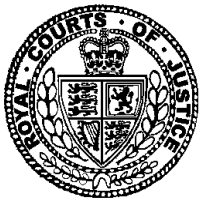

Neutral Citation Number: [2020] EWHC 924 (Admin)

Case No: CO/650/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2020

Before:

LORD JUSTICE IRWIN
MRS JUSTICE ELISABETH LAING DBE

- -

Between:

VIJAY MALLYA	**Appellant**
- and -	
GOVERNMENT OF INDIA	**Respondent**
-and-	
NATIONAL CRIME AGENCY	**Interested Party**

- -
- -

Clare Montgomery QC and Ben Watson (instructed by **Boutique Law LLP**) for the **Appellant**
Mark Summers QC and Aaron Watkins (instructed by **Crown Prosecution Service**) for the **Respondent**
Hearing dates: 11th, 12th, 13th February 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 20 April 2020.

Introduction

1. This is the judgment of the Court to which we have both contributed. The Appellant appeals against a decision of Senior District Judge Arbuthnot ("the SDJ"), sitting at Westminster Magistrates' Court, on 10 December 2018 to send the Appellant's case to the Secretary of State.

2. The Appellant was the controlling director of Kingfisher Airways ("KFA"). He also controlled a large group of companies in India, the United Breweries Group ("UB"), of which KFA was part. He assumed control of UB in 1983. After a series of acquisitions in the 1980s and 1990s, UB expanded into over 20 countries. United Breweries Holdings Ltd ("UBHL") had its headquarters in Bangalore.

3. In 2003, the Appellant formed KFA as part of UBHL's expansion. At all material times, the Appellant was the Chief Executive Officer ('CEO') of KFA. The airline began operations in May 2005, and expanded, acquiring Deccan Airways on 1 April 2008. By 2008, KFA was flying international as well as domestic routes and it grew to have 25% of the Indian market.

4. In 2008, the cost of aviation fuel rose, and the value of the rupee declined against the dollar. The events leading to the global financial crisis can be considered as commencing with the failure of Lehman Brothers in September 2008. We address the chronology in more detail below, but by late 2008 into early 2009, KFA took the decision to seek substantial loans from Indian banks. On 15 January 2009, KFA ratified a business plan for financial years ("FY") 2009/2015, including a plan to seek loans totalling 2000 Crores. One Crore equals 10 million rupees; thus, the desired total was 20,000 million rupees, representing approximately £266 million[1]. A Lakh is 100,000 rupees.

5. Between April and November 2009, five banks extended loans to KFA. They were the State Bank of India ("SBI"), the Bank of India, the Bank of Baroda, the United Bank of India ("UBI") and United Commercial Bank ("UCO"). These loans totalled 1250 Crores, leaving a shortfall of 750 Crores from the desired infusion of 2000 Crores.

6. In late 2009, KFA approached an additional bank, the Industrial Development Bank of India ("IDBI") to make up that shortfall. The money was lent in three tranches; 150, 200 and 750 Crores. The 200 crores was an advance on the loan of 750 crores. The loan of 750 Crores was sanctioned in a letter and agreement of 1 December 2009. The Requesting State, the Government of India ("GoI") seeks the extradition of the Appellant in respect of these loans. It is said that the loans were obtained by means of a conspiracy to defraud and by means of fraudulent misrepresentations; it is further said that the Appellant engaged in money-laundering some of the proceeds of the loans.

[1] At an exchange rate of 75 rupees to the pound sterling.

7. The finances of KFA did not improve. In 2010, the airline was in deeper difficulties. A "Master Debt Recast Agreement" ("MDRA") was organised, with SBI taking the lead. The six institutions which had combined to lend the 2000 Crores joined with twelve other lenders. The MDRA was finalised on 21 December 2010. 30% of the banks' debt was converted to equity in KFA, the payment schedule was extended and a further 1,158 Crores was "infused" into KFA during the calendar year 2011. Despite these measures, KFA got into increased difficulties. By mid-2012, KFA had been forced to exit the low-cost carrier market, and on 1 April 2012, its international operations were suspended. KFA sought international investment, but in vain. On 20 October 2012, the Directorate General of Civil Aviation suspended KFA's operating licence. Further hopes of rescue came to nothing.

8. No allegations are made against the Appellant in respect of the MDRA.

The Allegations and the Procedural History

9. The GoI made an extradition request in respect of the Appellant, submitted on 9 February 2017, which was certified by the Secretary of State on 16 February 2017. A warrant for the Appellant's arrest was issued on 28 March 2017, and he was arrested and granted bail on conditions on 18 April 2017. However, additional charges were received from the GoI, and the extradition request re-certified on 25 September 2017. A fresh warrant was executed on 3 October 2017, and the Appellant re-arrested and once again bailed.

10. The request originates from the Special Investigations Team of the Central Bureau of Investigation ("CBI") in Mumbai. Allegations are set out in the first affidavit of Superintendent Gusinha of January 2017. He recites the issue of a warrant from the Special Judge H.S. Mahajan, in Mumbai. The allegations are of conspiracy between the Appellant and other individuals, within IDBI and KFA, to obtain loans on 7 October, 14 November and 27 November 2009, as a result of "undue favour". The allegations then proceed to default, and to unlawful diversion and disbursement of some of the funds. The Appellant is described as a fugitive. It is alleged that the loans were made:

> "despite weak financials, negative net worth and low credit rating of the borrower company and despite the fact that M/S Kingfisher Airlines Ltd being a new client did not satisfy the norms stipulated in Corporate Loans Policy of the bank."

11. The subsequent affidavit of Superintendent Gusinha, dated 6 June 2017, submits "additional evidence". Here it is explained that the relevant offences are:

> "… under section 120-B read with section 409 of Indian Penal Code (IPC), 1860 and sections 13(2) r/w 13 (1) (d) of Prevention of Corruption (PC) Act, 1988 in respect of alleged corruption in the matter of sanction and disbursement of Rupee Term Loans."

12. The affidavit recites the names and positions of the co-conspirators, as follows:

> "That during investigation of the case, offence under section 420 IPC was invoked against accused Mr. Vijay Vittal Mallya and others and on completion of investigation, a Final Report i.e. charge sheet for the offences under Sections 120-B r/w 420 IPC and 13(2) r/w 13(1)(d) of PC Act 1988 and substantive offence thereof was filed before this Hon'ble Court on 24.01.2017 vide Special Case No. 06/2017 against M/s Kingfisher Airlines Ltd., Mr. Vijay Vittal Mallya, Chairman and CEO; Mr. A. Raghunathan, Chief Financial Officer; Mr Shailesh Shar aram Borkar, Asstt. Vice President (Finance); Mr Amit Avinash Nadkarni, Dy. General Manager (Finance); Mr. Arvind Kumar Chimanlal Shah, Sr. Manager (Accounts); all of M/s Kingfisher Airlines Ltd. And officers of IDBI bank namely Mr. Yogesh Shyamkrishna Agarwal, the then Chairman; Mr Bal Krishna Batra, the then Dy. Managing Director; Mr. O.V. Bundellu, the then Dy. Managing Director; Mr S.K.V. Srinivasan, the then Executive Director and Mr. R.S. Sridhar, the then General Manager. The cognizance of offences in the case has since been taken and the case is pending trial against the accused persons."

13. In this affidavit, evidence is recited against the Appellant of false representations, in the following terms:

> "In order to induce the consortium member banks to sanction and disburse the Term Loans/Corporate Loans aggregating to Rs. 2000 Crores, which also included the Corporate Loan of Rs. 500 Crores sanctioned by State Bank of India and Rs. 750 Crores sanctioned by IDBI bank, false representation/promises of induction of funds by way of unsecured loans, Global Depository Receipts and Equity were repeatedly made on behalf of M/s Kingfisher Airlines Ltd. By fugitive Vijay Vittal Mallya. He himself addressed a letter dated 25.03.2009 to the Chairman, State Bank of India wherein, he made false representation/promise of infusing funds by way of equity/GDRs and falsely represented that the company will in any event ensure that equity infusion takes place in Financial years 2010-11 and 2011-12 in two tranches."

