specifically concerned the availability of a stay on grounds of *forum non conveniens* in a case where the court had jurisdiction under Article 2 of the Brussels Convention, the equivalent provision to what is now Article 4 of the BRR. The CJEU considered that the court could not decline jurisdiction on grounds of *forum non conveniens* in such a case. The reasons for reaching this conclusion were, in particular, the mandatory nature of Article 2 and respect for the principle of legal certainty, both of which would be undermined by the exercise of a wide discretion to stay the proceedings on grounds of *forum non conveniens*:

> "37. It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention … It is common ground that no exception on the basis of the *forum non conveniens* doctrine was provided for by the authors of the Convention …
>
> 38. Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention … would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine.
>
> 39. According to its preamble, the Brussels Convention is intended to strengthen in the Community the legal protection of persons established therein, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before which proceedings in a particular case may be brought ...
>
> 40. The Court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels

> Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued …
>
> 41. Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention."

57. In principle, it seems to me, those considerations would apply equally to the question of whether a discretionary stay on the grounds of the principle of modified universalism is available in a case where the court has jurisdiction under Article 4 of the BRR. The question is whether the particular nature of insolvency proceedings requires a different approach.

58. In that regard, it is important to note that Article 1 of the BRR specifically excludes (among other things) bankruptcy and insolvency proceedings from the scope of the BRR. The rationale for that exclusion was that the "peculiarities" of bankruptcy require special rules relating to jurisdiction and recognition – precisely the problem that is addressed by the principle of modified universalism, and reflected in the Recast Insolvency Regulation (EU) 2015/848 and the UNCITRAL Model Law on cross-border insolvency: see the recent discussion of Zacaroli J in *Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), §§87–98.

59. The particular nature of insolvency proceedings is thus addressed by taking such proceedings out of the scope of the BRR altogether. That indicates that in a case where the proceedings *do* fall within the scope of the BRR, Article 4 must be regarded as mandatory save for the express exceptions set out elsewhere in the BRR. It is common ground that the present proceedings do not fall within the bankruptcy/insolvency exclusion in Article 1 of the BRR (or indeed any of the other exclusions in that Article). It follows, in my judgment, that jurisdiction under Article 4 cannot be avoided by a common law stay on the basis of modified universalism.

60. That proposition does not preclude the power of the court to grant a *temporary* stay of proceedings on case management grounds. The principles on which such a stay might be granted were set out by Bryan J in *MAD Atelier International v Manès* [2020] QB 971, §82, noting in particular that (1) a stay should only be granted in "rare and compelling circumstances", (2) the risk of inconsistent judgments will not justify a stay where the court has jurisdiction under the BRR, and (3) a case management stay should not be used to undermine the jurisdiction conferred on the court by the BRR. Essentially the same points were made in *Jefferies International v Landsbanki Islands* [2009] EWHC 894 (Comm), §§27–29 in relation to the question of a temporary case management stay where jurisdiction had been established under the Lugano Convention.

61. Mr Machell did not suggest that a temporary case management stay should be granted in the present case. His submission was rather that a stay on the basis of the principle of modified universalism was similar in nature to the residual power of the court to grant a stay on case management grounds. I disagree. A temporary stay on case management grounds is conceptually different from an indefinite stay in favour of insolvency proceedings in another jurisdiction on the basis of the principle of modified universalism. Moreover, it is notable that even in the rare circumstances where a case management stay might be granted, the courts have emphasised that it should not be used to undermine (or "cut across": *Jefferies International*, §27) the establishment of substantive jurisdiction under the BRR or the Lugano Convention. It follows *a fortiori*, in my view, that the principle of modified universalism should likewise not be used to circumvent the effect of Article 4 of the BRR.

Exercise of discretion to grant a stay

62. Even if (contrary to the view that I have reached above) a stay could in principle be granted under common law on the basis of the principle of modified universalism, notwithstanding jurisdiction under Article 4 of the BRR, it follows from the (pre-*Owusu*) judgment in *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966, §§70–71, that the court should in any event only exercise its discretion to grant such a stay where there are "exceptional circumstances" or "exceptionally strong grounds" to do so.

63. Three main issues arise from the parties' arguments as to the exercise of my discretion in this case: (a) whether the pursuit of WWRT's claims in this court is contrary to the scheme of the Ukrainian insolvency process; (b) the impact of the pending English bankruptcy proceedings and the applications for recognition of the Ukrainian proceedings; and (c) (if relevant) whether other factors such as submission to the jurisdiction suggest that a stay should *not* be granted.

The scheme of the Ukrainian insolvency process

64. It is common ground that under the provisions of the Ukrainian Bankruptcy Code, once insolvency proceedings have been opened in relation to a debtor (as occurred on 9 December 2019), Article 120 of the Bankruptcy Code provides that creditors may file claims against the debtor and such claims may be satisfied only within the framework of those insolvency proceedings.

65. Mr Machell's submission was that WWRT was a creditor of Mr Tyshchenko within the meaning of the Bankruptcy Code, such that any claim by it would have to be brought (if at all) within the framework of the pending insolvency proceedings. The fact that the Kyiv Commercial Court dismissed Star's application to be recognised as a creditor within those proceedings, which would bind WWRT as Star's successor in title, did not in his submission undermine this point; if anything Mr Machell said that this reinforced the need for a stay to avoid WWRT attempting to circumvent the Ukrainian proceedings by bringing proceedings in this jurisdiction.

66. Mr Ayres said that there was no inconsistency between these proceedings and the Ukrainian insolvency proceedings, since WWRT does not qualify as a "creditor"

within those proceedings. That is because a creditor is defined in Article 1 of the Ukrainian Bankruptcy Code as someone who has "claims for monetary obligations to the debtor", and the same article defines a monetary obligation as "the obligation of the debtor to pay to the creditor a certain amount of money in accordance with a civil law transaction (agreement) and on other grounds provided by the legislation of Ukraine." Dr Tsiura says in his second report that this means that the creditor must indisputably have a debt outstanding from the debtor, referring in this regard to various judgments of the Ukrainian Supreme Court. Accordingly, Dr Tsiura says, WWRT is not a creditor of Mr Tyshchenko for these purposes and Star should not have filed a claim in the insolvency proceedings. Rather, even if Star/WWRT's claim against Mr Tyshchenko were to be brought in Ukraine, it would have to be tried outside the insolvency process. It follows, Mr Ayres submitted, that there is no conflict between the Ukrainian insolvency proceedings and the present proceedings.

