Case 42
PJSC Aeroflot – Russian Airlines

v

Leeds and Others

[2018] 4 Costs LR 775

Neutral Citation Number: [2018] EWHC 1735 (Ch)
High Court of Justice, Chancery Division
6 July 2018

Before:
Rose J

Headnote

Where the claimant had made serious and consistent allegations of fraud which had been abandoned without explanation and the proceedings discontinued, thereby depriving the defendant of any opportunity to vindicate his reputation, such conduct justified an indemnity basis costs order. Only if the claimant were able to provide an explanation as to why the allegations were bound to fail, might it be appropriate so not to order. Here, the serious and consistent allegations of fraud made against the defendants, which had been entirely abandoned, justified an order on the indemnity basis, a fortiori, where, in doing so, their conduct had been "out of the norm". The fact that the defendants had refused to mediate the claim made no difference. Where allegations of fraud and serious wrongdoing had been made, proceedings would be intrinsically unsuitable for mediation. Order made for

payment of all the defendants' costs to be assessed on the indemnity basis for the whole proceedings.

Cases Cited

Bank of Tokyo-Mitsubishi Ufi Ltd v *Baskn Gida Sanayi Ve Pazarlama AS* [2010] 5 Costs LR 657
Clutterbuck and Paton v *HSBC plc and Others* [2016] 1 Costs LR 13
Elvanite Full Circle Ltd v *AMEC Earth & Environmental (UK) Ltd* [2013] 4 Costs LR 612; [2013] EWHC 1643 (TCC)
Governors and Company of the Bank of Ireland and Another v *Watts Group plc* [2017] 5 Costs LR 899; [2017] EWHC 2472 (TCC)
Hutchinson v *Neale* [2012] 5 Costs LO 588
Jarvis plc v *PriceWaterhouseCoopers* [2000] 2 BCLC 368
Lockston v *Wood* [2015] EWHC 2962
Sulaman v *Axa Insurance plc and Another* [2010] 3 Costs LR 391; [2010] CP Rep 19
Three Rivers District Council and Others v *The Governor and Company of the Bank of England* [2006] 5 Costs LR 714; [2006] EWHC 816 (Comm)

Judgment

Rose J:

Introduction

1. The trial of these complex and acrimonious proceedings brought by the Russian airline, Aeroflot, was set down for 28 days commencing on 10 April 2018. The timetable allocated four days' judicial reading time followed by opening submissions and evidence due to start in court at 2 pm on Monday 16 April 2018. Just before 5 pm on Friday April 13, Pinsent Masons, solicitors for Aeroflot, sent to Streathers who act for the third and fifth defendants ("the Forus defendants"), a letter enclosing by way of service an application notice seeking

permission to discontinue its proceedings against all defendants. The application to discontinue was made to the court because Aeroflot had the benefit of worldwide freezing orders against the defendants granted on 15 December 2017. According to CPR rule 38.2(2) a claimant must seek the permission of the court to discontinue where the court has granted an injunction or any party has given an undertaking to the court.

2. The draft order accompanying the application to discontinue provided that Aeroflot would pay the costs of the Forus defendants of the proceedings, to be assessed on the standard basis if not agreed. It made no provision for the costs of the second defendant, Mr Glushkov.

3. A short hearing took place on Tuesday April 17 at which I:

a. appointed Mr Subir Desai of the firm Charles Douglas Solicitors LLP pursuant to CPR rule 19.8(1)(b) to represent the estate of Mr Glushkov who had died on or about 12 March 2018;
b. granted permission to Aeroflot to discontinue the proceedings;
c. discharged the freezing orders granted on 15 December 2017 and Aeroflot's undertaking in damages;
d. ordered an interim payment on account of costs to be paid by Aeroflot to the Forus defendants in the sum of £2.5 million being about 60% of their total costs; and
e. ordered an interim payment on account of Mr Glushkov's costs in the sum of £600,000 being about 43% of his total costs (not including his costs claim as a litigant in person).

4. The Forus defendants indicated at that hearing that they intended to apply to the court for an order that Aeroflot pay their costs on the indemnity basis in respect of the entire litigation. The estate of Mr Glushkov which was represented at that hearing indicated that they would join that application.

5. A hearing took place on 14 June 2018 at which Mr Tregear QC presented the submissions of the Forus defendants on the question of indemnity costs. Mr Warents, appearing for the representative of Mr Glushkov's estate, adopted Mr Tregear's submissions. Mr Davenport QC opposed the application on behalf of Aeroflot.

The History of the Proceedings

6. The proceedings alleged that Mr Glushkov together with the late Mr

Berezovsky misappropriated large sums of money from Aeroflot between 1996 and 1998 and that the Forus defendants were the vehicles by which this was carried out. Mr Glushkov was appointed Aeroflot's First Deputy Director General between 11 January 1996 and 22 January 1998. Broadly, the claim put forward was that Mr Glushkov conspired with Mr Berezovsky to cause Aeroflot to enter into a number of substantial loan agreements with companies which he controlled in the Forus Group. Those loans were to be repaid from the assignment by Aeroflot to Forus of Aeroflot's rights to receive payments from non-Russian airlines for overflying Russian territory. It was alleged that the arrangements were entirely unnecessary for Aeroflot's genuine business needs. It was also alleged that Mr Glushkov failed to disclose to Aeroflot his own personal conflict of interest arising from his interest in the Forus Group. The damages claimed included the reimbursement of all fees and interest that Aeroflot had paid Forus during the course of their relationship and the payment of sums described as "unaccounted for funds", that is sums which Aeroflot inferred from an analysis of incomings and outgoings shown on Forus bank account statements were missing and must have been misappropriated by Mr Glushkov and Mr Berezovsky.

7. The defendants contested every aspect of the claim. Mr Glushkov's evidence was that the relationship between Aeroflot and the Forus Group predated his arrival at Aeroflot and was something that had been set up between Mr Berezovsky and Mr Shaposhnikov, the then acting General Director of Aeroflot. He said that in any event Aeroflot was well aware of his previous interest in the Forus Group but that that interest had ceased before the relationship between Aeroflot and the Forus Group started.

8. Further Mr Glushkov's evidence was in summary that when he started working for the airline in January 1996, Aeroflot was in a dire state in terms of its aged and deteriorating fleet of aircraft, its rudimentary accounting practices left over from the days when it was operated to funnel foreign currency income to the former State security agency, the KGB, and because its senior management was populated by political appointees with no experience or expertise in running a modern business ready to compete in the aviation sector. This meant that any turnaround in the airline's fortunes required a very substantial injection of Western capital brokered by sophisticated and experienced intermediaries. Forus, he said, were able to provide that expertise and

were indeed successful in organising loans to the value of many hundreds of millions of dollars for Aeroflot. The defendants point out that Aeroflot made no complaint about the arrangements at the time. They assert that the fees and interest rates were entirely reasonable and much more favourable than Aeroflot would have been able to negotiate if it had tried to go directly to Western banks. They say that no money has gone missing, it is simply that the documentary record after all this time is incomplete. They point to various reputable accounting consultants who have over the years examined in detail the many hundreds of transactions whereby money came into and went out of Forus pursuant to the arrangements with Aeroflot. They have all concluded that there was nothing untoward disclosed. The defendants have all along asserted that the reason why this claim is being pursued has more to do with Russian domestic politics than with any impropriety in the arrangements themselves.

