Neutral Citation Number: [2021] EWHC 1634 (Comm)

Case No: CL-2019-000122

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

The Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 18/06/2021

Before :

MRS JUSTICE MOULDER

- -

Between :

VTB BANK (PJSC)	**Claimant**
- and -	
MR DMYTRO FIRTASH	**Defendant**

- -
- -

Paul Stanley QC (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Brian Doctor QC and **Tetyana Nesterchuk** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendant**

Hearing date: 19 May 2021

- -

Approved Judgment

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

.....

MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. Pursuant to an order of 20 May 2021 following the hearing on 19 May 2021 it was ordered (inter alia) that:

   i) The Claimant pays the Defendant's costs of the Application incurred up to and including 22 February 2021 summarily assessed in the amount of £43,000 within 14 days of the order.

   ii) The remaining costs of the Application and the costs of and occasioned by the Freezing Order are reserved.

   iii) The parties shall make written submissions on the costs of the Application incurred from 23 February 2021, as well as the costs of and occasioned by the Freezing Order proceedings save insofar as already disposed of in this order, such written submissions to be limited to 5 pages and filed by 4 pm on 26 May 2021.

2. This judgment addresses the issues which were reserved from the hearing on 19 May 2021 of the remaining costs of the Application and the costs of and occasioned by the Freezing Order.

Background

3. Following a hearing on 23 April 2021 (the "April Hearing") of the application by the Defendant dated 18 February 2021 as amended by an application dated 5 March 2021 (the "Application"), the court determined, for the reasons set out in its judgment dated 14 May 2021 [2021] EWHC 1203 (Comm) that the Claimant ("VTB") should increase to £10 million the amount of fortification in respect of its cross-undertaking in damages given as a condition of obtaining the order of Cockerill J dated 26 February 2019, as amended by the order of Moulder J dated 26 March 2019 and further amended by consent pursuant to the order of Foxton J dated 23 February 2021 (together, the "Freezing Order")

4. The parties subsequently agreed that the Claimant should pay the Defendant's costs of the Application incurred up to and including 22 February 2021 but at a hearing on 19 May 2021 to deal with consequential matters arising from the Judgment (the "Consequential Hearing"). counsel for the Claimant stated that the Claimant was not willing to provide the additional fortification and accordingly the Freezing Order should be discharged. It was submitted for VTB that the court had no power to order VTB to provide fortification. The court accepted on the authorities (as set out in a separate ruling) that the court had no power to order VTB to provide fortification and therefore ordered that the Freezing Order be discharged.

5. Although the court had already given an ex tempore ruling in respect of the costs from 23 February 2021 up to the date of the April Hearing (but not the period after 23 April 2021), the court agreed to reserve the issue of costs in relation to both periods pending further submissions from the parties and the order made on 20 May 2021 reflected this. It seemed to me to be in the interests of justice that the court should consider whether to amend its conclusions expressed at the hearing in relation to the costs for the period from 23 February 2021 to 22 April 2021 in the light of the stance taken by

the Claimant at the Consequential Hearing which resulted in the discharge of the Freezing Order. It seems to me on the authorities that it is clear that the court has such power (*Ultraframe (UK) v Fielding* [2006] EWCA Civ 1660; [2007] 2 All E.R. 983, CA) and no submissions were made to the contrary. I note that in this instance the extempore ruling had not been perfected and the order made in relation to costs (other than in respect of the period up to and including 22 February 2021) is that the costs are reserved. Accordingly this judgment is the judgment of the court on the issue of costs in respect of the period from 23 February 2021 to the hearing of the Application and costs for the period from 24 April 2021.

General principles as to costs

6. The court has a discretion under CPR 44.2 as to whether costs are payable by one party to another and the amount of those costs. Pursuant to CPR 44.2(2)(a), the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.

7. CPR 44.2 (4) provides (so far as material):

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c)…"

8. CPR 44.2 (5) provides:

> "(5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

Claimant's submissions

9. It was submitted for VTB that the right order in principle is that the Defendant should have his costs on those issues upon which he has succeeded and VTB should have its costs on those issues on which he failed. VTB submitted that the Defendant should

have its costs in respect of the period up to 18 February 2021, but nothing thereafter, apart from 20 per cent in respect of the hearing itself. It was submitted for VTB that the Defendant should get its costs up to 18 February 2021, as these related to the issues upon which he succeeded, but thereafter the costs largely related to issues upon which VTB succeeded. The Claimant sought to break down the witness statements after that date and apportion value by reference to the paragraphs. The Claimant attempted a similar exercise in relation to the skeleton arguments and the time taken at the hearing. For the period up to 18 February 2021, VTB submitted that the Defendant's costs were unreasonable and should be reduced from approximately £68,000 to £50,000. In relation to the second period to the April Hearing, VTB submitted that an additional £5,630 should be permitted.

