Neutral Citation Number: [2018] EWHC 3072 (Comm)

Case No: CL-2012-000478

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

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

Date: 13/11/2018

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

- -

Between :

JSC VTB BANK **(a company incorporated in Russia)**	**Claimant**
- and –	
(1) PAVEL VALERJEVICH SKURIKHIN **(2) PIKEVILLE INVESTMENTS LLP** **(3) PERCHWELL HOLDINGS LLP**	**Defendants**
- and –	
(1) ZENO ALOIS MEIER **(2) BEAT LERCH** **(3) CROWN CAPITAL HOLDINGS LIMITED** **(4) THE BERENGER FOUNDATION**	**Respondents**

- -

Tim Matthewson (instructed by **PCB Litigation LLP**) for the **Claimant**
David Lord QC and Sebastian Kokelaar (instructed by **Withers LLP**) for the **Fourth Respondent**
The Defendants and the First to Third Respondents did not appear and were not represented

Hearing date: 2 November 2018

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Approved Judgment

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Mr Andrew Henshaw QC :

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(A) INTRODUCTION

1. The Claimant ("***VTB***") applies by a notice dated 16 August 2018 for security for its costs in respect of an application by the Fourth Respondent ("***Berenger***") issued on 12 July 2018 to discharge the order of Mr Christopher Butcher QC (sitting as a Deputy Judge of the High Court) dated 21 July 2015, whereby Mr David Rubin and Mr Stephen Katz were appointed as receivers by way of equitable execution over the membership shares and interests in the Second Defendant ("***the Discharge Application***"). The Discharge Application is listed for hearing on 23 and 24 January 2019.

(B) FACTS

(1) VTB's claims against Mr Skurikhin

2. VTB is the second largest bank in Russia, and its majority shareholder is the Russian state. The First Defendant ("**Mr Skurikhin**") is a Russian individual resident and domiciled in Russia, who was the Chairman of the SAHO group of companies, which carried on business in the agricultural sector in Russia.

3. In December 2008, VTB re-financed loans in roubles to the SAHO group of companies in an amount equivalent to around £42 million, and Mr Skurikhin provided personal guarantees for the loans. The SAHO group companies defaulted on the loans, and demands were served on Mr Skurikhin in respect of his personal guarantees. The demands were not complied with and proceedings were issued against Mr Skurikhin in the Russian courts, leading to VTB obtaining a number of Russian judgments against him.

4. Having sought and obtained a domestic freezing order in England against Mr Skurikhin and worldwide freezing orders against the Second Defendant ("***Pikeville***") and the Third Defendant ("***Perchwell***"), VTB sued Mr Skurikhin in England and Wales on the basis of the Russian judgments. VTB was granted summary judgment in respect of sixteen Russian judgments (in amounts equivalent to approximately £7.6 million) by order of Simon J dated 7 March 2014, and in respect of a further nine Russian judgments (in amounts equivalent to approximately £5.8 million) by order of Blair J dated 14 November 2014. Mr Skurikhin has not satisfied these judgments or related costs orders.

5. On 12 June 2014, VTB applied for and obtained a worldwide freezing order against Mr Skurikhin (the "***WFO***"). The WFO required Mr Skurikhin to make worldwide asset disclosure, but he failed to comply with that order. On 10 July 2014, Mr Skurikhin failed to attend court or to produce documentation under CPR Part 71 as had been ordered by Males J. VTB accordingly issued a committal application against Mr Skurikhin. On 31 October 2014 Flaux J sentenced Mr Skurikhin to 16 months' imprisonment (with 4 months suspended) for contempt of court. The Claimant says Mr Skurikhin has not come into the country since then, so the committal orders have not been enforced against him and he remains in contempt of court.

6. On 16 December 2014, VTB issued an application to enforce its judgments against Mr Skurikhin by seeking the appointment of receivers by way of equitable execution over the limited liability partnership interests in Pikeville (the "***Receivership Application***").

7. Pikeville is an English registered limited liability partnership, and is the registered owner of three valuable Italian properties. Its registered members are the First Respondent ("***Mr Meier***"), the Second Respondent ("***Mr Lerch***"), and the Third Respondent ("***Crown***"). Crown is a company incorporated in Hong Kong owned and controlled by Mr Meier and Mr Lerch. On 19 January 2010, Crown, Mr Meier and Mr Lerch each executed a declaration of trust pursuant to which they declared that they held the membership shares and interests in Pikeville on trust for Berenger. Accordingly, Berenger is the ultimate beneficial owner of Pikeville.

8. VTB's contention was (and is) that Mr Skurikhin either has a right to call for the assets of Berenger to be transferred to him, or has *de facto* control of those assets.

(2) Berenger and the Olympic trust

9. Berenger is a foundation incorporated under the laws of the Principality of Liechtenstein. It was formed on 12 January 2005 by WalPart Trust ("***the Founder***"). Mr Skurikhin was its economic founder.

10. Article 4 of the statutes of Berenger ("the ***Statutes***") provides that:

> "the beneficiaries and the extent of their benefits shall be specified in regulations, which shall be issued by the Founder of the foundation. Other bodies (e.g. the Board of Directors of the foundation) or third parties, who need not be involved in the foundation, may be appointed therein to determine in the form of regulations the beneficiaries and the extent of their benefits".

11. On 12 January 2005 the Founder issued regulations pursuant to which Mr Skurikhin, his descendants, and trusts, foundations and the like whose beneficiaries include one or more classes of beneficiaries of the Berenger foundation, were appointed as beneficiaries ("***the Original Regulations***"). By Article 3 of the Original Regulations, the Founder transferred, within the meaning of Article 4 of the Statutes, the right to modify the Original Regulations to the board (or council) of the foundation.

12. On 16 February 2005 Berenger's board replaced the Original Regulations with a new set of regulations, which named Mr Skurikhin and the trustee of the Olympic Settlement (Accreda Trustees Limited) as discretionary beneficiaries of the foundation.

13. The board of Berenger originally consisted of four individuals: Dr Andreas Schurti (a Liechtenstein attorney), Mr Urs Hanselmann (a Liechtenstein accountant and licensed trustee), Mr Meier and Mr Lerch. Mr Meier and Mr Lerch control Accreda Management AG, a provider of fiduciary and corporate services to businesses and individuals.

14. Mr Meier and Mr Lerch resigned as members of Berenger's board on 13 March 2012. Mr Meier has, however, continued to assist the board in the management of the foundation's affairs and assets.

15. The Olympic Settlement ("***Olympic***") is a discretionary trust established under the laws of the island of Nevis. It was established on Mr Skurikhin's instructions to act as the principal beneficiary of Berenger.

16. On 2 February 2005 the trustee of Olympic exercised its power under the trust deed to nominate thirteen individuals as beneficiaries of the settlement. These individuals were Mr Skurikhin himself, and members of his family and friends.

17. Also on 2 February 2005, the trustee of Olympic passed a resolution pursuant to clause 12 of the trust deed that a person could not be a beneficiary of the settlement in the event of a bankruptcy or lawsuit against him for an amount greater than $100,000.

(3) The Receivership Application

18. At a directions hearing on 6 February 2015, Leggatt J gave VTB permission to join Mr Meier, Mr Lerch, Crown and Berenger as Respondents to the Receivership Application, and granted permission to serve Berenger out of the jurisdiction. The Receivership Application was served on Berenger in Liechtenstein on 10 April 2015 through the court's foreign process section.

19. Berenger did not file any evidence in opposition to the Receivership Application, nor did it attend the hearing on 13 July 2015, which was an on notice hearing. Berenger says it was unable to respond to the Receivership Application at the time or to participate in the hearing because it lacked the funds to instruct solicitors and counsel in England; and has been able to make the Discharge Application only because a beneficiary of Olympic has made the necessary funds available to it.

20. At the hearing of the application VTB relied, *inter alia*, on a report from an expert in Liechtenstein law, Dr Heinz Frommelt, which concluded that it was likely that there was a "*mandate agreement*" between Mr Skurikhin (as the economic founder of

Berenger) and the members of Berenger's board pursuant to which Mr Skurikhin had the right to direct the members of the board to exercise their powers under the Statutes in a particular way, including by directing them to transfer Berenger's assets into his name.

