

Applicant of the Second Application;
[Fourth Respondent to (First)
Application]
Vladimir Niyazov and Andrey Titarenko
1st Affidavit
Exhibit VNAT1
Date Affirmed: 18 September 2017
Date Filed: 2017

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

Claim No.: BVIHC (COM) 2016/0187

BETWEEN:

By way of Claim:

RENOVA INDUSTRIES LTD.

Claimant

-and-

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

And by way of (First) Application:

RENOVA INDUSTRIES LTD.

Applicant of (First) Application

-and-

- (1) NATALIA KHODASEVICH
- (2) STUART MACKELLAR
- (3) MARK MCDONALD
- (4) [VLADIMIR NIYAZOV]

Respondents to (First) Application

And by way of Second Application:

VLADIMIR NIYAZOV

Applicant of Second Application

-and-

RENOVA INDUSTRIES LTD.

Respondents to Second Application

FIRST AFFIDAVIT OF VLADIMIR NIYAZOV AND ANDREY TITARENKO

Each of us, **VLADIMIR NIYAZOV**, of 7 Kykladon street, Flat 21, 4528 Limassil, Cyprus, and **ANDREY TITARENKO**, of Star Complex Block K, Megalou Alexandrou, 4534 Pyrgos, Limassol, Cyprus, **MAKE OATH** and **SAY** as follows:

A. Introduction

1. I, Vladimir Niyazov ("**Mr Niyazov**"), am the sole member of Tomsa Holdings Limited¹ ("**Tomsa**").
2. I, Andrey Titarenko, ("**Mr Titarenko**"), am the sole director of Tomsa.
3. The facts to which we state below are known to us from the sources which we identify and/or the documents to which we make reference. They are true to the best of our information and belief.
4. A bundle of true copies of documents which is marked as Exhibit "VN1" is now produced and shown to us. A reference in this affidavit to a page number is a reference to the corresponding page number in the Exhibit.

B. The Procedural History

5. These proceedings relate to the conduct of the affairs of Tomsa whilst in its current state of voluntary liquidation. However, as a legal entity, Tomsa is not a party or proposed party to these proceedings.
6. These proceedings commenced on 8 December 2016 by a fixed date claim form filed by Renova Industries Ltd. ("**Renova Bahamas**") as Claimant against the Registrar of Corporate Affairs (the "**Registrar**") as Defendant (the "**Claim**"). Renova Bahamas sought an order that Tomsa, which had been dissolved at that time, be restored to the Register of Companies in a state of voluntary liquidation. The Claim was supported by the First Affidavit of Simon David Hall dated 8 December 2016 ("**Mr Hall's First Affidavit**").
7. The Claim was heard on 12 January 2017 before Mr Justice Carrington QC. As a result of the hearing, an order was made that Tomsa be restored to the Register of Companies in a state of voluntary liquidation and Mark McDonald ("**Mr McDonald**") be appointed as a voluntary liquidator of Tomsa.
8. On 19 June 2017, Renova Bahamas reopened these proceedings by filing an application notice that sought, *inter alia*:

¹ See Certificate of Incumbency for Tomsa at VN1, pp.1-2

- 8.1. a declaration that the appointments of the First Respondent to the First Application, Natalia Khodasevich (“**Ms Khodasevich**”), and the Second Respondent to the First Application, Stuart Mackellar (“**Mr Mackellar**”), as Tomsa’s liquidators were invalid (paragraph 1);
- 8.2. alternatively, an order that Ms Khodasevich and Mr Mackellar be removed as Tomsa’s liquidators pursuant to s205C of the BVI Business Companies Act 2004 (paragraph 2) (the “**Business Companies Act**”);
- 8.3. an order for directions for conduct of Tomsa’s liquidation (paragraph 3); and
- 8.4. a declaration that the Amended Liquidation Plan dated 31 March 2017 is not binding on Tomsa’s liquidators (paragraph 4) ([54] to [55])

(the “**First Application**”).
9. The First Application was supported by the Second Affidavit of Simon David Hall dated 19 June 2017 (“**Mr Hall’s Second Affidavit**”).
10. Paragraph 5 of Mr Hall’s Second Affidavit provides:

“The first respondent (“Mr McDonald”) was appointed liquidator over Tomsa by an Order of the Court (Mr Justice Carrington QC [Ag]) dated 12 January 2017. The circumstances in which that appointment came to be made are set out in detail in my first affidavit, sworn herein on 8 December 2016 together with its exhibit “SDH 1” and to which I respectfully refer the Court...” (Emphasis added)
11. As stated in paragraph 5 of Mr Hall’s Second Affidavit, Renova Bahamas submits Mr Hall’s First Affidavit together with its exhibit as evidence in support of the First Application.

C. The Second Application

12. This affidavit is made
 - 12.1. in response to the First Application, and
 - 12.2. in support of an application by Mr Niyazov (the “**Second Application**”), as applicant, against Renova Bahamas, as respondent, seeking:
 - a. an order that Mr Hall’s Second Affidavit be struck out for a violation of CPR, r. 30.3 as it contains numerous false and/or misleading statements, and statements of information and belief, which the deponent is unable to prove from his own knowledge;

- b. an order that, for the purpose of the First Application, Mr Hall's First Affidavit be struck out as evidence in support of the First Application for a violation of CPR, r. 30.3 as it contains numerous false and/or misleading statements, and statements of information and belief, which the deponent is unable to prove from his own knowledge;
- c. an order to join Mr Niyazov as the Fourth Respondent to the First Application;
- d. for permission to Mr Niyazov to file this affidavit in response to the First Application;
- e. an order that Mr Niyazov's costs of the Second Application and costs of responding to the First Application be paid by the Applicant of the First Application and the Respondent to the Second Application, Renova Bahamas.