67. Mr Machell disputed the Ukrainian Supreme Court decisions cited by Dr Tsiura, which he said concerned a different point: that insolvency proceedings could only be *initiated* by a creditor whose claim was undisputed. There was, he said, nothing in the Ukrainian Bankruptcy Code to suggest that in an insolvency process that had been initiated (as in the present case) by the debtor, any claims brought by creditors had to be undisputed. He also submitted that Dr Tsiura's interpretation of the Bankruptcy Code and case-law was untenable in light of the terms of the *Star* judgment.

68. The question of Ukrainian law as to whether a creditor can bring a disputed tort claim within the framework of an insolvency procedure under the Bankruptcy Code is not for me to resolve definitively at the present hearing. For present purposes, the question is only whether Mr Tyshchenko has provided sufficient evidence of the "exceptionally strong grounds" required for the exercise of a discretion to stay these proceedings on the basis of a potential inconsistency with the Ukrainian insolvency proceedings.

69. I am not satisfied, on the basis of the material before me, that such grounds have been demonstrated. Mr Machell fairly accepted that the arguments on which he relied to dispute Dr Tsiura's conclusions were his own and not those of the Defendants' experts. While some of what he said was, he suggested, implicit in some of the Defendants' expert reports, none of those reports directly address Dr Tsiura's analysis of the definition of a creditor, nor do those reports comment on the Ukrainian case-law on this point to which Dr Tsiura refers.

70. Nor is it apparent from the material before me that Dr Tsiura's definition of a creditor within the meaning of the Bankruptcy Code is so obviously wrong that I should reject it even in the absence of expert evidence from the Defendants on this point. Mr Machell did not contend that Dr Tsiura's analysis was directly and expressly contradicted by the face of the provisions of the Bankruptcy Code; rather his submission was based on contextual inferences from various provisions of the Bankruptcy Code, as well as his submissions as to the interpretation of the case-law referred to by Dr Tsiura. That is an insufficiently robust basis for the summary rejection of Dr Tsiura's evidence on this point, particularly given the absence of any expert analysis of the surrounding provisions of the Bankruptcy Code on which Mr Machell relied, and the fact that the case-law in question is set

out only in partial extracts in the report of Dr Tsiura. While Mr Machell criticised the scope of Dr Tsiura's expert reports in this regard, that criticism was inevitably double-edged, because it highlighted the danger of rejecting the expert evidence without a full picture of the relevant source material, and without being able to put further questions to the experts in cross-examination.

71. As for the submission that the *Star* judgment is inconsistent with Dr Tsiura's definition of a creditor, the problem is that the judgment does not address this point. Again, therefore, Mr Machell's submission of inconsistency had to be based on inferences from the way in which the Kyiv Commercial Court dealt with the issues that were before it. That is an inherently unpromising foundation for the "exceptionally strong grounds" that he is required to establish. I also note that the reasoning in the *Star* judgment, even on the issues that it does cover, is expressed so tersely that it is in my view not possible to draw any definitive conclusions as to the definition of a creditor on which that reasoning might rest. In those circumstances I do not consider that the terms of this judgment are sufficiently obvious as to enable Dr Tsiura's evidence to be rejected on this basis.

72. Finally on this point, I note that while Mr Machell submitted that it would be "utterly perverse" for any insolvency process to deal only with liabilities that had been crystallised in a judgment or agreement, while leaving uncrystallised claims untouched, Mr Ayres pointed out in response that under English insolvency law, until the Insolvency Act 1986, unliquidated tort claims were likewise not provable in bankruptcy or the winding up of an insolvent company, and such claims therefore survived a bankruptcy: see *In re T&N* [2005] EWHC 2870 (Ch), §85.

73. I therefore do not consider that the evidence before me establishes sufficiently strong grounds to stay these proceedings so as to avoid inconsistency with the Ukrainian insolvency proceedings.

The English bankruptcy proceedings and application for recognition

74. Mr Machell also submitted that a stay should be granted in light of the pending English bankruptcy proceedings and application for recognition of the Ukrainian insolvency proceedings, to which I have referred above.

75. It is common ground that if the English bankruptcy petition is successful, the court will have a power to stay these proceedings under s. 285 of the Insolvency Act 1986. In addition, Mr Machell contended that if the application of the Ukrainian debt restructuring manager for recognition of the Ukrainian insolvency proceedings in this jurisdiction is successful, and if the Ukrainian proceedings are regarded as a "foreign main proceeding", then the effect of recognition would be an automatic stay of the present proceedings pursuant to Article 20(1) of the UNCITRAL Model Law, as given effect by the Cross-Border Insolvency Regulations 2006.

76. On that basis Mr Machell submitted that regardless of the view that the court takes of the Ukrainian insolvency proceedings, no proper purpose would be served by allowing this claim to continue.

77. I disagree. In the first place, the effect of recognition of the Ukrainian proceedings is disputed by the Claimants, and that will be a matter to be resolved (if it arises) in the recognition proceedings. Quite apart from that, and more importantly, the fact that there are specific statutory mechanisms under which a stay can be sought indicates that any stay should be pursued by those mechanisms, rather than seeking to pre-empt the outcome of those procedures by a discretionary stay in these proceedings. The existence of the English bankruptcy proceedings and application for recognition is therefore a factor going against the existence of the "exceptionally strong grounds" under the test in *Mazur Media*, rather than a factor supporting a stay at this stage.

Submission to the jurisdiction

78. Since I have rejected the two bases on which Mr Machell submitted that a common law stay on grounds of modified universalism should be granted, I do not need to consider the other arguments advanced by Mr Ayres and Mr Munby opposing such a stay. Nevertheless, since there was considerable argument on the question of whether Mr Tyshchenko had submitted to the jurisdiction, I will address this point for completeness.

79. Mr Munby contended that Mr Tyshchenko had submitted to the jurisdiction of the court by seeking a trial of preliminary issues of Ukrainian law at the hearing before Meade J on 3 December 2020. While this did not in itself oust the court's power to grant a stay as a matter of common law, Mr Ayres submitted that it would be highly exceptional as a matter of discretion to grant a stay in favour of someone who had already submitted to the jurisdiction in full knowledge of the Ukrainian proceedings.

80. Mr Munby relied on the judgment of the Court of Appeal in *The Messiniaki Tolmi* [1984] 1 Lloyd's LR 266, p. 270, in which it was said that a party "makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of the proceedings." In that case the defendant's application for strike out was held to be a voluntary submission to the court.