14. The allegations of false representation are then amplified, by reference to prospective inward investment, inward infusion of funds by equity, unsecured loans, an "exaggerated Brand Value" of KFA offered as security, misleading forecasts as to growth of the business, inconsistent business plans including a Business Plan of January 2009 which "contained scaled down/lower projections [of anticipated losses] so as to avail the loan from the banks". The affidavit also accuses the Appellant of offering "symbolic" and "grossly inadequate" security for the loans in the form of "negative lien …on 12 hire purchase aircrafts … despite being aware that M/s Kingfisher Airlines Ltd would never acquire a clear title on any of the aforesaid aircrafts during tenor of the loan".

15. The affidavit also alleges that "from inception [the Appellant] had intentions not to repay the loans" and that he "dishonestly and fraudulently" alienated assets to avoid recovery by the Bank after KFA's default. It was also said that:

> "While on one hand Mr. Vijay Mallya/UBHL were making false representation/promises of repaying the dues of M/s Kingfisher Airlines Ltd from Diageo deal [a reference to a "non-competition" deal on the part of a company associated with KFA, worth $75m], on the other hand, at the same point of time Mr. Vijay Vittal Mallya and UBHJL filed a suit in Hon'ble Mumbai High Court for declaring their respective guarantees as void and non-est ab initio, claiming the same to be executed under duress and coercion, despite having voluntarily executed the same. The above acts clearly reveal the dishonest intention of Mr. Vijay Vittal Mallya from the very beginning not to repay the legitimate dues of the banks."

16. A Schedule of Notional Charges was prepared for the extradition hearing, which is annexed to this judgment as Annex 1. It is clear that three broad allegations were made: conspiracy to defraud, making false representations, and diversion and dispersal of the proceeds of lending. The breadth of these allegations is important, given the argument later advanced by the Appellant that the GoI's case was restricted to conspiracy to defraud.

17. The SDJ recited that evidence and "extensive" written submissions were received from 4 December 2017 onwards. The matter occupied many sitting days (as we understand it, about three weeks, including five days of oral evidence), dispersed between 4 December 2017 and 12 September 2018. The volume of material before the SDJ was formidable, particularly bearing in mind the interrupted and spasmodic nature of the listing. The Appellant did not give evidence. He did however call evidence from expert witnesses: a Mr Humphreys, an expert in the aviation industry; a Mr Rex, an expert in banking; Ms Margaret Sweeney, an executive of the Formula One racing team "Force India"; Professor Martin Lau, an expert in Indian law; Professor Saez, a "political economic scientist who expressed views about whether the prosecution was political and on the *bona fides* of the head of the CBI" (judgment paragraph 64); and a Dr Mitchell, who gave evidence about prison conditions in India. A battery of objections was deployed in argument against extradition, as will readily be deduced from the expert evidence called.

18. The final oral submissions were made on 12 September 2018. Judgment was handed down on 10 December 2018.

19. The SDJ rejected all the objections to which we refer in paragraph 17, above. Her judgment consists of 471 paragraphs over 74 pages. We consider some (but not all) aspects of it later in this judgment. However, we cannot omit the following comments from the outset. Although the SDJ expressed her thanks to counsel, it emerged in the hearing before us that she had never been given an agreed chronology, or even competing chronologies, of the case. It is plain that on some aspects of the evidence she was without submissions. We regard both of those points as regrettable. Both sides agree that there are at least some points of error or misunderstanding by the SDJ, although the Respondent submits such points are minor and of no significance. We

address the relevant points below. Overall, we regard this judgment as an impressive, well-structured and thoroughly judicial approach, in circumstances which were intrinsically difficult, and where the court below should have been given more help. We regard the lack of an agreed chronology in a complex and detailed case, turning upon competing inferences as to honesty, as unhelpful.

20. The Appellant sought to appeal on a number of grounds. William Davis J rejected them all in writing on 5 April 2019. The Appellant renewed his application orally in front of Leggatt LJ and Popplewell J (as he then was) on 2 July 2019: *R (Mallya) v Government of India and Another (1)* [2019] EWHC 1849 (Admin). Permission was refused on all grounds save one: that the SDJ was wrong to conclude, in the language of s.84(1) of the Extradition Act 2003, that there was evidence "which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him".

21. It is worth reciting the reasoning of the Divisional Court on this issue as follows:

> "9. Five grounds of appeal are advanced on the applicant's behalf against the decision of the senior district judge. The first and by far the most substantial ground in terms of the nature and complexity of the material which the court is asked to grapple with is a contention that the senior district judge was wrong to conclude that the Government had established a prima facie case for the purpose of section 84(1) of the Act. In making that argument, the applicant faces the potential difficulty that it is, of course, not the function of an appellate court in an extradition case, any more than in any other type of case, to repeat the fact-finding exercise undertaken by the lower court. In order to persuade an appellate court to interfere with findings of fact made by a lower court after hearing and receiving evidence, particularly in a case such as this involving a very substantial volume of evidence, it is necessary to identify a material error of law or other demonstrable error in the lower court's process of reasoning, or to persuade the appellate court that the lower court has made findings for which there was no reasonable evidential basis or otherwise reached a conclusion which no reasonable judge could have reached.
>
> 10. Despite that high hurdle, we have been persuaded that the applicant's first ground of appeal is at least reasonably arguable. In those circumstances, it is neither necessary nor appropriate to say a great deal about the basis on which the applicant's case has been advanced on that ground today by Ms Montgomery, other than to give a bare summary of her submissions.
>
> 11. The approach which the senior district judge adopted in dealing with the question of whether a prima facie case had been shown was to begin by considering the notional charge of fraud by misrepresentation. We have been taken today through each of the main misrepresentations for which the senior district judge found that a prima facie case of fraudulent

> misrepresentation has been made out. In the case of many of those alleged representations it is argued that the representation is not one which is included in the extradition request, nor for that matter was it the subject of an allegation made by the Government of India at the extradition hearing. In those circumstances, it was not part of the case which the applicant had to meet or was given notice that he had to meet at that hearing.
>
> 12. In addition to those procedural objections, it is argued that many of the findings which the district judge made on that part of the case are based on a misunderstanding or misreading of the documentary evidence or that they have no reasonable foundation in that evidence or that they are inconsistent with evidence adduced at the extradition hearing.
>
> 13. In addition, submissions have been made that the district judge wrongly relied on material which was not admissible as evidence because it did not satisfy the admissibility requirements of sections 84(2) and (3) of the Act.
>
> 14. In relation to the conspiracy charge, the central complaint made is that, so it is said, the district judge did not give any proper consideration to the possibility that the bank's officials who approved the loans genuinely believed that the applicant and other executives of Kingfisher Airlines intended to ensure that the loans were repaid, and for that matter believed that there was a sufficient likelihood of repayment to justify the lending. It is further submitted that, if the judge had properly applied the test under section 84(1), she could not reasonably have concluded that, on the admissible evidence which was adduced at the extradition hearing, the test of showing a prima facie case against the applicant was made out.
>
> 15. Without prejudging in any way the ultimate merits of those arguments, we are, as I say, satisfied that they are arguments that can reasonably be advanced and which justify giving permission to appeal to this court on ground one."

22. The other grounds in respect of which permission was refused were, in summary, that the prosecution was politically motivated rather than based on fact; that the Appellant would not receive a fair trial in India, because of his political opinions or otherwise; and that his extradition would be incompatible with ECHR Article 3 by reason of prison conditions in India.

The Grounds before this Court

23. As will be seen from the reasons of the court granting permission, Ground 1 includes legal and evidential points, as well as the substantive argument that the SDJ was wrong to find that the evidence amounted to a *prima facie* case. Ground 1 is now formulated as follows:

1. The lower court was wrong to find a *prima facie* case which is not being prosecuted in India.

2. The lower court erred in law in its approach to the *prima facie* case test.

3. The lower court was wrong to conclude that a *prima facie* case of conspiracy to defraud was made out.

4. The lower court was wrong to conclude that a *prima facie* case of fraud by false representation was made out.

5. The lower court was wrong to conclude that a *prima facie* case of money laundering was made out.

6. The lower court erred in its approach to the admissibility of the Respondent's evidence.

24. We propose to address the constituent parts of Ground 1 in the following order: firstly (paragraph (2)), the approach to the *prima facie* test; secondly (paragraph (6)), admissibility of evidence; thirdly (paragraphs (3), (4) and (5)), whether the *prima facie* case as so sub-divided is made out; and lastly (paragraph (1)) whether the *prima facie* case advanced, if established to the correct standard, is nevertheless a different case from that being prosecuted in India. The reason for the re-ordering should be obvious. If either of the first two propositions were to be established, the appeal would succeed without a detailed consideration of the substantive points. Equally, the last point can only properly be addressed after detailed consideration of the evidence.