D. IES Litigation

13. As particularised below, these proceedings are parasitic on another set of proceedings, with claim number BVIHC (COM) 2013 0160, a claim brought in the Eastern Caribbean Supreme Court (the "**IES Litigation**"). Tomsa is party to the IES Litigation, however, as particularised below, it has a limited role as it has no business in relation to claims made against it and is not economically interested in the outcome of those proceedings.
14. The IES Litigation refers primarily to a number of disputes between two groups of parties. The first group consists of a Russian government minister and former businessman, Mikhail Abyzov ("**Mr Abyzov**"), and companies which were owned by him at the times relevant to their claims in the IES Litigation, who are claimants in respect of debt and restitutionary claims for a total amount of approximately \$1 billion (the "**Abyzov Parties**"). The adversary group of parties consists of a Russian oligarch, Viktor Vekselberg ("**Mr Vekselberg**"), his managers and companies owned and/or controlled by him at the relevant times (the "**Vekselberg Parties**").
15. A vast majority of claims under the IES Litigation concerns agreements in relation to the financing of a group of companies known as "Integrated Energy Systems" (also referred to or abbreviated as 'KES' in Russian), which was engaged in the Russian energy sector. Integrated Energy Systems Limited (Belize) ("**IES Belize**") was a central company of Integrated Energy Systems at the times relevant to the Abyzov Parties' claims.
16. Integrated Energy Systems are a part of a group of companies known as the 'Renova Group' owned and/or controlled by Mr Vekselberg. Renova Bahamas is a member of the Renova Group, which owes Integrated Energy Systems including IES Belize and Odvin Financial Inc. ("**Odvin**"), another Vekselberg Party relevant to these proceedings as described in further detail below.
17. Emmerson International Corp. ("**Emmerson**") has spent approximately \$500 million as investments in Renova Bahamas and IES Belize in relation to Integrated Energy Systems. Emmerson is the main claimant in the IES Litigation claiming the recovery of its investments from Mr Vekselberg,

Renova Bahamas, IES Belize and/or Odvin for an amount exceeding \$850 million. Mr Titarenko is director of Emmerson.

18. In 2009, Tomsa acquired from Kalielson Investments Limited (another of Mr Abyzov's companies) its investment in Integrated Energy Systems, which was made in 2007, for a principal amount of \$5 million. This investment represented roughly 1-2% of the total investments in Integrated Energy Systems made by the Abyzov Parties. In 2011, Tomsa sold its investment to Emmerson. Renova Bahamas was notified of the sale on 1 July 2013 ([3] and [4]).

19. In the IES Litigation, Renova Bahamas claims against Tomsa four declarations which concern investments in Integrated Energy Systems. Two of those declarations have been admitted by the Abyzov Parties including Tomsa. The remaining claims are set out in paragraph 16 of the Re-Amended Statement of Claim filed by Renova Bahamas on 1 October 2014 (the "IES RASoC"):

"16. In the premises, the Renova Group seeks declarations that: ...

16.2A There was an implied term of the Principal Terms as pleaded at paragraph 7A above.

16.3 Any further declaratory or other relief as the Court considers appropriate."

20. The declaration claimed at paragraph 16.2A of the IES RASoC concerns a certain implied term in a document known as the 'Principal Terms' signed by Mr Abyzov and Mr Vekselberg's manager, Mr Kuznetsov, on 21 October 2011 ([5] to [54]). This implied term is pleaded by Renova Bahamas in paragraph 7A of the RASoC:

"There was an implied term of the Principal Terms as follows (adopting the Principal Terms' defined terminology):

"Financings of, Investments into and other contributions to KES made for the purpose of the conduct or pursuance of "energy business" (as defined in clause 5.17(i), but subject to clause 6.2) by or through KES made by either Party after the date of these Principal Terms (21 October 2011) but before the date of the conclusion of the Deal (including the conclusion of the Shareholders' Agreement) ("additional pre-Deal contributions") are to be reflected In a revision to the effective shareholdings of each of the Parties to be calculated as if the additional pre-Deal contributions had been included in Schedule 1 as at 1 July 2011, without any adjustment for Interest (and with a corresponding pro rata reduction in the share of M. Yu. Slobodin unless he has made an equivalent contribution proportionate to his shareholding).

A due diligence process in respect of the additional pre-Deal contributions will take place in accordance with the terms of clause 2.2. save that the date for provision of the list of documents reasonably required to conduct the said due diligence shall be five working days from a Party providing notice that a pre-Deal contribution has been made (and the reference in clause 2.5 to the due diligence process shall be understood as including this process In respect of additional pre-Deal contributions).

References in clause 4.2 to:

- (i) the shareholdings referred to in clause 3.1. shall be understood as referring to the shareholdings as revised pursuant to this clause, and*
- (ii) to Schedule 1, shall be understood as including the additional pre-Deal contributions.""*

21. The implied term pleaded by Renova Bahamas in the IES Litigation concerns highly specific business matters allegedly governed by the Principal Terms as an alleged joint venture agreement in respect of Integrated Energy Systems.

