IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-000757
[2021] NZHC 1204

BETWEEN	SERGEY GRISHIN Applicant
AND	JOHN BOWIE Proposed Defendant/Respondent

Hearing: 11 May 2021

Appearances: W Akel and J W S Baigent for Applicant
J Bowie -Proposed Defendant/Respondent – In Person

Judgment: 27 May 2021

JUDGMENT OF GENDALL J

This judgment was delivered by me on 27 May 2021 at 3 p.m. pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] On 18 December 2020, the applicant, Sergey Grishin, filed in this Court an interlocutory application for pre-commencement discovery against John Bowie, the proposed defendant and respondent.

[2] On 18 February 2021 the respondent filed by way of email a letter providing his response to this application which essentially was a formal opposition.

[3] The applicant has provided a draft statement of claim and annexures with respect to his intended claim against the respondent.

[4] Essentially, the applicant contends the respondent has published 10 articles about and concerning the applicant which he says are seriously defamatory. The sting in these articles is said to be that the applicant is an evil Russian Oligarch, akin to the criminal mobster portrayed in the "Scarface" movie.

[5] In his pre-commencement discovery application, the applicant, amongst other things, generally seeks disclosure of the identity of all those who he says participated in or authorised the articles and related documents the subject of the defamation claim, to determine who could be possible defendants in this proceeding. The documents sought are said to be relevant to these issues, and the applicant maintains they are specifically defined and are proportionate to the remedies he seeks.

Pre-commencement discovery application

[6] The present application specifically seeks orders from this Court under paragraph 1:

> (a) That within 20 working days, or such other period as the Court directs, the proposed defendant [Mr Bowie] will serve on the applicant an affidavit stating –
>
> (i) Whether the documents identified in Schedule A (**Documents**) are or have been in the proposed defendant's control; and
>
> (ii) If they have been but are no longer in the proposed defendant's control, the best knowledge and belief as to when the Documents ceased to be in the proposed defendant's control and who now has control of them.
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> (b) Requiring that the proposed defendant make the Documents available for inspection within a further 10 working days or such other period as the Court directs.
>
> (c) For costs.

[7] The Documents in question here are outlined at Appendix "A" of this judgment. The background to and the specific grounds for the orders sought set out in the applicant's application are described as:

(a) The respondent resides in Wellington and is the publisher and an editor of the law news website, LawFuel, published on the website www.lawfuel.com.

(b) From around 20 April 2020 onwards the respondent published on the LawFuel website seven articles concerning or referring to the applicant, that the applicant says were defamatory of him

(i) *From Russia with Hate: The 'Scarface' Legal fight, 'Assassin' Lawyers & More Pierce Bainbridge Drama*, first published on 20 April 2020 under the byline "*LawFuel Editors*", and which continued to be published until about 27 October 2020;

(ii) *'Scarface' Oligarch Faces Judicial Slapdown From Movie Producer in Bizarre, $50 Million Litigation*, first published on 25 April 2020 under the byline "*LawFuel Editors*", and which continued to be published until about 2 November 2020;

(iii) *'Follow the Money, Mr Bond' – The Money Trail from The Bond Villain Case of Sergey Grishin & 'The Firm', Pierce Bainbridge*, first published on 12 May 2020 under the byline "*LawFuel Editors*" and which continued to be published until about 27 October 2020 when it was amended, the amended version was published from about 27 October 2020 until about 6 November 2020;

(iv) *'Scarface' Oligarch Chronicles – Billionaire Sergey Grishin*, first published on 26 May 2020 under the byline "*LawFuel Editors*", and "*LA Correspondent*", and which continued to be published until about 27 October 2020 when it was amended, the amended version was published from about 27 October 2020 until it was further amended on about 2 November, the further amended version was published from about 2 November until about 9 November 2020;

(v) *The Law Firm Hired by Rudy Guiliani is in Financial Straits*, first published on 17 July 2020 under the byline *"Dan Garner"*, and which continued to be published until about 19 November 2020 and which included the following article published by way of a link: "*As a Russian ex-banker admitted to scams for the sake of US citizenship*";

(vi) *The Women Disappointed in Meghan & Harry's Choice of LA's 'Scarface Oligarch' Mansion*, first published on 18 August 2020 under the byline "*LawFuel Editors*", which continued to be published until about 6 November 2020;

(vii) *The Odd Tale of the Scarface Oligarch, Meghan Markle, Prince Harry, The Mansion and Chapman Tripp*, first published on 19 August 2020 under the byline "*Lawfuel Editors*", and which continued to be published until about 27 October 2020;

Together referred to as the **Articles**.