S.84 Extradition Act 2003

25. Since this section of the Act is of importance throughout this judgment it is reproduced in its relevant parts as Annex 2.

Ground 1 paragraph 2: Error in law in the approach to the *prima facie* case

26. In his written submissions, the Appellant submitted that the SDJ ignored the burden and standard of proof. It was said that the statutory test under s.84 requires the requesting state to prove its case beyond reasonable doubt, although the submissions acknowledge the passage in *Devani v Kenya* [2015] EWHC 3535 (Admin), where Aitkens LJ analysed the correct approach to s.84(1):

> **"Issue one: the correct test to be applied under section 84(1) of the EA?**
>
> 47. In the case of a country to which section 84(1) of the EA applies, a three-stage process is involved once the DJ is satisfied that the request document itself establishes that the conduct alleged is criminal in accordance with the laws of the requesting state. The first stage, following the decision of the House of Lords in *Norris v Government of the United States of America*, is to identify, for the relevant charge, the "essence of the conduct" which is alleged by the requesting state. Secondly, the DJ must determine, upon the assumption that the relevant

> conduct had occurred in the UK, whether that conduct would be an offence under UK law. For this purpose, the requesting state will often produce "notional English charges", identifying the particular UK offence which is said to be constituted by the "essence of the conduct" alleged. Counsel representing Kenya in the present case did this exercise both at the extradition hearing and before us. Thirdly, the DJ must determine whether the requesting state has proved, on the basis of all admissible evidence (taking account of the admissibility rules set out in *sections* 84(2)-(4), 202 and 205 of the EA), whether there is sufficient evidence to substantiate the conduct alleged.
>
> 48. In *R v Governor of Pentonville Prison ex p Alves* the House of Lords held that under paragraph 7(1) of Schedule 1 to the Extradition Act 1989, which is in different terms to section 84(1) of the EA, the correct approach to be applied by a magistrate on an extradition request was to decide whether there was a case to answer, by reference to the well-known test set out by Lord Lane CJ in *R v Galbraith.* The same approach has been adopted in relation to section 84(1) of the EA: see, for example, the statement of Sir Brian Leveson PQBD at [16] of *Ravi Shankaran v Government of the State of India.*
>
> 49. Putting the matter this way could be mildly confusing. Lord Lane identified the test in *Galbraith* as the one to be used by judges in criminal trials when they have to decide whether to accede to a submission of "no case to answer" at the end of the prosecution case. Under section 84(1) the DJ has to do the opposite: viz. decide whether there ***is*** a case to answer. Furthermore, it is now well established that, in an extradition case to which section 84(1) applies, the court is required to have regard to all the admissible evidence before the court, including that of the requested person. In our view, the correct way to put the matter is to say that the DJ who has to decide whether there is a case to answer for the purposes of section 84(1) must determine whether, on one possible view of the facts, he is satisfied that there is evidence upon which the requested person could be convicted at a summary trial of an information against him, upon the basis of the notional English charges. In other words, the DJ must apply the test referred to at the end of the celebrated passage in Lord Lane's judgment in *Galbraith* at 1042, but with the additional gloss that, in deciding whether there is a case to answer, the DJ should consider all the admissible evidence before him, including evidence called on behalf of the requested person.
>
> 50. For convenience we will call this "the *prima facie* case test".”

27. It is conceded that the SDJ made direct reference to this authority in [68] of her judgment.

28. In our view this submission is quite untenable. It is clear beyond any doubt that the SDJ directed herself properly. It is clear she had the criminal burden and standard in mind when she considered whether there was a *prima facie* case. She also made direct reference in paragraph 342 to the approach laid down in *R v G&F* [2012] EWCA Crim 1756. In that case, the Court of Appeal (Criminal Division), Aikens LJ once more presiding, summarised the approach as follows:

> "36. We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in *Galbraith.* (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer *does* involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether ***a*** reasonable jury, not ***all*** reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that ***a*** reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

29. The role of an extradition court considering this question is to consider whether a tribunal of fact, properly directed, could reasonably and properly convict on the basis of the evidence. The extradition court is, emphatically, not required itself to be sure of guilt in order to send the case to the Home Secretary. The extradition court must conclude that a tribunal of fact, properly directed and considering all the relevant evidence, could reasonably be sure of guilt. There is no basis upon which it could be said the SDJ misunderstood this, or that she misdirected herself.

30. The second elaboration of this first complaint is put as follows. It is said that the SDJ made a "decision not to consider all the relevant evidence". This submission centres on a passage in the judgment below:

> "68. Lord Justice Aikens considered the approach to prima facie case in extradition in the case of *Devani v Republic of Kenya* [2015] EWHC 3535. At paragraph 49, he held that the District Judge must "*determine whether, on one possible view of the facts, he is satisfied that there is evidence upon which the requested person could be convicted at a summary trial of an information against him*". I accept that is the test I must apply.
>
> 69. The case against Dr Mallya can be conveniently divided into different parts. I am not considering all the evidence against him and in his favour but enough for me to consider whether there is a *prima facie* case against him.

Framework

70. There is a great deal of evidence provided by the GOI but some of it is repetitive. The defence team has also provided a number of volumes of evidence and called witnesses of whom the most significant in my view was Mr Rex, an expert in the banking and financial sector. A great number of issues were raised by the witnesses or in argument before me. I have not considered every point raised by any means. In a summary trial, a submission that there is not a prima facie case would be followed by a short, pithy judgment, either way. I am afraid pithiness has eluded the court in this case but against that, as I have said, only a very small part of the evidence is referred to below.

71. My approach has been to consider firstly the allegations that Dr Mallya and others dishonestly made representations to IDBI Bank to make a gain for themselves or to cause loss to the bank. It is the RP's knowledge and involvement in the events I have been particularly concerned with along with what KFA said to IDBI in the lead up to the sanction of the loans. The conspiracy which is alleged to have taken place involving some of the bank executives I have considered in less detail. Finally the allegation of money laundering, I deal with shortly. The decision in relation to the money laundering charge follows on from the conclusions I have drawn in relation to the making of false representations.

72. In looking at the allegation of the making of false representations I have concentrated on what is said in the correspondence which led up to the making of the loans, it is evidence which has not been disputed by the Defence. It consists of emails sent between the KFA alleged conspirators including Dr Mallya and it builds up a clear picture of their view of the financial situation of KFA. I have followed that with an in-depth analysis of the letters then sent to IDBI requesting loans. It is straightforward to compare what was being said in the emails sent about a month before to what IDBI was being told in the run-up to the sanctioning of the loans. It is an easy step from there to find a case to answer in relation to a number of the representations made to the bank. Then I look at what IDBI considered the loans were for. I turn then to what some of the loan money was spent on. Finally I look at whether there is a prima facie case some of the bankers were involved before looking at the allegations of money laundering.

73. There is a vast amount of evidence in the case but I am limiting myself to what is needed to prove a prima facie case, or not as the case may be."

31. In our view, the SDJ was not making "a decision not to consider all the evidence" in the sense criticised. She plainly considered a vast amount of evidence, from both sides. She knew what was her task, and she was fully aware of the burden and standard of proof which must govern any eventual trial. She was well aware of what was "needed to prove a *prima facie* case, or not". If she knew what was required to satisfy the test in *G&F*, and knew that evidence which might prevent a properly directed tribunal of fact from convicting the Appellant had to be considered, then she clearly must be taken to know that relevant evidence which could rule out a proper conclusion of guilt must be considered. We see no evidence that she failed to consider relevant evidence, and no such concrete or particularized submission has been advanced. In our view, this second submission under Ground 2 represents a seizing upon a phrase in the judgment, and is barren of merit.

Ground 1 paragraph 2: the law on inferences

32. The third aspect of the attack under paragraph 2 is that the SDJ misdirected herself on the approach to drawing inferences from the evidence. It is in this way that the matter is expressed in submissions, although in our view the point taken is in fact narrower. It is that the court below failed to exclude the possibility of the Appellant's innocence.

