Neutral Citation Number: [2024] EWHC 2705 (Ch)

Case No: BR-2022-000465

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 21st October 2024

Before :

SIR ANTHONY MANN, SITTING AS A JUDGE OF THE HIGH COURT

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Between :

LYUBOV ANDREEVNA KIREEVA	**Claimant**
- and -	
(1) ALINA ZOLOTOVA	**Defendant**
(2) BASEL PROPERTIES LIMITED	

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Richard Eschwege KC and Bibek Mukherjee (instructed by **Steptoe International (UK)**)
for the claimant
Matthew Bradley KC (instructed by **Gresham Legal**) for the defendants

Hearing date: 21st October 2024

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APPROVED JUDGMENT

Sir Anthony Mann

Introduction

1. This is an application to consider, at the behest of the 1st defendant, whether the present action stands struck out for want of a prescribed certificate required by what was effectively an unless order or, if it still subsists , then whether it should be struck out because a form of certificate provided amounts to an abuse of process. Mr Matthew Bradley KC appeared for the first defendant seeking to dispose of the action; Mr Richard Eschwege KC appeared for the claimant. The second defendant has played no part in the present proceedings at all.

2. On the occasion of the hearing of this application I was also supposed to hear an application by the claimant for disclosure, which was in fact issued and fixed first, but since it was logical to take the present application first (because if it succeeds the disclosure application becomes otiose) I took it first. Unfortunately it took longer than expected to hear, so the disclosure application has had to be adjourned.

Background

3. The action is an action by a Russian-appointed trustee in bankruptcy of the estate of a Mr Bedzhamov seeking to establish ownership of the sole share in the second defendant, which in turn owns an Italian villa. The claim is based on allegations that the first defendant, Ms Zolotova, holds the share on trust for the bankrupt, or that the transfer of the share to her falls to be set aside under section 423 of the Insolvency Act 1986. The defence also includes, inter alia, one based on champerty and maintenance (arising out of the litigation funding arrangement which the trustee has put in place) and defences based on the funder(s) being individuals who have been sanctioned under the arrangements currently in place as a result of the Russian invasion of Ukraine.

4. The action has been pursued by the trustee with the benefit of litigation funding from within Russia. Originally the funding was provided by a concern known as A1, but when it was perceived that US sanctions affected or might affect the individuals behind that concern, other arrangements were sought to be put in place. An intervening (allegedly purported) transfer to an individual associated with A1 was questioned, and a man called Mr Lyuboshits claims to have taken over all the positions of A1 in relation to this and other litigation via his company Cezar. He claims to have the funds to be able to fund this litigation and to be independent of A1. Both those assertions are challenged by Ms Zolotova. For the purposes of this judgment I refer to Mr Lyuboshits and his company Cezar as effectively the same.

5. The trial of the action in this matter was originally to take place in July of this year. However, shortly before the trial the claimant made an application for an adjournment of that trial on the basis that her funder (Mr Lyuboshits) was having difficulty getting funds out of Russia in order to fund the litigation. Details were provided in witness statements from the claimant's then solicitor, Mr Elliot, of her then solicitors, DCQ Legal. The issues of funding, as they then appeared, are dealt with in a judgment of mine given on 28th June 2024. I will not set them out again here, but draw attention to the fact that reference was made to failed attempts to get payments out through an Italian bank and a Hungarian bank, and a failed attempt to get funds out through some

unspecified arrangement in Dubai which now looks as though it might have been an agency agreement, a point which has significance later on in this judgment.

6. On 28th June 2024 I gave judgment in which I granted the adjournment, but on strict terms. Because of the apparent problems surrounding funding and its routing out of Russia, and in order to avoid the possibility, which seemed to be real, of those problems persisting until a new trial date after the beginning of October (to which I adjourned the trial) I ordered that a certificate be provided by 31st August 2024 which confirmed that funding arrangements were in place for trial, and that a route was in place. In my judgment I said this:

> "11. However, there are to be strict conditions attached to that [ie the adjournment]. The defendant should be safeguarded in relation to costs, and so far as possible against extensive delays arising out of trying to find funding routes. First, in relation to timing, it would not be right to allow a long adjournment. This case needs to be tried, if it is going to be tried. I shall direct that the case come on on the first available date on or after 7th October 2024, rather than having to wait the year which might otherwise be necessary. That is a consideration relating to court resources; I am likely to hear this trial myself and to be available then. The date can be fixed by reference to the convenience of counsel, but in the event of an irreconcilable conflict between the dates of counsel the dates of the defendant's counsel will have priority. Second, the claimant must pay the costs of this application and the costs thrown away as a condition of getting the adjournment. By pay, I mean actually pay. The way of achieving that is by my making an order that those costs (which I shall assess) shall be paid by 31st August, failing with the action will stand dismissed. I appreciate that this means that the (or a) funding route must be available by then, but I require it nonetheless. If it is dismissed then as a matter of practicality the costs thrown away will be costs which can be taken from the security already given so the defendant will have the costs that way (that is a statement of anticipated fact, and need not be in my order). Third, the claimant is not to have an extended time to get the fund routing in place. There must be a date by which it is apparent whether a funding route is in place or not, and here must be a reasonable amount of clarity and transparency about the ability of the claimant to take the case to trial in terms of funding. I shall therefore make an order that the claimant must, by 31st August, certify (through her solicitors) that funding arrangements are in place to allow the October trial to take place and providing details of the banking route through which it will be provided. I will not allow this trial to adjourned on a "let's see what happens by the date of the trial" basis. I appreciate that this is an unusual order, but the circumstances of this case justify it. I make it clear that it is the banking route that has to be provided, and a general certificate to the effect that funds are available, not full details of the source of the funding. If that certificate is not provided then again the action will stand dismissed."