(c) The applicant says that the Articles are defamatory of him.

(d) The applicant is entitled to claim relief against those involved in the chain of publication of the Articles.

(e) The applicant has prepared draft proceedings for defamation regarding the Articles, which currently identify Mr Bowie as the proposed defendant in his capacity as publisher of the LawFuel website.

(f) The applicant, however, believes that in publishing the Articles, the proposed defendant was acting not only on his own behalf but on behalf of others not yet known to the plaintiff, including without limitation the other "LawFuel Editors", "LA Correspondent", and "Dan Garner" that the Articles were published under the byline of, and/or the proposed defendant received payment or other benefit in publishing the Articles.

(g) The applicant believes the proposed defendant holds documents which will identify the other authors, editors, contributors, and/or publishers of the Articles.

(h) The applicant has engaged in correspondence with the proposed defendant requesting that the Articles be taken down from the LawFuel website, and asking for details of the person(s) who were involved in the publication of the Articles, including, in particular, the "LawFuel Editors", "LA Correspondent", and "Dan Garner" that the Articles were published under the byline of, and the names of the person(s) who provided a copy of an image of the applicant holding a large machine gun, which image is published in the Articles.

(i) The proposed defendant by email, of 9 November 2020, confirmed that the Articles have now been taken down from the LawFuel website, stated that they had received information for the Articles from Jennifer Sulkess, and referenced other material they had viewed, including complaints and cross-complaints filed by Affeld Grivakes, Attorneys (who the applicant believes to be acting for Jennifer Sulkess). However, the proposed defendant has failed and refused to respond to the specific requests for the information sought in this application.

(j) It is impossible or impracticable for the applicant to properly formulate his claim, including as to which jurisdiction to sue in, without knowing the identity of all those involved in the publication of the Articles.

The law

[8] The discovery application before me is brought in reliance on r 8.20 of the High Court Rules which provides:

> **8.20 Order for particular discovery before proceeding commenced**

(1) This rule applies if it appears to a Judge that—

(a) a person (the **intending plaintiff**) is or may be entitled to claim in the court relief against another person (the **intended defendant**) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to 1 or more documents or a group of documents; and

(b) there are grounds to believe that the documents may be or may have been in the control of a person (the **person**) who may or may not be the intended defendant.

(2) The Judge may, on the application of the intending plaintiff made before any proceeding is brought, order the person—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the person's control; and

(ii) if they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and

(b) to serve the affidavit on the intending plaintiff; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the intending plaintiff.

(3) An application under subclause (2) must be by interlocutory application made on notice—

(a) to the person; and

(b) to the intended defendant.

(4) The Judge may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

[9] In the alternative, the applicant relies on the decision *Norwich Pharmacal Co v Customs and Excise Commissioners*.[1]

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1 *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 (HL).

[10] So far as the origin of r 8.20 is concerned, *McGechan on Procedure* at HR8.20.01 states:[2]

> **HR8.20.01 Origin of rule**
>
> The equitable remedy of a bill of discovery permitted a plaintiff to bring an action against an "interested" party to make that party discover the names of persons who may have wronged the plaintiff, to enable the plaintiff to take action against any possible wrongdoers. This remedy is (in theory) still available: *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133, … and was recently successfully invoked in *Tahi Enterprises Limited v Taua* [2018] NZHC 3372…It seems that r 8.20 has its origins in this type of jurisdiction … although it is much wider in scope and may have eclipsed the earlier procedure entirely … The wide terms of r 8.20 may mean that there is no need to resort to the *Norwich* principles at all: *Taua v Tahi Enterprises Ltd* [2020] NZCA 639 at [57].