33. The submission rests on a formulation to be found in *G&F*, in the passage quoted in paragraph 28 above. The formulation was again adopted by the Court of Appeal (Criminal Division) in *R v Masih* [2015] EWCA Crim 477, where the court observed:

> "**The essential question**
>
> 3. The prosecution case was based upon circumstantial evidence. There is no dispute between the appellant and the respondent as to the correct approach in law to a submission of no case to answer when all the critical evidence is indirect and inferential. The ultimate question for the trial judge is:
>
> *Could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?*
>
> It is agreed that in a circumstantial case it is a necessary step in the analysis of the evidence and its effect to ask:
>
> *Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?*
>
> Matters of assessment and weight of the evidence are for the jury and not for the judge. Since the judge is concerned with the sufficiency of evidence and not with the ultimate decision the question is not whether all juries or any particular jury or the judge would draw the inference of guilt from the evidence adduced but whether ***a*** reasonable jury ***could*** draw the inference of guilt. These propositions are derived without contention from the decisions of this court in *Galbraith* [1981] 1 WLR 1039, *Jabber* [2006] EWCA Crim 2694 (approved by the Privy Council in *Goring* [2008] UKPC 56 at paragraph 22),

> *Hedgcock, Dyer and Mayers* [2007] EWCA Crim 3486, *Darnley* [2012] EWCA Crim 1148 and *G and F* [2012] EWCA Crim 1756."

34. Regrettably, this submission too misstates the law. There was no obligation on the court below to "exclude all realistic possibilities consistent with the defendant's innocence". That would be to truncate the test. As *Masih* once more makes clear, the test for a *prima facie* case is whether a reasonable jury, properly directed and considering the evidence, could exclude all realistic possibilities consistent with the defendant's innocence. In our judgment, it is clear that the SDJ understood the law perfectly well.

35. The real thrust of the submissions in this case is not to suggest an error in the SDJ's understanding of the law. It is that the SDJ misapplied the law to the evidence, to such a degree that it can be characterised as irrational, and therefore an error sufficient to show that her decision was "wrong". The substance of this appeal lies in paragraphs 3, 4 and 5 of Ground 1. However, before we can address those grounds, we must consider the question of admissibility of evidence and paragraph 6.

Ground 1 paragraph 6: Admissibility of Evidence

36. The submission under this complaint is that the SDJ erred in admitting three categories of evidence: (1) statements taken pursuant to s.161 of the Indian Criminal Procedure Code; (2) documents produced by the GoI without a statement producing them; and (3) materials relevant to the conduct of the Appellant after the collapse of KFA. We address them in turn.

37. S.161 of the Indian Criminal Procedure Code ('the Code') establishes the approach in India to witness statements in criminal cases. Witnesses are bound to appear at trial, to be sworn, and then to give oral evidence and be cross-examined. S.161 statements are prepared by police (or prosecutors) as an indication of the evidence a witness will give, but they are not admissible as evidence at trial in India. They may be used as the basis of cross-examination if the evidence given proves inconsistent with the statement. The process of creation is standardised. Once the statement is prepared by the relevant officer, it is read to, and approved by, the witness. The approval is attested by the officer, typically using the acronym "RO&AC", standing for "Read Over and Affirmed to be Correct". The statements are accepted to be hearsay evidence, as the SDJ remarked in paragraph 49 of her judgment.

38. It was submitted below (and maintained here) that it is significant that identical text is found in a number of s.161 statements from various witnesses who cover similar territory, that a number of statements are not contemporaneous, are not addressing events in which the witness took a part or directly observed, and that the witnesses do not produce the underlying documentary evidence upon which they rely.

39. As will be clear from Annex 2, s.84 permits the court to admit hearsay evidence. S.84(2) permits a judge to "treat a statement made by a person in a document as admissible evidence of a fact if – (a) the statement is made by the person to a police officer or another [similar]… and (b) direct oral evidence by the person of the fact would be admissible". S.84(3) directs the court to have regard to the discrete factors laid down: see Annex 2.

40. The SDJ considered these submissions in paragraphs 45 to 60 of her judgment. She noted that the criticism made to her was, firstly, that the treaty with India envisaged sworn statements under s.164 of the Code, and secondly that there are lengthy passages in a number of the statements which are word for word the same and thirdly that in many cases the witnesses were giving evidence after the event, reporting on matters by reference to documents before them (or available to them) which are not produced, or annexed to the statement.

41. The SDJ noted the response of the GoI that these statements were made to a police officer, that direct oral evidence would be admissible in England, and that the statements have value. She also noted (paragraphs 51 and 52) that she had no evidence as to how the statements were taken (save as could be inferred from the face of the documents). Equally, she had no evidence to "undermine the bona fides of the … officers". There was no separate witness statement by each officer who took a s.161 statement. However, there was a witness statement from Superintendent Kumar, which explained the system by which the statements are read over and affirmed to be correct in the presence of the investigating officer.

42. The SDJ then went through the steps laid down in s.84(2) and (3). The statements were made to officers in the course of investigations (paragraph 54); direct evidence would be admissible at trial (paragraph 55). She considered the nature of these statements and concluded the documents were authentic (paragraph 56). In large part the witnesses produce documentary evidence, or comment from their own knowledge on business and professional documents. The contents and the witnesses could of course be challenged at trial (ibid). Given that this would be a complex fraud trial, much of the issue will be determined by the underlying documents, and inferences to be drawn from them, in addition to evidence as to the systems established within the lending bank or banks (paragraph 57). The SDJ then observed:

> "58. The framework of the fraud will not be in dispute. In other words, the RP and the others will not contest that emails were sent in the terms they were or that representations were made, they will be questioning the intention which lay behind the acts."

43. The SDJ then concluded:

> "59. I find that the statements supply, along with the exhibits they produce, relevant evidence which would otherwise not available; the statements are relevant to the question of prima facie case that I have to determine; I have regard to the risk of unfairness that could be caused by the admission of the statements. I noted that in this extradition hearing the evidence relied upon by the GOI was able to be considered in detail by VJM's expert witnesses in particular the banking expert Mr Rex. The RP was not prejudiced by the admission of the statements in the format that they were in. I noted too that there was no evidence from VJM and had he wanted to challenge the evidence given in the s161 statements he would have been able to."

44. On that basis, she found the s.161 statements admissible.

45. Before us, the Appellant restated the same arguments. He relied on the decision of the High Court in *Shankaran v India* [2014] EWHC 957 (Admin), where the court declined to admit part of the central s.161 statement. Ms Montgomery emphasised the degree of "cut and paste" between different statements, and the degree to which much of the language in the statements was, by inference at least, attributable to officers and investigators rather than witnesses. For those reasons, the Appellant submits, it was an error to admit this material.

46. We reject those submissions, essentially for the reasons recited below. *Shankaran* was a decision on the facts, which were very different. There the case hung on one passage in a single s.161 statement, where the witness had gone back on (or rejected) the content. That is very far from this case. In our judgment, the SDJ was right to reject this argument.

47. That decision does not deal with all Ms Montgomery's points. She also criticised the SDJ for admitting s.161 statements about things which the makers of those statements did not witness. She submitted that the SDJ was wrong to say, in paragraph 53, that she would give "less weight" to such statements. She should, rather, have refused to admit them.

48. We accept Ms Montgomery's submission that s.161 statements dealing with events that their makers had not seen were inadmissible in so far as it was sought to rely on them as evidence of matters which their makers did not witness. It follows that they should be given no weight on those matters. However, while it is not suggested that any of these witnesses purported to give independent expert evidence, there is no reason why the points they made on the documents could not be taken into account as informed explanations of or commentary on the documents, rather than as evidence of relevant events. More importantly, some of these witnesses (for example, Mrs Sinha and Mr Kashyap) were giving evidence about things they had done and seen (or not seen) in the course of an audit or review of IDBI. Those comments and explanations were not given for the purposes of the criminal case against the Appellant, but were given relatively shortly after the events in question. For example, Mr Kashyap noted that two securities offered for the loan had still not been executed as at 10 June 2010, when he conducted a review of the KFA account.

49. Nor does it follow that the documents produced by the makers of the s.161 statements were inadmissible (see section 202(3) and (5) of the 2003 Act). Most, if not all, of the key documents are authenticated in accordance with section 202(4); and those that are not authenticated in that way were nevertheless receivable in evidence in the extradition proceedings (see section 202(5)). It follows that we accept Mr Summers' submission that, in so far as witnesses from IDBI describe what IDBI's records show or do not show, that evidence, too, was admissible.