7. This was encapsulated in the order which I made:

> "4. The Claimant shall, by 31 August 2024, file and serve a certificate (through her solicitors) stating (i) that funding

> arrangements are in place to allow the Adjourned Trial to take place and (ii) providing details of the banking route by which such funding will be provided (the "Certificate").
>
> 5. In the event that the Claimant does not, by 31 August 2024, pay the Costs and/or file and serve the Certificate, the claim shall stand automatically dismissed without further order and the Claimant shall pay to the First Defendant her costs of this action (to be assessed if not agreed). In such circumstances, the First Defendant has permission to apply for the funds already paid by the Claimant into court as security for the First Defendant's costs to be paid out to her."

8. The costs referred to in paragraph 5 are the costs thrown away by the adjournment and other costs, which in due course I assessed at £115,560. Those costs were paid on 30th August 2024 (a Friday), the very last working day for compliance with the order. On the same day the claimant provided a certificate signed by Mr Elliot as the claimant's solicitor, which provided:

> "Pursuant to paragraph 4 of the order of Sir Anthony Mann dated 28 June 2024, we certify and confirm on behalf of the Claimant that:
>
> 1. funding arrangements are in place to allow the trial in these proceedings to take place; and
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> 2. the route for the funding will be provided by Cezar Consulting Law Firm LLC, the Claimant's funder, using the bank account of its owner, Mr Lyuboshits, at Raiffeissen Bank ZAO (Formerly) 17/1, Troickaya UL, Moscow, Russia to transfer funds directly to this firm".

9. The bank identified (Raiffeisen Bank, mis-spelt in the certificate, and which I will call RB hereafter) was a bank previously identified as a bank of Mr Lyuboshits'. As appears from my earlier judgment, Mr Lyuboshits was able to pay some funds from that bank, but was limited to $30,000 per day and then, at least for a time, no transfers were permitted. The bank is an Austrian bank with a Moscow branch.

10. The next working day after the service of that certificate Ms Zolotova's solicitors, Greshams, challenged what was said in paragraph 2 of that certificate on the footing that 2 weeks previously, on 15th August 2024, RB had announced that, save for certain transfers for those in large international business, it would cease cross-border transfers in foreign currencies from 2nd September. No transfers (other than the limited ones referred to) would be effected after 16:00hrs Moscow time on 30th August.

11. In the last week of August (and therefore not long before the 30th August deadline) DCQ received funds sufficient to pay their outstanding fees (about £800,000) and to pay the sum required to be paid under my order. The funds came from the RB account. On 30th August itself, shortly before the cut-off time, Steptoe (solicitors who came on the record for the claimant on 13th September but who were not on the record at that time) received a sum of just over £403,000 from the RB account, the vast bulk

of which was paid out to other solicitors acting in other litigation involving Mr Bedzhamov's estate, the trustee and the bank which is the principal creditor in his bankruptcy, and which therefore was not a payment on account of Steptoe's own costs going forward. On the date of the hearing of this application it did not appear that Steptoe had received any sum on account of their costs, or any sum to fund the costs of the forthcoming trial, which one would have expected them to have received if the trial was to be properly funded. £100,000 was said to have left RB on 11th October on its way to Steptoe, but as at the date of the hearing (3 working days later) it had not arrived. It has been estimated that Steptoe's costs of the trial will be around £450,000.

The present application

12. The present application by the first defendant was made on 10th October. A lot of probing correspondence from the first defendant had taken place in the meanwhile. The application claims that the action should stand struck out for non-compliance with my order about the certificate, or that it should now be struck out as an abuse of process. The application notice gave no supporting reasoning but the draft order attached recited that funding arrangements were not in fact in place at the date of the certificate and that the details of the banking route given were not of a route by which funding could be provided ie there is a complaint about both limbs of the certificate. However, the supporting witness statement complains only about the second paragraph, saying that no funding route was in fact in place, paragraph 2 was not complied with, that the certificate was therefore not valid and that the action stands struck out. Notwithstanding that, and without complaint from Mr Eschwege, Ms Zolotova also advanced a complaint about the accuracy of the first paragraph (the availability of a funding arrangement).