9. In the final paragraphs of his witness statement lodged for the trial, Mr Glushkov had said:

> "I am proud of the work done for Aeroflot while I was employed there in 1996–1997. The contracts with Forus and the collateral used were within the standard financial practice. So far as I was and am aware, the transactions with Forus were in the best interests of and highly beneficial to Aeroflot. The interest and fees payable to Forus were competitive with those that would have been payable to any party providing the same or similar services at that time. Furthermore, by raising finance and discharging the loans arranged by Forus, Aeroflot was able to make the investment by the US Exim Bank in 1998 possible, because it developed a positive credit history.
>
> I haven't received any profits derived from the fees, interest and other payments paid by Aeroflot to Forus. Since 1995 I had no economic interest in Forus. I haven't been unjustly enriched while working at Aeroflot. I have not received any monies received by Forus as a result of the Airline Agreements and/or made any profits from the transactions between Aeroflot and Forus."

10. The claim form was issued by Aeroflot on 15 December 2010. There have been many substantial interlocutory skirmishes. The original proceedings were brought against five companies in the Forus Group as well as against Mr Berezovsky and Mr Glushkov who were

both domiciled here. Four of the five Forus Group companies challenged the jurisdiction of the English court. Floyd J (as he then was) upheld that challenge as regards the fifth defendant EM Finance SA (formerly known as Forus Services SA) on the grounds that the arbitration clause in an agreement between Aeroflot and EM Finance was effective to give the courts of Switzerland exclusive jurisdiction in relation to the matters of dispute: [2012] EWHC 1610 (Ch). Floyd J dismissed the challenge to jurisdiction by three other Forus defendants. On appeal by the three unsuccessful Forus defendants and on the cross-appeal of Aeroflot, the Court of Appeal upheld Floyd J's decision as regards EM Finance, allowed the appeal of Forus (Cyprus) Ltd on the basis that the arbitration clause in its agreement with Aeroflot was valid and dismissed the other two Forus companies' appeals: [2013] EWCA Civ 784.

11. On 23 March 2013, between the date of Floyd J's judgment in June 2012 and the judgment of the Court of Appeal in July 2013, Mr Berezovsky died. There was a pause in the litigation during which disputes over who was entitled to represent Mr Berezovsky's estate were resolved as described by David Richards J (as he then was) in *Lockston* v *Wood* [2015] EWHC 2962. The current trustees are Grant Thornton UK LLP who were supported by Aeroflot. The court ruled on 27 October 2015 that Grant Thornton's appointment should stand. There was a settlement between Grant Thornton and Aeroflot on 26 July 2016. Under the settlement, the Berezovsky estate agreed to pay Aeroflot £82 million in respect of these proceedings. However it appears that the estate is insolvent and no money has in fact been received by Aeroflot from the Berezovsky estate, save in respect of cost orders made in contested probate litigation between the estate and Aeroflot.

12. The litigation was picked up again and the matter was due to come on to trial in February 2017. However, unfortunately, Mr Glushkov, who had been acting as a litigant in person since October 2014 suffered from very serious and debilitating health problems. These problems required a series of complex operations to his legs and caused him to be in great pain for much of the time. His mobility was badly affected. Because of those health problems, shortly before the commencement of a five-day window in which the trial of the proceedings was initially listed, Mann J granted an adjournment of the

trial. He directed that it be relisted as soon as possible in October 2017 with a time estimate of 28 days.

13. In May and June 2017 there were further case management hearings to resolve disputes as to the status of certain documents in the bundles and to determine whether Letters of Request should be sent. The Letters of Request proposed would have been sent to the Russian authorities asking them to take evidence from certain Aeroflot witnesses in Moscow and to request that other witnesses be allowed to give their evidence at the trial from Moscow and be cross-examined by Mr Tregear by video link. After a number of hearings, I dismissed the application for the sending of Letters of Request.

14. The trial was relisted to start in October 2017 but, unfortunately, Mr Glushkov had again to apply for the trial to be adjourned because of the dates in fact fixed for his surgery. After some initial opposition, the application was not opposed by Aeroflot. It was thought when Mann J granted that second adjournment that the trial would take place in February 2018. However, due to the unavailability of the parties and counsel, the trial was fixed for 10 April 2018.

15. In December 2017, Aeroflot brought an application for a freezing order against the Forus defendants and against Mr Glushkov personally. The two remaining Forus defendants consented to the freezing of monies in two bank accounts in Switzerland. Those funds had been previously frozen at the request of the Russian prosecuting authorities made to the Swiss authorities. It was the notification by the Swiss authorities that it no longer considered that there was any justification for that earlier freeze to be continued that prompted Aeroflot to apply to this court in effect to continue to protect those funds.

16. On 12 March 2018 there was a further full day hearing of two applications by Aeroflot. The first was for permission to rely on further expert accounting evidence from their expert Mr David Dearman of Mazars and the second was for the trial of the action to be adjourned again. In my ruling on those applications ([2018] EWHC 571 (Ch)) I said:

> "2. The application is supported by the 22nd and 23rd witness statements of Michael Fenn, a partner of Pinsent Masons LLP, who act for Aeroflot. The fact that he has previously made 21 witness statements in these proceedings gives some indication of the complexity and hard

> fought nature of this claim. He is certainly not the only person to have made numerous witness statements in these proceedings already."

17. Mr Glushkov opposed the adjournment of the trial. He wrote to me saying that the parties have known for some time that on 10 April 2018 he had an appointment with the orthopaedic consultants at Kingston Hospital to consider surgery to replace his left knee. That surgery and further surgery to fuse his left ankle had been planned since 2016. The operation on his ankle could not take place sooner than four months following the knee replacement. Both operations would require long periods of recovery. Any adjournment of the trial would have pushed the trial back to 2019.

18. The reason behind the request for an adjournment was that Aeroflot had obtained an order from Master Teverson that Letters of Request be sent to the Swiss authorities asking them to compel EM Finance (one of the former Forus Group defendants which had successfully challenged the jurisdiction of the court) and a Swiss law firm Holenstein to disclose certain bank statements that were missing from the disclosed documents which Mr Dearman had been able to examine for the purposes of his reports. The Letters of Request had been sent by Senior Master Fontaine to Switzerland and a response from the Swiss court was awaited. I decided that it was unlikely that the Letters of Request to Switzerland would produce any useful documents and even less likely that they would do so within a reasonable time. I said:

> "46. Moreover, if the documents are found and disclosed, and indicate that there are in fact no unaccounted for funds, I am sure that there will be other challenges to the disclosure exercise. It is a triumph of hope over experience to have any real expectation that once these documents have been disclosed Aeroflot will accept that there are no unaccounted for funds so that this whole claim has been entirely misconceived and that judgment should promptly be entered for the defendants. The seeds of further disputes are already apparent in Mr Fenn's 23rd witness statement. There he criticises Mr Lankshear's description of the exercise carried out by Streathers in order to find the relevant documents amongst the EM Finance documents. He criticises the way that the documents were uploaded onto the web platform by Holenstein. There are also further seeds of dispute apparent in Mr Dearman's supplemental report. As I have described, this starts to raise new issues about the

> legitimacy of payments that are accounted for funds in the sense that they are evidenced by the bank statements that have been disclosed."

19. I described Aeroflot's demands for these documents as "a classic instance of a claimant seeking more and more disclosure in the hope rather than the expectation that something will turn up to bolster a claim that has been seriously undermined by the disclosure already made".