21. The Receivership Application was heard by Christopher Butcher QC (as he then was), sitting as a Deputy High Court Judge. In his judgment dated 21 July 2015, the Deputy Judge found as follows:

    i) The authorities establish that a receiver by way of equitable execution may be appointed over whatever may be considered in equity as the assets of the judgment debtor, and in that context property subject to a trust or analogous foreign arrangement would be regarded in equity as the assets of the judgment debtor if he has the legal right to call for those assets to be transferred to him or to his order, or if he has *de facto* control over the trust assets.

    ii) It was more likely than not that Mr Skurikhin had either (a) a right to call for the assets of Berenger to be transferred to him, or (b) de facto control of those assets, and so the membership interests in Pikeville should be considered in equity to be Mr Skurikhin's assets. It was therefore open to the court to appoint a receiver by way of equitable execution over them.

    iii) It was just and convenient for equitable receivers to be appointed. The judge therefore appointed Mr Rubin and Mr Katz as receivers (the "***Receivers***") by way of equitable execution over the membership interests in Pikeville.

22. Berenger highlights the fact that one of the matters which the judge said had led him to that conclusion was:

> "The evidence of Dr Frommelt, part of which I have quoted above. In my judgment it is significant that an experienced Liechtenstein lawyer draws the conclusions: (a) that Mr Skurikhin or his agent is the mandatory to a mandate agreement with the board of directors / foundation council of the Berenger Foundation; (b) that Mr Skurikhin is likely to be able to instruct the board to transfer at least significant parts of the Berenger Foundation's interests in Pikeville into his own name; (c) that the reason why Mr Skurikhin and his family benefit from the Berenger Foundation is because he is in de facto control as a mandatory and its economic founder." (§ 49(6))

23. The Receivership Order included the following provisions:

> § 1: The receivers are *"[u]ntil further Order of the Court"* appointed receivers by way of execution only over the membership shares and interests (including all dividends, bonuses, rights and other privileges arising from them) in Pikeville registered in the name of the First, Second and Third Respondents;

> § 4: The receivers are to hold those assets, and any assets of Pikeville which come into their hands, *"to the Order of the Court"*;
>
> § 6: "*The Receivers shall, within a reasonable period of the receipt of monies pursuant to the taking of any steps provided for herein to apply to Court for directions as to what is to become of the said monies*".
>
> § 7: "*Anyone served with or notified of this order may apply to Court at any time to vary or discharge this Order (or so much of it as affects that person), but they must first inform the Claimant's legal representatives. …"*
>
> § 20: "*The Claimant, the First and Second Defendants, the Respondents, the Receivers and any other person affected by this Order shall have permission to apply.*"

24. Since the date of the Receivership Order, the Receivers have taken steps to preserve the membership interests in Pikeville and to realise its assets. They were appointed as joint administrators of Pikeville by an order of Mann J dated 6 August 2015. The steps they have taken to realise Pikeville's assets include the commencement of legal proceedings in Italy in relation to the three Italian properties, two of which were subject to tenancy agreements in favour of Mr Skurikhin or his wife, Mrs Skurikhina.

(4) Subsequent events in relation to Mr Skurikhin, Berenger and Olympic

25. On or about 16 March 2016, Mr Skurikhin was declared bankrupt by the Arbitrazh Court of the Novosibirsk Oblast. By a ruling of the same court dated 7 June 2017, the bankruptcy proceedings were concluded and Mr Skurikhin was discharged from his obligations to his creditors. VTB appealed against that decision to the Arbitrazh Court of the West Siberia region. The appeal was partially successful. By a ruling dated 18 December 2017 the appeal court confirmed the decision of the lower court to conclude the bankruptcy proceedings, but set aside Mr Skurikhin's discharge. Mr Skurikhin's appeal against that decision was dismissed by the Supreme Court of the Russian Federation on 20 April 2018.

26. After it had become aware of Mr Skurikhin's bankruptcy, the board of Berenger passed a resolution on 14 June 2017 irrevocably excluding Mr Skurikhin from the class of beneficiaries of the foundation. The board also issued new regulations on the same date, which provide that the class of beneficiaries of the foundation shall consist of Accreda Trustees Ltd as trustee of Olympic.

27. On 18 June 2017 Accreda Trustees Ltd, as trustee of Olympic, passed a resolution confirming Mr Skurikhin's exclusion as a beneficiary by reason of his bankruptcy, pursuant to the resolution dated 2 February 2005 referred to in § 17 above.

(5) The Discharge Application

28. On 12 January 2018, Withers LLP ("**Withers**"), acting for Mr Skurikhin, sent a letter to Edwin Coe LLP ("**Edwin Coe**"), solicitors for the Receivers (and copied to PCB

Litigation LLP ("**PCB**"), solicitors for VTB), contending that their client no longer had any beneficial interest in the assets of Berenger and that accordingly the basis upon which the Receivership Order was made had fallen away. The letter summarised recent events up to and including the decision of the Arbitrazh Court of the West Siberia region on 18 December 2017. At this stage Mr Skurikhin was, the letter said, preparing appeals to the Supreme Court of Russia and the Constitutional Court of Russia. The last two paragraphs of the letter stated:

> "As a result of the steps taken by the Financial Manager in the Russian bankruptcy our client no longer has any direct or indirect beneficial interest in any of the assets of the Berenger Foundation, including the membership interests in Pikeville. Accordingly, the basis upon which the receivership order was originally made has now fallen away, and … there is no good reason why your clients should remain in office as receivers and administrators. Pikeville should now be returned to the control of its officers for the benefit of its members.
>
> We consider that it is incumbent on your clients, as officers of the Court, to bring these highly material developments in the Russian bankruptcy proceedings to the attention of the Court, and to seek its directions. We should be grateful if you would confirm within 7 days of the date of this letter that your clients will make an application for directions, and that they will take no further action to realise any of the assets of Pikeville pending the outcome of that application."

29. On 5 February 2018, PCB wrote to Withers informing them of the WFO and of the committal order of Mr Justice Flaux. PCB asked Withers to explain the basis on which the court should hear Mr Skurikhin and the steps that he intended to take to remedy his contempt. No response was received to that letter.

30. On 1 June 2018, Withers (acting through the same individual solicitor) wrote again to Edwin Coe, this time on behalf of Berenger and Olympic, stating that it had been instructed to make an application to discharge the Receivership Order. The letter requested the immediate cessation of enforcement action in Italy, where it appeared hearings had been listed for 4 June and 13 July 2018 in respect of properties owned by Pikeville.

31. Berenger on 12 July 2018 applied to discharge the appointment of the Receivers ("***the Discharge Application***") on the basis that (in substance):

    i) the membership interests in Pikeville are not amenable to execution of the judgments obtained by VTB against Mr Skurikhin. Those interests belong beneficially to Berenger, and Mr Skurikhin does not have any interest in, or right to, the assets of Berenger. More particularly:

        a) the factual basis for the Deputy Judge's decision, namely that Mr Skurikhin controlled Berenger through a mandate agreement, was incorrect. Each of Mr Meier, Dr Schurti and Mr Hanselmann confirm in their witness statements that no such agreement has ever existed, and

that Mr Skurikhin was only ever a discretionary beneficiary of the foundation; and

b) Mr Skurikhin has in any event lost his status as a beneficiary of Berenger and Olympic since the making of the Receivership Order; and/or

ii) the Receivership Order serves no useful purpose because, as a matter of Liechtenstein law, Berenger's assets are not amenable to execution by a creditor of a discretionary beneficiary, even if that beneficiary holds a mandate agreement.

32. As expressed in Part A of Berenger's application notice, the grounds for the application are that:

> "The membership shares and interests in the Second Defendant are held on bare trust for the Fourth Respondent by the First, Second and Third Respondents. Those membership interests are not amenable to execution of the judgments obtained by the Claimant against the First Defendant because the First Defendant does not have any right to, or interest in, the assets of the Fourth Defendant. Further, or alternatively, the appointment of the Receivers serves no useful purpose because there is no property which can be reached either at law or in equity."