22. Tomsa is a business company incorporated under the Business Companies Act. There is no real issue in dispute between Tomsa and any of the Vekselberg Parties since Tomsa no longer has any business or financial/economic interest in relation to the Principal Terms (whether or not this document proves to be a legally binding agreement and is found to imply the term as alleged by the Vekselberg Parties).
23. Continuing a declaratory claim against a business company which has no economic interest in the outcome of the declaratory relief is an abuse of process (i.e. use the court process for ulterior purposes and not those dispute resolution purposes intended by such court process) once the lack of economic interest becomes apparent.
24. Together with two other Abyzov Parties (Alabaster Associates Limited and Gardendale Investments Limited) that are subject to abuse on the same grounds, Tomsa is preparing and will bring an application in the IES Litigation to strike out all claims against it pursuant to CPR r. 26.3(1)(c) in accordance with the Amended Liquidation Plan ([54] to [55]).
25. In paragraph 7(g) of the Amended Liquidation Plan it is provided:
- “7. To achieve the main objectives, among other things, the Liquidators shall: ...*
- g. instruct the legal practitioner to (i) put forward in the IES Dispute a defense that the declarations sought by the Vekselberg Parties have no economic effect on the Company’s affairs and there is no real issue between the Company and the Vekselberg Parties; and (ii) apply to the Court for an order to strike out the Vekselberg Parties’ statements of case against the Company in accordance with ECSC CPR Rule 26.3(1)(b) (the statements of case do not disclose any reasonable ground for bringing a claim) and Rule 26.3(1)(c) (the statements of case are an abuse of the process of the court or are likely to obstruct the just disposal of the proceedings);”*
26. In any event, Tomsa’s involvement in the financing of Integrated Energy Systems, provided by the Abyzov Parties, amounted to roughly 1-2% of such financing and Tomsa has no economic interest in the outcome of the IES Litigation (save for possible costs orders). Therefore, Tomsa is only tangentially connected to the issues in dispute by other Abyzov Parties (including Emmerson and Mr Abyzov) in the IES Litigation.
27. These proceedings also relate to the possible indebtedness of Tomsa to Renova Bahamas and other Vekselberg Parties for costs in the IES Litigation. Such costs have not been quantified and no potential costs have been identified which are payable by Tomsa separately from the other Abyzov Parties. Tomsa would only be financially exposed to such costs if Emmerson and Mr Abyzov, the main Abyzov Parties, are unable to settle them.
28. Emmerson has already provided security for costs for Mr Abyzov in the amount of \$1.4 million. Since most of Tomsa’s costs in the IES Litigation are shared with Mr Abyzov, such security covers

most of Tomsa's financial exposure to costs in the IES Litigation in the event of an unsuccessful outcome for Tomsa.

29. Emmerson committed on 19 May 2016 that it would pay Tomsa's costs in the IES Litigation accrued prior to 15 April 2016 ([56] to [57]). In order to fortify this and other commitments by Emmerson to settle Tomsa's costs in the IES Litigation, Emmerson provided a security as a cash deposit in the amount of GBP 2,334,817 at an escrow account held by Lennox Patton as an escrow agent.
30. The extent of the possible joint costs liabilities of Tomsa, Emmerson and Mr Abyzov against Renova Bahamas in relation to Tomsa's statements of case in the IES Litigation cannot exceed \$3 million, which is an incomparable sum with regards to the total value (in excess of \$850 million) of Emmerson's claims against Renova Bahamas.
31. Although the outcome of the IES Litigation is not certain, Emmerson has, at least, a well arguable case to recover its investments. Without any further information, it is unlikely that Emmerson, being a company with such investment assets, would not be able to (i) meet its obligations which are incomparably small with regards to the size of its assets or (ii) recover as a result of the IES Litigation such a small part of its investments, which would have a value less than the possible adverse costs order.
32. Emmerson also received confirmation from its auditors [58] that proves its ability to pay the costs of the IES Litigation for all parties thereto regardless of the outcome.
33. In other words, Emmerson claims at least \$850 million from Renova Bahamas in the IES Litigation; and these Tomsa proceedings (if they are indeed brought to resolve issues in the voluntary liquidation of Tomsa) only make sense in the highly unlikely event that Emmerson is unable to settle the adverse costs orders in favour of Renova Bahamas for a total amount not exceeding \$3 million (most of which Emmerson has already transferred to an escrow, as described in paragraph 29 above).

E. Background

34. Tomsa was incorporated in the British Virgin Islands ("BVI") on 2 January 2009. (see Certificate of Incorporation at [60])
35. Mr Niyazov became the sole member of Tomsa on [2].
36. From September 2014 to November 2015, Mr Niyazov was an authorised representative of all the Abyzov Parties, including Tomsa, Emmerson and Mr Abyzov, in the IES Litigation.

37. Mr Titarenko has, since April 2014, been an authorised representative of all the Abyzov Parties, including Tomsa, Emmerson and Mr Abyzov, in the IES Litigation (save that Mr Titarenko does not represent Tomsa in voluntary liquidation since March 2016).
38. Elena Nikulina ("**Ms Nikulina**") was a director of Tomsa from 14 January 2009 to 9 February 2017. (see the Register of Directors of Tomsa at **[59]**)
39. Mr Titarenko was appointed as a director of Tomsa on 24 March 2015 for the main purpose of conducting the IES Litigation on behalf of Tomsa. After the resignation of Ms Nikulina on 9 February 2017, Mr Titarenko became the sole director of Tomsa.
40. Since his appointment as a director of Tomsa, Mr Titarenko has not been involved in the business of Tomsa, if any, outside the IES Litigation. Mr Titarenko also did not update Ms Nikulina of the developments concerning the IES Litigation.
41. Since September 2015, we have been planning to remove Tomsa from the IES Litigation and liquidate it straight afterwards.
42. During the period from December 2015 to April 2016, Mr Niyazov was only sporadically informed about developments in the IES Litigation by Mr Titarenko.
43. The liquidation of Tomsa began prematurely in March 2016 due to an oversight by Ms Nikulina, who was at the time, one of two directors of Tomsa (the other director being Mr Titarenko), but had assumed that she was the sole director. We do not see anything beyond poor bookkeeping for Ms Nikulina's oversight.
44. The Liquidation Plan **[61]** and the Declaration of Solvency **[62]** were signed solely by Ms Nikulina.
45. The Liquidation Plan is void due to the fact that it was not approved by way of directors' resolution (in accordance with the Articles of Association of Tomsa, a directors' resolution cannot be passed by one of its two directors). The Liquidation Plan stated that Tomsa was not involved in any ongoing litigation.
46. A statement of assets and liabilities **[63]** was attached to the declaration of solvency in respect of Tomsa signed by Ms Nikulina as the sole director. It was stated that Tomsa had zero assets and zero liabilities.
47. When Mr Niyazov was presented with the Liquidation Plan and the Declaration of Solvency signed solely by Ms Nikulina, he thought that Tomsa had already been successfully removed from the IES Litigation and that Ms Nikulina remained the sole director of Tomsa, whereas Mr Titarenko had resigned (as he was only appointed as a director of Tomsa in March 2015 with the purpose of carrying on the IES Litigation on Tomsa's behalf). Based on Mr Niyazov's erroneous understanding, he approved the commencement of the liquidation **[65]**.