13. The case of the first defendant on this application is (in outline) as follows:

    i) It was accepted by Mr Bradley that the certificate was, purely on its face, a compliant certificate. That is despite the slightly odd wording in the opening words ("The route for the funding will be provided…"). However, it was said that as a matter of underlying fact the certificate was inaccurate in both its limbs.

    ii) The first limb of the certificate is inaccurate because it can now be inferred that funding arrangements for the trial were not in place at the time of the certificate.

    iii) The second limb of the certificate is inaccurate because it does not accurately specify an available route of funding and the route specified cannot be the route.

    iv) So far as may be necessary, Mr Elliot knew of the inaccuracies, or at least was reckless as to them and did not make proper inquiries.

    v) So far as may be necessary, Mr Lyuboshits and Mr Nurtdinov (the latter of whom seems to be the liaison between Mr Lyuboshits/Cezar and the claimant's solicitors, and who has conduct of the funding aspects of this matter on behalf of Mr Lyuboshits) knew the facts which made both limbs inaccurate.

vi) Even if the certificate should for some reason be treated as technically valid and sufficient, it is an abuse of the process for the claimant to seek to hang on to the benefits of the certificate when it can be seen to be false after 2nd September (when the falsity of the second paragraph was said to have been pointed out to Mr Elliot).

14. The case of the claimant is (in outline) as follows:

i) Neither limb of the certificate was inaccurate.

ii) Insofar as there was any inaccuracy, on authority the certificate can only be impeached if it was not given in good faith and/or illusory. This court cannot decide, on the evidence available, that there was bad faith, particularly bearing in mind the stronger proof needed for such allegations; and it was not illusory.

A point of construction on the certificate

15. There is one point of construction of the certificate that is relevant and which it will be useful to get out of the way at this stage. The certificate certifies that the funds will come from RB to the solicitors' account "directly". Ms Zolotova's case is that that means without any intermediary, and that has been demonstrated to have been impossible for the period after 30th August because of RB's stated intention not to effect any foreign transfers after that date. The claimant's answer to what the route actually will be is that the payment will be effected from that bank via an agent, which was said by her representatives to be a "standard way" of getting moneys out of Russia. To that Ms Zolotova says that that is not a direct payment and the certificate is therefore inaccurate on its face (in the light of the information about the lack of unavailability direct transfers).

16. Mr Eschwege's response to that raises the point of construction. He says that the word "directly" relates purely to mechanics and is not material to the certificate. His alternative description was that it was immaterial.

17. This is a significant dispute because it goes to the heart of the complaint about the second paragraph of the certificate. I consider that Mr Eschwege is plainly wrong about that. The word in the certificate is not immaterial. It imports that there is to be no intermediate step between the RB account and the solicitors' account. Passing the money through what is described as an agent is an intermediate step, and is significant in the context of the certificate. The requirement to specify a "route" for the funding arose precisely because at the time I required the certificate it was apparent that there was no clear route for moneys to leave Russia. The evidence was that attempts were made to engage an Italian and a Hungarian bank, and they failed. They were to have been part of the route. An attempt to transfer the money via some unspecified entity in Dubai was said to have not borne fruit. That is another route that failed. Some moneys had been transferred from RB on a sporadic and limited amount basis, and it was not apparent that those transfers were anything other than bank to bank transfers (without an intermediate bank or other entity) but that was proving a problematic method of transfer. No solution had been proposed for how the money was to get from RB to the solicitors in a sufficient quantity.

18. It was in that context that I required the "route" to be specified. It was so that it could be made plain how the money was to get from RB (or another account if that was where the money was) to the solicitors in the face of apparent difficulties in achieving that by a direct (I cannot avoid the use of that word here) transfer. What was required was that it be shown how it was that the money could leave Russia and end up in this jurisdiction when the evidence had indicated that that was very difficult, and the purpose of that was to ascertain whether it really was going to be possible to get the funds here for a trial so as to avoid the prospect of there being no funding for the claimant and that becoming apparent at a time when resources would be wasted in the apparent false expectation of a trial. Any intermediate steps would have to be specified as part of the route.

19. Accordingly, when the certificate specified that the funds would be transferred "directly" it was making an important statement. It was saying exactly what that word means, which is a direct transfer from bank to bank without any intermediary. An interposed "agent" (whatever that might mean) is not a direct transfer. In fact the word "directly" is the only thing in paragraph 2 which actually identifies a route at all. If that word were not there all the paragraph would be doing is specifying a source. The money has to get from that source to the solicitors. That is via a "route". The word "directly" specifies that route. It is therefore the opposite of an immaterial word; it is a crucial word, without which the certificate would be invalid on its face (unless one implied the word, which would again demonstrate its materiality, not its immateriality).

20. This means that that part of the certificate has been shown to be false. Mr Eschwege accepted that it was inaccurate to use the word "directly", though he did not concede falsity because of his submission that it was immaterial. Since it is far from immaterial the inaccuracy renders the certificate false in that respect.

Paragraph 1 of the certificate – is it inaccurate?

21. This part of the certificate asserts that funding arrangements were in place to enable the trial to take place so far as the claimant was concerned. It should be noted that all that was required under this head was a certification without particularisation. It was just a certification of availability. It was to be made by the solicitor, not the client herself. Part of the significance of that is that the solicitor would be expected to be in a good place to ascertain the necessary facts, both in order to be able to certify and because he would have his own interest in discussing the matter with his client and getting a satisfactory answer.