33. The application is supported by witness statements from Mr Meier and the current members of Berenger's board (Dr Schurti and Mr Hanselmann), and by expert evidence on matters of Liechtenstein and Nevis law including the effectiveness of Mr Skurikhin's exclusion as a beneficiary of Berenger and Olympic.

(C) VTB'S APPLICATION FOR SECURITY FOR COSTS

(1) VTB's application under CPR 25.12

34. VTB seeks security for its costs of defending the Discharge Application in the sum of £120,000. VTB's application as set out in its application notice and evidence, is made under CPR 25.12(1):

> "A defendant to any claim may apply under this section of this Part for security for his costs of the proceedings."

35. VTB contends that:

i) in respect of the Discharge Application, it is properly to be regarded as a "*defendant*" to a "*claim*" within the meaning of CPR 25.12(1);

ii) Berenger is resident out of the jurisdiction, but not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982; and/or

iii) Berenger is a body corporate and there is reason to believe that it will be unable to pay VTB's costs if ordered to do so.

36. Berenger's position is that:

i) VTB is not a defendant to a claim within the meaning of rule 25.12(1), and therefore does not have standing to make the application;

ii) condition (ii) is satisfied;

iii) Berenger has assets within the jurisdiction in the form of the membership interests in Pikeville, which are held by the members on bare trust for it. Pikeville owns the Italian properties, which were acquired for some €18 million. Berenger is also the ultimate beneficial owner of 55% of the shares in Miccros Limited, which lent the funds to Pikeville to purchase the Italian properties; and

iv) even if the court concludes that it does have jurisdiction to order security for costs in respect of the Discharge Application, the court should decline to exercise its discretion.

37. The critical issue is whether or not condition (i) is satisfied.

(2) Whether VTB is the defendant to a claim for CPR 25.12 purposes

38. An application for security for costs under Rule 25.12(1) may be made by "*a defendant to a claim*". CPR 2.3(1) defines a "*defendant*" as "*a person against whom a claim is made.*" The word "*claim*" is not defined. However, there is a case law on the nature of the proceedings that can sustain an application for security for costs.

39. In *Taly NDC International NV v Terra Nova Insurance Co Ltd* [1985] 1 WLR 1359, a third party against whom the plaintiff had obtained orders for specific discovery and interrogatories applied for security for costs against the plaintiff under RSC Order 23, rule 1 (which applied *"on the application of a defendant to an action or other proceeding"*). The Court of Appeal upheld the decision of the judge to dismiss the application. Parker LJ said at pp. 1361-2:

> "I have no hesitation, myself, in coming to an opposite conclusion. In my judgment the proceedings referred to in the rule, if they are not an action, are at least proceedings of the nature of an action and refer to the whole matter and not to an interlocutory application in some other proceedings. Were it otherwise, it appears to me that chaos would reign, for every time an interlocutory application was taken out by a defendant the plaintiff would be able to say, "The plaintiff is in the position of the defendant in this application and the defendant is in the position of the plaintiff. They are proceedings. Therefore I ought to have security for the costs of this application." One has only to examine that to see that it cannot have any foundation whatever."

Croom-Johnson LJ said at p. 1363C–D:

> "As to the point on jurisdiction, it really proceeds upon the proper construction of R.S.C., Ord. 23, r. 1 , and I have no doubt myself that the purpose of that Order is that the proceeding, which is referred to there, is the proceeding as a whole, whether it is an action or something equivalent to an action …. The right to ask for security for costs under Order 23 , where the plaintiff is not resident within the jurisdiction, is purely devoted to people who are plaintiff and defendant in the proceeding as a whole."

40. In *CT Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] BCC 713, the Court of Appeal applied *Taly* and upheld a decision to dismiss an application by a plaintiff for security for its costs of the defendant's application for an inquiry as to damages suffered by the defendant as a result of the grant of an interlocutory injunction. Dillon LJ said at p.719:

> "The natural meaning of the term 'plaintiff' in a context of litigation is the plaintiff in the proceedings as a whole or original proceedings. The definition in s. 225 should be construed in accordance with that natural meaning.
>
> Accordingly, I reject Mr Gee's submission that by route of the definition of 'plaintiff' in s. 225 an impoverished corporate defendant who makes an application by interlocutory summons or motion in some other plaintiff's action thereby constitutes itself a 'plaintiff' which can be ordered to give security for the costs of its application under s. 726 , 'plaintiff' in s. 726 bears its ordinary meaning and that does not include a defendant which makes an interlocutory application."

and at p721:

> "Mr Gee accepts, as I have mentioned, that the rule that a defendant cannot be ordered to give security when he has been brought before the court and is seeking to defend himself (as opposed to counterclaiming in respect of matters which go beyond his defence) would preclude a plaintiff from claiming security against a defendant, whether a foreign resident or an impoverished company, in respect of an application by that defendant to set aside or curtail a Mareva or other injunction obtained ex parte by the plaintiff. In my judgment, an application by the defendant for an inquiry as to damages under the cross-undertaking when the Mareva or other injunction has been discharged is likewise a mere matter of defence.
>
> For this conclusion there are several reasons which are cumulative (or different aspects of the same point), viz: (1) the cross-undertaking is the price which the plaintiff has to pay for obtaining an injunction before the action can be finally tried and decided, (2) the damages under the cross-undertaking are not

> strictly damages but compensation to the defendant for loss suffered if it is subsequently established that the interlocutory injunction should not have been granted, and (3) there is no separate cause of action for the damages and it can only be enforced by application in the action in which the injunction was granted. See generally the observations of Neill LJ in Cheltenham & Gloucester Building Society v Ricketts [1993] 1 WLR 1545 at pp. 1550H–1552G. Therefore the general rule as to not awarding security for costs against a defendant is applicable."

41. In the same case, Millett LJ referred at p.724 to the parallel jurisdiction under section 726(1) of the Companies Act 1985 to order security for costs against a limited company which was "*plaintiff in an action or other legal proceeding*", to which he stated (at p725) Order 23 rule 1 ought to be similarly construed. He said:

> "Had Parliament intended to confer power on the court to order security for costs against the applicant (whether a plaintiff or a defendant in existing proceedings) who makes an application to the court in the course of those proceedings, it would hardly have restricted the operation of the section to 'a plaintiff in an action, suit or other legal proceedings'."

At 724-725:

> "Policy considerations support the same conclusion. The purpose of the jurisdiction to order security for costs is to prevent the injustice which would result if a plaintiff who was in effect immune from orders for costs were free to litigate at the defendant's expense even if unsuccessful. Such an order can be made only against a plaintiff; it cannot be made against a defendant. That is because a plaintiff institutes proceedings voluntarily. If he chooses to bring proceedings against an insolvent company with limited liability, he does so with his eyes open; he takes the risk that he may not recover his costs even if successful, but it is his own decision to take that risk. The defendant, however, has no choice in the matter. He is compelled to litigate or submit to the plaintiff's demands. He must be allowed to defend himself without being subjected to the embarrassment of having to provide security for the plaintiff's costs. This involves being free to take whatever steps and make whatever applications are necessary in order to enable him to defend the proceedings."

and at p727:

> "It has long been firmly established by authority that the court cannot award security for costs against a defendant, and that in considering whether a party is a plaintiff or a defendant the court must have regard to the substantial and not the nominal position

> of the parties. The question in every case is whether the party against whom an order for security is sought is in the position of plaintiff in the proceeding in question."