81. It is, however, established that the conduct on which submission to the jurisdiction is founded must amount to "wholly unequivocal" conduct demonstrating an intention to have the case tried in this jurisdiction: *SMAY Investments v Sachdev* [2003] EWHC 474 (Ch), §41. Patten J went on to comment in that case that the order sought could "only operate as an unequivocal submission to the jurisdiction if the only possible explanation for it is an intention on the part of the first defendant to have the case tried in England."

82. In the present case, Mr Tyshchenko's conduct did not unequivocally recognise the court's jurisdiction. Quite the contrary, the Defendants had filed an acknowledgement of service indicating an intention to contest jurisdiction, and the Defendants then made an application *not* directly for a trial of a preliminary issue, but rather for:

> "directions of the Court to direct the orderly conduct of the matter generally in the light of the Defendants' contemplation and anticipation of making an Application to determine the proceedings on the basis of evidence of Ukrainian law (whether by way of application to strike out the claim or by way of trial of a preliminary issue or otherwise) (without prejudice to their right to later file an Application to contest jurisdiction)".

83. Mrs Tyshchenko's witness statement, filed in support of that application, reiterated that the Defendants sought to reserve their rights to challenge jurisdiction:

> "Any Application to determine the proceedings on the basis of evidence of Ukrainian law (whether by way of application to strike out the claim or by way of trial of a preliminary issue or otherwise) would be made without prejudice to the Defendant's right to later file any Jurisdiction Application. I wish to expressly reserve that right as the Defendants currently maintain their position as to jurisdiction.
>
> However, if the anticipated Application would be seen to be submitting to the Jurisdiction, the Defendants may decide against making it, subject to taking further advice. …"

84. A subsequent letter sent by the Defendants to the court on 23 November 2020 explained the rather odd form of the application (purporting to seek "directions" rather than formally seeking a preliminary issue trial) as being an attempt to avoid submission to the jurisdiction:

> "We have not formally applied for an order for trial of a preliminary issue lest it be suggested that that was a submission to the jurisdiction, but we therefore ask the Court to order such a trial on the explicit footing that there is no such submission to the jurisdiction."

85. Consistent with that objective, the skeleton argument of Mr Aldridge on behalf of the Defendants for the hearing before Meade J sought an order that there should be a preliminary issue trial on issues of Ukrainian law "without Ds having submitted to the jurisdiction".

86. The Defendants' application for a preliminary issue was therefore expressly made on the basis that it would not amount to submission to the jurisdiction. Meade J rejected that course, precisely because he considered it to be "unsound in principle" for a preliminary issue to be tried (and potentially then to go on appeal), only for the Defendants to say that the court did not have any jurisdiction anyway. As he noted, Mr Aldridge had not identified any case in which a preliminary issue had been ordered to finally determine the parties' substantive rights, whilst holding the question of jurisdiction in abeyance: [2020] EWHC 3584 (Ch), §§14–15. Meade J therefore directed that the case should "follow the conventional course" of determining jurisdiction first, before considering the continuation of the freezing order.

87. There is no suggestion in the judgment of Meade J that the Defendants had already submitted to the jurisdiction simply by making their "directions" application on the basis that it was put. That does not of course preclude me from reaching a different conclusion on the basis of the arguments before me now. But in the circumstances set out above it is quite clear that the Defendants had not submitted to the jurisdiction, did not intend to do so, and nor did Meade J understand them to have done so: indeed the fact that the Defendants maintained their jurisdiction challenge was the very reason why Meade J refused to proceed with a preliminary issue trial.

88. I therefore reject WWRT's contention that Mr Tyshchenko submitted to the jurisdiction by advancing the application for "directions" for a preliminary trial before Meade J. As noted above, however, that does not change the overall conclusion which is that I would have dismissed the application for a stay on the grounds of modified universalism, even if a stay on this basis were available where the court has jurisdiction under Article 4 of the BRR.

Reflexive or analogous application of Article 34

89. Mr Machell's alternative argument, not foreshadowed in his skeleton argument but developed at the hearing, was that a stay could be granted "by analogy" with Article 34 of the BRR. Article 34(1) provides:

> "Where jurisdiction is based on Article 4 … and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice."

90. Mr Machell accepted for the purposes of this hearing (while reserving the right to argue the contrary in due course) that the bankruptcy exclusion in Article 1 of the BRR precludes the express application of Article 34 if the pending action in the third State is in the nature of bankruptcy or insolvency proceedings. That proposition was also common ground before Andrew Baker J in *BB Energy (Gulf) v Hussein Al Amoudi* [2018] EWHC 2595 (Comm): see §15. Mr Machell nevertheless contended that Article 34 could be applied by analogy to such a case on a similar basis to the way in which Article 28 of the Lugano Convention was applied by analogy, or reflexively, to pending proceedings in Ukraine, in *JSC Commercial Bank v Kolomoisky* [2019] EWCA Civ 1708, §§159–181.

91. Even leaving aside the very late emergence of this argument, I do not think that it is a good one. In *Kolomoisky* Article 28 of the Lugano Convention was given reflexive or analogous effect to pending proceedings in Ukraine, in order to address the problem of the lacuna that would otherwise have arisen from the fact that Article 28 expressly applies only to related actions pending in the courts of different States bound by the Convention. The Court of Appeal considered that applying this reflexively to pending proceedings in a third State would not subvert the objectives of the Convention, but would on the contrary further its purposes, by achieving legal certainty and avoiding the risk of inconsistent judgments (§§177–178). In so doing the court approved the approach taken by Andrew Smith J in *Ferrexpo v Gilson Investments* [2012] EWHC 721 (Comm), [2012] 2 Lloyd's Rep 588.

92. The problem that the reflexive application of Article 28 of the Convention was thus designed to avoid, in *Kolomoisky*, does not arise in the present case, since Article 34 of the BRR now specifically addresses proceedings in a third State. That, as the judge held in §23 of *BB Energy*, distinguishes the decision in *Ferrexpo* from a case concerning Article 34 of the BRR; and the same must be true of the subsequent judgment in *Kolomoisky*.

93. Mr Machell's argument therefore advances a rather different proposition to that in issue in *Ferrexpo* and *Kolomoisky*: that Article 34 should be applied to proceedings which he accepts are expressly excluded from the scope of the BRR.

94. I do not consider that this would be a proper extension of Article 34. It would not fill a lacuna or apply Article 34 in a way that would further the purpose of the BRR. Rather, it would apply Article 34 to a situation deliberately *excluded* from the scope of the jurisdictional rules of the BRR.