10. In its supplementary submissions following the Consequential Hearing it was submitted for VTB that there was no reason to depart from the original assessment: VTB succeeded on those issues on which it succeeded, and lost on those issues on which it lost, and the order as originally proposed reflects that.

11. It was further submitted for VTB that fortification involves the court deciding what fortification it will require, and the Claimant deciding whether it will pay that price. It is not required to make that decision in the abstract. There were many possible approaches the Court might have taken, and VTB was under no obligation to give the undertaking and did not undertake that it would do so. It was submitted that Mr Firtash chose not to rest content with his fortification application but to make further and alternative applications, and they failed.

Defendant's submissions

12. The Defendant originally submitted (paragraph 8 of its skeleton for the Consequential Hearing) that it should get at least 80 per cent of its costs from 23 February 2021 to the date of the Consequential Hearing, that it was successful on the issue of fortification which was sought by the original application, and had the Claimant consented, the amended application was likely not to have been made. Further, (as noted in paragraph 47 and 50 of the judgment) VTB was obliged to seek directions if it knew that the value of the assets frozen exceeded the value of the claim in the Cyprus proceedings, and that obligation was triggered on 23 February 2021, if not before. It was submitted that the issues regarding the French mortgage would have had to be reviewed pursuant to an application for directions.

13. In its supplemental submissions following the Consequential Hearing it was submitted for the Defendant that it should recover 100% of its costs or such proportion as the court deemed appropriate. It was submitted that had VTB explained that it would never have accepted a requirement to provide further fortification in February 2021 then all further costs of the application to replace the Freezing Order with a restriction could have been avoided.

Discussion

14. There are two related but separate periods for which costs have been incurred and are now claimed by the Defendant: costs for the period from 23 February 2021 to the hearing of the Application and costs for the period from 24 April 2021.

Costs from 23 February 2021 to the April Hearing

15. The original application of 18 February 2021 was to vary the Freezing Order in light of the reduction of the amount claimed in the Cyprus proceedings and to obtain additional fortification. The application to vary the amount was successful in that it was agreed between the parties and reflected in the consent order of Foxton J dated 23 February 2021. As referred to above the parties have also agreed the principle that the Defendant should receive its costs for the period to 22 February 2021.

16. The issues before the court by the time of the April Hearing were firstly to discharge the Freezing Order and substitute it with a restriction on title, secondly to procure the removal of the French mortgage, and thirdly to provide additional fortification. The Defendant succeeded on the issue of additional fortification but did not succeed in relation to the restriction on title or the removal of the French mortgage. The court refused to consider whether the Claimant had shown a good arguable case in support of continuing the Freezing Order for the reasons set out in the judgment at paragraphs 25 to 27.

17. As referred to above, the starting point is that the Defendant has been successful on his application, although in deciding what order to make, the court has regard to all the circumstances. In this case the relevant circumstances are firstly that the Claimant succeeded on some of the issues on the Application and secondly, the conduct of the parties.

18. Whilst the court has power to make an order that costs incurred only up to a particular date, and the Claimant agrees in principle that the Claimant should recover its costs to 22 February, in determining the appropriate costs order, the court has to look at the totality of what has occurred. I do not therefore accept what I regard as an artificial distinction proposed by the Claimant between the original application and the amended application. The court heard the application as amended, and the issue of costs is to be judged by reference to the totality of the Application.

Conduct of the parties

19. In relation to the conduct of the parties I take into account the following matters set out below.

Lack of cooperation between the parties

20. In my view this is a matter which could have been dealt with much more efficiently and proportionately had the parties on both sides taken a more constructive approach. There was no good reason in my view why a bundle of over 2,000 pages was submitted and why (even leaving aside the issue of the Claimant's belated stance to additional fortification) the issues could not have been narrowed prior to the hearing.

21. In particular I note in relation to the restriction on title, VTB filed the evidence of Mr Bonye and no evidence was provided by the Defendant to gainsay this. Given that evidence, I see no reason why, if the parties had been constructive in their approach, this element of the application could not have been dealt with without the need for this to be a matter before the court, although I accept that the amount of time devoted to this issue was relatively small.