22. It is said by Mr Bradley that the averment of funding was false based on what happened after the date of the certificate. The relevant narrative, shortly stated, is as follows.

23. On 2nd September Greshams wrote to DCQ raising various points. Among those points was a question about the moneys received by Greshams for the costs thrown away. It was noted that the funds did not come from DCQ's client account, as would have been expected, and it was asked whether or not DCQ had funded those costs themselves; this question was said to be relevant to the question of whether funding arrangements were actually in place. It then took the point about RB's cesser of foreign payments and asked how, in the light of that, Mr Lyuboshits could send

money to his firm. Mr Elliot's response on behalf of DCQ on 4th September (which was extremely short) was that all funds received (apart from a then historic amount of £500,000, which is immaterial to this application) had been sent to them by Mr Lyuboshits from his account at RB and his firm had not funded the costs payment. The query about RB's inability to effect direct payments was not mentioned.

24. Greshams responded on the next day (5th September) asking a number of questions, including whether it was accepted that Mr Lyuboshits would not be able to pay from RB and asking how, if that was the case, he would be able to fund this (and other) litigation. They also asked whether all of DCQ's outstanding fees, including counsel's fees, had been paid in full. The immediate response (in an email of the next day) was to say that instructions were being sought, to which Greshams replied that instructions should not be necessary to answer most of the questions.

25. In parallel with this Greshams wrote to me (without a formal application notice, and without providing for Mr Elliot to respond) asking me to order Mr Elliot to make a witness statement answering their questions. I declined to make such a direction on a request made in correspondence.

26. On 13th September Steptoe came on the record in place of DCQ, and they were immediately assailed with correspondence from Greshams pursuing their points. It invited confirmation that funding arrangements were in place and details of the banking route. Steptoe responded shortly on the same day, saying (in response to funding aspects) that they confirmed that the certificate remained accurate, and that the change of solicitors was not occasioned by funding difficulties. That did not deter Greshams' pursuit in correspondence and on 16th September they raised the same points about RB's ability to transfer money, asking how Mr Lyuboshits would continue to fund litigation and whether DCQ's and counsels' fees were now paid in full. On 18th September Steptoe wrote saying they were taking instructions and would revert as soon as possible, and pointing out they had only just come on the record.

27. Steptoe did revert, after a fashion, on 26th September. In a long letter dealing with a variety of items they confirmed that Mr Lyuboshits was intending to fund the proceedings using monies on [sic] his bank accounts and adding: "We will provide details of the precise payment routes by 16th October 2024." I pause the narrative to comment that this letter acknowledges that the route was not known to them at the time, and it could take a period of over two weeks to indicate what it was. That is virtually an admission that a route was not in place at the date of the certificate.

28. In a witness statement signed on 1st October Mr Dooley of Steptoe referred to certificate issues. He said:

> "As regards the source of funding for the trial, I have been informed by Mr Nurtdinov of Cezar that this will remain Mr Lyuboshits' bank account at Raiffeisen bank, Moscow. Whilst Raiffeisen has now stated publicly that it will not permit international transfers (save for limited exceptions), there is no impediment to Mr Lyuboshits transferring funds to a third party agent to then transmit the funds to my firm. That is now a standard way of transferring funds from Russia and Mr Nurtdinov has confirmed that my firm will shortly be in receipt

> of funds to cover the costs of this firm and counsel instructed by us"

29. As at the date of the hearing before me those funds had not arrived. As I have indicated £100,000 was promised and is said to have left Russia on 11th October but had not arrived by the end of the hearing before me. Mr Bradley suggested that that evidence indicated that Mr Dooley was being given the runaround by his client (or her funders). It is known that £450,000 is required for the claimant's costs of the trial.

30. The trustee herself gave some short evidence relating to the certificate. In a witness statement signed on 10th October she recounts the certificate and deals with the position of RB, saying merely that as of 30th August 2024 she had no knowledge of the bank's change of position on international payments. She says she believed the funding would be provided using the bank account of Mr Lyuboshits at RB.

31. Based on this material I am invited to infer that the first limb of the certificate is inaccurate because funding arrangements were not in place. I disregard for the moment the apparent absence of a route for getting the funds here, which I treat separately. By funding arrangements the certificate should be taken to mean arrangements for raising and making available funds that can and will be transmitted to the solicitors to fund the litigation. Mr Bradley invites me to infer that the material above demonstrates that at the date of the certificate such arrangements cannot have been in place and Mr Elliot cannot have been satisfied that they were. The main material for that is said to be the fact that funds have not made their way here yet when one would have expected that to have happened and there has been no indication of when they would arrive. Essentially, Mr Bradley says that if they are not here now, and no evidence is given of how and when they are to be received, there never can have been funding arrangements in place within paragraph 1 of the certificate.