[11] In turning now to the object of the rule, *McGechan on Procedure* at para HR8.20.03 describes this in the following way:[3]

> On the terms of the rule, the object of r 8.20 discovery appears to be to allow the plaintiff to formulate its claim properly, but a wider notion of allowing the plaintiff the opportunity to consider its further course of action and of possibly limiting the issues has received support: *Nelson v Dittmer* [1986] 2 NZLR 48…

[12] As to the jurisdictional requirements for an application under r 8.20 or pursuant to the *Norwich Pharmacal Co* case, *McGechan on Procedure* at para HR8.20.03 states:[4]

> In *Welgas Holdings Ltd v Petroleum Corp of NZ Ltd* (1991) 3 PRNZ 33 (HC), it was held that to obtain an order under what is now r 8.20, three things must be established:
>
> (a) The intending plaintiff is or may be entitled to claim relief against another person;
>
> (b) It is impossible or impracticable for the plaintiff to formulate the claim without the documents sought; and
>
> (c) There are grounds for belief that the documents may be or have been in the possession of the person concerned.

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2 *McGechan on Procedure* Thomson Brookers on-line and loose-leaf edition at HR8.20.01.
3 Above n 2 at HR8.20.02.
4 Above n 2 at HR8.20.03.

[13] So far as these jurisdictional requirements are concerned, *McGechan on Procedure* at para HR8.20.03 goes on to explain:[5]

> **(1) Entitled to claim relief**
>
> It is important that there be an adequate basis for the claim. In Exchange *Commerce Corp Ltd v NZ News Ltd* [1987] 2 NZLR 160, … the Court of Appeal held (at 164,233) that there must be at least the "real probability of the existence of a claim against someone". In *Welgas Holdings* (above), McGechan J explained (at 43) that this did not refer to the probability of success, but to the fact that the plaintiff must have a real as opposed to a speculative claim: "a so-called 'sufficient substratum of fact'… some basis of fact which takes matters beyond mere fishing; mere trawling or speculation, hoping something useful may be caught".
>
> The focus is on the probable existence of a claim, not the probability of the claim being established at trial. It must be more than a speculative possibility, and the real concern on this aspect is to "sort out the real from the fishing" …
>
> **(2) Impossible or impracticable to formulate claim**
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> "Impossible or impracticable" does not mean merely inconvenient: … The Court of Appeal has said, however, that what is meant is an "inability to plead the claim in accordance with the requirements of the rules" … In *British Markitex Ltd v Johnston* (1987) 2 PRNZ 535 (HC), Wylie J said that the words import a notion of reasonableness and that justice for the parties requires pleadings to be properly drawn. If the document sought would enable the drawing of proper pleadings which could not otherwise be achieved, it is justifiable to invoke what is now r 8.25.
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> …
>
> **(3) Grounds for belief as to possession of documents**
>
> The Courts will not permit discovery to become a fishing expedition; it will be necessary a fortiori in a r 8.20 application to describe with some specificity the document or class of document sought: *Campbell v Tameside Metropolitan Borough Council* [1982] QB 1065 …

[14] Lastly, it is clear that for an order to be made under r 8.20 the Court needs to be satisfied the order is necessary at the time it is made.

[15] I turn now to consider these jurisdictional requirements under r 8.20 in the circumstances of the present case.

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5 *McGechan on Procedure*, above n 2 at HR8.20.03

1. Applicant entitled to claim relief

[16] On this aspect I repeat that the focus is to be on the probable existence of a claim, not the probability of the claim being established at trial.[6] The applicant's draft intended statement of claim pleads a number of what are said to be defamatory causes of action arising out of separate but linked publications. I have had an opportunity to consider this material which is before the Court and have no doubt that a reasonable reader of this material might well conclude that the applicant is a dangerous and evil person who has committed serious crimes ranging from violence to fraud and criminal money laundering as a "Scarface" Russian Oligarch. Largely, as I understand the position, this is not disputed by the respondent. In the material he has filed, which constitutes his notice of opposition to the present application, the respondent in fact seems not only to acknowledge publication of the Articles in question but says they are true.