50. Ms Montgomery also took issue with paragraphs 40 and 57 of the judgment, in which the SDJ gave an account of the seizure of the significant emails and then said that, as they were unlikely to be disputed, the real question was what was in the Appellant's mind at the relevant times, and, if a *prima facie* case was found, whether a fact-finder could be sure that he was dishonest in doing what he did (we consider paragraph 57 in more detail in paragraph 58, below). We accept Ms Montgomery's submission that

the SDJ appears to have misunderstood the evidence about the seizure of the emails. The emails were not seized from Mr Raghunathan, and Mr Raghunathan did not give evidence that the officer, Mr Kumar, seized them. However, as Mr Summers submitted, there was evidence before the SDJ that the emails were seized by the police in a search of Mr Raghunathan's office on 13 October 2015. Indian law requires two independent witnesses to be present at the search and there are witness statements from those two witnesses. The emails are authenticated in accordance with section 202(4).

51. That misunderstanding makes no difference, as it does not undermine the chain of evidence. Mr Kumar did seize the computer on which the emails were found. We also consider that, on the facts of this case, the SDJ was entitled to look at the reality of the situation, which is, in truth, that the sending and receipt of the emails is unlikely to be challenged, and the real issue would be what their authors and recipients knew and intended when the loans were applied for.

52. A final point concerns the admissibility of evidence of later events. The GoI relied on these in its request for extradition as shedding light on the Appellant's intentions at the relevant times (see paragraph 15, above). The SDJ considered the arguments about this material in paragraphs 62 and 63 of the judgment. She accepted the GoI's submission that this evidence had "to do with the facts of the offence" and would have been admissible under section 98 of the Criminal Justice Act 2003.

53. As Mr Summers pointed out in his skeleton argument, it is not obvious that section 98 governs the admissibility of evidence in extradition proceedings. On the assumption that it does, there are two potential objections to this evidence: either that it is not relevant, or that it is evidence of "bad character". Again, as Mr Summers points out, evidence of conduct after an alleged offence can shed light on the motives of the alleged offender at the time of the alleged offence. In our judgment, such evidence plainly "has to do with the facts of the offence", and is plainly relevant. It follows that the SDJ was not wrong to take it into account.

54. The evidence of the Appellant's conduct when the guarantees were called in, which was, in short, to do all he could to shirk any responsibility (as the witness statement of Mr Joseph describes) was material from which a reasonable jury could draw a secure inference that the Appellant never intended to pay the money, should his guarantee be called on.

55. For these reasons, we consider that the material subject to the challenge in paragraph 6 represented admissible evidence on which the SDJ was entitled to rely.

Ground 1, paragraph 4: was there a *prima facie* case on fraudulent misrepresentation?
The approach of the SDJ

56. We take this part of the Ground first, since it is evidentially easier to do so. We begin with an analysis of the approach of the SDJ. She gave particular weight to the emails seized by the police and thus before the court.

57. The SDJ listed the allegations made by the Respondent in paragraph 22 of her judgment. In paragraph 40 she said that she was particularly concerned with emails exchanged at various times in 2009 in which KFA's "financial predicament" is

"discussed between KFA executives". She said that the emails were seized from Mr Raghunathan (KFA's Chief Financial Officer) and exhibited. "The officer, Mr Kumar, says he seized them from Mr Raghunathan's home. Mr Raghunathan has given evidence to the same effect".

58. In paragraph 57 she observed that this was an allegation of fraud, which would rely on documentary evidence. The papers contained a number of documents which were unlikely to be challenged. At trial it would be for the Appellant to explain what he knew and when, what his intentions were and what he did with the money. If a *prima facie* case were found, the main question would be whether a fact-finder could be sure that he was dishonest. In paragraph 58, she said that "the framework of the fraud will not be in dispute. In other words, the RP and others will not contest that emails were sent in the form that they were or that representations were made, they will be questioning the intention which lay behind the acts".

59. The SDJ next considered whether the Respondent had shown a *prima facie* case (judgment, paragraphs 65-355). The SDJ found that the Respondent had shown that there was a *prima facie* case against the Appellant.

60. The SDJ said in paragraph 72 that in looking at the allegation that false representations had been made, she had concentrated on the correspondence which led up to the making of the loans. She said that it was evidence which was not disputed by the defence. It consisted of emails between the KFA alleged co-conspirators and built up a clear picture of their view of the finances of KFA. She then analysed the letters sent to IDBI asking for the loans. It was straightforward to compare what was being said in the emails a month previously with what IDBI was told. It was an easy step from there to find a case to answer in relation to a number of representations.

61. The SDJ said there was evidence that the Appellant had private meetings with Mr Agarwal (who was then the Chairman of IDBI: see paragraph 12, above) in the run up to the loan applications. There were no records of those meetings which the SDJ had seen. Mr Agarwal's diary for 2009 had not been traced. She referred to evidence that there were at least two such meetings in the third quarter of 2009 (paragraph 74).

62. In paragraphs 76-79 she summarised the emails sent between the Appellant, and Mr Nedungadi (President and Chief Financial Officer of UB Group, and a Director of KFA), on 6 and 7 May 2009. They were about returned cheques, and were copied to Mr Raghunathan. The SDJ quoted the Appellant saying that the 500 Crores from SBI was not enough to make "seriously overdue operational payments and the more we use to meet Banking commitments as against operational commitments, we are sure to hit a brick wall". She then said, "The attitude of SBI to the loan is shown by his next sentence". The email continued: "Besides, SBI are virtually auditing every payment and have told Raghu that they will only release operational payments". He doubted whether SBI would agree to release funds to Yes Bank, and said that out of the 500 Crores, they had to pay 48.6 Crores in interest to SBI and 35 Crores paid to IOC "under duress". On 7 May 2009, Mr Raghunathan told the Appellant that he had just come from a meeting with SBI, had collected the appraisal note and covering note, and had given it to various banks.

63. The email exchange, she said, continued later that night between Mr Nedungadi and the Appellant. Mr Nedungadi said he was not suggesting closing down the airline, but

pointed out that payments due to banks were in fact in respect of long overdue operational payments paid by banks on their behalf to operating creditors. IOC was behaving aggressively and would not hesitate to initiate penal prosecutions. He doubted whether the company could be run effectively if its directors were trying to avoid arrest. Five minutes after that email, the Appellant asked Mr Raghunathan how many post-dated cheques were outstanding with IOC (paragraph 78).

64. By September 2009, KFA executives had concerns about KFA's finances. The year-end losses to March 2009 were considerable. The financial position had not improved as projected between April and September 2009, the first half year of financial year 2010 ("H1 FY2010").

65. Shortly before IDBI was approached for the first short-term loan ("STL"), emails were exchanged between KFA executives, the Appellant and Accenture, in which, the SDJ said (paragraph 80), the "true financial position was discussed". The SDJ summarised those emails in paragraphs 81-90. She said that this evidence showed concerns about KFA in the weeks before the application for the loans from IDBI. Ms Montgomery pointed out that these are incomplete email chains and that only a tiny proportion of all the emails seized by the Respondent feature in the papers for this case. That may be so, but in our view it does not follow that, in context, the emails cannot be evidence supporting a *prima facie* case.

66. Mr Nedungadi emailed the Appellant on 3 September 2009 at 7.02pm. He enclosed the latest financial projections from KFA. He had asked for these as he had a "kick-off meeting" on Tuesday 8 September with lawyers and bankers for the purposes of KFA's GDR issue. He told the Appellant that at the time of the SBI loan proposal they had also presented projections for KFA. The projection for FY09 was an EBITDA (that is, earnings before interest, tax, depreciation and amortisation) loss of 768 Crores and a PBT (profit before tax) loss of 1594 Crores. The actuals showed an EBITDA loss of 1326 Crores and a PBT loss of 2155 Crores (paragraph 81).

67. Mr Nedungadi then set out the position for the current year. The projection for FY10 was an EBITDA profit of 969 Crores and a net loss of 174 Crores. He said that, in fact, in Q1 the loss was more than 300 Crores. The most recent projections showed an EBITDA at 74 Crores and a net loss of 931 Crores. Mr Nedungadi was not sure if even that was accurate. In the months of July and August the load factors dropped from +70% to "a mere" 62% in August and "that too with a lower yield (from …4200 Crores to 3875). At that rate, chances are that the actual loss for current year will far exceed current projections" (paragraph 82).