20. When considering the consequences of the requested adjournment I said that the primary consideration was the substantial prejudice to Mr Glushkov:

> "He is accused of very serious wrongdoing and he should have an opportunity to rebut the allegations that are made against him. He is a litigant in person and I have no doubt that these proceedings have weighed and are weighing very substantially upon him. He has had to respond to these proceedings by writing letters and attending court when he can alongside trying to cope with his painful and debilitating medical conditions. He has made his arrangements so that there is a window available between his medical appointments and operations for the trial to take place in April and May. To put the matter off yet further seems to me extremely unfair and undesirable as far as he is concerned."

21. I refused the application to adjourn.

22. Mr Glushkov had been expected to attend that hearing on 12 March 2018. As attempts during the day to make contact with him failed, his daughter Natalia Glushkova and his civil partner Denis Trushin went into his house late that night and found his body. It appears he had been strangled to death. The Metropolitan Police's investigation into his murder is still ongoing. On 14 March 2018 Pinsent Masons wrote to me referring to the widely reported news that unfortunately and sadly Mr Glushkov had passed away. They confirmed that they were urgently seeking details of the executors of his estate in order to ascertain their position as regards the proceedings.

23. On March 16 I wrote to counsel and solicitors also expressing my sadness on hearing of the death of Mr Glushkov. I said I understood that following my refusal to adjourn the trial, work was underway to agree a timetable for the trial. With that in mind I directed that both sides serve a witness statement listing the witnesses

they intended to call to give evidence at the forthcoming trial. The purpose of this was to gain some sense of the state of the evidence and how long the hearing in April/May, at that point with a time estimate of 24 days, was in fact likely to last. I directed that the witness statements should cover the following matters in respect of each witness to be called by that party: (a) whether the witness will be attending the trial in London or giving evidence remotely; (b) in respect of each witness, whether the witness has recently confirmed that they are willing and able to come to London to attend or to give evidence remotely, as appropriate; (c) for any witness coming to London from overseas, how far advanced any travel arrangements including any necessary visa applications were and the dates of any travel plans already confirmed; (d) if any witness was intending to give evidence remotely an update on the arrangements that have been put in place both here and at the remote location to ensure that this happened smoothly. I directed that the witness statements be served by 10 am on Thursday 22 March 2018.

24. On 19 March 2018 Streathers served the tenth witness statement of Mr Lankshear, the partner with conduct of the matter for Forus, explaining their position as regards their witnesses. Their two factual witnesses, Hans-Peter Jenni and Rick Helsby and their expert witness Mr O'Brien would attend at court and give evidence in London. They had recently confirmed this on March 16 and 17. Mr Jenni and Mr O'Brien were coming from overseas but did not need visas.

25. On 21 March 2018 Pinsent Masons served the 24th witness statement of Mr Fenn concerning the arrangements for their witnesses to attend either in London or in Moscow to give evidence at trial. He listed ten witnesses whom Aeroflot intended to call to give evidence, all of them except Mr Fenn based overseas.

26. The statement described the position as regards visas from Russia. From this it was clear that as at 21 March 2018, no applications had yet been made for visas for those intending to attend the trial in London due to start on April 16. The decision not to apply for such visas in good time before the start of the trial was, he said, based on information on the Embassy website stating that most visa applications submitted in Moscow are processed within ten days. Mr Fenn said that in reliance on this, they had not yet submitted visa

applications for their witnesses to attend trial and that the applications "were due to be submitted this week".

27. Mr Fenn stated that on 16 March 2018 his assistant Mr Litovchenko was informed by the visa agent that there may be a delay in obtaining visas for witnesses due to the current diplomatic difficulties between the Russian Federation and the United Kingdom. He went on to say that some of the Russian witnesses had expressed concerns over their safety and a reluctance to travel to London following the well-publicised poisoning of the former Russian spy Mr Sergei Skripal and his daughter in Salisbury on 4 March 2018 and the suspicious death shortly after of Mr Glushkov. Mr Fenn said that they were trying to persuade one Aeroflot witness, Ms Kryzhevskaya, to attend but that if they were unable to do so they would seek permission to adduce her evidence by video conference. Some witnesses had always intended to give their evidence in Russia and four others who had formerly intended to come to London now wanted to give their evidence in Russia. Three further witnesses had informed Pinsent Masons that they were not prepared to provide any evidence at all at the trial. One witness had failed to reply to any communications since he had provided his witness statement some years before.

28. Mr Fenn's statement also referred to the current state of affairs in relation to Mr Glushkov's estate and in particular that no personal representatives had taken up appointment. Mr Fenn says that on March 16 he had spoken to SO15 Counter Terrorism Command to ask if they had any details of the executors of Mr Glushkov's estate. The response had been that it was "far too early to know the executors" and that they were "a few weeks from knowing that".

29. The covering letter dated 21 March 2018 from Pinsent Masons enclosing Mr Fenn's 24th witness statement noted that if no one came forward to represent Mr Glushkov's estate then it appeared that the estate would not be bound by any findings made at the trial or by the outcome of the trial. This was a matter of obvious considerable concern. The letter closed by saying that:

> "If the difficulty is not obviated imminently, and that seems increasingly likely, then Aeroflot may be compelled to seek an adjournment of the trial against all the defendants. The court will of course be appraised immediately of any such developments."

30. On 21 March 2018 Mr Tregear confirmed by email that the Forus defendants were not aware that Mr Glushkov had intended to call any other witnesses at trial.

31. No application to adjourn the trial was made by Aeroflot and there continued to be various further disputes between the parties requiring my directions, notably about the difficulties that the Forus defendants were encountering in Switzerland obtaining the release from the banks of frozen monies needed to pay their legal fees.

32. On 29 March 2018 the parties served an agreed draft timetable for the trial together with the trial bundles. The index to the bundles was 292 pages long and there were in all about 120 lever arch files of documents. It was agreed that because of the time it would take to set everything up in court, the trial would start at 2 pm on Monday April 16 rather than at 10.30 am.

33. On 5 April 2018 the parties served their skeleton arguments.

34. On 6 April 2018 Pinsent Masons served orders regarding two witnesses who were expected now to give their evidence in Russia rather than come to London. Pinsent Masons also confirmed that they had engaged facilities at Rostelecom in Moscow and engaged Eurasian Linguistic Services to provide interpreting services at the court in London and a Mr Alexander Shishkin to be the interpreter in attendance at the facilities in Moscow.

35. On 9 April 2012 a disagreement arose because the independent solicitor previously nominated to supervise the taking of the video link evidence in Moscow was not available. I had made an order on 6 June 2017 resolving a dispute between the parties as to the identity of the solicitor. As neither side had been prepared to accept the solicitors proposed by the other side, I had ordered that Victoria Novikova should attend in Russia. However it then emerged that Pinsent Masons had not been in touch with Ms Novikova since June 2017. Unsurprisingly their email to her on 5 April 2018 asking her to confirm her availability to travel to Moscow between 16–20 April 2018 met with a polite but firm response that their request had come out of the blue. She said "This is very short notice and no prior warning was given/request made to keep these dates available". She could not now attend as she had another engagement.

36. There was then a further dispute between the parties as to who should replace her since the much more junior lawyers proposed by Pinsent Masons were not acceptable to Streathers. This resulted finally

in a new lawyer being identified by Streathers and Pinsent Masons accepting that she was suitable early in the evening of 11 April 2018.