[17] I am satisfied on this jurisdictional element that for present purposes the applicant has done enough to show there is an adequate basis for the claims he makes against the respondent. There appears to be, in my view, some reasonable factual basis here to suggest the applicant might be entitled to relief, although the probability of this claim being established is a matter for trial. This is not a case, as I see it, of mere fishing.

2. Impossible or impracticable to formulate claim

[18] The applicant claims in his application before me that it is impossible or impracticable for him to properly formulate his claim, including as to which jurisdiction to sue in, without knowing the identity of all those who were involved in the publication of the Articles in question and also what role they may have had in providing documents to the respondent that became the basis for LawFuel's publications.

[19] It does seem the allegedly defamatory articles were written under different names. These included "LawFuel Editors", "LA Correspondents" and "Dan Garner".

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6 *Heatherington v Carpenter* [1997] 1 NZLR 699 (CA).

[20] The applicant says he seeks discovery of the documents sought to identify the writers and the extent of their involvement in the particular publications.

[21] So far as Articles written under the by-line "Dan Garner" are concerned, the respondent states in his opposition to this application that in 2020 he published articles relating to a US firm of solicitors, Pierce Bainbridge, representing the applicant which "were written principally by an American attorney". Although this was not disclosed at the outset, the respondent now seems to acknowledge that the author of these Articles under the by-line "Dan Garner" was in fact a lawyer and former partner/associate of the Pierce Bainbridge firm, Dom Lewis.

[22] An important aspect in the present case, the applicant says, is the chain of publication of the various Articles. Discovery, he maintains, should disclose all those involved in this chain.

[23] In *Taua v Tahi Enterprises Ltd*,[7] the Court of Appeal confirmed that discovery is available to seek the names of intended defendants not only to establish the basis of potential liability but also so they can be brought before the Court to answer claims which may already be formulated. In particular, the Court of Appeal at [59] stated:

> The alleged causes of action intended to be brought against them may or may not succeed, but this is not a case in which it is necessary to weigh competing rights of plaintiffs to obtain and potential defendants being compelled to provide information. … If the claims are not genuinely arguable, they might be susceptible to being struck out. But it would be wrong in circumstances such as these to use the discovery rules as an indirect means of defeating the substantive claims.

[24] From the evidence before me in this case, it is clear a significant amount of correspondence has flowed between counsel for the applicant and the respondent directly regarding this preliminary discovery question and disclosure issues. The applicant maintains, and it does seem to be the case, that he has got nowhere in these discussions.

[25] Overall, I am satisfied, therefore, that given justice for the parties in this case requires that intended pleadings are properly drawn, to do so here will require

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7 *Taua v Tahi Enterprises Limited* [2020] NZCA 639

disclosure of the documents sought by the applicant, if indeed they exist. It would be impracticable, as I see it, for these claims to be formulated without their provision. For these reasons I find this second jurisdictional requirement satisfied. In my view, a reasonable argument exists that it would be impossible or impracticable here to properly formulate the applicant's claim without provision of this discovery.

3. Grounds for belief as to possession of documents

[26] As I have noted above, I accept the present application is a focused one and that it seeks specific information to enable the defamation proceedings proposed by the applicant to be properly formulated. It seeks information too as to who is responsible for publications said by the applicant to be defamatory.

[27] It appears that a chain of publication is involved here as Palmer J referred to in *Sellman v Slater*[8] and that this represents part of the information sought.

[28] A number of the documents refer to "LawFuel Editors", "L A Correspondent", "Dan Garner" and related identities. It seems to me self-evident that the respondent will have documents in his possession relating to these people by his use of the various by-lines.