68. He referred to accumulated losses of about 2250 Crores as at the end of FY09. A minimum of 1000 Crores further loss would be added to that. Based on that projection, those losses would "not be recouped even in the next five years. Investors will be hard-pressed to put money into a company knowing that no dividend is possible for a minimum of 5 years". He added that if the underwriters insisted on the financials being adjusted for audit notes, the deferred tax of 2200 Crores and Maintenance Reserve Treatment of about …900 Crores will be added to the accumulated losses". We note that KFA's audited accounts are dated 28 July 2009. We describe, in paragraphs 127 and 128, below, what the auditors had to say about the deferred tax credit.

69. Mr Nedungadi's "third point" was that industries with high operating leverages incur high losses in bad times, but are normally quick to make profits in good times. That did not seem to be happening with KFA. In addition, public records would show that KFA had lost ground to other carriers in July and August. He ended the email, "I urgently seek your guidance as the reality of operations, particularly the sales performance seems to be very different from what was anticipated" (paragraph 84).

70. The Appellant emailed Mr Raghunathan on the same day ("within 6 minutes"). He said he had not seen the numbers Mr Raghunathan had provided to Mr Nedungadi. He wanted answers to the questions Mr Nedungadi had raised (paragraph 85).

71. Mr Nedungadi emailed Rajat Agarwal of Accenture (not the alleged co-conspirator Agarwal) at 9.16pm on 3 September. He referred to the rights issue. Bankers and lawyers would shortly be starting their due diligence on the company's operations, including financial projections. The SDJ said that "more relevantly, perhaps" Mr Nedungadi was "really surprised" to see that Q1's operating results were significantly worse than the full year's projected loss given to SBI (the lead underwriter of the issue) (paragraph 86). The months of July and August had been "even worse". The email says that ATVs had dropped, apparently across all classes. The SDJ noted that despite discounting of tickets, seat factors had dropped [from a high of 71%] to just 62% in August [which was counter-intuitive]. He asked for Mr Agarwal's urgent input, as he had to speak to the underwriters on Tuesday morning (paragraph 88). He added in the email that he needed "explanations for both domestic and international operations" (paragraph 78).

72. The SDJ noted that that email was copied to SR Gupte and that Mr Nedungadi said that, since Mr Gupte had been closely monitoring operations of late, Mr Nedungadi sought his guidance as well. Mr Nedungadi outlined the position, saying that KFA would have accumulated losses of 3500 Crores by the end of the FY 2010, which might increase if "certain accounting methods are changed" [that is, if the underwriters insisted on reversing the deferred tax impact (2200 Crores) and the treatment of the Maintenance Reserve (900 Crores)]. The company might take "10 years to recoup these accumulated losses". The most recent trend of the business was downwards in capacity deployed, capacity utilisation and yield, which would add to the concerns. He added, "As a finance person you will readily appreciate what I am saying". Mr Nedungadi asked to speak to Mr Gupte for "guidance" the following afternoon (paragraph 88).

73. On 7 September 2009, Anurag Mathur of Accenture forwarded an attachment to Mr Nedungadi. It was said to be a comparison between the Q1 performance of KFA with the business plan provided to SBI. The numbers were based on KFA's "MIS" (management information system). He also attached a comparison between KFA's performance in Q1 and that of Spice Jet, on a per aircraft basis, and a separate analysis of KFA's ATR operations (paragraph 89). Mr Nedungadi then forwarded this to Harish Bhat, an employee of UB Group, and asked him to discuss the material with him. On 9 September 2009, Harish Bhat forwarded the comparison between the Q1 results and KFA's business plan presented to the SBI to Mr Raghunathan (paragraph 90).

74. In paragraph 91, summarising the effect of these exchanges, the SDJ said that this evidence was important because it showed "the concerns about KFA in the weeks

leading up to the application for loans from IDBI". It showed that KFA's advisers and management were looking at KFA's actual performance compared with the business plan provided to SBI. In paragraph 92, she said that in the application to IDBI, KFA relied on information sent to SBI, when it was "abundantly clear that the situation of the company had deteriorated in a significant way". In paragraph 93, she went on to say that "The true position of KFA is not set out in the letter dated 1 October 2009 where Mr Raghunathan CFO of KFA is applying for the loan". He told Mr Batra of IDBI that "the impact of the loss for the previous financial year (FY2009) is around Rs1600 Crores". But on 3 September 2009 the Appellant was being told by Mr Nedungadi that they had projected a loss of 1594 Crores, and the actuals revealed a PBT of 2155 Crores. "This was a misrepresentation on the face of it of the loss" (paragraph 93).

75. The SDJ said that the letter of 1 October seemed to blame KFA's situation on the price of fuel, including an import duty which the GoI might abolish. The "impression is given" that KFA's problems were those of all the Indian aviation industry. In fact, according to what KFA clearly told IDBI later, the poor first half results were caused by engine failure in 20 aircraft, a fact which was not mentioned in the KFA internal emails. It was also clear from the 3 September emails that KFA had lost ground to other carriers in July and August 2009, and their load factors had dropped from 72% to 62% in August 2009. It was significant that Mr Raghunathan was acting under the instruction of the Appellant when he sent the letter of 1 October 2009; he was to "get Mr Ramachandran on the job and apply to IDBI for 950 Crores" (paragraph 94).

76. Whatever may have been KFA's position earlier in the year when it had obtained a loan of 1050 Crores from the consortium of banks, by 1 October 2009, its position had got worse. On the face of it, the letter of 1 October misrepresented the position. It used out-of-date information. The business plan sent with the letter was dated January 2009. The brand valuation was dated November 2008 (paragraph 95).

77. The Appellant's expert, Mr Rex, took a different view of the internal emails. They were a discussion between officers of the UB Group. The references to "a minimum of 5 years" and "The Company may take ten years to recoup these accumulated losses" referred to the time it would take to reverse the negative balances in KFA's distributable reserves. Mr Rex said that it was not a suggestion that the losses would continue over that period. That would also explain Mr Gupta's comment, "As a finance person you will readily appreciate what I am saying". The SDJ did not agree with Mr Rex's interpretation of the emails (paragraph 96).

78. In paragraph 97 of the judgment the SDJ summarised 17 findings about the state of knowledge of the Appellant and KFA executives, gathered from her reading of the documents. We did not detect in the Appellant's oral submissions any serious challenge to these findings, apart from the finding in paragraph 97.d "That although they had presented projections for KFA for the YE 2009 of a PBT loss of 1594 Crores, the actuals showed a PBT loss of 2155 Crores", and the SDJ's approach to the dispute she described in paragraph 96 of judgment (paragraphs 97.j and p).

79. In paragraphs 98-107 of the judgment, the SDJ made findings about the express or implied representations made by KFA to get the first loan. In paragraph 99 she referred to the email which the Appellant sent on 1 October 2009 to Mr Raghunathan. He told Mr Raghunathan that he must put a colleague on to applying to IDBI for 950

Crores: "Do not delay". The Appellant told Mr Raghunathan to make a file of emails threatening legal action, to meet Mr Verma, and to show him the file "in order to underscore the critical urgency of the situation". The email showed that the Appellant was closely involved, and how urgent the situation was.

80. On 1 October Mr Raghunathan wrote to Mr Batra of IDBI, asking for a loan of 950 Crores. The SDJ described the letter of 1 October 2009 and its enclosures in some detail in paragraphs 100-105. In essence, Mr Raghunathan suggested that KFA's difficulties were shared by other airlines, as a result of spiralling fuel prices. Prospects were better because of falling oil prices and the policy changes such as the abolition of fuel import duty, and cost-cutting measures. Aviation companies were on the road to recovering faster and emerging "profitable in the long term". Mr Raghunathan described KFA's "huge brand pull" and cost-cutting measures. The steep rises in fuel prices caused losses of about 1600 Crores in FY2009. KFA had been forced to defer payment to creditors. To clear those dues and raise more working capital, KFA needed 2000 Crores, of which they had already raised 1050. In paragraph 101 the SDJ described what Mr Raghunathan said about raising money from the Group and associated companies and their plans to raise $400m from a 'strategic investor". Mr Raghunathan said that KFA had got two valuations from "two different reputed international valuers" and that the brand value was estimated at around 3400 Crores (there is further analysis of that valuation at paragraphs 177-185 of the judgment). A strategic investor would understand the potential of the brand. Aircraft would be sold, raising about 324 Crores. That sum had not been included in the enclosed business plan. KFA had the strong support of the Group, which had made investments of about 1652 Crores.