32. I confess to having a very significant degree of scepticism as to whether adequate arrangements were in place. There is more than a strong whiff of uncertainty. However, I do not find that the certificate is false in this respect. The certificate was intended to be a mechanism of allowing the claimant's solicitor, after making proper inquiries (which he would probably want to make in his own interest – see above) to provide reassurance based on his own assessment. He did not have to justify it with particulars, and even now there is no obligation on the claimant to specify what the arrangements were. There may come a time when the material suggesting an absence of arrangements can only be effectively rebutted by saying what those arrangements are, but I do not think that the evidence is there (quite). It seems clear, and surprising, that funds have not yet found their way to Steptoe, but that does not quite mean that the certificate in August was untrue at that time (which is when the matter has to be tested). There may have been arrangements which would have achieved funding for a trial which satisfied Mr Elliot, and those arrangements may subsequently not have generated the expected funds (at whatever time was required by the arrangements). Despite my scepticism, I am not prepared to find that the certificate was false and inaccurate in relation to the matters in paragraph 1.

Certificate paragraph 2 – inaccuracy

33. I have already decided a question of construction about the certificate, and on the basis of that, and of the sensible acknowledgment by Mr Eschwege, I have found that the certificate under this paragraph is inaccurate. At this point I wish to add something more about the level of materiality of the word "directly".

34. In the context of the background to the certificate the word is very material, and its inaccuracy very significant. The certificate was intended to try to make sure that the lead up to the trial, and the trial itself, was not disrupted, or even set at nought, by the continuation of what were obvious funding difficulties once Mr Lyuboshits (or technically his company Cezar – they can be treated as one for these purposes) had taken over the funding role. Significant and justifiable doubts were apparent as to whether Mr Lyuboshits really had the very significant funds (estimated at over $20m) necessary to assume the financial obligations of A1, to be advanced in the somewhat speculative "investment" of litigation conducted by Mr Bedzhamov's trustee in bankruptcy. There were further significant and justifiable doubts about whether he would be able to get relevant funds out of Russia, given the current state of sanctions – the route problem. In order to do what could be done to clarify the position before trial I provided for the certificate. It was to deal with both of those problems – they were both significant.

35. Thus the accuracy of the certificate in relation to routing was important. Unlike the obligation about funding arrangements, where details did not have to be given, details of the routing did have to be given. That was to prevent glib, untested and unverified generalisations to be given, because the evidence up to the date of my order did not indicate a great degree of hope that a route would actually be available. Therefore the route had to be specified in order that it could be seen that the problems of finding a route had been overcome.

36. Therefore the word "directly" was very important. It suggested a straightforward route. That route was not available. The certificate was false in a very material, if not crucial, respect. It is now said that moneys can be routed by an "agent", and it is further said by Mr Dooley that that is a "standard" way of getting money out of Russia these days. That particular averment would seem to be highly questionable. If it was standard then why has it not been adopted before, and why was it not specified (with the identity of the "agents") in the certificate? I was told on instructions that the missing £100,000 referred to above was being transferred in that way, but it would seem that the transfer had not been immediately successful. Even if it is true, the certificate did not say that that would be the mechanism, and is very materially false. Mr Elliot's evidence does not say that he believed the transfer would be via an agent, so he seemed to intend to certify what he certified. (I deal with his knowledge below.)

37. I therefore approach the remainder of this judgment on the footing that the mis-statement in the certificate was very materially inaccurate.

Knowledge of the falsity

38. Mr Eschwege submitted that in order for this certificate to be impeached it had to be on the footing that apparent compliance (which there was in this case) was either in

bad faith or compliance was "illusory". Mr Bradley disputed those requirements but said that if necessary he was prepared to aver and rely on an allegation of bad faith in the provision of the certificate. The bad faith is that Mr Elliot knew of the unavailability of the direct route, or did not make inquiries, and/or that Mr Lyuboshits and Mr Nurtdinov knew. He did not really seek to make a case that the claimant herself knew, and she put in a very short witness statement denying that she knew of the change of RB's position. That, at least, is plausible. She seems to have been very much on the sidelines of funding questions and I do not find that she herself knew. She probably left that to others.

39. I deal first with the knowledge of Mr Lyuboshits and Mr Nurtdinov. Mr Nurtdinov is important because he has an important liaison and probably lawyerly role. He has been described by Mr Lyuboshits in the past as "*a dispute resolution lawyer with over a decade of experience in leading Russian law firms and family offices*" who was to "*manage the day-to-day running of the Financial Manager's litigation and will be responsible for liaising between the Financial Manager [viz Ms Kireeva] and her English solicitors.*" He acts for Mr Lyuboshits (or his company) in this respect. Neither has put in a witness statement dealing with their knowledge of the change of stance of RB. Mr Dooley's evidence has provided hearsay evidence from Mr Lyuboshits in the form of a sentence which conveys that Mr Lyuboshits says that he did not know of the announcement of RB's change of stance. Nothing is said about Mr Nurtdinov's state of mind.

40. The announcement was publicised in a variety of financial publications. I have been shown 8 publications from 7 different sources which publicise the announcement. I have no way of knowing how widespread their circulation is (though one is the Moscow Times) but the announcement obviously had significance in financial circles. One of the publications (I believe it is called The Insider) reports that "the bank's support services told its customers" of the change (as one would expect). The announcement says that customers were told that they were being informed as far in advance as possible. Transfers in foreign currency could be made until 4pm Moscow time on 30th August. A publication called "The Bell" noted that RB's facility was hitherto one of the few ways that US dollars could be sent out of Russia.