22. I also note that although the Defendant was not successful in relation to the issue of the French mortgage, the Claimant appears to have taken an approach to valuation which at best might be described as not constructive.

Expansion of the Application by the Defendant

23. As is evident from the judgment, the witness statements of Mr Marsh required careful reading in order to identify the grounds upon which the Defendant sought to discharge the Freezing Order, and seemed to change between the second and third witness statement. What started off as a fairly straightforward application became increasingly complex over the weeks leading to the hearing. This was largely due to the issue being raised in the witness statements of whether the Freezing Order should be discharged, and a significant amount of time was spent in oral argument at the April Hearing on the issue of the "good arguable case", even though this was not an application which was before the court; see paragraphs 25 to 27 of the judgment. However this has to be balanced against the approach of the Claimant as now advanced in relation to additional fortification as discussed below.

Approach of the Claimant to the proceedings

24. I note the court's finding at paragraph 38 of the judgment that there appears to have been a significant delay in the production of the statement of claim in the Cyprus proceedings, which has not been satisfactorily explained. As noted in the judgment, the absence of a detailed statement of claim some 18 months after it was due in the Cyprus proceedings, and over two years from the grant of the original Freezing Order, can at best be described as remarkable. Whilst it can be said that this is not directly relevant to the Application, it is important context to the Application which was granted in support of the Cyprus proceedings, and in my view is indicative of the approach which the Claimant has adopted throughout these proceedings, which in my view tends to suggest that it has dragged its feet wherever possible.

25. Of direct relevance to the issue of costs is that it is far from clear why the Defendant was put in a position where it had to apply for a reduction in the amount secured and the Claimant only agreed to do so after that Application had been lodged. Whilst the judgment noted that the Defendant had not been prejudiced from the failure of the Claimant to apply for directions (paragraph 50 of the judgment), this does not mean that the failure to do so should not be taken into account on the question of costs. Even though the costs of the Application up to the date of the consent order have been conceded, it is still relevant in my view to the issue of conduct. I accept the submission that VTB was bound to apply for directions, and had the application for directions been made, it is likely that the issue of the French mortgage would have been reviewed by the court in any event.

26. In my original remarks at the Consequential Hearing I stated that had VTB adopted a more realistic and cooperative approach to the issues raised by the Application, a considerable amount of court time and cost could have been saved. This in my view would have been consistent with its duty to help the court to further the overriding objective.

27. That original view has been reinforced by the conduct of the Claimant following hand down of the judgment in relation to the consequences of the Defendant succeeding on its Application for additional fortification.

28. The Claimant in its skeleton for the hearing of the Application focussed only on the quantum of additional fortification and whether the risk of loss was made out. I note in particular paragraph 30 of the Claimant's skeleton:

> "An "intelligent estimate", on a provisional basis and given the evidence before the Court, of the amount, risk, and causation of any loss does not suggest that Mr Firtash is likely to suffer losses remotely approaching the £10 million figure that he has arbitrarily alighted on. An intelligent estimate would, indeed, suggest that the likelihood of any loss being suffered at all in relation to this sort of property is small. No further fortification is justified."

Thus the crux of VTB's opposition to additional fortification at the April Hearing was based on whether the risk of loss was made out and not whether the proposed additional fortification would be given or as to its form.

29. As the Claimant noted in its skeleton, much of the evidence after 22 February 2021 was not directed to fortification. It related to the application to replace the Freezing Order with a restriction on title and to remove the mortgage of the French property. However at the April Hearing both of these aspects of the Application were resisted by the Claimant and there was no suggestion from the Claimant that it was prepared to dispense entirely with the Freezing Order should the Defendant be successful in its application for additional fortification.