[29] Before me, the respondent did not seem to advance any denial that documents relating to these matters were in his possession. As to this, the respondent also appears to acknowledge that Jennifer Sulkess, who has been named as a source of various articles, has provided information to the respondent. If Ms Sulkess wrote the Articles in question that will likely impact on questions of liability. The applicant contends too that Jennifer Sulkess and Anna Fedoseeva, the previous wife/partner of the applicant, are now in a business or personal relationship and documents from the former, it is said, clearly remain held by the respondent.

[30] I conclude that clear grounds exist for the belief that the documents in question are in the possession of the respondent.

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8 *Sellman v Slater* [2017] NZHC 2393 at [103] ff.

Grounds for opposition to the current application

[31] Turning to the respondent's opposition here, first, s 68 of the Evidence Act 2006 is raised and said to provide protection to the respondent. This section was considered by Asher J in *Slater v Blomfield*.[9] It is clear from this that it is the respondent who must establish that the grounds to s 68 confidentiality protection must be made out by the respondent. Here, I am satisfied the respondent has provided no sworn evidence to support his contentions of confidentiality and the need for protection of his sources.

[32] As I note, Jennifer Sulkess has been identified as a source by the respondent and it seems that no confidentiality can attach to any document that she may have provided and any correspondence between the two. Given also the close alignment between Ms Sulkess and Ms Fedoseeva (as business and personal partners as I note above) it seems too that no confidentiality might attach to Ms Fedoseeva as well. Similar considerations might well apply with regard to Ms Fedoseeva's Russian lawyers and public relations entities operating on her behalf. The applicant contends these parties are all potentially part of a common design to harm him.

[33] The applicant argues too that the respondent published various Articles under false names (e.g. "Dan Garner") which he maintains is duplicitous in the extreme. It is said the respondent must know and have known then that the true author's name was not used. Also, the applicant maintains the writers of the stories described as "LawFuel Editors", "L A Correspondents", and "Dan Garner", are not informants within s 68 given that these Articles are written under false names. I accept this.

[34] As to the image in question, for present purposes, I accept the applicant's argument that the use and surrounding aspects of this suggests a clear private feud and its publication, to an extent, raises a chilling effect on the applicant's position. The applicant contends the Articles I outline above, which he sues upon, present a one-sided and doctored account of his matrimonial and other proceedings and the emails referred to in the respondent's opposition. These include allegations of his defrauding the Russian Central Bank of 50 billion dollars, which the applicant maintains are

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9 *Slater v Blomfield* [2014] NZHC 221; [2014] 3 NZLR 835.

ridiculous and yet he says they reinforce the impression of him as an evil Russian oligarch. The repetition rule too treats those who republish statements or assertions of others which are defamatory as having made the statements themselves. None of this here provides assistance to the respondent in terms of s 68, in my view. At this point, it does not seem too that the real disputed issue here is about public interest. The applicant says the genesis of all this lies in a domestic dispute between he and his former wife blown out of all proportion by the respondent. Nor, the applicant maintains, does any of this have any public relevance in New Zealand.

[35] Next, the respondent endeavours to argue that this application is a pointless one. He notes that the articles in question have been taken down in stages from the "LawFuel" website. But he does accept the applicant's argument that this does not render the present application pointless or of no relevance. The extent and duration of publication, if defamation is established, goes to damages. Overall, I am satisfied the present application cannot be seen as a pointless. Nor, in my view, could it be categorised as mere "fishing" nor, on the evidence presently before the Court, could it be said that it appears to be part of an overall vendetta on the part of the applicant.

[36] Lastly, I accept first, that the information sought in this application is relevant to the applicant's intended defamation proceedings and secondly, that the alleged publications by the respondent, by their very nature, have caused "more than minor" harm to the applicant in the terms outlined in *Jameel v Dower Jones & Co*.[10] The respondent too, it seems, is subject to the jurisdiction of this Court, notwithstanding that it is clearly the international reputation of the applicant at issue here.