42. On the facts, Millett LJ stated at p728:

> "If attention is concentrated on the defendant's application to enforce the plaintiff's cross-undertaking in damages, the defendant certainly has the appearance of a plaintiff. It claims that it has suffered loss for which the plaintiff is responsible and it seeks compensation for that loss. If the plaintiff recognises that it is likely to be ordered to pay something, though not as much as the defendant claims, it can protect its position by making a payment into court. It certainly looks like a defendant. But as the cases which I have cited in this part of my judgment demonstrate, it is necessary to consider the whole litigation between the parties in order to determine which of them is really in the position of a plaintiff and which a defendant. If the proceedings are considered as a whole, then it is apparent that the parties have never exchanged roles, and that the defendant has done nothing to justify being treated as a plaintiff. …"
>
> "As for the defendant, it has had no choice in the matter. It has done nothing beyond reacting to the steps which the plaintiff has taken against it. The plaintiff brought the proceedings; the defendant has been compelled to defend them. The plaintiff obtained an injunction against it which the defendant claims ought not to have been granted; the defendant has obtained its discharge. The defendant claims that the existence of the injunction caused it loss; it seeks to recover the loss. It seeks only to be restored, so far as compensation can achieve it, to the position it was in before the proceedings began. The defendant must counter-attack to recover ground lost by an earlier defeat, but it makes no territorial claim of its own; it cannot fairly be described as an aggressor."

43. In *Hutchison Telephone (UK) Ltd v Ultimate Response Limited* [1993] BCLC 307, the Court of Appeal was concerned with an application for security for costs against a defendant who had brought a counterclaim. Bingham LJ said at 317:

> "The trend of authority makes it plain that, even though a counterclaiming defendant <u>may</u> technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. So the question may arise, as a question of substance, not formality or pleading: is the defendant simply defending himself, or is he going beyond

> mere self-defence and launching a cross-claim with an independent vitality of its own?"

44. This test was applied by the Court of Appeal in *Autoweld Systems Ltd v Kito Enterprises LLC* [2010] EWCA Civ 1469. Black LJ (with whom Rimer and Sedley LJJ agreed) said at § 59:

> "It must be borne in mind that the design of the rules is to protect a defendant (or a claimant placed in a similar position by a counterclaim) who is forced into litigation at the election of someone else against adverse cost consequences of litigation."

45. The principles were considered by the Privy Council in *GFN SA v The Liquidators of Bancredit Cayman Limited (in official liquidation)* [2009] UKPC 39, an appeal to the Privy Council from the Court of Appeal of the Cayman Islands. Bancredit Cayman Ltd was wound up and its liquidators adjudicated upon proofs of debt. A number of parties whose proofs of debt had been rejected by the liquidators applied by summons pursuant to the Insolvency Rules for orders reversing the rejection of their proofs of debt and for orders expunging the admission of the proofs of debt submitted by certain other creditors. The liquidators applied for security for the costs of the applications. The question for the Privy Council was whether these applications could be said to be an "*action, suit or other legal proceeding*" and/or an "*action or other proceeding*" for the purposes of s74 of the Cayman Islands' Companies Law and Order 23 rule 1 of the Grand Court Rules of Court.

46. Lord Scott stated that the origin of the court's power to entertain an application for security for costs lay in its inherent jurisdiction to control its own proceedings. The rules of court did not create or confer the power to do so, but harnessed that power so as to control its exercise (§ 9). He went on to say that the court should consider the substance of the application rather than its strict form (§§ 20-24). An interlocutory application designed to regulate or assist in some way the conduct of the substantive action between the parties was not capable of sustaining an application for security for costs (§25). By contrast:

> "…an application which, although interlocutory in form, raised issues as to the rights of the parties which were in substance independent of the issues in dispute in the parent action would, in their Lordships' opinion, normally constitute in substance "proceedings"…" (§ 26)

> and:

> "The applications to reverse the liquidators' rejection of the appellants' proofs of debt require the court to determine whether, and if so to what extent, Bancredit Cayman Ltd was indebted to the appellants at the commencement of the winding up. … These are applications to determine the substantive, as opposed to merely procedural, rights of the would-be creditors in the winding up. The cause or matter (to use a neutral term) in which these applications are made is the winding up. But the only issue raised for decision by the winding up application was whether

> Bancredit should be placed in liquidation. The winding up order did not and could not resolve any issue as to the state of indebtedness between individual creditors and the company. Each creditor's submission of a proof of debt and the liquidators' response to that proof provided a new factual platform on the basis of which new substantive issues between individual creditors and the liquidators might arise. The commencement of litigation to resolve these issues would, in my opinion, constitute the commencement of "proceedings" for the purposes both of section 74 and of Order 23." (§ 27)

47. Lord Neuberger of Abbotsbury MR gave a separate opinion with which Lord Rodger of Earlsferry JSC, Baroness Hale of Richmond JSC and Sir Jonathan Parker concurred. He agreed with Lord Scott that the court has an inherent jurisdiction to order security for costs, which, whilst essentially discretionary, must be exercised in a manner that accords with the settled practice of the court, as circumscribed or extended by primary or secondary legislation (see § 30). He also held (at § 31) that:

    i) it was the settled practice of the court not to order security for costs against a defendant in relation to any steps which are reasonably necessary to enable him to resist a claim brought against him;

    ii) in general, a discrete order for security will not be made in relation to what is in substance an interlocutory application; and

    iii) as a general rule, the court must look at the substance of the application, as opposed to its strict form.

48. He concluded at § 32:

> "In my judgment, viewed in the light of these principles, the applications in the present case were originating applications falling within the expressions I have just quoted. They brought before the court issues which were not previously before the court, and which would not otherwise have been before the court; and, although brought in the context of a winding up ordered by, and under the ultimate supervision of, the court, these applications were essentially free-standing. The applications arose because of Bancredit Cayman Ltd's insolvency and because of a dispute as to whether that company was genuinely indebted to the appellants (as they claimed and the liquidators denied) or to other claimants (as the liquidators claimed and the appellants denied). The winding up proceedings merely provided the forensic framework in which the applications were made, or the procedural launch pad from which the applications were issued. Indeed, in his engaging submissions, Mr Lowe QC realistically accepted that the applications were in substance originating proceedings. This concession must be right given that these applications would admittedly be originating

> proceedings if this was a voluntary or creditors' winding up and all the facts were otherwise identical."

The court therefore concluded that the applications made under the Insolvency Rules were in substance originating applications, and that security for costs should be granted.

49. More recently, the authorities were reviewed by Rose J in *Re Dalnyaya Step LLC (in liquidation)* [2017] 1 WLR 4264. In that case, a person claiming to be a liquidator appointed by a Russian court to carry out the liquidation of a Russian company, which was a subsidiary of a Guernsey unit trust, applied for and obtained a recognition order under the Cross-Border Insolvency Regulations 2006. He also applied for an order under section 236 of the Insolvency Act 1986 that the managers of the unit trust produce certain documentation and attend court for questioning. The managers made an application to set aside the recognition order and resisted the application under section 236. They applied for security for costs against the liquidator. This was resisted on the basis that neither the recognition application nor the section 236 application constituted "*proceedings*" or a "*claim*" for the purposes of CPR Rule 25.12 and/or that the application to set aside the recognition order was a free-standing "proceeding" in which the managers were the claimant and the liquidator was the defendant.

50. Rose J held that she had jurisdiction to make an order for security for costs against the liquidator and did so. She held that the recognition application was properly described as a proceeding within the meaning of CPR 25.12 to which the managers were defendants (§§64 and 65). She rejected the submission that the set-aside application had an "*independent vitality*" of its own: the managers were not seeking any separate relief themselves, and the set aside application was purely a defensive stance taken against the recognition order which had been sought and obtained in order to enable the liquidator to bring the section 236 application against them (§ 71). Rose J concluded (§ 76):

> "… in my judgment, the application to set aside the recognition order is part and parcel of the proceeding or claim that was commenced by [the liquidator] when he applied for the recognition order. The set aside application cannot be regarded as free-standing, entirely separate from the order which it seeks to challenge. Whether or not the [managers] were defendants to [the liquidator]'s claim or proceeding at the moment it was initiated, they have certainly become defendants now that they challenge the making of the recognition order. They should not be deprived of the status of defendants for the purposes of the security for costs jurisdiction by the fact that [the liquidator] failed to mention what he knew about the troubled history of DSL at the ex parte hearing before the registrar. [The liquidator] must have realised that his subsequent application under section 236 against the [managers] would be stoutly resisted, rightly or wrongly, on the grounds on which they now rely. Subject to the points on the exercise of my discretion which I discuss below I consider that I have jurisdiction to order security for costs against [the liquidator]." (my emphasis)

51. There is a potential parallel between Berenger's Discharge Application in the present case and the managers' application in *Dalnyaya* to set aside the recognition order. VTB contended that Rose J's reasoning quoted above flowed from the point, made in the second passage I have underlined, that the liquidator had applied for the order *ex parte* and had not disclosed the position fully to the court. However, in my view the point Rose J makes in the first underlined passage is of general application.