41. Mr Eschwege has drawn my attention to the well known principle that the court will generally not decide disputed questions of fact purely on the basis of witness statements. Particularly where questions of honesty are involved, but also in other cases, there would generally need to be cross-examination, in order for those disputes to be decided, or at least compelling evidence against the challenged statement. That is familiar territory in summary judgment and other interlocutory applications, and I of course accept their applicability to this sort of application. However, a court can reject written evidence on the basis of implausibility, either inherent or in the light of the surrounding circumstances and other incontrovertible evidence, and make adverse findings accordingly. See eg *Shyam Jewellers Ltd v M Cheeseman* [2001] EWCA Civ 1818 at para 34; *Moloo v Standish Hotels Ltd* [2002] All ER (D) 57 at para 5.

42. Applying those principles, I find it totally implausible on the facts that Mr Lyuboshits and Mr Nurtdinov did not know of RB's change of policy on or after 15th August and before the certificate date. Whether or not they saw the actual publicity documents that I have seen, those announcements indicate, not surprisingly, that notification of

RB's change of stance was given to its customers. It would be particularly pertinent to give notice to Mr Lyuboshits and/or Mr Nurtdinov because they had been actively involved in getting funds out of the country to fund the litigation, and in particular the funds sent out in the last week of August. The need to get funds out of Russia must have been a frequent topic of contacts between the bank and those two individuals, and in that context it is inconceivable that the bank did not tell them that from the end of August it was not going to be possible. Mr Elliot's evidence, in a witness statement of 11th October, says that in the two months following my order about the certificate he regularly chased Cezar for funds, reminding them to pay the wasted costs, and he told them that they had to pay his costs by 31st August 2024. It is not surprising that they were chased for funds, and Mr Lyuboshits and Mr Nurtdinov must have been investigating how they could have been paid. The assertion of Mr Lyuboshits as to his knowledge, conveyed purely in a hearsay statement, cannot sensibly stand against the overwhelming likelihood of their being told, especially in the context of the August payments which look very much as though they were paid so as to beat the deadline (particularly the £403,000 paid right up against that deadline). Mr Lyuboshits' statement is one of those statements made on an interlocutory hearing which is sufficiently implausible that it is right not to accept it even though there has been no cross-examination or full trial of the point. Mr Nurtdinov himself has not apparently said anything about it. His silence is doubtless very significant. I find that the outflow of funds to pay Mr Elliot's costs in the last week of August was made to beat a deadline of which Mr Lyuboshits and Mr Nurtdinov were aware.

43. Next is the question of the knowledge of Mr Elliot. He has said in a witness statement that he did not know of RB's change of policy about external transfers. In his witness statement of 11th October 2024 he said:

> "8. During the last week of August, we received significant payments direct from Mr Lyuboshits from his account at Raiffeisen Bank, Moscow. These were enough to pay our outstanding invoices (including counsel fees) and the wasted costs order. I understood at that time from Mr Nurtdinov that Raiffeissen had lifted restrictions on the amount of funds which could be sent to us and was now able to make large payments to us. Believing that Raiffeissen could make these transfers to us going forward, I was able to prepare the Certificate.
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> 9. I was not aware until we received a letter from Gresham Legal on 2 September 2024, that on 15 August 2024, Interfax had released a statement (PIE26/2) stating that Raiffeisen intended to stop making international payments as from 2 September 2024.
>
> 10. In particular, I believed that the payment route described in the Certificate was in place and that funding would be provided by Cezar, the Claimant's current funder, using the bank account

> of its owner, Mr Lyuboshits, at Raiffeisen bank ZAO (Formerly) 17/1, Troickaya UL, Moscow, Russia to transfer funds directly to DCQ Legal."

44. Mr Eschwege urged on me that this fell into the category of statements which the court should not disbelieve without cross-examination or falsification from other sources. His case is that there is no evidence to falsify it.

45. Again, I have some considerable scepticism about Mr Elliot's statements of knowledge. It is at least credible that he would not have seen the particular announcement which was placed before him by Greshams because he may not have been scouring the press for such things, but less credible that the fact would not have come out in the discussions he was having with Mr Nurtdinov. Mr Bradley is also entitled to rely on the fact that when challenged on the point in the letter of 2nd September 2024 he simply did not deal with it. In particular he did not say he did not know about it. He gives a reason for that in his witness statement in rather odd terms. He says:

> "14. By early September, I knew the Claimant was minded to find other solicitors, I liaised with her, Cezar and Steptoe as regards a handover and I did not further address the payment route described in the Certificate. I did not respond to the Gresham correspondence in early September taking issue with the Certificate because by that point I was considering if my firm should remain on the record in these proceedings. Arrangements were then made for Steptoe to replace my firm."

46. That is a somewhat odd statement. However, even given that and considering a degree of implausibility in his averment that he thought that the direct route would be available, I do not quite think it right to reject his evidence and say that he knew of RB's change of policy before he signed the certificate.