95. Furthermore, even if Article 34 could potentially be applied by analogy or reflexively in this case, I am not satisfied that the present proceedings are "related" to the pending insolvency proceedings in the Kyiv Commercial Court in a way that could create a risk of irreconcilable judgments. These are not insolvency proceedings, but are civil claims in damages brought on a legal basis (Article 1166 of the Ukrainian Civil Code) that on the basis of the materials before me does not appear to be in issue in the Ukrainian insolvency proceedings. Indeed Dr Tsiura's second report states that a civil claim brought under Article 1166 *cannot* be tried within the framework of the Ukrainian insolvency proceedings. Moreover, the dismissal of Star's application to be recognised as a creditor in the Ukrainian insolvency proceedings means that the specific claims at issue in the present proceedings will in any event certainly not be tried in the course of the Ukrainian insolvency proceedings.

96. Nor, for the reasons set out above, do I consider that there is sufficient evidence before me to enable me to conclude that these proceedings are more generally inconsistent with the scheme of the Ukrainian insolvency proceedings.

97. I would not, therefore, have been inclined to stay the proceedings on the basis of an analogous or reflexive application of Article 34, even if that course were open to me.

Forum non conveniens

98. It follows from my findings on domicile under Article 4 of the BRR that the issue of *forum non conveniens* does not arise. If the issue had arisen, however, I would not have been inclined to grant a stay on this basis.

99. The primary submissions of Mr Machell under this head turned on his contentions regarding the scheme of the Ukrainian insolvency process which, for the reasons set out above, I have found to be insufficiently compelling on the evidence before me to grant a stay on the basis of the principle of modified universalism. The same applies to any stay on grounds of *forum non conveniens*.

100. Mr Machell's other submission was that the connections in the case are overwhelmingly with Ukraine. I agree (indeed it cannot seriously be disputed) that the central issues in the claim turn on Ukrainian law. As Mr Munby said, however, that does not mean that Ukraine is "clearly or distinctly" the more appropriate forum (using the classic formulation in *The Spiliada* [1987] AC 460, p. 477), given the fact that WWRT is an English company; expert evidence can readily be obtained on the issues of Ukrainian law, as the present hearing demonstrates; and significant effort and resource has already been spent on pursuing the proceedings in this jurisdiction including the translation of large numbers of banking documents into English.

101. In addition, while it follows from the decision of the Supreme Court in *Vedanta Resources v Lungowe* [2019] UKSC 20, that the presence of a co-defendant who is undoubtedly domiciled in the jurisdiction (in this case Mrs Tyshchenko) is not a "trump card" (§84), the court confirmed that this remains a relevant and important factor in the task of identifying the proper place to bring the claim (§69); see also Flaux LJ in *ED & F Man Capital Markets v Straits (Singapore)* [2019] EWCA Civ 2073, §43. I consider that this is a very significant factor, in this case, in favour of maintaining the proceedings in this jurisdiction, given that WWRT's claim turns on the same facts in relation to both Defendants, and where the Defendants' roles in the alleged tortious acts are said to have been substantially intertwined.

CONTINUATION OF THE FREEZING ORDERS

The parties' submissions

102. Mr Tyshchenko's main basis for resisting the continuation of the freezing order was his jurisdictional challenge, which I have dismissed. As a fallback position, Mr Machell submitted on the first day of the hearing that even if the stay application was dismissed, the freezing order should be set aside on the grounds that even if the *Star* judgment did not give rise to an issue estoppel, it was clear from that judgment that the tort claims advanced by WWRT in these proceedings were not assigned to Star (and in turn to WWRT), such that WWRT did not have a good arguable case on the merits. On the second day of the hearing Mr Machell confirmed that he no longer pursued that argument. He did, however, maintain that the freezing order should be set aside on grounds of breaches of the duty of full and frank disclosure at the without notice application, particularly in relation

to the information that was given about the Ukrainian insolvency proceedings and the *Star* judgment.

103. Mrs Tyshchenko's skeleton argument focused on the merits of WWRT's claim, advancing the point on assignment of tortious rights that had also initially been pursued by Mr Tyshchenko. She also submitted that the limitation period under Ukrainian law had expired, and that as a matter of fact she had no material connection to Fortuna Bank and the disputed loans. In Mrs Tyshchenko's oral submissions she contended that Article 1166 of the Ukrainian Civil Code did not create a freestanding liability in tort, that fraud is not a civil law concept under Ukrainian law but is only actionable under criminal law, that a criminal investigation had been conducted in relation to the disputed loans and had concluded in 2019, that the evidence relied upon by WWRT in these proceedings had been obtained illegally, and that there were false statements in the affidavits filed by Ms Gutovska. In addition, if the freezing order was continued and not discharged, Mrs Tyshchenko requested the fortification of WWRT's cross-undertaking in damages and the variation of the freezing order to enable her to continue to carry out normal banking operations through her current account (including using electronic transfers).

Good arguable case

104. My judgment of 4 September 2020 set out the reasons why I considered there to be a good arguable case under Article 1166 of the Ukrainian Civil Code: see [2020] EWHC 2409 (Ch), §§13–16. I do not consider that the matters referred to in Mrs Tyshchenko's submissions displace that conclusion.

105. As with the test for a jurisdictional gateway, the question of whether there is a good arguable case turns on whether there is a "plausible evidential basis", in this case for the underlying claim: see §40 above and *Lakatamia Shipping v Toshiko Morimoto* [2019] EWCA Civ 2203, [2020] 2 All ER (Comm) 359, §38. I will consider the various matters relied upon by Mrs Tyshchenko on that basis.

106. Article 1166 as a freestanding tort. The question of whether Article 1166 gives rise to a freestanding cause of action in tort is pre-eminently a matter for expert evidence at trial. For present purposes, the evidence of Dr Tsiura is that Article 1166 is indeed a freestanding tort under Ukrainian law; indeed he describes the Defendants' suggestion that Article 1166 must be combined with another specific provision as "nonsense", and says that there are thousands of claims that have relied solely upon Article 1166. Mrs Tyshchenko's contrary submissions relied upon the expert report of Dr Berveno, but for the reasons discussed above I do not consider that any weight can be placed on that report for the purposes of this hearing. While Mrs Tyshchenko also advanced what were essentially legal submissions of her own on this point, that cannot be regarded as an adequate substitute for an expert report, as I have already noted; and in any event her submissions were rather limited and did not materially engage with Dr Tsiura's evidence on this point. I therefore have no hesitation in concluding that WWRT has established a good arguable case in this regard.