81. In paragraph 103, the SDJ described what Mr Raghunathan said about security. The brand, valued at 3400 Crores, would be assigned. There would be a negative lien on the fleet of HP leased aircraft (see paragraph 99, below), a corporate guarantee from UB, and a personal guarantee from the Appellant. The loan would be re-paid in instalments by January 2014. Mr Raghunathan told IDBI that SBI would be happy to share their appraisal note with IDBI. The letter enclosed a brand valuation by Grant Thornton, the FY2009 Annual Report, and a January 2009 business plan, which had been reviewed by Grant Thornton (paragraph 104). The figures for the half year to September 2009 were not available, but the 2010 Q1 financials were. KFA did not provide those to IDBI (paragraph 105).

82. The SDJ described (in paragraph 106) a follow-up letter dated 7 October 2009 from Mr Raghunathan to IDBI. Mr Raghunathan referred to a meeting he had with IDBI on 5 October and to a meeting between the Appellant and Mr Agarwal, the Chairman of IDBI (the alleged co-conspirator) on 6 October 2009. Mr Raghunathan asked for a short-term loan of 150 Crores for six months "to meet certain critical obligations to overseas vendors including Aircraft Lessors and other service providers". He referred to a corporate guarantee and to the other securities discussed at the meeting. Mr Raghunathan sent a second letter on 7 October. He also referred to meetings between Mr Agarwal (the alleged co-conspirator) and the Appellant, and between Mr Raghunathan and IDBI. KFA would get back to IDBI about the other securities discussed. As we have said, there were no notes or records of the discussions at these meetings.

83. In paragraph 107, the SDJ referred to the evidence of Mr Rex that when the STL went to the Credit Committee of IDBI, the prospective lending bank, it had a requirement for a personal guarantee from the Appellant. The sanction letter said that the loan was to meet "certain payment obligations to overseas vendors including Aircraft Lessors and other service providers". The loan was paid out on 9 October 2009.

84. She summarised her findings about the express or implied representations which KFA made to get the first loan in paragraph 108. She found that 17 representations were made. We did not detect any serious challenge to those findings.

85. In paragraphs 110-119, she made findings about IDBI's "perspective" on the first loan. She summarised her 13 findings about those in paragraph 120. She said that there had been conversations between KFA and IDBI, of which there were no notes.

86. In paragraphs 112-119 she described the salient features of the memorandum dated 7 October 2009 proposing that the loan be approved. In paragraph 112, she said that the memorandum reported that KFA incurred a loss of 1609 Crores in FY 2009, whereas "it is clear from an email on 3 September 2009 that the actual loss before tax was 2155 Crores". This is one of those points where the parties agree there was an inaccuracy. The 7 October 2009 memorandum referred in at least two places to a "net" loss of 1609 Crores, as the SDJ acknowledged in paragraph 115. We address this issue below, but the point is that the net figure advanced was based on assumptions about a deferred tax credit and the treatment of the maintenance reserves, which might very well not be available.

87. The SDJ also noted that the memorandum recorded that the performance of the company was "showing improvement". She said "That information must have come from KFA and it was untrue". In fact, the emails made clear that, in the understanding of the Appellant and those within KFA, KFA's performance was deteriorating. "On the face of it the Credit Committee was being misled. At the time it was written, KFA knew it had made a larger than expected first half loss" (paragraph 112). We consider that the reference to "first half" is likely to be a slip for "first quarter" (cf paragraphs 98 and 116 of the judgment).

88. She noted in paragraph 113 that the memorandum said that KFA was expected to make a net profit in coming years due to various benefits including improved load factors. This was contrary to material in the September emails about load factors.

89. The memorandum suggested that the losses of 1609 Crores in FY2009 would be reduced to 174 in FY2010, and it was expected that KFA would start earning profits from FY2011. That, said the SDJ, was not reflected in the internal emails sent about a month earlier. There was no reference, either, to the Q1 FY2010 losses which were said to be far larger than expected (paragraph 116).

90. Paragraph 120 is a summary of 13 impressions IDBI had been given about KFA's financial position. Most significant were

    a) at c., that IDBI had been given an accurate picture of the financial health of KFA,

    b) at f., that KFA was showing improvement in the current year,

c) at g., that KFA was expected to start to earn profits from FY2011, and

d) at h., that KFA was expected to earn net profits in coming years.

91. In paragraphs 121-122, the SDJ made findings about the representations which were made in relation to the advance of 200 Crores. Two letters were sent by Mr Raghunathan to three addressees at IDBI, and to Mr Sridhar of IDBI, on 4 and 5 November 2009 respectively. Apart from one, Mr Dasgupta, who was the General Manager of the Large Corporate Group ('LCG') of IDBI, the addressees were alleged co-conspirators. The SDJ summarised her two findings in paragraph 123. Both letters refer to a meeting/discussions between the Appellant and Mr Agarwal. The representations (paragraph 123) concerned the debts which the 200 Crores would be used to settle.

92. The next topic was the representations made in order to secure the third loan of 750 Crores. The SDJ said (paragraph 124) that to see what had been said to IDBI by KFA, she considered documents sent to the Executive Committee ("the EC") of IDBI for the meeting of 27 November 2009 at which the EC considered the proposal to agree a loan of 750 Crores, and a proposal to sanction the Chairman's decision to approve the advance on the loan of 200 Crores. The documents were

a) a short memorandum dated 24 November 2009,

b) an attached Appendix ("the Appendix"), and

c) a "long memo".

93. The short memorandum was written by Mr Ananthakrishnan, Head of the LCG of IDBI (paragraph 140) (not one of the alleged co-conspirators). The long memo was sent to the Committee by Ms Kabra (a witness, who was the Assistant Manager in the Project Department of IDBI's LCG) and Mr Sridhar, the General Manager of that Department, and an alleged co-conspirator, and prepared and signed by them (paragraphs 138 and 139). The SDJ analysed those documents and made findings about the representations made in each of those three documents in paragraphs 125-128, 129-137 and 138-176, respectively.

94. We will refer to only seven of the nineteen representations which were apparent from the Appendix sent to the EC and which were listed in paragraph 137 of the judgment.

i) KFA was confident of meeting the short-term challenges and taking advantage of the growth potential in the long term (b.).

ii) The security offered included an unconditional and irrevocable personal guarantee from the Appellant (e.).

iii) KFA would bring in funds to meet a shortfall in its projected net profits (j.).

iv) An undertaking would be obtained from KFA that they would invest 200 Crores each year from 2009 to 2011 (i.).

v) KFA would undertake to raise 800 Crores by way of a rights issue before March 2010 (l.).

vi) KFA would undertake to raise 1880 Crores by way of equity in FY2011 and 2012 (l.).

vii) "The net profits were a PAT [that is, profit after tax] loss of 1519 FY2009, a projected PAT loss of 174 in FY2010 then profit after tax of 257 in 2011 climbing to 1331 in 2014" (m.).

95. The long 46-page memorandum was dated 19 November 2009. It went to the Credit Committee for their meeting on 23 November. It was then sent to the EC. Ms Kabra's evidence was that, departing from the normal procedure, instead of being prepared in draft by the junior officer, and corrected by the General Manager, it was prepared by Mr Sridhar himself, it was said "because he had the papers". The Risk Department gave KFA a credit rating of BB. This did not comply with IDBI's policy of not lending to new clients unless their credit rating was BBB.