48. Photini Panayiotou (“**Ms Panayiotou**”) was nominated by Ms Nikulina as Tomsa’s liquidator and was appointed on 24 March 2016 [64].
49. Since 2010, during Tomsa’s liquidation in March/April 2016 and until the present time, Ms Panayiotou has been and is a director of IES Belize and Odvin, which were and continue to be subsidiaries of Renova Bahamas.
50. Ms Panayiotou should have known about the IES Litigation since the claims brought against IES Belize and Odvin in those proceedings amounted to more than \$400 million. Furthermore, Ms Panayiotou should have known that there were costs orders (the “**Cost Orders**”) made in the IES Litigation in favour of IES Belize, Odvin, Renova Bahamas and other Vekselberg Parties against Emmerson, Tomsa and others in respect of. These unquantified costs orders are in the range of \$2 million.
51. Ms Panayiotou could have requested that the Liquidation Plan be amended to account for the IES Litigation. In any event, she should not have completed Tomsa’s liquidation in accordance with the Liquidation Plan, which contained information concerning the absence of ongoing litigation that she ought to have known was false.
52. Nevertheless, the liquidation of Tomsa was completed by Ms Panayiotou and the company was dissolved on 15 April 2016 [57].
53. Ms Panayiotou should be held responsible for the prejudice suffered by Tomsa and its shareholder as a result of her wrongful completion of Tomsa’s Liquidation.
54. Mr Titarenko did not know about the commencement of Tomsa’s liquidation. He only learned of the liquidation, which was performed in March/April 2016, after it had been completed by Ms Panayiotou.
55. As described at paragraph 7 above, on 12 January 2017, the Court ordered that Tomsa be restored to the Register of Companies. Tomsa was restored on 23 January 2017.
56. Section 218A(2) of the Business Companies Act provides:
- (2) Where the company was dissolved following the completion or termination of its voluntary liquidation under this Act or its liquidation under the Insolvency Act, 2003, the Court shall not restore the company to the Register unless*
- (a) the applicant nominates a person to be liquidator of the company, if it is restored to the Register; ...and*
- (c) satisfactory provision has been made or will be made for the expenses and remuneration of the liquidator, if appointed.*
57. Mr McDonald was nominated as Tomsa’s voluntary liquidator by Renova Bahamas. At paragraph 41 of Mr Hall’s First Affidavit dated 8 December 2016, Mr Hall submitted on behalf of Renova Bahamas that “[Renova Bahamas] has made provision in respect of Mr McDonald’s fees.”

58. As a result of the hearing on 12 January 2017, Mr McDonald was appointed by the Court as Tomsa's voluntary liquidator.
59. This appointment was unlawful as it was made in violation of section 218A(2)(c) of the Business Companies Act. Mr Hall's statement cited above at paragraph 57 was intended to comply with this section of the Business Companies Act, but it was false and/or misleading in this regard: it appears from the letter from Mr McDonald to "*Tomsa Holdings Limited c/o Maples*" dated 30 January 2017 ([66] to [68]), that as of 30 January 2017 Renova Bahamas had not arranged for any provision of Mr McDonald's expenses and remuneration, or such provision could not be considered as satisfactory to the Court.
60. The appointment of Mr McDonald inevitably occurred in a situation of a potential conflict of interest: (i) on one hand, Mr McDonald should have continued the IES Litigation on behalf of Tomsa and he should have regarded, at least at the time of his appointment, that achieving a successful outcome was in the best interests of Tomsa; (ii) on the other hand, Mr McDonald would have had a vested interest in maintaining his appointment as Tomsa's liquidator, which was a well remunerated mandate for him and his firm, Grant Thornton, and was being financed by Renova Bahamas, an adversary of Tomsa in the IES Litigation.
61. This potential conflict of interest does not usually occur when a company is voluntarily liquidated. In the situation of Tomsa's voluntary liquidation, at the time of its restoration to the Register of Companies in January 2017:
- (i) Renova Bahamas was a main adversary of Tomsa in the IES Litigation; and
 - (ii) all possible liabilities of Tomsa would be possible debts owed to Renova Bahamas originating from costs orders in the IES Litigation.

Furthermore,

- (iii) financial exposure of Tomsa, if any, to the Costs Orders depends on quantum negotiations (and/or further costs orders on quantum) between the Abyzov Parties (including Tomsa, Emmerson and other allied parties), on one side, and Renova Bahamas and other Vekselberg Parties on the other side; and
 - (iv) financial exposure of Tomsa to adverse costs orders in the IES Litigation depends on the outcome of the litigation.
62. Based on our experience in the banking and finance industry, we see that the only practical ways to eliminate or at least mitigate the potential conflict of interest in relation to Mr McDonald's appointment as Tomsa's liquidator (an appointment financed by Renova Bahamas) described above, whilst at the same time preserving the financing arrangement of Tomsa's Liquidation by Renova Bahamas, would be for Renova Bahamas to pay Mr McDonald in advance, or deposit with

a trustee, funds in an amount sufficient to cover (i) Mr McDonald's remuneration and, his firm, Grant Thornton's services related to the liquidation at least until the anticipated trial date of the IES Litigation; and (ii) lawyers' fees for Tomsa's representation in the IES Litigation independently from other Abyzov Parties; or alternatively, Renova Bahamas would commit itself to indemnify Mr McDonald and Tomsa for such costs from the time of Mr McDonald's appointment at least until the anticipated trial date of the IES Litigation.