107. Assignment of rights under Article 1166. Dr Tsiura's evidence – set out in his first report and maintained in his second report – is that the rights of claim against

the Defendants under Article 1166 were transferred to Star/WWRT under the assignments of the assets purchased in turn by those companies. The contrary evidence of Mr Moroz is that tortious rights were not transferred to Star, since under Ukrainian law tort liabilities are specific to the injured person. He says that this is supported by the terms of the *Star* judgment. (The assignment issue is also addressed by Dr Selivanov and Dr Berveno, but I do not place any weight on their evidence for the reasons already discussed.)

108. The dispute between the experts on this point is not something that I can resolve at this hearing on the evidence before me. I accept that (even if not *res judicata* for the purposes of these proceedings) the reasoning in the *Star* judgment may well be relevant in due course to the assignment issue. But the terms of that judgment do not come close to being so unequivocal that I could, on that basis, reject Dr Tsiura's evidence as being implausible. On its face, the judgment turns on a claim to damages brought under Article 58 of the Ukrainian Banks Law, and the court apparently considered that this claim was not assigned to Star. But the judgment makes no reference to Article 1166 of the Ukrainian Civil Code, and Dr Tsiura's evidence is that Articles 58 and 1166 are provisions of very different nature that give rise to entirely different claims. That is one of the reasons that Dr Tsiura considers that the *Star* judgment has no relevance to these proceedings. The report of Mr Moroz does not grapple with this point.

109. I therefore consider that WWRT has established a good arguable case, with a plausible evidential basis, that the rights under Article 1166 of the Ukrainian Civil Code were assigned to Star and in turn to WWRT, such that WWRT can claim damages in the present proceedings.

110. Civil/criminal liability in fraud. Mrs Tyshchenko's argument that liability for fraud can only be established by a criminal complaint is directly contradicted by the evidence of Dr Tsiura. Mrs Tyshchenko relied for this point on the evidence of Dr Berveno, which I do not consider to be reliable; and in any event Dr Berveno's claims in this regard are rebutted in detail in Dr Tsiura's second report, in terms that are entirely plausible. In similar vein Dr Tsiura also explains that the criminal investigation that was closed in 2019 found that there had been no criminal conduct, but did not in any way address fraud claims under the Ukrainian Civil Code (or indeed any other non-criminal matters). Mrs Tyshchenko did not adduce any expert evidence that addressed these aspects of Dr Tsiura's evidence. WWRT clearly has a good arguable case in respect of these issues.

111. Limitation. The submissions of WWRT at the without notice application properly recognised that the Defendants might seek to raise a limitation defence, based on the three-year limitation period under Article 257 of the Ukrainian Civil Code. This issue is addressed in both Dr Tsiura's first and second reports, which explain in particular that the limitation period starts to run when the claimant learned or could have learned of the infringement of its right, which Dr Tsiura considers did not occur until the analysis of the loan files and initial forensic report in June 2020.

112. Mrs Tyshchenko's submissions and the expert report of Mr Moroz both refer to the three-year period without addressing the question of when time started to run for the purposes of Article 257. I do not, therefore, consider that the Defendants

have put forward anything that would lead me to alter my conclusions that WRRT has at least a good arguable case on this point (see [2020] EWHC 2409 (Ch) §18).

113. Merits of factual case. I do not consider that there is anything in Mrs Tyshchenko's submissions to displace my conclusions at the without notice application that WWRT has a good arguable case on the facts of its claim against her. The analysis in the first affidavit of Ms Gutovska shows that Mrs Tyshchenko is or was at some stage a shareholder, director and/or ultimate beneficial owner of numerous companies in the Factor group, which are said to be connected to the borrowing companies on the basis of the matters set out in the detailed list appended to that affidavit. The matters relied upon by Mrs Tyshchenko in support of her contention that she was nevertheless not involved in the Factor group are addressed in detail in the second affidavit of Ms Gutovska.

114. Without reaching any conclusions as to the merits of this, which will be a matter for trial, it seems to me that the matters referred to in Ms Gutovska's affidavits establish at the very least a plausible evidential basis for WWRT's claim against Mrs Tyshchenko. Indeed it is notable that Mrs Tyshchenko's evidence says very little indeed about WWRT's detailed analysis of the network of Factor group companies that were connected with the borrowing companies.

115. Provenance of the banking records. Finally, for the reasons already set out in my initial comments on the BTW report, there is no plausible basis for Mrs Tyshchenko's claim that WWRT has brought this claim on the basis of banking records that were obtained illegally, or were "stolen" as Mrs Tyshchenko claimed.

Other conditions for continuation of the freezing orders

116. There is no dispute that the Defendants hold, between them, assets that are caught by the freezing order – whatever the value of those assets may be. Nor is there anything in the Defendant's submissions to alter my conclusions on the risk of dissipation set out at [2020] EWHC 2409 (Ch), §§19–21.

Full and frank disclosure

117. At the hearing, Mr Machell submitted that there were two deficiencies in the disclosure given by WWRT at the without notice hearing, which he submitted were sufficiently significant that the freezing order should be discharged without re-grant. The first was that the court was misled by being given the impression that Mr Tyshchenko's Ukrainian insolvency proceedings were only at an early stage, akin to a pending bankruptcy petition, whereas in fact the debt restructuring phase was already underway. The second was that the court was given an incomplete picture of the terms of the *Star* judgment. Mrs Tyshchenko relied upon separate allegations of inaccuracies in the evidence of Ms Gutovska.

118. I do not consider that any of the matters referred to by the Defendants establish material breaches of WWRT's duty of full and frank disclosure at the without notice hearing.

119. Ukrainian insolvency proceedings. The skeleton argument on behalf of WWRT and the first affidavit of Ms Gutovska for the without notice hearing explained

that Mr Tyshchenko had petitioned for his own bankruptcy in Ukraine, but said that the proceedings were ongoing and that Mr Tyshchenko had not yet been made bankrupt. That was entirely accurate. The evidence before the court did not address in detail the various phases of the bankruptcy proceedings, nor did it say that the current status of the proceedings involved a debt restructuring phase, but I do not consider that these were material omissions; nor did the omission of these further details render what was said at the hearing misleading.

120. The *Star* judgment. The *Star* judgment was referred to in outline in the skeleton argument and evidence for the without notice application, and addressed in more detail at the hearing. In particular Mr Todd QC at the hearing specifically drew my attention to the passage in the *Star* judgment in which the court dismissed Star's claim on the basis that assignment to Star had not transferred the right to bring an Article 58 claim against Mr Tyshchenko, before explaining his position that this did not undermine the assignment of the claims relied upon in this case.