37. 10 April 2018 was the first day of the time set aside for reading in to the case. I read the Aeroflot skeleton dated 5 April 2018. One passage caused me considerable concern. The skeleton recorded that Pinsent Masons had been trying to discover whether anyone was likely to seek a grant of probate or letters of administration for Mr Glushkov's estate. They had tried to correspond with anyone who might know of the intentions of Mr Glushkov's two children, Dmitrii Glushkov who lives in Russia and Natalia Glushkova who lives in London. They said these enquiries produced no results. Pinsent Masons had lodged a caveat at the Probate Registry so that they would be informed if any event took place. They submitted that Aeroflot's cause of action survived against Mr Glushkov's estate pursuant to s 1 of the Law Reform (Miscellaneous Provisions) Act 1934 and drew my attention to CPR rule 19.8(1). This rule provides that where a person who had an interest in a claim has died and that person has no personal representative the court may order (a) that the claim proceed in the absence of a person representing the estate or (b) that a person may be appointed to represent the estate. According to CPR rule 19.8(5), if the court makes either such order, the estate is bound by the outcome of the proceedings.

38. Aeroflot argued that it was not appropriate for the court to make any such order. Any order would, they said, almost certainly be met by a challenge by the estate in the event that Aeroflot secured a judgment against it on the grounds that the trial proceedings had infringed the estate's rights under ECHR Article 6. That being the case, they submitted that I should make an order that the trial against the estate be vacated with a direction that the matter be restored for directions in three or four months' time. That would afford further time for a potential beneficiary of the estate to emerge and for an order under CPR rule 19.8(1) to be made.

39. On reading that I immediately wrote to counsel seeking clarification about what was being suggested. Since there was no application to adjourn the trial as against the Forus defendants, it appeared that Aeroflot was suggesting that there should be a 28 day trial against the Forus defendants and then, some months hence, a further identical trial at the behest of any personal representatives of Mr Glushkov's estate who came forward.

40. During the afternoon of April 10 there was further correspondence between counsel and me about the appropriateness of making an order under CPR rule 19.8(1). The Forus defendants urged me to make such an order but Aeroflot submitted that no such order should be made.

41. That debate was overtaken by events because on 11 April 2018 Messrs Charles Douglas, solicitors, wrote to Streathers and Pinsent Masons to inform them that they were instructed to make an application under CPR rule 19.8(1)(a) on behalf of Mr Glushkov's civil partner Mr Trushin and Natalia Glushkova.

42. On 12 April 2018 Mr Trushin and Ms Glushkova served a draft application for an order under CPR rule 19.8(1)(a). They had by this time instructed Mr Warents of counsel to appear for them. The application was supported by a witness statement from Mr Subir Desai, a partner in Charles Douglas. This stated that Mr Glushkov's death was the subject of an ongoing police murder investigation. It was believed that he died intestate. He confirmed that no personal representative had yet been appointed in respect of his estate. The only persons who could conceivably have any interest in the estate were Mr Trushin, Natalia and Dmitrii. Dmitrii Glushkov wrote to the court on 10 April 2018 from Moscow saying that he was content for the estate to be bound by any decision that the court may make. He did not wish to take any active role in the proceedings. Mr Desai also said that the applicants believed that the value of the estate was worth less than £250,000. If that was right, then Mr Trushin would be the sole beneficiary. If the estate was worth more than that, Mr Trushin would also be entitled to 50% of the additional assets and the remaining assets would be divided equally between Mr Glushkov's two children. I consider the response of Aeroflot to this letter further below.

43. On the morning of 13 April 2018, Aeroflot issued an application supported by the 26th witness statement of Mr Fenn asking for certain witnesses of fact based in Russia to be cross-examined by means of videoconferencing and for an order that other witnesses be allowed to produce their evidence under hearsay notices. Mr Fenn's statement recorded that one witness had now refused to give evidence even in Moscow. Three other witnesses who were prepared to travel to London had not been granted visas to do so and so might have to give their evidence by video conference. A number of witnesses had not responded to any communications from Pinsent

Masons since January 2017 and their evidence was now sought to be introduced under hearsay notices.

44. That was the rather chaotic state of the proceedings at the time that the notice of discontinuance was served at about 5 pm on 13 April 2018.

45. Aeroflot have declined, as is their right, to provide any explanation as to why they decided to discontinue the proceedings. Mr Davenport submitted that the reasons for that decision are covered by legal professional privilege. The Forus defendants invite me to infer that what has happened confirms their belief all along that these proceedings were politically motivated. Mr Tregear submits that the obvious inference is that Aeroflot has withdrawn its claim because the arrival of the trial "meant that it was no longer able to maintain the pretence that its allegations against the defendants had any prospect of success". Further, the Forus defendants do not shirk from asserting that neither Aeroflot nor its legal representatives ever had any real belief in the truth of the fraud allegations that they were making: "Aeroflot's game, or the game of the Russian state acting through Aeroflot, was essentially to use civil proceedings as an instrument of political oppression." They submit that eight years of litigation has forced the defendants to incur huge costs to meet litigation that has been pursued by Aeroflot in an unreasonable and disproportionate way. Following the discontinuance there has been no apology from Aeroflot and no retraction of any of the allegations.

46. Aeroflot vehemently denies any suggestion made or implied by the defendants that it has conducted the case in any way improperly, let alone dishonestly. As to the reasons for the discontinuance Aeroflot would not be drawn.

47. I accept that Aeroflot is fully entitled to decline to give any details as to the reasons for its decision to discontinue. That is a matter clearly covered by legal professional privilege. Discontinuance is a right of a claimant and a party should not without more be punished for discontinuing the case as opposed to fighting it out. Were it otherwise, one would be setting up perverse incentives for the future conduct of proceedings. I do not therefore draw any inference about Aeroflot's faith or lack of it in the strength of its case other than the inevitable inference that at some unknown point before 13 April 2018 Aeroflot and its advisers realised that their case was doomed to fail in its entirety.

Indemnity Costs in a Case Alleging Serious Fraud

48. The defendants submitted that there are two bases on which the court should conclude that Aeroflot should pay costs on the indemnity basis. They first rely on the decision of David Richards J (as he then was) in *Clutterbuck and Paton* v *HSBC plc and Others* [2016] 1 Costs LR 13 ("*Clutterbuck*") as authority for the proposition that where a claimant proceeds with allegations of serious dishonesty and fraud against a defendant and discontinues those claims without explanation, an order for indemnity costs should usually follow.

49. In *Clutterbuck*, simplifying a little, proceedings had been issued against 15 defendants claiming damages in tort for deceit and/or negligence. The eleventh defendant served a defence and then issued an application to strike out the claim on the grounds that the particulars of claim disclosed no reasonable grounds for bringing the claim and/or that it was an abuse of the court's process. The eleventh defendant, his solicitors and counsel had prepared for the hearing of the strikeout application before David Richards J. The previous day the claimants had requested that the applications be taken out of the list. When the court refused to vacate the hearing, the claimant served on the eleventh defendant notice of discontinuance of the entire proceedings. The hearing therefore proceeded as a hearing on the issue of whether the claimant should pay the eleventh defendant's costs on the indemnity basis. The judge concluded that the decision had already been taken to discontinue proceedings if the attempt to take the applications out of the list failed. The judge noted that the claim in deceit had been withdrawn without explanation and without apology.