63. Neither Renova Bahamas nor Mr McDonald ever sought an arrangement for the latter's remuneration and expenses in a way which would eliminate or at least mitigate the potential conflict of interest in relation to Mr McDonald's appointment as Tomsa's liquidator. Mr McDonald could either seek financing (i) from Mr Niyazov, as the sole shareholder of Tomsa; (ii) from Tomsa's directors (who were to provide a declaration of solvency with regards to the voluntary liquidation); (iii) from Emmerson, which is the Abyzov Party most interested in the outcome of the IES Litigation; or (iv) from Renova Bahamas. In the latter case, such an arrangement could only be achieved as described in paragraph 62 above. In the absence of such arrangement at the time of Mr McDonald's appointment, he should not have accepted the appointment; or having failed to obtain such arrangement at a subsequent time, Mr McDonald ought to have resigned.

64. Mr Niyazov will seek in a separate set of proceedings an order to remove Mr McDonald from his position as Tomsa's liquidator on the basis of, among others, his appointment in violation of section 218A(2)(c) of the Business Companies Act and his subsequent failure to correct this breach.

65. Ms Nikulina resigned as a director of Tomsa on 9 February 2017 ([59]). As a result of the resignation, Mr Titarenko became the sole director of Tomsa.

66. The Liquidation Plan dated 24 March 2016 did not provide for an authorisation of a liquidator to carry on the business of Tomsa as such option is stipulated in section 198(1)(b)(iii) of the Business Companies Act that:

"the directors of the company shall...approve a liquidation plan specifying...whether the liquidator is authorised to carry on the business of the company if he determines that to do so would be necessary or in the best interests of the creditors or members of the company".

67. Section 205(3)(a) of the Business Companies Act further provides that:

"Notwithstanding subsection (1)(b), the directors, after the commencement of the voluntary liquidation, may (a) authorise the liquidator to carry on the business of the company if the liquidator determines that to do so would be necessary or in the best interests of the creditors or members of the company where the liquidation plan does not give the liquidator such authorisation"

68. Mr McDonald was well aware of the IES Litigation, which must be regarded the business of Tomsa for the purpose of sections 198(1)(b)(iii) and 205(3)(a). He should have sought to discuss with Tomsa's directors how to carry out Tomsa's role in the IES Litigation and should have sought their authorisation in relation to the same. However, Mr McDonald never did so.

69. Tellingly, neither Mr McDonald nor any of his representatives attended any of the sessions of a four-day hearing of various disclosure complaint and other interlocutory applications in the IES Litigation held on 22-24 and 27 February 2017. Mr Titarenko was present throughout the four-day hearing as the director of Emmerson and the signatory to the list of documents for standard disclosure on behalf of the Abyzov Parties (save for Tomsa).
70. Mr Titarenko, as the sole director of Tomsa, was dissatisfied with Mr McDonald's approach to carrying out the IES Litigation on Tomsa's behalf, his failure to resolve the issues concerning the invalid or at least deficient Liquidation Plan dated 24 March 2016, and his apparent intention to conduct the liquidation of Tomsa without reference to any liquidation plan and without consulting Tomsa's director regarding the remaining business of Tomsa (i.e. the IES Litigation).
71. Mr Niyazov, as the sole member of Tomsa, was dissatisfied with (i) Mr McDonald's disregard for requests for information in relation to the source of his financing as Tomsa's liquidator and the extent of his costs incurred that Tomsa was liable for; and (ii) Mr McDonald's failure to explain how he were to eliminate or mitigate the potential conflict of interest relating to the financing of Tomsa's liquidation by Renova Bahamas, an adversary of Tomsa in the IES Litigation. Mr Niyazov regarded such failure of Mr McDonald as a breach of the voluntary liquidator's fiduciary duties owed to the company's members, in particular, breaches of the duty to account and the duty of utmost good faith.
72. In order to bring the liquidation of Tomsa in line with its best interests including the interests of its remaining business (i.e. the IES Litigation), Mr Titarenko as the sole director of Tomsa and Mr Niyazov as the sole member of Tomsa undertook the following on 31 March 2017:
- 72.1. Mr Titarenko, as the director of Emmerson and Tomsa, arranged for an unconditional facility for US\$100,000 to settle any of Tomsa's possible debts² and liquidation expenses to be provided by the Deed of Funding Commitment **[69]**;
- 72.2. approved the Amended Liquidation Plan **[74]** by way of members' resolution and directors' resolution;
- 72.3. appointed Ms Khodasevich as an additional voluntary liquidator by way of members' resolution under section 205A(1) of the Business Companies Act **[79]**;
- 72.4. Mr Titarenko, as the sole director of Tomsa, signed a new Declaration of Solvency **[76]** for the purpose of Tomsa's liquidation.

² Prior to Tomsa's restoration from dissolution, Emmerson committed to settle all of Tomsa's debts that may arise as a result of Tomsa's participation in the Main Proceedings prior to its dissolution on 15 April 2016. However, all such debts could only be joint and several with Emmerson and would be settled by Emmerson in any way; no separate debt or contingent liability of Tomsa has been identified to date.

73. Immediately after the appointment of Mr Khodasevich as an additional voluntary liquidator and the adoption of the Amended Liquidation Plan, Mr McDonald and his lawyers, Appleby, expressed to Ms Khodasevich that they could not acknowledge the validity of both her appointment and the Amended Liquidation Plan. Further, they expressed to Ms Khodasevich that they required more time to produce their opinion on the validity of her appointment and the Amended Liquidation Plan, despite that Mr McDonald is a qualified lawyer of a common-law jurisdiction (a New Zealand barrister) and he had consistently been receiving advice from a leading partner at Appleby, Mr Andrew Bolton. To date, neither Mr McDonald nor Appleby have unequivocally expressed their opinion on (i) the statutory right of a company's members to appoint additional voluntary liquidators; (ii) whether a voluntary liquidator is bound by a liquidation plan; and (iii) what deficiencies, if any, exist in the Amended Liquidation Plan or in the members' resolutions on the appointment of Tomsa's additional voluntary liquidators.
74. In view of Mr McDonald and his lawyers' failure to assert their position on the validity of the liquidation framework set out by the appointment of Ms Khodasevich as an additional voluntary liquidator and adoption of the Amended Liquidation Plan, Mr Niyazov, as the sole member of Tomsa, on 12 April 2017, appointed Mr Mackellar as an additional voluntary liquidator. Since this date, Tomsa has had three voluntary liquidators and any decision regarding Tomsa's liquidation can be made jointly by any two of them.
75. Tomsa's liquidators on August 2017 appointed Lennox Patton as legal practitioners for representing Tomsa at the IES Litigation.
76. Emmerson amended its commitment to settle Tomsa's costs related to the liquidation and deposited GBP 2,334,817 with Lennox Patton at an escrow account. This apparently should have discontinued alleged concerns by Renova Bahamas and Mr McDonald regarding solvency of Tomsa.