121. It is fair to say that Mr Todd did not at that point identify a potential argument that the conclusion in the *Star* judgment relating to the Article 58 claim also implied that the assignment to Star did not transfer the right to bring an Article 1166 tortious claim against Mr Tyshchenko. That argument, however, was one which (as noted above) Mr Machell on the second day of the hearing confirmed that he no longer pursued in relation to the continuation of the freezing order. Mr Machell was therefore effectively submitting that the duty of full and frank disclosure required WWRT in its without notice application to raise an argument which Mr Machell himself expressly did not pursue on behalf of his client when given an opportunity to do so, with the benefit of expert evidence and full consideration of the relevant defences that might be raised. That is an inherently contradictory position.

122. Even leaving that contradiction aside, I do not consider that WWRT had a duty to anticipate this point at the without notice hearing. The duty of full and frank disclosure requires the applicant to draw the court's attention to "significant factual, legal and procedural aspects of the case": *Tugushev v Orlov* [2019] EWHC 2013 (Comm) at §7(i), per Carr J. As I recently noted in *Valbonne v Cityvalue and UHL* [2021] EWHC 544 (Ch), §30, the requirement is to identify arguments which it is reasonably anticipated that the absent party might wish to make, rather than to attempt an exhaustive trawl through every possible legal objection that might be taken. While (as indicated above) the *Star* judgment might well be relevant in due course, the argument advanced is certainly not one that is obvious on the face of the judgment, given that the judgment itself makes no reference whatsoever to Article 1166.

123. Evidence of Ms Gutovska. Mrs Tyshchenko made various claims that Ms Gutovska made false statements in her affidavit. None of these have any substance.

124. An initial claim advanced in Mrs Tyshchenko's second witness statement was that WWRT's assets in Ukraine were not as initially described. This criticism was not pursued in Mrs Tyshchenko's skeleton argument or oral submissions at the hearing. It is in any event rebutted in detail in Ms Gutovska's second affidavit, which explains that the criticism appears to rest on a misunderstanding of the

evidence in Ms Gutovska's first affidavit. I am satisfied on the basis of the material before me that WWRT's witness evidence was an accurate statement of the matters known to WWRT at the time of the without notice hearing. The position is that the assets held by WWRT take the form of the rights to assets that have been pledged as securities for the loans purchased by WWRT. WWRT's assets are therefore the rights to securities rather than the underlying secured assets themselves, title to which remains in the name of the entities providing the security.

125. Ms Gutovska's second affidavit nevertheless explains that WWRT has recently discovered that some of the Ukrainian securities held by it were sold by Star without WWRT's knowledge. It appears that a settlement has been reached between WWRT and Star, and Ms Gutovska's second affidavit sets out the securities that are now agreed (as between WWRT and Star) to be held by WWRT. Her evidence is that WWRT is in the process of having those remaining assets revalued, but that it had not (by the date of her second affidavit) received the revaluation report. This further evidence does not undermine the accuracy of the evidence at the without notice hearing, but it does (as discussed below) have a bearing on the question of the fortification of WWRT's cross-undertaking in damages.

126. A different point advanced at the hearing was a challenge to Ms Gutovska's description of communications between Mr Tyshchenko and Star since July 2020, on the basis of text message exchanges which purportedly indicated friendly communications between those parties around the time period in question. There is nothing in this point – the text message exchanges are not inconsistent with Ms Gutovska's evidence and there is no other material before me which suggests that Ms Gutovska's evidence on this point was inaccurate. In any event nothing turned on this particular issue for the purposes of the without notice application.

127. Mrs Tyshchenko also made some rather vague factual submissions at the hearing in relation to one of the disputed loans referred to in Ms Gutovska's first affidavit. That is, however, an issue going to the merits of the claim that will need to be determined at trial. There is certainly nothing before me that would enable me to conclude for the purposes of this hearing that the evidence given by Ms Gutovska was factually inaccurate.

Cross-undertaking in damages

128. Mrs Tyshchenko sought the fortification of WWRT's cross-undertaking in damages, on the basis of the uncertain nature of WWRT's assets (as explained above) and the evidence of Ms Gutovska as to the diminution of those assets following the sale by Star of some of the relevant securities. Mrs Tyshchenko contended that the undertaking should be fortified to enable her, in due course, to enforce a damages claim against WWRT for the loss of life insurance policies that were cancelled as a result of the freezing order, as well as (in the meantime) to provide a basis on which she could instruct solicitors to represent her.

129. On the second day of the hearing, Mr Ayres proposed that WWRT could fortify its cross-undertaking in damages in the amount of £150,000, secured on the assets of WWRT in Ukraine. The problem with this proposal was that the intangible

nature of WWRT's Ukrainian assets is precisely the reason why fortification of the cross-undertaking is sought by Mrs Tyshchenko.

130. Rightly recognising the potential difficulties with his initial proposal, therefore, on the third day of the hearing Mr Ayres proposed that WWRT could pay £50,000 into court in fairly short order, but said that if any further sum were to be paid into court that would require further time in order for WWRT to realise its securities in Ukraine for the purpose of obtaining funds. Mr Ayres also noted that there was an unsatisfied costs order against the Defendants from the hearing before Meade J, in the amount of £60,000, and that WWRT would agree to a stay of this by way of fortification. Mr Ayres nevertheless maintained that Mrs Tyshchenko's submissions as to the need for fortification were not supported by any real evidence, and therefore resisted any order for fortification in a sum exceeding £150,000.

131. Given the uncertain position regarding WWRT's Ukrainian assets, I consider that it is appropriate to order fortification of the cross-undertaking. Without further evidence of loss, however, the sum will be confined to the amount of £150,000 proposed by Mr Ayres. I will therefore order payment into court of £50,000 within 28 days, with a further £40,000 to follow (I will hear further submissions on the timescale for this), combined with a stay of the £60,000 costs order of Meade J.

Variation of the freezing order

132. If the freezing order is continued, Mrs Tyshchenko sought its variation to release both Tanglewood Villa and her bank accounts from its scope.

133. There is, in my judgment, no justification for releasing the property from the freezing order. Indeed the property is the principal asset known to be beneficially owned by Mrs Tyshchenko (albeit through an offshore trust structure).

134. Regarding Mrs Tyshchenko's bank accounts, the main problem as emerged in discussion was an inability to operate these normally via electronic banking and direct debits, following the freezing order. Following the hearing, the parties agreed a consent order to address this issue.

CROSS-EXAMINATION ON ASSETS

135. The final issue before me is WWRT's application for the Defendants to be cross-examined on their assets and, in that connection, for further documents to be produced. The application is opposed by both Defendants. I will consider separately the applications for cross-examination and document disclosure.