47. However, if that is right then another fact flows from it, which is this. If Mr Elliot did not know, it was because he was not told. If that is right then one or both of Mr Lyuboshits and Mr Nurtdinov must have effectively misled him by not telling him, and/or telling him that the direct route would be available, and allowing him to give a false certificate. The significance of this appears below.

The requirements for invalidating the certificate – whether mala fides and/or illusion is required

48. There was a significant debate between the parties as to whether it was sufficient to show mere falsity in the certificate for the certificate to be ineffective (Mr Bradley's position), or whether the additional factor of mala fides and/or illusion was also required (Mr Eschwege's position); though Mr Bradley did advance a case of lack of bona fides in any event. By "illusion" I mean that a document is illusory, a factor raised in one of the cases.

49. The debate turned on *Reiss v Woolf* [1952] 2 QB 557, in which the Court of Appeal had to consider whether Further and Better Particulars complied with an unless order for their service. In that case the court construed the order (which required "default")

as not necessarily meaning "any document with writing on it", but to avoid a default the document must be "a document made in good faith and which can fairly be entitled 'Particulars'. It must not be "illusory" (Somervell LJ approving Devlin J's formulation in that respect at p560). Mr Eschwege submitted that that applied in the present case and that the document had not been demonstrated to lack bona fides and certainly was not illusory.

50. Mr Bradley disputed that test as applicable. He pointed to *QPS Consultants Ltd v Kruker Tissue (Manufacturing) Ltd* 1999 WL 852867, in which Simon Brown LJ observed that:

> "But in my judgment Reiss v Woolf is not still applicable, at any rate in the context of further and better particulars. (Lists of documents perhaps raise different considerations: certainly the requirements of such a list are inevitably less specific than those of a request for particulars)."

51. He reached that conclusion because of the availability of relief from the sanction that would otherwise have applied, a factor that was not available at the time of *Reiss v Woolf*:

> "In short, the position is now very different to that obtaining at the time of Reiss v Woolf. If today an Unless Order is breached, the court, so far from being powerless, has a wide general discretion to do whatever is required in the interests of justice. In these circumstances there can be no justification for construing Unless Orders for particulars as narrowly (and, I would add, artificially) as in times past.
>
> It is on this basis that I would agree with the judge's approach as to what these orders require and as to when the sanction is applicable, rather than because I think such an approach to be consistent with Reiss v Woolf. It was not, I conclude, necessary for the judge to have found the Particulars as a whole 'illusory' and nor, therefore, was it necessary, as the plaintiffs supposed, to establish that:
>
> "in relation to a substantial number of the requests no genuine attempt had been made to answer them."
>
> The order should properly have been found breached and the court's discretion thus engaged on a less exacting test than this."

52. Mr Bradley also pointed to the apparent doubt for an additional "good faith" requirement in *Euro-Asian Oil SA v Abilo (UK) Ltd* [2015] EWHC 1741 at para 17 per Andrew Smith J:

> "For my part, I find it difficult to accept that a document provided in "good faith" will always be either necessary or sufficient to comply with an unless order, and in particular I

> would think that a litigant who deliberately did not disclose a document of marginal significance – perhaps because of some embarrassing content unrelated to the litigation - but otherwise made full and proper disclosure would not fail to comply with a typical "unless" order for disclosure."

Though in the immediately following sentence he considered he did not need to engage with that.

53. By way of riposte Mr Eschwege pointed to *Lakatamia Shipping Company Ltd v Nobu Su, TMT Company Ltd* [2014] EWHC 275 (Comm) in which Hamblen J applied the "illusory" test, not having been referred to *QPS*.

54. I do not consider that I have to try to resolve any conflict which might exist between these cases for at least two reasons. First, the cases concerned documents and compliance complaints which are different from the document in the present case, and second, in any event I consider that if bad faith is necessary it has been established.

55. Whether or not bona fides is part of any test for another document, or whether or not a lack of bona fides is automatically fatal to any other form of required documentation, I consider that it would necessarily be fatal to this certificate. The certificate was a document intended to be provided in order to make sure this case could sensibly proceed to trial in the face of problems with funding which the clamant had disclosed and which were the successful foundation of her application to adjourn the July trial. It related to matters which were less technical than matters which might affect Further and Better Particulars (or Further Information, as they are now called) and disclosure, which were easily ascertained by the client and by the solicitor and which the solicitor would be expected to know about and find out. There was a point in requiring the certificate to be provided by the solicitor and not the client herself. There is something to be said for Mr Bradley's case that the validity of such a document should be tested by a "true or false" test without more, but I do not need to decide that because it is plain that bad faith will invalidate the document. A document intended to be provided for those purposes must plainly be honestly provided.