F. Response to the First Application

77. In the First Application, Renova Bahamas seeks the relief set out in paragraph 8 above. We claim that the First Application should be dismissed in its entirety due to a failure by Renova Bahamas to submit any sustainable grounds for its claims for relief. We deal with each claim for relief (and the grounds for such claim) submitted by Renova Bahamas in the First Application below.

Claim 1: *"A Declaration that the purported appointments of [Ms Khodasevich] and [Mr Mackellar] as liquidators of [Tomsa] were invalid and that [Mr McDonald] is the only validly appointed liquidator of Tomsa"*

78. Renova Bahamas submits two grounds for Claim 1:

“Neither appointment is valid, because section 205A(1) of [the Business Companies Act] permits a member to appoint an additional liquidator only in circumstances where the liquidator already appointed was appointed by the member and/or [“Ground 1”] not in circumstances where the existing liquidator was appointed by the Court under section 218A(4)(a) [“Ground 2”]”

79. Section 205A(1) of the Business Companies Act provides:

“The members of a company may, by resolution, appoint an eligible individual as an additional voluntary liquidator to act jointly with the voluntary liquidator or voluntary liquidators already appointed.”

80. Nothing in section 205A(1) or any other section of the Business Companies Act relates to or implies Ground 1 or Ground 2 submitted by Renova Bahamas, as referred to in paragraph [78] above.

81. Submitting Claim 1 on Ground 1 and Ground 2 is a denial of a clearly stated statutory right of the members to appoint an additional liquidator. Bringing such a claim before the Court is self-evidently an abuse of process as it is well known to all the parties that such claim cannot be sustained.

82. Mr Niyazov, as the proposed Forth Defendant to the First Application, invites the Court to dismiss Claim 1 of the First Application because of the abuse of process.

Claim 2: “an order that [Ms Khodasevich] and [Mr Mackellar] be removed as liquidators of [Tomsa], pursuant to s205C of [the Business Companies Act]

83. The relevant parts of Section 205C of the Business Companies Act provide:

“(1) A voluntary liquidator may only be removed in accordance with this section.

(2) The Court may, on application by a person specified in subsection (3), remove the voluntary liquidator of a company from office if [...]

(b) the Court has reasonable grounds for believing that

(i) the voluntary liquidator’s conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator;

(ii) the voluntary liquidator has an interest that conflicts with his role as voluntary liquidator; or

(iii) for some other reason, he should be removed as voluntary liquidator.

(3) An application to the Court to remove a voluntary liquidator may be made by

(a) a director, member or creditor of the company; [...]

84. A voluntary liquidation carried out in accordance with the Business Companies Act protects the rights and interests of the creditors of the company in voluntary liquidation in various ways. One such protection is the right of any creditor to seek to remove a voluntary liquidator. Apparently, as soon as a company pays its indebtedness in respect of a particular creditor, its rights and interests which are protected by the Business Companies Act cease to exist. Therefore, the only possible situations where the Court should interfere with the removal of a voluntary liquidator on the application of a creditors are situations where the voluntary liquidator (i) unreasonably delays the

repayment of such creditor's debts and/or (ii) disposes of assets of the company under voluntary liquidation in a way which puts at risk the repayments of such creditor's debts. However, Renova Bahamas is not a creditor of Tomsa in the ordinary meaning: under standard accounting principles (such as UK GAAP or IFRS), Renova Bahama's possible receivables from Tomsa have no value and would not be accounted for as liabilities of Tomsa. Rather, Tomsa may become liable to Renova Bahamas under circumstances where Emmerson and Mr Abyzov would not be able to pay certain adverse cost orders, which is highly improbable as described above.

85. Therefore, Claim 2 should be dismissed as it is brought by Renova Bahamas, which is not a proper claimant under section 205C(3)(a) of the Business Companies Act.

86. Even if the Court decides to consider Claim 2, nevertheless Renova Bahamas has failed to identify sustainable grounds for the claim as particularised below.

87. Renova Bahamas states at Grounds 4(a) – , (e) of the First Application:

“(4) ... if the appointments of [Ms Khodasevich and Mr Mackellar] are valid, [Ms Khodasevich and Mr Mackellar] should be removed from office for one or more of the following reasons:

a. It is in the best interests of the liquidation that [Ms Khodasevich and Mr Mackellar] be removed;

b. The appointments of [Ms Khodasevich and Mr Mackellar] are unnecessary, and will result in expense, delay, and potential adversarial litigation between the liquidators, contrary to the best interests of the liquidation;

c. The appointments of the [Ms Khodasevich and Mr Mackellar] have not been made in the interests of [Tomsa] and its creditors, but with the purpose of preventing [Mr MacDonald] from so acting and/or interfering with or undermining the Order of the Court appointing [Mr MacDonald], so as to amount to an abuse of process;

d. The conduct of the second and third respondents (as evidenced in particular by their purported written resolutions dated 25 April 2017) has fallen below the standard that ought reasonably be expected of an impartial and/or reasonably competent liquidator; and/or

e. The conduct of the second and third respondents demonstrates that they are incapable of exercising any, or any independent, judgment.”