Cross-examination

136. The general principles were recently set out by Trower J in *JSC Commercial Bank Privatbank v Kolomoisky* [2021] EWHC 403, at §§39–44. It is not disputed that cross-examination on assets prior to judgment will generally only be ordered in exceptional cases, and will normally only be ordered where it is likely to further

the proper purpose of the order, for example by revealing further assets that might otherwise be dissipated. There is, in that regard, a difference between a serious deficiency in the existing disclosure of assets, and a "general suspicion that disclosure is inadequate", the latter of which is unlikely to be sufficient.

137. In the present case I am inclined to agree with Mr Ayres that the disclosure of assets so far provided by the Defendants is so inadequate that it crosses that high threshold.

138. The order that I made on 4 September 2020 required the Defendants to disclose their assets worldwide exceeding £30,000 in value, save for their interests in stocks and shares in any company incorporated in Ukraine or Russia, interests in any company carrying on business only in Ukraine or Russia, and real property situated in Ukraine or Russia. Pursuant to that order, Mr Tyshchenko has stated that he holds no assets exceeding £30,000, whether held in his own name or jointly owned. Mrs Tyshchenko has stated that her assets exceeding that threshold consist of her Land Rover (believed to be valued at around £37,000) and Tanglewood Villa, which is owned by Copper Homes Limited, incorporated in the Isle of Man, for which Mrs Tyshchenko is the ultimate beneficial owner. In further correspondence Mrs Tyshchenko has disclosed other assets consisting of cars, a small sum in a frozen UK bank account, and her interest in a gymnastics school, all of which were said to be worth less than £30,000. She says that her interests in other companies are worthless.

139. The freezing order also provided (in the usual way) for the Defendants to spend certain sums on their legal fees and living expenses, provided that they informed WWRT's legal representatives where the money was coming from. So far, the information provided by the Defendants in that regard has indicated that the main source of funding for Mr Tyshchenko's legal fees and their living expenses is borrowing from family members. Complaints from WWRT as to the inadequacy of this explanation elicited an indication (in a letter dated 28 October 2020) that the main source of funds for both Defendants was Mr Tyshchenko's mother, Motrona. Mrs Tyshchenko has, however, now said that she no longer receives financial support from Motrona, without indicating any replacement source of funds for her living expenses.

140. None of this explains the disappearance of the Defendants' considerable wealth in recent years. The judgment of Flaux J in *JSC BTA Bank v Ablyazov* [2014] EWHC 2019 (Comm), [2015] 1 WLR 1547 recorded Mr Tyshchenko's evidence in those proceedings, in December 2013, as being that he owned a hundred companies. The Factor group companies continue to exist and are connected to the Tyshchenko family, as set out in the evidence of WWRT. No explanation has been provided by the Defendants as to what has happened to their interests in these companies, beyond an unsupported assertion by Mrs Tyshchenko that Mr Tyshchenko spent "all his funds and assets" to support Fortuna Bank.

141. Nor is there any proper explanation as to the source of funds supporting the Defendants' lifestyle which appears to have included, at the time the freezing order was served, the employment of domestic staff, membership by Mr Tyshchenko of a number of golf clubs in the UK and Ukraine, and private school education for their children. To that can be added, since the service of the freezing

order, the costs of the various solicitors and expert witnesses who are dealing with not only the present proceedings (initially on behalf of both Defendants, and now on behalf of only Mr Tyshchenko) but also the English bankruptcy petition and the numerous proceedings initiated in Ukraine.

142. Mr Ayres' submission is that all of this gives rise to a strong inference that assets are being held for the Defendants by third party nominees, particularly Motrona. That is, in my judgment, a reasonable inference which goes beyond a "general suspicion" of defects in asset disclosure, particularly when combined with the existing evidence of companies and properties connected to the Defendants that are now said to be held by the Defendants' daughters and other family members. If assets are indeed being held for the Defendants under nominee arrangements that have not been disclosed pursuant to the order, that would be an obvious breach of the order.

143. I also note that in his judgment in the *Ablyazov* case Flaux J made a number of serious adverse findings regarding the veracity of Mr Tyshchenko's evidence concerning his dealings with Mr Ablyazov and Mr Ablyazov's assets, including referring to the "vague and evasive nature of much of his evidence in cross-examination" (§21, see also §§65, 67 and 110), and finding that evidence given in his second cross-examination "flatly contradicted" evidence given in his first cross-examination (§§65, 102–103 and 108). Mr Tyshchenko's evidence that a particular company was not owned by him was found to be "completely incredible" (§108), and Flaux J concluded that in relation to critical issues Mr Tyshchenko had "not engaged in good faith in the disclosure process" (§111). While of course not decisive, this shows that Mr Tyshchenko has a track record of lying about assets, which lends weight to WWRT's belief that the information provided by him so far is not credible.

144. I therefore consider that this is a case where further investigation of the Defendants' assets and sources of funds is required. It is of course necessary to give careful consideration to whether there are any less burdensome means of obtaining this information. No alternative course has been proposed by the Defendants, nor do I consider that there would be any alternative less intrusive means available to WWRT to obtain the further information sought. It is apparent from the correspondence before me that WWRT has been pressing for further information for some time, but has not made any material progress.

Document disclosure

145. Mr Mather objected to the extensive and wide-ranging nature of the documents sought, in a list of 98 separate requests. It was not disputed that a disclosure order should not be made if it goes beyond information that is necessary for the purposes of policing the injunction (see e.g. *PSJC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 482 (Ch), §33(5)). While Mr Mather accepted that an order for disclosure of documents could be made if required to enable a claimant to identify the nature and extent of a defendant's interest in assets, he contended that many of the requests in the present case related to investigation of the assets of relevant companies rather than the identification of the interests of the Defendants in those companies.

146. There is in my judgment some force in that submission. Mr Ayres' response that it was necessary to "dig below" the corporate structures in order to identify underlying assets only goes so far: that may have merit where the underlying ownership is uncertain or disputed, but cannot justify a general enquiry into the transactional history of companies whose ownership is undisputed.

147. It is also necessary to have regard to the provisions of the order that are sought to be policed, in considering the proportionality of document disclosure requests. In this case, the orders for the provision of information in the freezing order are expressly confined to assets exceeding £30,000, and exclude interests in Ukrainian and Russian companies and real property, and interests in companies carrying on business exclusively in Ukraine and/or Russia. It is therefore difficult to justify blanket requests for disclosure of documents relating to interests falling below that financial threshold or covering interests in the excluded Ukrainian or Russian assets.

148. I do, however, consider that it is reasonable to order some further disclosure given the paucity of the Defendants' asset disclosure to date, and the incongruity between their current alleged impecuniosity and the evidence of their lifestyle. I address the specific requests for disclosure in the Appendix to this judgment.