52. A further possible analogy is the situation that arises where a party applies to set aside the registration in England and Wales of a foreign judgment. CPR 74.1 provides that CPR Part 25 applies to an application for security for the costs of, *inter alia*, any proceedings brought to set aside the registration, and any appeal against the granting of the registration, *"as if the judgment creditor were a claimant"*. This seems to me to reflect the policy that, although in one sense an application to set aside registration or an appeal against registration might be said to be a new proceeding raising new issues, the judgment debtor is in substance in the position of a defendant to the proceedings and thus cannot in general be required to provide security for costs.

(3) Application to the present case

53. VTB argues that it is a defendant to a claim within CPR 25.12(1) because the Discharge Application, although interlocutory in form, raises issues as to the rights of the parties in substance independent from the parent action:

   i) Berenger was not a defendant to the claims brought by VTB against Mr Skurikhin, and was simply added as a party to the Receivership Application;

   ii) the Receivership Application was heard more than three years ago, and Berenger opted to take no part in it despite having been served with the application;

   iii) the issues determined by the Deputy Judge in the Receivership Application are now *res judicata* and/or it is an abuse of process for them to be raised again in the Discharge Application;

   iv) Berenger is in substance asking the court to rehear the Receivership Application. If it had appealed the Receivership Order (which was the only proper way to challenge the decision of the Deputy Judge), VTB would have been entitled to security for costs under CPR 25.15; and

   v) whilst the Receivership Order provided at paragraph 7 that anyone served with it could apply at any time to vary or discharge the order, that was to provide for a material change of circumstances, for example the bankruptcy of or misconduct by the Receivers. It did not permit the rehearing of matters already fully argued at an *inter partes* hearing.

54. However, I do not accept that VTB is in substance a defendant to a claim by Berenger.

   i) The Receivership Application was initiated by VTB, against Berenger (among others), and in the context of proceedings commenced by VTB. It was made for the purpose of enabling VTB to enforce the judgments it has obtained against Mr Skurikhin, against assets held by Berenger. Berenger did not choose to become a party to the application or the proceedings.

ii) The Discharge Application is in substance a defensive measure, by which Berenger seeks in effect to be removed from the proceedings and to regain control of its assets.

iii) Berenger does not seek any positive relief or finding against VTB in the nature of a counterclaim or comparable to the relief sought by the creditors in *GFN*. It does not, adopting the words of Millett LJ in *CT Bowring*, make any territorial claim of its own.

iv) Berenger's application has no independent vitality of its own, and is simply part and parcel of the claim or proceeding commenced by VTB in the form of the main action and/or the Receivership Application, in the same way as the set-aside application in *Dalnyaya* was part and parcel of the recognition application proceedings.

v) Berenger's application does not in any relevant sense raise issues that were not previously before the court. The issue remains whether the Receivership Order was properly made and/or should continue to stand. That is not altered by the facts that the application (a) has been made late, (b) raises matters that could have been argued before the Deputy Judge when the Receivership Application was originally made or (c) raises matters that have arisen subsequently. None of those matters alters the fundamental point that the Discharge Application does not raise issues going beyond the scope of the questions raised by the Receivership Application and Receivership Order themselves, i.e. whether Berenger's assets should in equity be regarded as belonging to Mr Skurikhin. Specifically as to point (c), as Berenger points out, if Mr Skurikhin had already been removed as a beneficiary at the time of the hearing before the Deputy Judge then that would plainly have been a proper basis for resisting the receivership application, and it could not have been said that Berenger was advancing a claim with an independent life of its own. It would be strange if the fact that the circumstances have altered since the making of Receivership Order were to convert Berenger from a defendant into a claimant.

vi) It may be the case that the provision in paragraph 7 of the Receivership Order – for any party to be able to apply at any time to vary or discharge it – was primarily intended to cater for changes of circumstances. However, (a) Berenger's case is in part (and, it submits, primarily) based on a change of circumstances, viz the removal of Mr Skurikhin as a discretionary beneficiary of the trusts, and (b) paragraph 7 is not in its terms confined to changes of circumstances. It is therefore, at least arguable that Berenger has standing to make the Discharge Application without seeking to *appeal* from the Receivership Order (which would of course have put Berenger at risk of a security for costs order under CPR 25.15).

vii) I also see some force in Berenger's point that the only reason Berenger has found itself in the position of applicant in the Discharge Application is that VTB, as the applicant for the order, and/or the receivers as officers of the court, have not themselves returned to court for directions as they were invited to do in Withers' letter of 12 January 2018. In *Speedier Logistics & Ors v Aardvark Digital & Anr* [2012] EWHC 2776 (Comm) Eder J at § 25 referred to *"the continuing duty*

on a claimant who has sought the exercise of the court's discretion on a certain basis" and said: *"If that basis changes, it seems to me important, as a matter of principle, that the claimant does revert to the court to inform the court of the position. The main reason for that is that the exercise of the court's discretion was originally on a particular basis and, if that basis changes, it seems to me, as a matter of principle, that the court must be informed of that change in the ordinary circumstances"* (and see, to similar effect, § 32). I would accept that VTB has a reasonable argument that there has in fact been no relevant change in circumstances – see further below – but equally it is arguable on behalf of Berenger that there has been such a change, and thus that VTB itself and/or the receivers should themselves be in the position of applicants.

viii) I deal below with VTB's specific points about *res judicata* and abuse of process.

55. VTB's contention as to *res judicata* is that the Deputy Judge's judgment was final and conclusive on the merits as to whether the membership interests in Pikeville should be considered as the assets in equity of Mr Skurikhin. An issue estoppel can in principle arise from an interlocutory judgment provided it is final and conclusive on the merits (see e.g. *Desert Sun Loan Corp v Hill* [1996] C.L.C. 1132 at 1138 and 1142), and the decision in the present case was made following an *inter partes* hearing where the point was fully argued by VTB. VTB refers by way of analogy to the Court of Appeal's conclusion in *S.C.F. Finance Co. Ltd. v Masri (No. 3)* [1987] Q.B. 1028, in the context of a freezing injunction, that a decision at an *inter partes* hearing about the ownership of a bank account (which had been alleged to belong to a third party, the defendant's wife) created an issue estoppel.

56. In the course of his judgment deciding to appoint a receiver by way of equitable execution, the Deputy Judge held that:

i) a receiver by way of equitable execution may be appointed over whatever may be considered in equity as the assets of the judgment debtor (§§ 38 and 45);

ii) property subject to trust or analogous foreign arrangements would be regarded in equity as assets of a judgment debtor if he has the legal right to call for those assets to be transferred to him or to his order, or if he has *de facto* control of the trust assets in circumstances where no genuine discretion is exercised by the trustee over those assets (§§ 39 and 45);

iii) the question was therefore *"whether the Court is satisfied that Mr Skurikhin either has a legal right to call for the assets of the Berenger Foundation to be transferred to him or to his order, or has de facto control over the assets of the Berenger Foundation"* (§ 46);

iv) *"at this stage of the proceedings this question has to be answered on the balance of probabilities"* (§ 47);

v) on the material before him, the judge was satisfied that it was more likely than not that Mr Skurikhin had either a right to call for the assets of the Berenger foundation to be transferred to him, or *de facto* control of those assets (§ 48); and

vi) it followed that the membership interests in Pikeville, which the members themselves say are held as nominees for the Berenger foundation, should be considered in equity to be Mr Skurikhin's assets, with the result that it was open to the court to appoint a receiver over them (§ 50).

57. Thus the Deputy Judge, applying the ordinary civil standard of proof and at an *inter partes* hearing, concluded that the assets belonged to Mr Skurikhin in equity.