88. Grounds 4(a), 4(b) and 4(c) of the First Application appear to refer to section 205C(2)(b)(iii), which provides that the Court may remove an individual as voluntary liquidator if *“the Court has reasonable grounds for believing that [...] for some other reason, [the individual] should be removed as voluntary liquidator”*.

89. However, The grounds cited above contain numerous errors of law and inaccuracies:

Ground	Explanation of errors of law/inaccuracies
<i>(4)a. It is in the best interests of the liquidation that [Ms Khodasevich and Mr Mackellar] be removed</i>	1. The purpose of the Court is to resolve disputes between parties and protect their interests and interests of third parties. It is not for the Court to decide (i) what is in <i>“the best interests of the liquidation”</i> and (ii) how such <i>“best interests”</i>

	relate to the parties to these proceedings or to certain third parties. 2. Irrespective of what “<i>the best interests</i>” could mean, such ground would support a conclusion that a voluntary liquidator could be removed if it were beneficial or desirable “<i>in the best interests</i>” to remove the liquidator. However, for the purpose of section 205C(2)(b)(iii), the Court should be assured that the liquidators <u>should</u> be removed.³
(4)b. <i>The appointments of [Ms Khodasevich and Mr Mackellar] are unnecessary, and will result in expense, delay, and potential adversarial litigation between the liquidators, contrary to the best interests of the liquidation</i>	3. The appointments of Ms Khodasevich and Mr Mackellar (as additional voluntary liquidators) were made by Mr Niyazov, the sole member of Tomsa in accordance with section 205A(1). This section does not impose any obligations on the members to make appointments only where necessary, with regard to the potential expense of such appointment, unspecified “<i>delay</i>” or “<i>potential adversarial litigation between the liquidators</i>”. 4. Moreover, at the point where an additional voluntary liquidator is <u>appointed</u>, nothing prevents the members from acting in a way which a creditor or the Court would regard as contrary to “<i>the best interests of the liquidation</i>” (whatever such wording means). 5. It is unclear what “<i>potential adversarial litigation between the liquidators</i>” could mean and what could be a cause of action for such litigation. 6 and 7. Explanations 1 and 2 above in respect of the meaning of “<i>the best interests of the liquidation</i>” are repeated here. As is the case for Explanation 2 above, “<i>delay</i>” or an increase in “<i>expense</i>” may be valid grounds as to why it would be <i>advantageous</i> to remove the liquidators but they are not valid grounds for why the liquidators <u>should</u> be removed as required by section 205C(2)(b)(iii).
(4)c. <i>The appointments of the [Ms Khodasevich and Mr Mackellar] have not been made in the interests of the Company [Tomsa] and its creditors, but with the purpose of preventing [Mr MacDonald] from so acting and/or interfering with or undermining the Order of the Court appointing [Mr MacDonald], so as to amount to an abuse of process</i>	8. The appointments of Ms Khodasevich and Mr Mackellar (as additional voluntary liquidators) were made by Mr Niyazov, the sole member of Tomsa in accordance with section 205A(1). As is the case for Explanation 4, at the point where an additional voluntary liquidator is <u>appointed</u>, nothing prevents the members from acting in a way which a creditor or the Court would regard as contrary to “<i>the interests of the Company</i>” or “<i>in the interests</i>” of the company’s creditors.⁴ 9. It is totally incorrect to refer to actions of Mr Niyazov as the sole member of Tomsa as “<i>interfering with or undermining the Order of the Court</i>”. If the Order had been made against Mr Niyazov, this wording would constitute an accusation of contempt of court. However, the Order was not

³ Otherwise, by way of example, if Person A is a more competent liquidator than Person B for the same remuneration, it can be proved that “in the best interests of the liquidation” Person B should be removed as liquidator and replaced by Person A. This is not what the law states or implies.

⁴ This is valid for any resolution of the members of a company. The members have no duty to act in the best interests of the company or its creditors, and their resolutions should be [taken for granted] [rephrase] by other persons (e.g. directors or liquidators) in any assessment of such interests. By way of example, if the members pass a resolution that the number of directors shall henceforth be 5 rather than 4, the question for the directors is not whether it is in the best interests of the company to have 5 or 4 directors but how to distribute the powers and the work streams between the five directors in the best interests of the company.

	made against Mr Niyazov. He certainly has not “<i>interfer[ed] with</i>” it. Further, it is inappropriate to refer to actions of third parties as “<i>undermining the Order of the Court</i>”, even if such actions were contrary to the course of events anticipated by the Court when the Order was made. 10. Furthermore, the Order was executed as soon as Tomsa was restored in the Register of Companies and Mr MacDonald was appointed as its voluntary liquidator. There is nothing in the Order to “<i>interfer[e] with</i>” or “<i>undermin[e]</i>” after its execution. 11. It is unclear what “<i>abuse of process</i>” is being referred to. These proceedings were closed in January 2017 and reopened in June 2017 by the filing of the First Application. The appointment of the liquidators cannot constitute an abuse of a closed process. If the “<i>abuse of process</i>” refers to the liquidation as the “<i>process</i>”, it is unclear what ulterior purpose (not related to the liquidation) could be pursued by Mr Niyazov which would prevail over the primary purpose of the liquidation. 12. The statement that something has “<i>not been made in the interests of [Tomsa] and its creditors</i>” makes no sense without detailed analysis of the conflict of interest between Tomsa and “<i>its creditors</i>” given that all purported contingent creditors of Tomsa are adversaries of Tomsa in the IES Litigation and the indebtedness could only originate from the adverse costs orders in the IES Litigation.
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90. Grounds 4(d) and 4(e) of the First Application appear to refer to section 205C(2)(b)(i), which provides that the Court may remove a voluntary liquidator if “*the Court has reasonable grounds for believing that [...] the voluntary liquidator’s conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator*”.
91. As a consequence of Mr Niyazov’s claim to strike out Mr Hall’s Second Affidavit (as described in paragraph **Error! Reference source not found.** above) the Court should dismiss Claim 2 brought on Grounds 4(d) and 4(e), as such claim can not be sustained without substantial support of evidence.
92. We, as the sole member and the sole director of Tomsa, are satisfied with the conduct of Ms Khodasevich and Mr Mackellar as Tomsa’s liquidators.
93. Renova Bahamas failed to substantiate its allegations made in Grounds 4(d) and 4(e). Specifically, we consider Written Resolutions dated 25 April 2017 (referred to in Ground 4(d)) ([80] to [85]) as internal documents of Tomsa created with sound and reasonable purposes which are clearly stated in these Resolutions.
94. With regards to Claim 2 brought on Grounds 4(d) and 4(e) the Court should not interfere in the affairs of Tomsa on the application by Renova Bahamas, in the circumstances where Renova