30. Whilst I accept the submission that VTB was not under an obligation to give the undertaking, there is no doubt in my view that its conduct had consequences for the way that the Application was pursued by the Defendant. The submission for VTB that Mr Firtash chose not to rest content with his fortification application but to make further and alternative applications, ignores in my view the duty of the parties to assist the court in furtherance of the overriding objective and in particular for matters to be dealt with expeditiously and proportionately. CPR 44.2 expressly provides that the court will have regard to all the circumstances and that "conduct" includes the manner in which a party has pursued or defended its case or a particular allegation or issue. Had the Claimant made its position on the principle of additional fortification (were it to be ordered in the amount sought by the Defendant) clear, then the focus of the April Hearing is likely to have been on additional fortification as this would have resolved the other issues raised by the Defendant had the Claimant indicated that in the event the court ordered additional fortification it would or might refuse to provide the fortification and would instead accept the release of the Freezing Order. I note that although the Claimant was given the opportunity to make submissions following the Consequential Hearing, no explanation has been advanced as to why the Claimant was prepared to forego the protection of the Freezing Order rather than provide the additional fortification. The Claimant is a bank and there has been no suggestion at any point that it cannot afford to pay the sum into court. It was submitted for VTB that VTB was not required to make the decision "in the abstract". However there was never any suggestion that VTB objected to providing additional fortification by way

of payment into court or that VTB would have been willing to provide such fortification in a different way.

The appropriate order

31. I have regard to CPR 44.2 (6) and (7):

> "(6) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead."

32. I am not persuaded that the approach of attributing percentages by reference to paragraphs in the witness statements results in a fair reflection of costs. In my view a better approach in the circumstances is that the court which has had the benefit of considering the evidence and hearing the detailed submissions should form a view on the respective elements of the Application, including those issues upon which the Defendant has not been successful, and the conduct of the parties and having formed a view, make an order which reflects the court's overall view of the Application, having regard to the matters referred to in the rules.

33. Having regard to all the circumstances, in my view a reduction should be made to the proportion of costs which the Defendant is entitled to recover. I am not persuaded, however, in the circumstances, that VTB is entitled to an order that the Defendant should pay any proportion of its costs.

34. At the Consequential Hearing I indicated that the appropriate order was that VTB should pay 40 per cent of the Defendant's costs for the period 23 February 2021 to 23 April 2021. That was prior to hearing the submissions on fortification during the Consequential Hearing and before ordering that the issue of these costs should be the subject of further submissions. In my view, having regard to all the circumstances as now before the court and having considered the supplementary submissions made after the Consequential Hearing, the appropriate order for costs for the period 23 February to 23 April 2021 is that VTB should pay 70 per cent of the Defendant's

costs, to be summarily assessed. I make no order that the Defendant should pay any part of the Claimant's costs for this period.

Costs for the period from the April Hearing

35. In relation to the costs for the period from the April Hearing to 26 May 2021 the Defendant seeks its costs on the indemnity basis. It was submitted that in correspondence VTB referred only to the "form of fortification" as being in issue whereas at the Consequential Hearing VTB stated at the outset that VTB was not prepared to provide any additional fortification. It was submitted that VTB wanted to continue to enjoy the benefits of its Freezing Order for long as possible when in truth it had already decided not to provide the additional fortification. It was submitted that this is conduct "outside the norm" calculated to exert further pressure on the Defendant and wasting the parties' and the court's time.

36. Although the Claimant was given an opportunity to respond to the Defendant's submissions (and those submissions are referred to above) it has given no explanation to the court as to when and why it decided not to provide the additional fortification and to release the Freezing Order.

37. Against the background of the absence of any explanation from the Claimant, it is noteworthy to record the material correspondence between the parties and with the court after the hand down of the judgment and prior to the Consequential Hearing.

38. On 12 May 2021 VTB's solicitors, Herbert Smith Freehills ("HSF"), wrote to the court:

> "However, the Claimant does object to the draft order proposed by the Defendant:
>
> The Claimant does not agree that the only outstanding issues are costs and permission to appeal. The Court has ordered the Claimant to provide (significant) additional fortification of £10 million but the form of that fortification remains in issue. The Claimant does not agree with the Defendant's proposal that there should be a payment into Court within 7 days, particularly given that the amount of fortification that has been ordered is very substantial.
>
> The Claimant does not agree that a two hour hearing to determine consequential matters is excessive and unnecessary, particularly given that the form of fortification is in issue. The Claimant also understands that Mrs Justice Moulder has indicated, since circulating her draft judgment, that she intends for a date to be fixed to deal with consequentials." [emphasis added]