[37] Whether or not the respondent may have a strong defence to the claim against him, I am satisfied on the material presently before the Court the claims are genuinely arguable on their face and are not susceptible to being struck out.[11]

[38] Overall, the applicant's contentions first, that the Articles in question were an unjustified attack on his reputation and secondly, that the sting of these Articles simply cannot be justified nor regarded as expressions of opinion, in my view, would appear

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10 *Jameel v Dower Jones & Co* [2005] EWCA civ 75; [2005] 1 QB 946.

11 *Taua v Tahi Enterprises*, above n 7 at [18]; *Collier v Bennett* [2020] EWHC 1884 (QB) at [53].

on the material before me at this point to carry some weight. It seems clear too that the respondent failed to seek any comment from the applicant prior to publication of the Articles in question.

Conclusion

[39] I conclude, therefore, that overall, the interests of justice favour the making of the pre-commencement discovery orders sought here. That discovery may well show who else was involved in the alleged wrong in this case. As both *Slater v Blomfield*[12] and *Mediaworks v Staples*[13] make clear, there is a clear public interest in ensuring that parties to civil litigation have sufficient information to enable them to fairly advance their position and thus to provide a level playing field for litigation in the courtroom. This must involve disclosure of all material that either assists or hinders parties involved in such litigation so they may present their cases effectively. The identity of those involved in actions that are complained of needs to be properly known and as *Slater v Blomfield* discusses, the identity of sources may in certain circumstances assist in assessing whether statements may be true or otherwise. Discovery too, it seems, will not be particularly onerous on the part of the respondent. This pre-commencement discovery too, in my view, will more likely lead to a less costly and more efficient resolution of the proposed proceedings given that it may be known more clearly who the parties are who were involved in the publications in question.

[40] For all these reasons, the present application succeeds.

[41] An order is now made that by 25 June 2021 the proposed defendant/respondent John Bowie will serve on the applicant an affidavit stating:

(a) Whether the documents identified in Schedule A of the respondent's application (being those documents outlined in Appendix "A" to this judgment) are or have been in the proposed defendant's control;

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12 *Slater v Blomfield*, above n 9.
13 *Mediaworks v Staples* [2019] NZCA 133.

(b) If they have been but are no longer in the respondent's control, the best knowledge and belief as to when the documents ceased to be in the respondent's control and who now has control of them.

[42] A further order is made requiring that the respondent John Bowie make the documents in question available for inspection by 9 July 2021.

[43] As to costs, the applicant has been successful in this application and is entitled to an award of costs here. Costs are, therefore, awarded on this application and on the substituted service application on a category 2B basis together with disbursements as approved by the Registrar against the respondent John Bowie.

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Gendall J

Solicitors:
Simpson Grierson, Auckland

Copy to:
William Akel, Barrister, Auckland
John Bowie – Proposed Defendant/Respondent

APPENDIX "A"

1. Documents identifying the person who supplied Mr Bowie with the video or image of Mr Grishin holding a large gun in an antique store in Japan, as published in the Articles.

2. Documents identifying the following persons, along with details of the manner and extent to which they were involved in the publication of the Articles:

   (a) the "LawFuel Editors" recorded as the authors of the Articles.

   (b) the "LA Correspondent" recorded as an author on one of the Articles.

   (c) "Dan Garner" recorded as an author of one of the Articles.

   (d) all other persons in any way involved in the publication of the Articles.

3. Documents identifying any persons who made any payment/s or provided other benefit/s to LawFuel for publishing the Articles or any of them, along with details of the payments and/or other benefits.

4. Any correspondence relating to the Articles whether hard copy, digital or otherwise between Mr Bowie, or anyone associated with LawFuel, and Jennifer Sulkess or anyone else on her behalf, or Anna Fedoseeva or anyone else on her behalf.

5. Any other correspondence relating to the Articles whether hard copy, digital or otherwise between Mr Bowie, or anyone associated with LawFuel, and Affeld Grivakes LLP including partners Christopher Grivakes or Damion Robinson (attorneys for Ms Sulkess) or Ekaterina Dukhina (attorney for Ms Fedoseeva), or Anatoliy Vereschagin, or public relations agency Progress Communications Agency or Cherkizovo.