56. I consider that this document was not honestly provided. Despite my scepticism, I have not found Mr Elliot to have provided it on the basis of his own dishonesty; nor has the client herself been shown to have been dishonest (she was probably rather out of the debate). However, contrary to the submissions of Mr Eschwege, Mr Lyuboshits and Mr Nurtdinov are not irrelevant to this picture. Mr Elliot said:

> "Following receipt of the Order, I immediately forwarded it to Mr Nurtdinov at Cezar, the Claimant's funders. Over the next two months I regularly chased Cezar for funds, repeatedly reminding them that the court required them to provide us with funds to pay the wasted costs caused by the adjournment and to ensure that funding arrangements were in place to fund the (adjourned) trial by 31 August 2024. I also told them that they had to pay our outstanding invoices by 31 August 2024."

57. Knowing as they did that the certificate had to be provided, and knowing, as they must have done, that RB's stance meant that moneys could not be paid directly from

that account, and apparently not having established any other route, they must have known that the certificate could not be provided. They must either have told Mr Elliot of the difficulty (though I have not found that they actually did) or they deliberately withheld knowledge of the problem from Mr Elliot, making it impossible for him to certify truthfully that there was a route. I consider it more likely that (if they did not tell Mr Elliot of the problem) they (through Mr Nurtdinov) encouraged him somehow to make the certificate that he did. The bottom line is that they must have known that the certificate, long-since required, could not be provided in respect of paragraph 2 but encouraged or allowed its provision.

58. In my view that conduct amounts to bad faith. I also consider that it taints the certificate. Cezar (and Mr Lyuboshits and Mr Nurtdinov) are not the client, but they are the people apparently authorised by the client to negotiate matters of funding, and compliance with the order, by the client and to act on behalf of the client in that respect. Their conduct therefore taints the certificate and the act of the client's solicitor. The certificate was a very important document with serious consequences. It and its purpose are fundamentally undermined by such conduct and it cannot be allowed to stand as a genuine certificate.

Abuse of process

59. This is an alternative basis on which Mr Bradley puts his case. He does not need it in the light of my previous conclusion, but I will consider it as an alternative anyway.

60. Mr Bradley's case is that on 31st August the claimant was in no position to provide a certificate. However, one was provided. Thereafter, irrespective of whether the falsity was innocent or deliberate, she sought to retain "an illegitimate advantage at the expense of the court system" (quoting my words from a previous judgment of mine about non-payment of a trial fee by the claimant) by continuing to press her claim without telling the first defendant or the court that the premise on which she had been permitted to litigate after 31st August did not exist and had not actually existed as at that date. The claimant was duty bound to correct her assertions in the certificate and did not do so.

61. The circumstances in which the court might find something to be an abuse are infinitely varied. I was not shown any authority close to the facts of this case. Mr Bradley contented himself by relying on the helpful general statement of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1882] AC 529 at 536. Lord Diplock referred to:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

62. I consider that to be a useful starting point, and there is no point in providing examples of different cases where the jurisdiction has been exercised if they have no useful parallels. The issue is always going to be fact sensitive in every case. I have, however, studied the notes in the White Book at paragraph 3.4.17, and note the useful

two stage process apparently described in *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110 at para 63 – first the court has to consider whether the conduct is an abuse of the process, and if it is then it has to decide whether to strike the claim out, bearing in mind considerations of proportionality and a close examination of the facts.

63. Taking the version of facts which I have found above, the certificate was not, at the time, inaccurate to the knowledge of the actual provider (Mr Elliot). However, the funders, who were the part of the team most closely connected with the exercise, knew that it could not be provided, and yet it was. Immediately after it was provided the falsity was pointed out to Mr Elliot and he had no response. There was no route which had been ascertained, within the meaning of the certificate. Even as at the date of the hearing before me no proper route has been specified other than a generalised statement about an allegedly standard route via an unspecified agent. It is plain that the certificate could not have been properly and accurately provided in terms which would fulfil the requirements of the order as at the date that it was required.

64. In the circumstances if, contrary to my finding, the certificate was technically valid for some reason, then nonetheless reliance on it is an abuse of process because it should never have been provided. That in my view is a clear abuse. It was a key document for the survival of the claim, and the whole purpose of the mechanism was to provide an accurate certificate (if one could be provided) so that the court and the claimant could have some reassurance that costs and resources were not going to be wasted by proceeding towards a trial which realistically could not take place for want of funding. The certificate, and reliance on it thereafter as preserving the proceedings, is in my view conduct falling within the wide description of Lord Diplock.

65. I am also satisfied that it is so serious that striking out the proceedings because of that abuse is the proper remedy. The claimant should not be allowed to claim the fruits of a tree which, after 31st August 2024, should not have been there in the first place. Although I am not saying that an application for an extension of time before the event, or an application for relief from sanction after the event would necessarily have succeeded (I rather doubt that they would in the absence of a potential or actual route, which has still not materialised), no such application was made.

66. Accordingly, carrying out the exercise that I should carry out, I find that if, contrary to my conclusion that the certificate was invalid or ineffective, its provision and reliance on it thereafter was an abuse of process and the action would fall to be struck out for that reason.

Conclusion

67. I therefore find that the certificate in this case was not a valid or effective certificate, or alternatively that its provision and reliance on it is an abuse of process. The action therefore stands dismissed, or alternatively should be struck out, accordingly. The appropriate form of order can be subject to debate at the consequentials hearing following delivery of this judgment if necessary.