39. On 13 May 2021 the Defendant's solicitors responded to VTB's solicitors copied to the court:

> "We refer to the Court's decision that a hearing will take place next Wednesday 19 May 2021 and in particular to the Court's indication that "a brief oral hearing should be held to deal with any matters which have not been resolved prior to that hearing. It also seems to me that such a hearing should be held as soon as possible if the order is to be effective."
>
> Mr Firtash has put forward his proposed order. The Claimant has requested a hearing but we are none the wiser as to its position. In order to ensure that, in accordance with the court's indication, the issues are resolved or failing that identified before the hearing, please let us know as soon as possible today VTB's proposals in relation to the draft order proposed by the Claimant and sent by Mr. Doctor QC yesterday, including in relation to fortification and costs. We will then consider VTB's proposal with our client and revert tomorrow. The parties can then, if the Court agrees, exchange brief skeleton arguments by 4pm on Monday on any remaining areas of disagreement. Please can you respond by 2pm today so that we can update the Court promptly in relation to the parties' agreed timetable. "

40. HSF responded rejecting the proposal to exchange skeleton arguments by 4pm on Monday and insisting on the rule for 1pm on Tuesday 18 May 2021. The email referred to VTB requiring "adequate time to consider the issues in order to make informed and sensible proposals".

41. At 6:47pm on Friday 14th May HSF then sent an email to the Defendant's legal representatives stating that:

> "we are still taking instructions <u>on the form of fortification</u> which our client is prepared to offer. We will provide a concrete proposal by close of business on Monday". [emphasis added]

42. At 9:10pm on Monday 17 May the Defendant's solicitors sent a further email to HSF noting that no proposal had been received.

43. In the skeleton argument for the Consequential Hearing no clear indication was given that VTB intended to submit that the court had no power to order fortification and that it intended to refuse to provide the additional fortification and accept that the Freezing Order be discharged. The relevant paragraphs of VTB's skeleton read as follows:

> "The proper form of order is that <u>unless VTB provides such fortification</u> within a certain period by payment into court or in some other form acceptable to the Claimant, <u>the order should be discharged.</u>
>
> VTB submits, however, that in this case the order should enable time for it to make an application for permission to appeal, and that <u>the condition of further fortification should be stayed during that period</u> and (if permission is granted) until the

> hearing of the appeal, in other words to preserve the status quo pending that application. " [emphasis added]

44. Thus although the skeleton for VTB contemplated an "unless" order, it appeared to be implicit that VTB (through its counsel) took the view that the court could order fortification, a view which by the time of the Consequential Hearing it no longer maintained to be good law.

45. VTB took a course which was open to it as a matter of law but it has not stated when and why it decided not to provide the additional fortification. In my view at the very latest when delivering its skeleton for the Consequential Hearing VTB should have made its position clear so that the Defendant and the court were not taken by surprise at the Consequential Hearing.

46. In my view the Defendant is entitled to its costs in relation to the period from the April Hearing to the Consequential Hearing and for its costs incurred in following up on the events at the Consequential Hearing. The failure of the Claimant's representatives to present its proposals in a timely manner led to protracted correspondence and time being spent chasing the Claimant's representatives. Further as set out above the failure of the Claimant to indicate its intentions prior to the actual hearing both took the Defendant by surprise and further wasted court resources giving the Defendant no opportunity to reach an agreement prior to the hearing.

47. In the absence of a satisfactory explanation from VTB and on the evidence of the correspondence before it, the court is entitled to infer that there is no good explanation for the failure of the Claimant to set out its position either in correspondence and/or in its skeleton in advance of the Consequential Hearing and its conduct merits indemnity costs being awarded to the Defendant in respect of the period from 23 April to 26 May 2021.

Conclusion

48. In the circumstances in relation to the period from 23 April to 26 May 2021, I conclude that the Claimant should pay 100% of the Defendant's costs for that period on the indemnity basis, to be summarily assessed.

Summary assessment

49. The court had two statements of costs to be assessed on the standard basis. The first is for the period 9 February to 22 February 2021, where the amount claimed was approximately £68,000, and for the period from 23 February 2021 to the April Hearing, the amount claimed by the Defendant was approximately £196,000.

50. I have regard to CPR 44.3. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue, and I have regard to the factors set out in 44.3(3). Although the costs have been split into two time periods up to the April Hearing, for the purposes of the summary assessment, in my view the court needs to consider the costs in the round.

51. This was a half day hearing, an application to vary a Freezing Order. The court is very familiar with the scale of costs incurred in the Commercial Court, but the total

amount claimed of some £264,000 cannot in my view be said to be proportionate and reasonable, notwithstanding the factors set out in CPR 44.3.