CONCLUSION

149. For all the reasons set out above I dismiss Mr Tyshchenko's challenge to the jurisdiction of this court, and will order the continuation of the freezing order against both Defendants subject to the provisions set out in the consent order dated 19 March 2021. I will also order cross-examination of the Defendants on their assets, and provision of further documentary disclosure to the extent set out in the Appendix to this judgment.

APPENDIX: DOCUMENT DISCLOSURE REQUESTS

1. Copper Homes (requests 1–10). These requests relate to the ownership of Tanglewood Villa. As indicated above, this is held by Copper Homes which is an Isle of Man company. Mrs Tyshchenko does not, however, dispute that she is the beneficial owner of Tanglewood Villa, and the property is undoubtedly covered by the freezing order. There is therefore no need for further documentation relating to this company for the purposes of enforcing the order.

2. Timeson Technology (requests 11–15). Mr Tyshchenko is recorded as the person with significant control of this company, but the Defendants claim to be entirely unaware of the company and say that they have no interest in it. I am satisfied that it is appropriate to seek documents evidencing the Defendants' interests in the company, as well as bank statements and accounts since those may shed light on the connections between the Defendants and this company. I do not, however, consider it necessary or proportionate to seek documents evidencing the assets of the company. I will therefore grant requests 11–13 and 15 but not request 14.

3. Golden Arrow (requests 16–20). This company is believed to be owned by one or both of the Defendants, but has not been disclosed as an asset by Mr Tyshchenko. Mrs Tyshchenko accepts that she is a director of the company but has given ambiguous information as to its ownership. Despite claiming that this is a dormant company, she has apparently claimed (and received) government furlough payments for the company during the current Covid pandemic. I am satisfied that it is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 16–18 and 20 but not request 19.

4. Factor Capital (requests 21–25). Mrs Tyshchenko is registered as the sole director and person with significant control, of this company, and has given a rather curious explanation that the company was set up by her for her clients with a different name, but that when those clients refused to take it she renamed it and offered it to Motrona who likewise ultimately decided not to take it. The company is said to be dormant and according to Mrs Tyshchenko has never had any activity. I am satisfied that it is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 21–23 and 25 but not request 24.

5. Factor Petroleum (requests 26–30). Mrs Tyshchenko is the sole director of this company, as was Mr Tyshchenko in the past, but since 2019 the company has apparently been owned by the Defendants' oldest daughter. Mrs Tyshchenko claims that this is another company that is inactive, despite which she has, as with Golden Arrow, apparently claimed and received government furlough payments for the company. I am satisfied that it is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 26–28 and 30 but not request 29.

6. Navigator Plus (requests 31–35). This company is believed to be owned by one or both of the Defendants, but has not been disclosed as an asset of either of them. The sole director and listed person with significant control is a Mr Sergey Baranov, who is believed to be Mrs Tyshchenko's brother. I am satisfied that it

is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 31–33 and 35 but not request 34.

7. Rhythmic Gymnastics Academy (requests 36–40). Mrs Tyshchenko is listed as the sole shareholder and director of this company, but she says that this is an inactive company with no account. Given that there does not appear to be any dispute about her ownership of this company I do not consider that it is necessary to seek documents relating to the Defendants' interest, nor is it necessary or proportionate to seek documents evidencing the assets of the company. I am, however, satisfied that it is appropriate to ask for copies of the accounts and bank statements for the company. I will therefore grant requests 37–38 only.

8. Wind Solar Invest (requests 41–45). Mr Baranov is listed as the sole director of this company, with the Defendants' oldest daughter listed as the shareholder and person with significant control. I am satisfied that it is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 41–43 and 45 but not request 44.

9. Quelxon Holdings, Elpeim, Swimdom and Keron Holdings (requests 46–65). These four companies were referred to by Flaux J in the *Ablyazov* judgment as being companies owned or controlled by Mr Tyshchenko. The Defendants have not, however, disclosed any interests in these for the purposes of these proceedings. I am satisfied that it is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 46–48, 50–53, 55–58, 60–63 and 65, but not requests 49, 54, 59 and 64.

10. Sci Du Grand Chene (requests 66–70). This is a French company which is understood to have been the holding company for the Defendants' villa near Cannes in France. That property was apparently transferred to Mrs Tyshchenko as part of her divorce settlement, but is said to have been subsequently repossessed by the lender for non-payment of interest. Mrs Tyshchenko has said that she believes that the company is "closed" but has not provided any further details of this. I am satisfied that it is appropriate to seek documents on the same basis as for Timeson Technology. I will therefore grant requests 66–68 and 70 but not request 69.

11. 439 Route du Grand Chene, Mougins (requests 71–75). This was the Defendants' villa near Cannes, said to have been repossessed and subsequently sold. In light of the information provided by the Defendants I consider that is appropriate to seek documents relating to the sale of the property and the proceeds (if any) paid to the Defendants following that sale, but it is not appropriate to seek further documents relating to the loan on the property or the reason for repossession. I will therefore grant requests 74–75 only.

12. Vehicles (requests 76–87). Mrs Tyshchenko has already disclosed her Range Rover as being an asset worth more than £30,000, together with two other cars for which the values have been provided by Mrs Tyshchenko as being under £30,000. Given the information already provided, I do not consider it necessary to seek further documentary evidence relating to those cars. There is also a request for documentation in relation to a "Bentley of unknown registration details". That

is a wholly vague request to which I do not consider that the Defendants can properly be expected to respond.

13. Other assets (requests 88–93). The request for bank statements during the last 3 years (request 88) is reasonable and proportionate. The request for documents evidencing all interests in shareholdings, trusts and other investments (requests 89–91) would, however, include interests in Russian and Ukrainian assets that are excluded from the freezing order. I will therefore grant those requests but subject to the exclusions for Russian and Ukrainian assets set out in the freezing order. Request 92 relating to the value of Mr Tyshchenko's debenture or share in the Wisley Golf Club is reasonable and proportionate, given the evidence that this may well be worth significantly more than £30,000. Request 93 which seeks documents evidencing any other asset of more than £5000 is, however, too broad and goes beyond policing the terms of the freezing order; I do not consider that it is necessary or proportionate at this stage.

14. Defendants' means of support and legal fees (requests 94–98). Given the Defendants' claims to have little or no independent means of support, notwithstanding a lifestyle and litigation strategy that appears wholly inconsistent with those claims, these requests for evidence of their income and sources of funds, including the source of payments for their legal expenses, are reasonable and proportionate, and I will grant them.