50. David Richards J stated that the general proposition in relation to cases in which allegations of fraud are made is that if they proceed to trial and if the case fails then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. The court of course retains a complete discretion in the matter and there may well be factors which indicate, notwithstanding the failure of the claim of fraud, that indemnity costs are not appropriate. The underlying rationale is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because in effect the defendant has no choice but to come to court to defend his position. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is

appropriate for the court to approach the question of costs in the same way. David Richards J referred to the earlier case of *Jarvis plc* v *PriceWaterhouseCoopers* [2000] 2 BCLC 368. In that case a claimant had discontinued proceedings which had alleged that the company's auditor had acted in bad faith. Lightman J held that where such an allegation was made and not substantiated, the court was amply justified in exercising its discretion to award costs on the indemnity basis. In that case, as in this, the proceedings were discontinued only at the very last moment and no reason was given.

51. Mr Tregear submitted that the approach of the court as exemplified by the *Clutterbuck* and *Jarvis* decisions is justified because of the special position that an allegation of fraud, dishonesty or serious professional misconduct occupies in civil proceedings. He referred to the Bar Code of Conduct which, in the section headed "Behaving ethically", sets out a rule that the barrister's duty to act with honesty and integrity includes a duty not to draft any statement of case, witness statement or other document containing any allegation of fraud unless the barrister has clear instructions to allege fraud and has "reasonably credible material which establishes an arguable case of fraud". Because of this requirement, he submitted, a defendant against whom fraud is alleged comes to court under a significant disadvantage in that the court is more likely to grant onerous orders such as orders freezing assets or requiring extensive disclosure. That is why when such an allegation is abandoned at the last minute with no explanation as to what has suddenly made the allegations unsustainable, the court should mark its disapproval by an order of indemnity costs.

52. Mr Davenport submits that there is no such principle or rule and that every case must be considered on its own merits. He seeks to distinguish *Clutterbuck* on the basis that the claimant there had failed more than once to provide a satisfactory draft of its proposed amended particulars and had issued a notice of discontinuance the day before the strike out application was due to be heard.

53. In my judgment that is no basis for distinguishing *Clutterbuck* from the present case. On the contrary, the present case is stronger given that the allegations of fraud were pursued over eight years and the proceedings were prosecuted vigorously up to a few hours before the whole claim was abandoned the afternoon before the trial. I accept Mr Davenport's submission that it would be going too far to refer to "the rule in *Clutterbuck*" as Mr Tregear did. But I respectfully

consider that the approach in *Clutterbuck* is sound. Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail.

54. There is no doubt that the allegations against Mr Glushkov and the Forus defendants made in the pleaded case and in the skeleton arguments provided to the court at various stages repeated the most serious allegations. They alleged "sustained and concerted wrongdoing" and that Mr Berezovsky and Mr Glushkov used the Forus companies and the control they gained over Aeroflot's financial affairs "to effect large-scale misappropriation of funds belonging to Aeroflot". They asserted that Mr Glushkov and Mr Berezovsky had conspired to defraud Aeroflot and that the Forus companies which they controlled were the vehicles for the fraud. It was asserted frequently by Aeroflot that the evidence of fraud was compelling; and that Aeroflot was confident that it would be able to demonstrate this at trial. The allegations were expressed in the most loaded and hyperbolic language; the terms "conspiracy", "perpetrated fraud", "misappropriation of substantial sums", "fraudulent misrepresentations", "sustained and concerted wrongdoing" were used by Aeroflot often and at every stage of the proceedings. Mr Glushkov was described as having been "inserted" into the management of Aeroflot by Mr Berezovsky; the Forus defendants were described as "conduits" for monies that had been "extracted" from Aeroflot.

55. Aeroflot rely on the judgment of the Savelovsky Court in Russia on 3 March 2017. That court found Mr Glushkov guilty of committing a crime contrary to Article 159(4) of the Russian Criminal Code, that is embezzlement of property by way of deceit. For this crime, Mr Glushkov was sentenced to eight years' imprisonment and a fine of 1,000,000 roubles. Aeroflot was held to be entitled to satisfy its losses in part and to recover from Mr Glushkov damages amounting to US$122,654,085.43. The court also ordered that Aeroflot could seek recovery from monies frozen in Switzerland in bank accounts of the Forus Group.

56. I do not accept that I can rely on the Savelovsky Court's judgment as providing any support for the allegations of fraud that were made in these proceedings against the defendants. The Russian

prosecutors must have realised that there was no possibility of Mr Glushkov attending the trial to defend himself against the accusations, given that he had been absent from Russia for more than ten years. Mr Glushkov was granted asylum in the United Kingdom on 30 July 2009 because, he said, of his political persecution as a former associate of Mr Berezovsky. In a witness statement made in 2011, Mr Glushkov described his treatment during the course of earlier proceedings in Russia, in 2000 and 2001 arising from his and Mr Berezovsky's handling of Aeroflot foreign currency revenues:

> "207. Following my arrest on 7 December 2000, I was imprisoned in Russia until March 2004.
>
> 208. I had and still have a severe blood disorder called haemochromatosis. I also suffer from hypertension, and other conditions and complications. Despite my serious medical conditions, I was detained in extremely harsh conditions in the FSB-run Lefortovo Prison. It is very unusual for someone who is accused of economic crimes to be kept at Lefortovo, so the very fact I was kept there is an indication that the case against me was a 'political' one.
>
> 209. Whilst I was in prison, and when I was not in solitary confinement, I was usually in a very small cell with two other prisoners. One of them was always a 'hen', the term used to describe prisoners promised a reduction in their sentence in exchange for information obtained from cellmates. I was asked questions by certain cellmates about Boris and the opening of bank accounts. I avoided answering these questions.
>
> 210. In January 2001, whilst I was at Lefortovo, Alexander Filin of the GPO visited me and told me that if I was prepared to give evidence against Boris in relation to Aeroflot, this would help me in my predicament. I refused. Boris, like me, was innocent of any wrongdoing.
>
> 211. Such was my ill health during my detention that on 22 February 2001, I was transferred from prison to the Haematological Centre in Moscow for treatment."

57. Further, it was the decision of the Swiss authorities to lift the order freezing the defendants' Swiss bank accounts that had been imposed at the behest of the Russian prosecutor that prompted the application for freezing relief here in December 2017. The Swiss authorities clearly did not consider that that judgment, which has not of course been satisfied

by Mr Glushkov, justified maintaining that restriction over the monies in place.

58. Aeroflot also rely on the fact that the Berezovsky estate represented by Grant Thornton, Holman Fenwick Willan LLP and leading and junior counsel agreed to settle this claim for a very substantial amount of money. They say this indicates that Grant Thornton must have formed its own view of the merits on the available evidence in 2016. However, I do not accept that I can draw any inference from that about the strength of the case against Mr Berezovsky, still less about the case against Mr Glushkov and the Forus defendants. Nothing has been paid by the Berezovsky estate towards that settlement sum and there is no prospect of anything ever being paid. The estate is insolvent and there are other creditors with proprietary claims who stand in the queue ahead of Aeroflot for any monies that the trustees manage to find.

59. I therefore hold that on the basis that these proceedings made serious and consistent allegations of fraud against the defendants and that those allegations have been entirely abandoned without explanation, the defendants are entitled to costs on an indemnity basis.