58. Conversely, however, it is at least arguable that in deciding whether this was a final and conclusive judgment on the merits, regard must be had to the order that the judge actually made, i.e. the terms of the Receivership Order itself. Those terms included both:

i) the provisions in §§ 4 and 6 (referred to in § 23 above) for the receivers to hold the assets and their proceeds to the order of the court, and to apply to the court for directions as to what is to become of the monies; and

ii) the provisions in §§ 7 and 20 for application to discharge or vary the order.

59. The provisions referred to in (i) above are consistent with the view that the final determination of who owns the assets remains a matter for the court to decide. That is not the only possible explanation for them: another is that the question of which assets should ultimately be available to satisfy VTB's judgment remains a matter for the court's discretion, particularly if other assets have been located in the meantime. However, it is at least arguable that the ultimate question of ownership remains for determination. Berenger points out that the Court of Appeal in *Masri v Consolidated Contractors (UK) Ltd (No. 2)* [2009] QB 450 made clear that the making of a receivership order by way of equitable execution has no proprietary effect, but acts *in personam* as an injunction restraining the judgment debtor from receiving or dealing with the relevant property; it does not vest the property in the receiver, and the judgment creditor receives no interest in the received property until it is transferred to him in satisfaction of the judgment debt (§§ 51-53).

60. The provisions referred to in (ii) above, even on VTB's view of their scope, are capable of resulting in an application to discharge the Receivership Order in the event of a change of circumstances, which might include Mr Skurikhin having legitimately ceased to have any interest in the assets.

61. Berenger adds that, as CPR 69.10 and 69.11 and the notes to 69.11 indicate, CPR 69.10 (discharge of receiver on completion of his duties) is not prescriptive or exhaustive as to the circumstances in which an application to discharge a receiver's appointment may be made, and such an application is not limited to cases where the receiver has completed his duties: see *McCracken v Crown Prosecution Service* [2011] EWCA Civ 1620. In *McCracken*, the Court of Appeal held that the court had jurisdiction to hear an application to discharge a receiver appointed to take possession of and sell (*inter alia*) a property which the High Court judge had held belonged to a criminal defendant, even though the defendant's mother (who claimed to own the property) had appeared and lost on that issue before the court. I find this decision of limited assistance, because the Court of Appeal's decision appears to have been influenced in part by the fact that the High Court judge had expressly stated in his judgment that *"[i]n what seems to me the unlikely event of the claims being now made by Mrs M being substantiated by more*

evidence, she can, if she so wishes and is so advised, apply for the appointment of the receiver to be set aside" (see Court of Appeal judgment §§ 26 and 36).

62. VTB cites *S.C.F. Finance Co. Ltd. v Masri (No. 3),* where the Court of Appeal regarded an *inter partes* decision made on 8 July 1985 in the context of a freezing order application as creating an issue estoppel for the purposes of a garnishee application made the following day. A point of possible distinction from the present case, though, is that the applicant there (the first defendant's wife) had applied for variation of the injunction and later for its discharge on the ground that the relevant assets belonged to her and not to the first defendant; but then at the hearing of her application announced that she was not proceeding with it and acknowledged that the consequence must be that it be dismissed. Berenger says this reasoning does not apply here: Berenger made no application before the Deputy Judge, and the Deputy Judge's order makes express provision for further directions and/or applications.

63. VTB also contends that the change of circumstances on which Berenger relies is irrelevant, because it was no part of the Deputy Judge's reasoning that Mr Skurikhin was a discretionary beneficiary of the trusts. On the contrary, the judge was careful to point out that *"a (mere) discretionary beneficiary under a trust does not have a proprietary interest in trust assets"* (Judgment § 44(1)). The reasons the judge gave for his conclusion were:

> "(1) That there is evidence indicating that assets including those in the Berenger Foundation structure are the product of Mr Skurikhin's transfer of his assets out of Russia in an attempt to make them difficult to trace and/or judgment proof. A journalistic article by an individual appointed to carry out an audit of at least some of the SAHO group companies, Mr Valeriy Lebedinskiy, describes how Mr Skurikhin has transferred assets outside Russia, into companies which are "well-camouflaged and are being controlled via a special 'intermediate layer' being Swiss attorneys Beat Lerch and Zeno Meier…" It mentions that certain of these assets are held through Crown, and, inter alios, Pikeville. "All these companies were founded to laundry (sic) monies withdrawn from Russia". The article continues: "Pavel Skurikhin is a very careful man, he had several years to thoroughly hide his assets from bailiffs.
>
> (2) There is no doubt that Mr Skurikhin is closely associated with assets which are and have been held subject to the structure involving Berenger Foundation and Pikeville. Important assets of Pikeville are used for the sole benefit of Mr Skurikhin and his wife. This includes the Italian properties which are apparently leased rent free to Mr and Mrs Skurikhin; and the money loaned to Paradis de Beauté Srl.
>
> (3) The extreme coyness of the members of Pikeville in revealing the ultimate controlling party of the LLP, coupled with Pikeville's involvement with companies associated with Mr Skurikhin, namely Sibinvestproject JSC, AL.PA Srl and SAHO

Group ZAO, supports an inference that it is Mr Skurikhin who exercises ultimate control.

(4) The directors of the Berenger Foundation have produced no evidence to show that the foundation's directly or indirectly held assets are not under Mr Skurikhin's control

(5) Mr Skurikhin has signally failed to provide proper disclosure of his assets, or produce the documents which he has been ordered to produce. He has failed to produce any documentation which would indicate that he is not in control of the assets of the Berenger Foundation, and has not appeared to be examined on his asset position. In circumstances in which Burton J, on the material before him, inferred that Mr Skurikhin did indeed have control of the assets of the Berenger Foundation, it was clearly for him, if the inference was not to continue to be drawn, to produce evidence that he did not. No material has been adduced, however, which begins to contradict the inference drawn by Burton J.

(6) The evidence of Dr Frommelt, part of which I have quoted above. In my judgment it is significant that an experienced Liechtenstein lawyer draws the conclusions: (a) that Mr Skurikhin or his agent is the mandatory to a mandate agreement with the board of directors / foundation council of the Berenger Foundation; (b) that Mr Skurikhin is likely to be able to instruct the board to transfer at least significant parts of the Berenger Foundation's interests in Pikeville into his own name; (c) that the reason why Mr Skurikhin and his family benefit from the Berenger Foundation is because he is in de facto control as a mandatory and its economic founder." (§ 49)

64. As VTB says, these reasons are in large part based on Mr Skurikhin's control over the assets and not dependent on his being a discretionary beneficiary. Berenger's point, though, is that one of the factors the judge found "*significant*", as indicated in quoted paragraph (6) above, was that by reason of such control *"Mr Skurikhin is likely to be able to instruct the board to transfer at least significant parts of the Berenger Foundation's interests in Pikeville into his own name"*. Berenger says Mr Skurikhin's subsequent removal as a discretionary beneficiary means that can no longer happen, and that that is a material change of circumstance. In short, Berenger says that although being a discretionary beneficiary does not confer equitable ownership of assets, a person such as Mr Skurikhin who is *not* a discretionary beneficiary cannot own the assets in equity. Though I do not find this argument immediately attractive, I am unable to say at this stage that it is clearly without merit.

65. These matters may well form part of the issues ultimately to be resolved as part of the Discharge Application. I do not, however, consider it necessary to reach a concluded view on them now. Indeed, it is not entirely clear precisely how the *res judicata* point impacts on the question of whether VTB is a defendant to a claim for CPR 25.12 purposes. It is possible to conceive that if Berenger were plainly issue estopped, then

it might be appropriate to regard it as in substance being in a position akin to that of an appellant or a person making a fresh claim. However, the *res judicata* point is not in my view plain. It is arguable that Berenger is not issue estopped, not least because there has been an arguably relevant change of circumstances, even if VTB may have the better of the argument on that point. In these circumstances, at least, VTB's *res judicata* point is in my view not capable of converting Berenger's position from that of a defendant to that of a claimant.