52. I note the high hourly rates which are claimed. They are some £800 and £750 for a grade A fee earner. I also note the use of junior counsel and the total amount of counsel time. Taking both statements together, there is some £88,000 of counsel time for a half day application. In my view, the amount which is reasonable and proportionate for the period from 9 February 2021 to 22 February 2021 is £43,000. For the period from 23 February 2021 to the hearing on 23 April 2021 it is £130,000.

53. As to the costs which are to be assessed on the indemnity basis the amount claimed are approximately £39,000 for the period from the April Hearing to the Consequential Hearing and approximately £17,000 for the period from the Consequential Hearing to 26 May 2021.

54. CPR 44.3 provides:

> "(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> (2)…
>
> (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party."

55. In my view the total amounts claimed by the Defendant are unreasonable in amount. Given that the Defendant anticipated a straightforward hearing as to costs and the form of fortification it was unreasonable for so much counsel time to be incurred in preparation for the Consequential Hearing and for so much time to be spent on documents. Accordingly I summarily assessed the costs for the period at £29,000 and for the period from the Consequential Hearing to 26 May 2021 at £9,000.

Costs of the action

56. The Defendant also now seeks an order for its costs in respect of the Freezing Order proceedings together with an order for a sum to be paid on account pending detailed assessment.

57. The Claimant submitted that the application for the costs of the action was not one to which the order in relation to which these are submissions responded, and should be the subject of a separate application.

58. I reject the submission that the application of the costs of the action should be the subject of a separate application. The order of 20 May 2021 was as follows (so far as material):

> "The remaining costs of the Application and the costs of and occasioned by the Freezing Order are reserved.
>
> 6. The parties shall make written submissions on the costs of the Application incurred from 23 February 2021, as well as the costs of and occasioned by the Freezing Order proceedings save insofar as already disposed of in this order, such written submissions to be limited to 5 pages and filed by 4 pm on 26 May 2021. "

59. The order clearly contemplated that the costs of and occasioned by the Freezing Order proceedings would be dealt with following receipt of the supplementary submissions.

60. It is submitted for the Defendant that the only possible explanation as to why VTB chose to discharge its injunction rather than provide the additional fortification is that it has no confidence in the merits of its claim in Cyprus.

61. It was submitted for VTB that the discharge of the order now does not indicate that it was not properly granted and maintained throughout the period when it applied.

62. The issue as to which party should bear the costs of and occasioned by the Freezing Order proceedings raises the question of who is the successful party when as here proceedings are discontinued, albeit after the injunction has been in place for a period of years.

63. The initial fortification which was granted was to "hold the ring". The April Hearing was the first occasion on which the Court considered evidence as to the losses which might be suffered by the Defendant. Having found that the Defendant was entitled to additional fortification as a condition of the grant of the Freezing Order, the Claimant then chose to discontinue its proceedings.

64. It seems to me that there is no basis for this court to form a view as to the merits of the claim in Cyprus or for any inference that VTB has no confidence in that claim. However the purpose of a Freezing Order is to protect assets which could be available through one route or another for satisfaction of a judgment if the Claimant wins his case. By allowing the discharge of the Freezing Order the Claimant has failed to achieve the purpose of obtaining the Freezing Order.

65. Whilst I proceed on the assumption that the order was properly granted, in circumstances where the Claimant has now allowed the Freezing Order to be discharged prior to its purpose being achieved, it seems to me that the Defendant is in substance the successful party.

66. However I note that the Defendant did not seek the discharge of the Freezing Order at the return date in March 2019 and the Freezing Order was therefore allowed to continue from February 2019 and only challenged by the Application in February 2021.

67. I also note that (as referred to above) the Claimant failed to seek directions from the court when the amount of the claim was reduced.

68. Having regard to all the circumstances the appropriate order in my view is for the Claimant to pay 50% of the Defendant's costs in respect of the Freezing Order proceedings on the standard basis, to be subject to detailed assessment.

Payment on account in respect of the Freezing Order proceedings

69. CPR 44.2 (8) provides:

> "(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

70. The Defendant submits that the Court should order a reasonable sum to be paid on account of the costs in the Freezing Order proceedings.

71. The total amount claimed for the period from 28 February 2019 to 26 March 2019 is approximately £111,000 and from 27 March 2019 to 8 February 2021 approximately £187,000. To these figures the appropriate percentage of 50% is to be applied.

72. Having applied the appropriate percentage, the amount which I determine to be a reasonable sum having regard to the principles in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) are the sums of £33,000 and £46,000. This in my view allows an appropriate margin for error and takes into account the difficulty that may be faced in recovering from an individual any overpayment.