Conduct of Proceedings "Out of the Norm"

60. The second basis on which the defendants invite the court to award them indemnity costs is by applying the more familiar test described by Tomlinson J (as he then was) in *Three Rivers DC* v *Bank of England* [2006] EWHC 816 (Comm); [2006] 5 Costs LR 714 at [26]. The principles enunciated there refer to circumstances which take the case "out of the norm" – a formulation that has proved useful in many subsequent decisions. Conduct need not be such as to attract moral condemnation but includes whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations. As to manner, Tomlinson J referred to where allegations of dishonesty are pursued aggressively over an extended period of time and where the claimant maintains those allegations without apology to the bitter end. He referred also to cases "where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant" only later to suffer a resounding defeat. I was also referred to other helpful summaries of the principles to be applied in *Bank of Tokyo-Mitsubishi Ufi Ltd* v *Baskn Gida*

Sanayi Ve Pazarlama AS [2010] 5 Costs LR 657 at [26]–[29] per Briggs J; *Elvanite Full Circle Ltd* v *AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC) at [16] per Coulson J and *Bank of Ireland* v *Watts Group plc* [2017] EWHC 2472.

61. Mr Davenport referred me to a line of authorities where the court considers the appropriate award for the costs of a successful but dishonest party, typically a claimant who succeeds in establishing an entitlement to some compensation but who has in part put forward a dishonest, fraudulent case. He referred me to Briggs J's explanation of the applicable principles in *Bank of Tokyo-Mitsubishi* at [19], *Hutchinson* v *Neale* [2012] 5 Costs LO 588 [28] and *Sulaman* v *Axa Insurance plc* [2010] CP Rep 19 [17]–[18].

62. I do not consider that those cases have any relevance to the present inquiry. Aeroflot is not the successful party here; it must be treated as having suffered the same kind of resounding defeat that Tomlinson J had in mind in *Three Rivers*. I reject the submission which appeared to follow from references to these authorities that an order for indemnity costs in the current circumstances can only be made if it can be shown that the misconduct of the paying party gave rise to wasted costs.

63. Applying the principles set out in those cases I have no hesitation in concluding that Aeroflot should pay the defendants' costs of this litigation on the indemnity basis.

64. I have already described the seriousness of the allegations of dishonesty, conspiracy to commit fraud and theft of monies that were persisted in with vigour. The allegations were persisted in "to the bitter end" in the sense that on 13 April 2018, only a few hours before the notice of discontinuance was served, Mr Fenn made his 26th witness statement asking the court to admit in evidence under hearsay notices the Aeroflot witness statements purporting to justify those allegations.

65. The other factors I have taken into account are as follows.

(i) Inaccurate Statements to the Court During Interlocutory Proceedings

66. The Forus defendants complain that there were frequent and damagingly inaccurate statements made to the court by Aeroflot during the course of the proceedings. Of these they highlight the following.

67. First Aeroflot brought an application for specific disclosure of

documents held by EM Finance on the basis that those documents were in the possession or control of the third defendant, Forus Holding. EM Finance was the company formerly known as Forus Services which had successfully contested the jurisdiction of the English court and so dropped out of these proceedings as a defendant. In the evidence filed by Aeroflot to support the application for specific disclosure a number of significant incorrect statements were made which enhanced the strength of Aeroflot's case on the application:

a. It was said that Forus Holding, which was still a defendant in these proceedings, had been the counterparty to the loan agreements with Aeroflot and had been the assignee of Aeroflot's rights to overflight payments from foreign airlines.
b. It was said that Mr Jenni's evidence suggested that Forus Holding was the holding company of the Forus Group and that this included EM Finance, the company from which documents were being sought.
c. It was said that Aeroflot had only discovered in November 2016 that the documents that had so far been disclosed did not include the EM Finance's documents.

68. The Forus defendants therefore say that the picture presented to the court on the issue of whether the documents held by EM Finance were in the control of a party to the proceedings was that the remaining defendant, Forus Holding, was the principal Forus Group counterparty with Aeroflot; that the holder of the documents was within the group headed by Forus Holding; and that Aeroflot had for a long time thought that the documents now sought would have been included in disclosure that had already taken place.

69. In fact none of this was correct. Forus Holding was never party to any loan to or overflight payment assignment from Aeroflot; those contracts were between Aeroflot and EM Finance. Mr Jenni's evidence was that EM Finance had been part of the Forus Group but that in 2001 it split off from the Forus Group and changed ownership; Aeroflot had known since December 2015 that EM Finance documents had been excluded from disclosure on the grounds that it was not a party to the proceedings and its documents were not in the control of the remaining defendants.

70. Aeroflot describe the reference to Forus Holding rather than EM Finance as the counterparty to Aeroflot as an inadvertent error.

They deny that the implication of the Aeroflot evidence was that EM Finance was still part of the Forus Group headed by Forus Holding. They say that the third error was the result of the author of the statement being unaware of the true position but that there was no danger of the court being misled because the mistakes were corrected.

71. I am sure that there was no deliberate attempt to mislead the court here. But it is at best unfortunate that all three errors risked giving the court a very skewed view of the facts that were highly material to any decision on the application. The application for specific disclosure was withdrawn by Aeroflot before the hearing.

72. Secondly, the Forus defendants point to a statement made in the application for a freezing order issued on 11 December 2017. That application for relief was prompted by the receipt of a letter by Aeroflot from the Swiss Prosecutor's office indicating that the restriction on the account that had, until then, been imposed at the request of the Russian authorities was going to be lifted on December 29. The application was supported by an affidavit sworn by Mr Fenn of Pinsent Masons. He said in that affidavit that "Neither Mr Glushkov nor the Forus defendants have provided an undertaking, despite Aeroflot's request that they do so". In fact Aeroflot had not sought an undertaking from Mr Glushkov or the Forus defendants and so there had been no refusal to give an undertaking.

73. In the event Mr Glushkov wrote to me on December 14 giving his consent to the making of the freezing order. The Forus defendants made it clear in their skeleton that they had been unaware of the intention of the Swiss Prosecutor to unfreeze the Swiss accounts until they were served with Aeroflot's application for an injunction. At no point prior to the service of the application had Aeroflot informed them of this development in Switzerland or asked whether they would undertake not to use the money. The Forus defendants were willing to give an undertaking not to deal with the money pending the conclusion of the trial. The Forus defendants stressed in their skeleton that the hearing was a waste of time and costs because what Mr Fenn said in his statement was untrue. No correction was provided by Aeroflot at the hearing of the application until I raised the matter with counsel for Aeroflot, Mr Casey. The explanation given was that there had been an intention to ask for an undertaking and that Mr Fenn's affidavit "didn't catch up" with the fact that they had decided not to do so.

74. As to why Aeroflot had not sought an undertaking before

issuing their application and bringing the matter to court, Mr Casey referred to Aeroflot's reluctance to give the Forus defendants warning because they are "run by a man with a criminal conviction in Switzerland and who's committed, as Aeroflot contends, a very substantial fraud against them". Thus again, the nature of the claim was prayed in aid both in oral submissions and in their skeleton argument. The skeleton submitted by Aeroflot for the injunction hearing also referred to "complex, serious and sustained fraud" and to Mr Glushkov as the "key perpetrator" of that fraud. They also relied, to make good their submission that there was a risk of dissipation, on the line of authorities deciding that if a claimant establishes a good arguable case based upon allegations of fraud or dishonesty, the court will usually be entitled to assume that is sufficient, alone, to demonstrate the risk of dissipation.

75. The injunction order made against Mr Glushkov with his consent provided that costs were reserved and the injunction against the Forus defendants with their consent provided for their costs to be in the case.