66. VTB alternatively contends that Berenger is in substance a claimant because it is an abuse of process for Berenger to seek to raise again the issues determined by the Deputy Judge when making the Receivership Order, and that as a result Berenger's application raises issues as to the rights of the parties that are independent from those in the 'parent action' i.e. (in this context) the Receivership Application. VTB cites the following statement of Buckley LJ in *Chanel Ltd. v F. W. Woolworth & Co. Ltd.* [1981] 1 W.L.R. 485 at 492:

> "The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."

See also *Orb v Ruhan* [2016] EWHC 850 (Comm) at [82].

67. VTB says the Discharge Application is plainly abusive because:

i) the grounds for the Discharge Application are ones that could have been pursued by Berenger at the *inter partes* hearing on 13 July 2015 before the Deputy Judge;

ii) more than three years have passed since the Receivership Order was made and the receivers have expended much time and cost in realising Pikeville's assets, including bringing proceedings in Italy in relation to the Italian properties. There has also been unexplained delay since the events of June 2017 alleged to constitute a change of circumstances: and in reality the Discharge Application appears to have been triggered by the proceedings in Italy in mid 2018;

iii) the assets of Pikeville are already subject to the control of the court because under § 6 of the Receivership Order, after realisation of the assets, the receivers are required to apply to the court for directions as to what is to become of the monies; and

iv) the Discharge Application was issued by Withers on behalf of Berenger only months after Withers had contended on behalf of Mr Skurikhin that the basis for the Receivership Order had fallen away. The natural inference is that Mr

Skurikhin is directing Berenger to bring the Discharge Application, despite his continued failure to remedy his contempt of court.

68. Berenger's answers to these points are that:

   i) although some of the grounds for the Discharge Application could in principle have been pursued by Berenger at the *inter partes* hearing on 13 July 2015 before the Deputy Judge, (a) Berenger's evidence is that it lacked sufficient funds to do so at the time, having only latterly obtained funds from a beneficiary of the Olympic trust to pursue the application, and (b) in any event, the "*real point*" underlying the application, namely the change of circumstances regarding Mr Skurikhin's interest in the trusts, did not exist at that time;

   ii) the same point applies as to the passage of time since the Receivership Order was made;

   iii) as to the lapse of time since the resolutions removing Mr Skurikhin as a discretionary beneficiary were made in June 2017, the proceedings in Russia relating to his bankruptcy were not concluded until the Supreme Court's decision of April 2018, and it was reasonable for Berenger to take some time to obtain funds and enter into correspondence. In any event, any delay amounts at most to a matter of months, and does not come close to amounting to an abuse of process; and

   iv) Mr Skurikhin is not making the application and no longer has an interest in the trusts; whilst members of his family continue to do so, that is not to the point: VTB's judgment can be enforced only against assets belonging to Mr Skurikhin. The position might be different if there could be shown to have been a transfer at an undervalue.

69. I view some of these answers with a degree of scepticism. It is unclear – and no explanation appears in Berenger's evidence – why the (unidentified) beneficiary who is now said to be funding the Discharge Application was unable or unwilling to fund the defence of the Receivership Application in 2015. The facts that (a) Mr Skurikhin was the Berenger foundation's economic founder, (b) members of his family continue to have interests in the assets of both trusts, and (c) the same solicitors who wrote on Mr Skurikhin's behalf in January 2018 have subsequently pursued the Discharge Application on Berenger's behalf, all provide reasons to suspect that the application is being made at the behest of, and possibly being funded by, Mr Skurikhin.

70. Grounds for scepticism or suspicion do not, however, necessarily justify a finding of an abuse of process. I do not consider it possible to conclude with confidence, on the evidence currently available, that Berenger's pursuit of the Discharge Application will necessarily amount to an abuse of process, though I do not in any way seek to pre-empt any conclusions that might be reached on the hearing of the Discharge Application itself. As with VTB's *res judicata* point, I do not consider the *possibility* that Berenger's application is abusive to be capable of converting Berenger's position from that of a defendant to that of a claimant for CPR 25.12 purposes.

(4) VTB's alternative basis: CPR 3.1/inherent jurisdiction

71. In its skeleton argument and at the hearing, VTB advanced for the first time an alternative basis for an order for security for costs. It submits that if CPR 25.12(1) does not apply, the court may nevertheless grant security for costs under its CPR 3.1 case management powers and/or its inherent jurisdiction.

72. CPR 3.1. provides so far as relevant:

> "(2) Except where these Rules provide otherwise, the Court may - …
>
> (f) Stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
>
> …
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective…
>
> (5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol."

73. In *Ali v Hudson* [2003] EWCA Civ 1793, there was an application for a stay of a claimant's appeal from an order striking out his claim, and for security for the costs of the appeal under CPR 3.1. Security for costs could not be ordered under CPR 25.15 because the claimant was an impecunious individual and none of the conditions in CPR 25.13(2) applied. Clarke LJ stated:

> "36… In my opinion, on the natural meaning of rule 3.1(2)(f) and (m) the court had jurisdiction to grant a stay on terms that Mr Ali secure costs of future proceedings. Thus, for example, the court has power under paragraph (2)(f) to stay the whole or part of any proceedings until a specified event. I see no reason why, as a matter of jurisdiction, that should not be a payment into court by the respondent to the application. Thus, naturally construed, on an application by A for a stay, the rules give the court power to order a stay until a specified event, namely a payment into court by B. The court also has power under paragraph (2)(m) to make any further order for the purpose of furthering the overriding objective. That too would provide jurisdiction for such an order…
>
> 37. As I see it, that power is independent of the power conferred by rule 3.1(5) , which gives the court a separate and free-standing power to order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol. That conclusion seems to me to be supported by rule 3.1(6A), which

> expressly recognises that a party may pay money into court following an order either under paragraph (3) or under paragraph (5).
>
> 38. I would not therefore accept Mr Cranston's submission in so far as it seeks to limit the jurisdiction of the court. …

74. Clarke LJ then referred to the decision of the Court of Appeal in *Olatawura v Abiloye* [2002] EWCA Civ 998, [2003] 1 WLR 275, where the court held there to be jurisdiction to make an order that a claim be dismissed under CPR rule 24.1 (summary judgment) unless the claimants provided £5,000 security for costs. In that case Simon Brown LJ (with whom Dyson LJ agreed) said:

> "23. Assume, then, that in a given case the court concludes that an order for security would not unfairly deprive the party concerned of his ability to litigate the dispute. Should such an order then be made? In addressing this question it is right to bear in mind that under the new rules it is not just the claimant against whom an order for security for costs can be made; it can also be made against the defendant. Under the old rules, of course, it was only the defendant who could be ordered to pay money into court, principally in proceedings for summary judgment, as a condition of his being allowed to defend the claim. That payment in was not, of course, in respect of costs, but rather to provide some security for the claim. But if, as a condition of pursuing an unpromising defence, it is appropriate to secure the claim, why not also the claimant's costs of advancing the claim? And if that, why is it not at least as appropriate to require someone advancing an unpromising claim to secure the defendant's costs. He, after all, has chosen to involve the defendant in litigation and the defendant has no option but to concede the claim or incur costs in resisting it. Such no doubt was the thinking underlying the new rule 24.
>
> 24. Now, it is clear, the court has an altogether wider discretion to ensure that justice can be done in any particular case. Obviously relevant considerations, besides the ability of the person concerned to pay, will be (a) his conduct of the proceedings (including in particular his compliance or otherwise with any applicable rule, practice direction or protocol), and (b) the apparent strength of his case (be it claim or defence). And these considerations, of course, are expressly reflected in the new rules governing the court's power to order payment into court: rule 3.1(5) dealing expressly with compliance, rule 24 with the probabilities or otherwise of success.
>
> 25. That, however, is by no means to say that the court should ordinarily penalise breaches of the rules and the like by making orders for payment into court under rule 3.1(5) . Quite the contrary. The one case drawn to our attention in which this

question has been considered — Buckley J's judgment in *Mealey Horgan plc v Horgan* (transcript 24 May 1999, briefly reported in The Times, 6 July 1999), to which reference is made in paragraph 3.1.5 of the Annual Practice — held that it would be inappropriate to order a defendant to give security as a penalty for failure to serve witness statements in time when that had prejudiced neither the trial nor the claimant. Buckley J suggested, however, that such an order might be appropriate if *"there is a history of repeated breach of timetables or of court orders or if there is something in the conduct of the party which gives rise to suspicion that they may not be bona fide and the court thinks the other side should have some financial security or protection"*. That seems to me to point the way admirably: a party only becomes amenable to an adverse order for security under rule 3.1(5) (or perhaps 3.1(2)(m)) once he can be seen either to be regularly flouting proper court procedures (which must inevitably inflate the costs of the proceedings) or otherwise to be demonstrating a want of good faith — good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in according with the overriding objective.