Bahamas failed to identify its prejudice caused by the alleged inappropriate conduct of the two Tomsa's liquidators.

Claim 3: "that directions be given for the orderly conduct of the liquidation of [Tomsa]"

95. Claim 3 is not substantiated, since Renova Bahamas has not indicated which particular directions it seeks from the Court.

Claim 4: "a declaration that the purported amended liquidation plan dated 31 March 2017 and/or paragraph (3) of the "Members' Resolution in Writing" dated 31 March 2017 and/or the purported written resolutions of the second and third respondents dated 25 April 2017 are not binding on the liquidator or liquidators of the Company and/or directions that he or they should not seek to comply with the same"

96. Renova Bahamas states at Ground 6:

"There is no requirement for a Liquidation Plan in circumstances where the Court has appointed a voluntary liquidator."

97. Ground 6 is a false statement which directly contradicts the law (since the Liquidation Plan is required for the voluntary liquidation, independently on the ways of appointment of voluntary liquidators).

98. Renova Bahamas further states at Ground 7:

99. " ... the purported Amended Liquidation Plan is not in accordance with section 198(1)(b) of the BVI Business Companies Act 2004. Among other things:

a. It erroneously proceeds on the assumption that the original liquidator Ms Panayiotou resumed office on the restoration of the Company;

b. It purports to impose duties on and provide authorisations to the liquidators that a member is not entitled to impose or provide;

c. It purports to limit the liquidators' expenditure."

100. The text of the Amended Liquidation Plan is itself evident that Grounds 7a and 7c are false statements.

101. If a liquidation plan is binding on the voluntary liquidators, it can impose certain obligations and duties on them. Renova Bahamas has not explained why the duties imposed by the Amended Liquidation Plan are inappropriate.

102. Renova Bahamas has not also explained why the authorisation provided by the Amended Liquidation Plan is relevant to its validity.

103. Renova Bahamas has not explained why the Court should declare the Amended Liquidation Plan void (or "non binding on the liquidators") rather than declare certain its paragraphs ineffective.

CONCLUSION

104. For the reasons set out above, we respectfully invite the Court to grant Mr Niyazov the relief sought.

Approved

Sworn by the said Vladimir Niyazov
at [location]

on the day of September 2017

Before me:

)
)
)
)
)
)
)


VLADIMIR NIYAZOV

Commissioner for Oaths / Notary

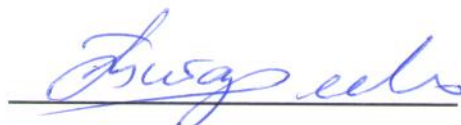
Approved

Sworn by the said Andrey Titarenko
at [location]

on the *A* day of September 2017

Before me:

)
)
)
)
)
)
)


ANDREY TITARENKO

Commissioner for Oaths / Notary

**Applicant of the Second Application;
[Fourth Respondent to (First)
Application]
Vladimir Niyazov and Andrey Titarenko
1st Affidavit
Exhibit VNAT1
Date Affirmed: 2017
Date Filed: 2017**

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION
CLAIM NO. BVIHC (COM) 2016/0187**

IN THE MATTER OF SECTION 207a OF THE BVI BUSINESS COMPANIES ACT, 2004

AND IN THE MATTER OF TOMSA HOLDINGS LIMITED (IN VOLUNTARY LIQUIDATION)

BETWEEN:

By way of Claim:

RENOVA INDUSTRIES LTD.

Claimant

-and-

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

And by way of (First) Application:

RENOVA INDUSTRIES LTD.

Applicant of (First) Application

-and-

(1) NATALIA KHODASEVICH

(2) STUART MACKELLAR

(3) MARK MCDONALD

(4) [VLADIMIR NIYAZOV]

Respondents to (First) Application

And by way of Second Application:

VLADIMIR NIYAZOV

Applicant of Second Application

-and-

RENOVA INDUSTRIES LTD.

Respondents to Second Application Defendant

EXHIBIT VNAT1

I hereby certify that the attached are the documents referred to as the exhibit "VNAT1" in the First Affidavit of Vladimir Niyazov and Andrey Titarenko sworn before me on the day of September 2017.

Commissioner for Oaths / Notary

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION
CLAIM NO. BVIHC (COM) 2016/0187**

**BETWEEN:
By way of Claim:**

**RENOVA INDUSTRIES LTD.
Claimant
-and-
THE REGISTRAR OF CORPORATE AFFAIRS
Defendant**

And by way of (First) Application:

**RENOVA INDUSTRIES LTD.
Applicant of (First) Application
-and-
(1) NATALIA KHODASEVICH
(2) STUART MACKELLAR
(3) MARK MCDONALD
(4) [VLADIMIR NIYAZOV]
Respondents to (First) Application**

And by way of Second Application:

**VLADIMIR NIYAZOV
Applicant of Second Application
-and-
RENOVA INDUSTRIES LTD.
Respondents to Second Application**

FIRST AFFIDAVIT OF VLADIMIR NIYAZOV AND ANDREY TITARENKO

**Walkers
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