76. I am sure that Mr Fenn's incorrect reference to the refusal to give an undertaking was a mistake and not made with the intention to mislead the court. However that does not change the fact that this was an oppressive application and the explanation for why no undertaking was sought does not withstand scrutiny. The Swiss prosecutor indicated that he would only release the monies on December 29. There was no basis for fearing that the assets could be dissipated if the defendants were put on notice of the application in effect to extend the freezing order beyond that date.

77. The third instance of the court being misled occurred during the hearing of Aeroflot's application to adjourn the trial on 12 March 2018. That adjournment was said to be necessary to allow time for letters of request which had been sent to the Swiss authorities to obtain bank statements from EM Finance to be complied with. These would supplement the incomplete record of payments into and out of Forus' bank accounts in respect of the overflight payments coming in from foreign airlines. I queried with Aeroflot's counsel how it could be that Aeroflot would not be aware itself of what payments it was owed by foreign airlines and why they were not able to analyse whether the loans were being properly amortised by the allocation of overflight payments. Mr Davenport's answer was that Aeroflot had no means

independent of Forus to find out what it was owed by foreign airlines. The further implication was that Mr Glushkov and Forus had deliberately engineered this situation so as to facilitate the misappropriation of the funds because Aeroflot had no means of checking independently whether all the overflight receipts were being used to pay off the loans.

78. In fact, again, this was not right. I am satisfied from the documents that Mr Tregear showed me at the hearing of this costs application that Aeroflot was responsible for invoicing the foreign airlines for the amounts they owed and the credits that were notified to them by that airline once the payment had been made. This was also apparent from Aeroflot's own witness, Ms Kryzhevskaya who referred to Aeroflot being responsible for the accounting between Aeroflot and the foreign airlines. Another Aeroflot witness referred in her evidence for the trial to an Aeroflot sales ledger on which invoices were recorded when sent and when paid so that unpaid sales invoices could be pursued.

79. Again, I am sure that Mr Davenport did not deliberately mislead the court by his answer. However all three of the instances I have described involve incorrect information being provided where all the mistakes were as to material facts being placed before the court and all served to enhance the likelihood of Aeroflot obtaining the relief that it was seeking – the specific disclosure order, the freezing of the Swiss funds and the adjournment of the trial. Each of those applications was an occasion for Aeroflot to repeat and rely on the very serious allegations of fraud and dishonesty made in its claim. I consider that even without an intention deliberately to mislead the court, the accumulated effect of these inaccuracies does take this case out of the norm.

(ii) Aggressive Pursuit of Mr Glushkov, Mr Jenni and Mr Glushkov's Estate

80. The Forus defendants and the Glushkov estate also rely on the unusually aggressive stance adopted by Aeroflot in these proceedings. They object in particular to the derogatory references to Mr Jenni, the Swiss lawyer who was involved in the setting up of the Forus Group in spring 1991 in Lausanne. Aeroflot referred to Mr Jenni as "the convicted fraudster" relying for that on his conviction in Switzerland of aiding and abetting the commission of what Aeroflot referred to as

"the Andava fraud". Andava was a company formed by Mr Berezovsky and Mr Glushkov in 1994 which Aeroflot had earlier alleged was involved in defrauding it of foreign currency revenues.

81. The proceedings in the Federal Criminal Court in Switzerland were between the Swiss Federal Prosecutor's Office and Aeroflot as claimants against Mr Jenni and various third parties including Forus Holding SA. Mr Jenni was charged with "unfaithful management and money laundering". From that judgment it is clear that:

a. The court confirmed that no accusation of embezzlement of money had been filed, and concluded that the actions outlined in the bill of indictment did not fulfil the criteria defining embezzlement. There was no basis for the court of its own motion to pursue such an accusation: para 3.
b. The court accepted that Mr Glushkov had owed duties to Aeroflot which he had violated, based on the existence of the Russian judgment which could not be called into doubt. The court held that the question whether Mr Glushkov's superiors in Aeroflot had known about the benefit he gained from his involvement with Andava was irrelevant to the proceedings before it. Such knowledge on the part of Aeroflot senior management would have been an obstacle to criminal liability for fraud under Swiss law but did not nullify the breach of fiduciary duty. But, the court said as Mr Jenni "is not being charged with fraud or aiding or abetting fraud, but with unfaithful management or aiding and abetting unfaithful management" the legal and circumstantial issues under Russian law regarding fraud were irrelevant: para 4.2.2(b).
c. The court found that it had been proven that Mr Jenni played a central role in the establishment of the Andava group and the design of the transactions which comprised the relationship between Andava and Aeroflot. There was no basis for finding that he did not know that Mr Glushkov was acting in breach of his duties towards Aeroflot and Mr Jenni was therefore found guilty of aiding and abetting unfaithful management by contributing to the withdrawal by individuals in senior positions at Aeroflot of large amounts of money from the company for their personal gain: para 4.2.4 and 6.4.
d. He was sentenced to 21 months' prison sentence suspended for two years and a substantial fine.

82. Having read the Swiss court's judgment in full, I accept Mr Tregear's submission that references to Mr Jenni being a "convicted fraudster" were offensive and unwarranted. In the Aeroflot skeleton argument served a few days before the proceedings were discontinued Aeroflot again referred to Mr Jenni as having been "involved in the Forus Fraud 'on the ground level'".

83. As far as Mr Glushkov is concerned, I have already described how these proceedings were pursued relentlessly against him despite his painful and debilitating illness, and his programme of frequent hospital appointments which sometimes prevented him from attending court. In a short statement to the court at the hearing of this indemnity costs application, Mr Warents described the distress of Mr Glushkov's children and civil partner and how this was "compounded by the knowledge that for many years during which Mr Glushkov's health was deteriorating, Mr Glushkov had struggled to defend himself against what he saw as a politically motivated campaign of persecution by Aeroflot and the Russian state".

84. Mr Warents also described how Ms Glushkova and Mr Trushin discovered Mr Glushkov's body at his home at approximately 10.30 pm on 12 March 2018. They had gone to his home after becoming concerned that they had not heard from him for some time. On discovering his body they called for an ambulance and also the police. Mr Warents went on:

> "Obviously Ms Glushkova and Mr Trushin found these events extremely distressing. I should say it has not helped that Aeroflot subsequently has been extremely aggressive and unsympathetic in the way that it has dealt with them particularly in correspondence questioning whether there was a will, questioning whether there were any creditors of the estate, in a completely unfeeling and unsympathetic manner, particularly given what has happened since with the discontinuance of the claim."

85. I agree with that description of Aeroflot's behaviour. The witness statement of Mr Desai in support of the application issued on 12 April 2018 described how, in the short time since Mr Glushkov's death, Ms Glushkova and Mr Trushin had been doing their best to work out what was going on in the proceedings and how best to deal with the case. They had also been dealing with their bereavement during this time. Mr Desai then set out such information as he had been able to

gather. He said that to the best of the applicants' knowledge Mr Glushkov had died without leaving a will. They had spoken to close professional associates of Mr Glushkov and believe that he died intestate. So far as they were aware there were no other people with an interest in Mr Glushkov's estate other than Mr Trushin, Natalia and Dmitrii. They believe that the estate was unlikely to be worth more than £250,000. The applicants, he said, were not in a position to fund any active defence and had no desire to take any active role in the trial either now or in the future. They were prepared therefore for the estate simply to be bound by any order or judgment the court made as a result of the forthcoming trial. They hoped and believed that the claim against the estate could be determined one way or another without further delay or additional cost.