26. Similarly it is not to be thought that an order for security for costs will be appropriate in every case where a party appears to have a somewhat weak claim or defence. The last thing this judgment should be seen as encouraging is the making by either side of exorbitant applications for summary judgment under rule 24.2 in a misguided attempt to obtain conditional orders providing security for costs. On the contrary, the court will be reluctant to be drawn into an assessment of the merits beyond what is necessary to establish whether the person concerned has "no real prospect of succeeding" and the occasions when security for costs is order solely because the case appears weak may be expected to be few and far between."

75. Clarke LJ continued in *Ali*:

"40. Those principles show that the power to order security for costs in a case of this kind should be exercised with great caution. The correct general approach may be summarised as follows:

i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;

ii) in any event,

a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good

> faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and
>
> b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding.
>
> 41. That approach seems to me to be consistent with that of Field J in Reed v Oury, although he was there considering, not a possible condition that security for costs be imposed, but a condition that previous orders be satisfied. In that context he said in paragraph 24 that if, having regard to a party's conduct overall, a party has acted very oppressively or very unreasonably, it may be appropriate to stay his claim conditionally or unconditionally or strike it out or order a payment into court. That is a high test.
>
> 42. A similar approach should to my mind be adopted before imposing a condition that a party should only be permitted to proceed with a claim or an appeal by providing security for costs, unless the case falls within CPR rule 25.13, which this does not. I would accept Mr Cranston's submission that merely to act unreasonably in a sense other than that identified above should not in general be sufficient to make an order which will have the effect of depriving the party concerned of access to the courts.
>
> 43. These principles have been recently considered in this court by Peter Gibson LJ (with whom Mance LJ and Hale LJ agreed) in CIBC Mellon Trust Co v Mora Hotel Corp NV [2002] EWCA Civ 1688, [2003] 1 All ER 564 . In paragraph 38 of his judgment Peter Gibson LJ referred both to Olatawura v Abiloye and to Reed v Oury and said that both those authorities suggest that it is only appropriate for the court to exercise its powers under CPR Part 3 to require a payment into court in limited circumstances and that the court should not do so in the absence of a want of good faith on the part of the party against whom the order is sought. Peter Gibson LJ added:
>
> > "That consideration is reinforced by the greater significance, since the Human Rights Act 1998 came into force, which the court attaches to not impeding access to justice.""

76. On the facts, the Court of Appeal in *Ali* rejected the applicant's contention that the respondent's conduct had amounted to an abuse of process (§ 49), and concluded that the respondent should not be ordered to make a payment into court as a condition of being allowed to proceed with the appeal.

77. VTB also refers to *CT Bowring,* discussed earlier, where in the context of an application for security for costs by a claimant in respect of a defendant's application to enforce a cross-undertaking in damages, Sir Michael Kerr stated at p731:

> "bearing in mind that the court may release such undertakings altogether, it must be entitled to impose terms on parties seeking to enforce them, in whatever way appears to be just in the circumstances; and some form of security for costs may be an appropriate requirement in some cases… I prefer not to seek to define the limits of the court's discretion in this or other cases, save that – as already mentioned – its scope is in my view wider than the inherent jurisdiction to deal with abuses of the court's process."

78. The above statement was approved by Lord Scott in *GFN* at § 12. However, it is important to note that Lord Neuberger (with whom the other members of the Privy Council in *GFN* agreed) at § 34 expressly left open:

> "questions such as whether and if so when it is possible or appropriate to order security for costs against a defendant who brings a counterclaim or defends by way of set-off, whether and if so when security can be ordered in the context of a committal application, or in connection with an application to set aside a compromise of an action, and whether the decision of the Court of Appeal in *C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567 was correct".

79. VTB submits that it follows from the Court of Appeal's decision in *Ali*, together with the dicta of Sir Michael Kerr in *CT Bowring*, that it is likely to be appropriate for the court to require security for costs under its case management powers in CPR 3.1 *"where the conduct of one of the parties amounts to or is likely to amount to an abuse of process"*.

80. VTB thus says it would be appropriate to require security for its costs under the court's case management powers in CPR 3.1 and/or under its inherent jurisdiction because:

    i) the nature of the Discharge Application is plainly an abuse of process: it is an attempt to argue matters that should have been pursed before the Deputy Judge at the hearing on 13 July 2015, more than 3 years after the Receivership Order was made and after much time and cost has been expended by the Receivers in realising Pikeville's assets;

    ii) there is no evidence to suggest that the third party funding Berenger's Discharge Application is unable to provide security for costs or, therefore, that security for costs would stifle the Discharge Application; and

    iii) there is very strong evidence that Berenger will not be able to comply with any costs award against it: Mr Schurti and Mr Meier explain in their witness statements that the reason Berenger did not take part in the hearing of 13 July 2015 was that it did not have sufficient resources at that time to instruct English solicitors and counsel, and that the funds for the Discharge Application have been made available by a beneficiary of Olympic. Therefore, on Berenger's own evidence, it is unable to fund the Discharge Application from its own resources. VTB will therefore be seriously prejudiced if security for costs is not granted.

81. However, Clarke LJ in § 40 of *Ali*, quoted above, stated that *"the power to order security for costs in a case of this kind should be exercised with great caution"*. The respondent to the security application in *Ali,* though he was an impecunious individual, was a claimant and appellant. In my view the need for caution is at least as great when security is sought under CPR 3.1 or the court's inherent jurisdiction against a person who is in substance in the position of a defendant. Anything other than a cautious approach would be likely to be inconsistent with basic fairness and with the policy underlying the line of authority referred to by Millett LJ in *CT Bowring* at p.727 quoted in § 41 above.

82. Further, I do not read Clarke LJ's conclusions in *Ali* as supporting VTB's submission that a mere suspicion of abuse is sufficient basis for an order for security for costs: a proposition which VTB also says follows from the point that the test for a security for costs order under CPR 3.1 must be wider than the test for striking out on the grounds of abuse of process. Rather, it is in my view necessary to show that the party concerned (here, Berenger, as distinct from Mr Skurikhin) can be *shown* either to be regularly flouting proper court procedures, or otherwise to be demonstrating a want of good faith i.e. a lack of will to litigate a genuine claim, defence or appeal as economically and expeditiously as reasonably possible in accordance with the overriding objective.

83. There is some force in VTB's complaints about delay on Berenger's part. However, Berenger's answer is based not merely on its explanation about lack of funds (about which I have already expressed some scepticism) but also its point that the events since June 2017 have materially changed the legal position. I do not consider that such delay as may have occurred since that date, bearing in mind also the ongoing events in Russia, enables VTB to demonstrate abuse by Berenger in the sense of lack of will to litigate in accordance with the overriding objective.

84. I also bear in mind, though this is not a critical factor, that it is at least arguable that the impact or otherwise of the events of 2017 on ownership of the assets will have to be resolved by the court anyway, if only in the context of an argument about the appropriate directions to be given pursuant to §§ 4 and 6 of the Receivership Order and/or the ultimate disposition of the assets or their proceeds.

85. Viewing the matter in the round, and while recognising that there are grounds for doubt about Berenger's approach to the litigation and the merits of the Discharge Application, adopting the cautious approach mandated by the authorities I do not consider such doubts to be sufficient to justify requiring Berenger to provide security for costs.

(D) CONCLUSION

86. VTB's application for security for costs is therefore dismissed.