86. On 12 April 2018 Pinsent Masons wrote to Mr Desai a letter which I regard as shameful. They effectively berate Mr Trushin and Ms Glushkova through their solicitors for failing to come forward sooner, demanding an explanation "by return and in any event by noon tomorrow" why they had left it "so late" to make the application. The letter went on to ask many intrusive and hectoring questions about what contact the clients have had with others about the trial; what efforts they have made to establish whether Mr Glushkov left a will including who is referred to by the phrase "close professional associates" in Mr Desai's statement; the basis upon which they had reached the view about the value of Mr Glushkov's estate (which Pinsent Masons describe as "an unsubstantiated belief"); in particular what assets do they consider belong to the estate; what efforts they have made to identify assets; what efforts they have made to ascertain whether there are any creditors of the estate and to establish their views on the suggestion that the trial proceed without the estate being represented; what contact they had made with Mr Glushkov's former solicitors Boodle Hatfield who might be a substantial creditor of the estate. Finally they demanded to know the basis on which the time estimate of 30 minutes had been given for the application since they considered that a time estimate of at least 2 hours 30 minutes will be required.

87. The High Court is familiar with high-value litigation being hard fought with no quarter given on either side. But it is, fortunately, "out of the norm" for a litigant and its legal representatives so to lose sight of any basic standard of decent and compassionate behaviour as to

send a letter in those terms. It is all the more shocking given that it seems very unlikely that at the time the letter was drafted and sent, Aeroflot had no inkling that the next day it would serve a notice of discontinuance, abandoning all claims against Mr Glushkov's estate.

(iii) Aeroflot's Arguments

88. Aeroflot's main argument against the court ordering indemnity costs is that the Forus defendants refused to mediate the claim. Aeroflot first proposed mediation on 13 July 2016. This was before their expert Mr Dearman had served his first report. The Forus defendants declined to mediate saying that their resources were already fully stretched, and they could not invest the time and money required to pursue a mediation in parallel with litigating. They invited Aeroflot to make a settlement proposal.

89. Aeroflot submit that this rejection of mediation was unreasonable and that the court should penalised the Forus defendants in respect of costs from that point onwards.

90. Nothing further happened in relation to either mediation or settlement proposals until June 2017. Pinsent Masons wrote to Streathers on 19 June 2017 proposing a face-to-face without prejudice meeting in order to address any concerns which the Forus defendants might have regarding the cost of mediation. Streathers replied at the end of June rejecting mediation and maintaining the position that they were not prepared to meet face-to-face. They invited Aeroflot to make a written settlement proposal. Pinsent Masons wrote in mid-July 2017 offering to settle the claim for the amount of the Savelovsky Court judgment, namely US$123 million. That offer was made at a time when the expectation was that the trial would commence in October 2017. On 21 July 2017 Streathers refused the offer and invited Aeroflot to withdraw the claim and make proposals to pay the Forus defendants' costs.

91. There was no further discussion about settlement until 21 March 2018 following the dismissal of Aeroflot's application to adjourn on March 12. At that point Pinsent Masons offered to accept $9 million in compensation plus 50% of Aeroflot's costs. That offer was rejected on 4 April 2018. At that point the balance switched to Pinsent Masons indicating that a settlement might be reached which would involve Aeroflot making a substantial payment towards the Forus defendants' costs. By the time the claim was discontinued the

negotiations had reached the stage by which Streathers indicated a willingness to accept £2.5 million from Aeroflot towards the Forus defendants' costs.

92. Mr Davenport referred me to the importance that the court places on encouraging parties to mediate to avoid costly and time-consuming disputes: see the Chancery Guide paras 5.1, 5.2 and 18.2. He referred me to a number of authorities in which an unreasonable refusal to mediate was a relevant consideration in reducing the level of costs to which the receiving party might otherwise have been entitled.

93. In my judgment it would be inappropriate to take a refusal to mediate into account. I accept Mr Tregear's submissions that where allegations of fraud and serious wrongdoing are made, the proceedings are intrinsically unsuitable for mediation. To penalise the Forus defendants in costs for the stance they took would in effect be penalising Mr Glushkov and the Forus defendants for insisting on their right to have their reputations vindicated by the decisions of the court following a trial.

94. In any event I have been case managing these proceedings for some time and I am satisfied there was never any possibility of these parties making any progress in alternative dispute resolution. A heated and voluminous correspondence between the parties was generated by the need to select an independent solicitor simply to sit in Moscow with the witnesses giving evidence by video link. The parties were unable to agree the identity of the solicitor, or her daily subsistence allowance and I was required ultimately to give directions to resolve the matter. There was in my judgment no possibility of them agreeing the identity of a mediator.

95. Aeroflot also invited the court to make enquiries as to "what lies behind the two Forus companies, situated in the BVI and Luxembourg" before deciding the issue of indemnity costs. I do not agree that any such enquiry is either necessary or appropriate – any more than it is either necessary or appropriate for the court to enquire as to who has been making the decisions relating to Aeroflot's pursuit of these proceedings and its decision to abandon them.

96. Finally Aeroflot complain that costs were wasted because the Forus defendants initially asserted that the claims were governed by Swiss rather than Russian law and Aeroflot had to incur the costs of pleading to Swiss law. It was only later that the Forus defendants accepted that Russian law applied and also accepted the accuracy of

the evidence on Russian law provided by Aeroflot's expert. I do not regard this as anything more than part of the natural evolution of a case as it proceeds towards trial. It certainly does not weigh heavily in the balance against the factors I have described as pointing in favour of an order for indemnity costs.

Guidance to the Costs Judge

97. I have considered whether it is appropriate to order indemnity costs for the whole of the proceedings or for some shorter period. The defendants refer to the fact that some months before the start of the trial it became apparent that the evidence supporting the contention that any of Aeroflot's funds had actually gone missing was seriously undermined by disclosure of documents from EM Finance. Mr Davenport also referred to this somewhat obliquely in his submissions. However, since Aeroflot have declined to explain why they have discontinued these proceedings, they cannot ask the court to infer that the reasons are connected with developments in the evidence which occurred part way through the proceedings. The appropriate order is that Aeroflot pay all the defendants' costs to be assessed on the indemnity basis for the whole proceedings.

98. Mr Glushkov's costs comprise the fees of Boodle Hatfield who initially acted for him, as set out in the witness statement of Simon Fitzpatrick dated 16 April 2018, Mr Glushkov's costs as a litigant in person recoverable pursuant to CPR rule 46.5 and the fees of Charles Douglas acting as representatives for the estate. Clearly, had Mr Glushkov instructed solicitors and counsel to act for him throughout the whole proceedings rather than having acted as a litigant in person since October 2014, Aeroflot would now be facing a liability to his estate of significantly more than they can be assessed as liable to pay. As regards the Boodle Hatfield and Charles Douglas fees, I would hope that the result of any assessment would be that the estate is not diminished materially, if at all, by reason of Mr Glushkov's or his estate's liability for these fees. As regards the costs to which the estate is entitled by reason of Mr Glushkov acting as a litigant in person, I note that during the period when I have been case managing these proceedings, he was fully engaged with the case, so far as his health permitted, and that his letters to the court were always courteous, temperate and helpful.

Simon Davenport QC (instructed by Pinsent Masons LLP) appeared for the claimant.

Francis Tregear QC, *Alexander Pelling* and *Owen Curry* (instructed by Streathers Solicitors LLP) appeared for the third and fifth defendants.

Daniel Warents (instructed by Charles Douglas Solicitors LLP) appeared for the estate of Nikolay Glushkov.