96. We should also refer to ten of the representations listed in paragraph 176 of the judgment which were apparent from the 46-page memorandum sent to the EC. As is clear from paragraph 93 of the judgment, different representations could be inferred from the Appendix and from that memorandum.

i) The audited loss for 6 months to 30.09.2008 was a PAT loss of 910 Crores. The projection to 30.09.2009 was a PAT loss of 283 Crores but the actual loss was 991 Crores for 6 months, although the projected loss for the full year was only 174 Crores (k.)

ii) One reason for the loss in H1 of FY2010 was that 20 aircraft suffered engine failure, leading to a loss of capacity (l.).

iii) KFA was expecting better results in Q3 and Q4 (m.)

iv) KFA would raise 800 Crores by a rights issue, and was planning to bring in a further 1880 Crores (x.)

v) KFA would raise 800 Crores in additional equity in a rights issue in FY2010 to make up for the shortfall in H1FY2010, and planned to raise $400m through a strategic investor in FY2011 and 2012 (y.).

vi) There was a plan to raise over 3000 Crores in equity funds which made the UB Group confident of meeting short-term challenges and taking advantage of growth potential in the long term (z.).

vii) The financial projections were a PAT loss of 174 Crores for FY2010 and a PAT loss of 257 Crores for FY2011. KFA was hopeful of earning profits from FY2011 onwards (ee.).

viii) There had been a further shortfall of 550 Crores in FY2009 which was not covered in the SBI figures (gg.).

ix) There was a further shortfall in H1 2010, but KFA was expecting to close Q3 and Q4 without further loss. To meet this shortfall, KFA was planning to raise 800 Crores of additional equity (hh.).

x) There was a condition that KFA would raise funds to meet any shortfall in projected profit because there were questions about KFA's ability to service the debts (jj.).

97. Under the heading "Representations made in the loan requests/applications", the SDJ then considered two topics: the brand valuation, and "other representations" (judgment, paragraphs 177-185 and 186-193).

98. She observed (paragraphs 184 and 185) that the lowest brand valuation was 1911 Crores, the next highest was 2349 Crores, and the Grant Thornton valuation was 3406 Crores. The letter of 1 October 2009 only mentioned the highest figure, but said there were two valuations. It implied, when "the truth was very different", that both came to around 3400 Crores.

99. In paragraphs 186-193 the SDJ described "Other representations made". KFA gave a negative lien over some aircraft as a further security. This was worthless, as the aircraft were subject to onerous hire purchase agreements, such that if KFA defaulted on the loans, the aircraft would still be subject to the hire purchase agreements. IDBI had asked for the terms of the hire purchase agreements, but they had not been provided. Had they been, it would have been clear that the terms of those agreements exceeded the term of the loan. As she put it, "The question is what was [KFA] doing offering this worthless security for the loan in the first place." By putting the lien forward as a security, KFA implied that it had value.

100. In paragraph 187 the SDJ questioned the sudden, large, increase, in a mere seven weeks, in the amount of equity "infusion" which KFA said it would acquire ($400m for the first loan application, to 1880 Crores for the application for the 750-Crore loan). It was an easy representation to make. In paragraph 188 she described evidence suggesting that borrowed money was not going into the business, as promised, but passing around from account to account ("a round robin").

101. In paragraphs 189-190, she described the provision by the Appellant of a personal guarantee in respect of the loan of 150 Crores. A first version of the guarantee dated 4 November 2009 was rejected for legal reasons. Attached to it was a list of his assets and liabilities as at 9 April 2009 (valued at 1395.04 Crores). A list of assets was not attached to the second version of the guarantee, dated 2 December 2009. The Respondent's case was that only a week after the asset list was sent to IDBI, SBI were told that the Appellant's assets were only worth 248.94 Crores. There might be an innocent explanation for this, but none had been given.

102. In paragraphs 191-193 the SDJ made some observations about a corporate guarantee offered by UB. UB's exposure at that time was either three, or 15 times, its net worth. UB never paid out on this guarantee.

103. The SDJ then considered, in paragraphs 194-204, "what the loans were supposed to be used for". The SDJ said in paragraph 195 that she had approached this issue "by looking at what representations were being made by KFA to the Bank". They were set out in the correspondence with the Bank which she had summarised and could be inferred from the memoranda provided to IDBI's EC. The dispute between the parties was whether KFA was entitled to spend the money lent to it as it wished, or whether it was required to use the money for specific purposes only. The overall impression was

that KFA needed the money to pay pressing creditors, and KFA represented that the money would be used to pay trade creditors, and not to banks. She concluded (paragraphs 205-206) that IDBI had stipulated that the loans should be used to pay specific pressing creditors and not to pay other creditors. She accepted Mr Rex's evidence was that the original creditor list would have been paid off by October/November 2009. She interpreted the documents as requiring KFA to pay off companies providing the services listed in the table of pressing creditors amounting to 2000 Crores listed in the SBI appraisal note. They should not have been used to pay other creditors.

104. The next heading in the judgment is "What were the loans in fact used for?". The Respondent's case was that the money was used for paying IDBI's fees, paying the lease on a private jet provided by KFA to the Appellant and clearing various bills including bank charges. The SDJ's focus was the second and third loans (paragraph 211). The SDJ analysed the evidence (paragraphs 207-238) and expressed her conclusions in paragraphs 239-242. She rejected the evidence of the Appellant's expert that the loans could be used generally. An account was opened specifically to receive the loans paid by IDBI and it was therefore possible to see what the money had been spent on. She decided that there was a *prima facie* case that the money was misused.

105. In paragraphs 243-253, the SDJ summarised her findings about whether "misrepresentations were made to" IDBI. She concluded (paragraph 253) that there was "a *prima facie* case of making false representations to make a gain for himself or a loss to another". Reviewing all the different sources of representations made in the documents before the court, the SDJ found that there were eleven key misrepresentations.

a) On the face of it, Mr Raghunathan misrepresented the state of KFA on 1 October 2009. He implied that KFA was in a similar position to other aviation companies, and like them, would emerge profitable in the long term. From the email correspondence in September 2009, KFA was not expecting to emerge profitable in the mid-term. This reflects the second allegation made by the Respondent and listed by the DJ in paragraph 22 of the judgment.

b) Mr Raghunathan misrepresented the loss in FY2009 as 1600, rather than the actual loss of 2155 Crores.

c) The SDJ found that when KFA told IDBI that Q3 and Q4 would close without further loss, they did not honestly believe that. This reflects the second allegation made by the Respondent and listed by the SDJ in paragraph 22 of the judgment.

d) The representation that 200 Crores would be infused in FY2009, 2010 and 2011 was questionable. There was evidence of money moving from one KFA account to another.

e) Two international valuers had valued the brand at 3400 Crores, when in fact the values were very different. Only the highest valuation was sent

to IDBI on 1 October 2009. This reflects the third allegation made by the Respondent and listed by the SDJ in paragraph 22 of the judgment.

f) The memorandum dated 7 October 2009 to the Credit Committee gives the impression that KFA's performance is improving. "That is simply untrue if the forecast for FY2010 is compared with the actuals for Q1, and by 7 October, Q2". It was a misrepresentation to rely on projections of a loss of 1609 Crores being reduced to a loss of 174 Crores in FY2010 when it is known that the loss for H1 FY2010 is many times greater than the projected loss for the year. This reflects the second allegation made by the Respondent and listed by the SDJ in paragraph 22 of the judgment.

g) There was a "possible" misrepresentation about load factors.

h) It was a misrepresentation to say that KFA was confident of meeting the short-term challenges and taking advantage of the growth potential in the long term. Judging by the emails of September 2009, KFA was not confident at all. This reflects the second allegation made by the Respondent and listed by the SDJ in paragraph 22 of the judgment.

i) A misrepresentation about the Appellant's net worth was made to SBI or to IDBI. This reflects the third allegation made by the Respondent and listed by the SDJ in paragraph 22 of the judgment.

j) There was a possible misrepresentation in the explanation for the H1 FY2010 loss, which was many times greater than the projected FY2010 loss. There was reference to aircraft suffering engine failure but the SDJ did not consider that the half year loss was caused by the grounded aircraft. It was not a significant point when considering whether there was a *prima facie* case against the Appellant.

k) There was a misrepresentation about what the loans would be used for. The SDJ did not accept that when KFA applied for the loans it was intending to use the money just for the services referred to in the appraisal note. Given its desperate financial situation, it was going to use the money in any way it wanted to, whatever the terms of the loans. "Mention of "round robins" in the documentation show what KFA was capable of doing".

106. We have summarised the SDJ's judgment about misrepresentation at some length, but we have not done full justice to the careful and methodical way she marshalled and analysed the evidence.

The submissions
General submissions on misrepresentation

107. Ms Montgomery submitted that the conspiracy case and the case based on false representations were mutually exclusive. She also submitted that the misrepresentation case only worked if it was possible to say that the Appellant personally had made all the misrepresentations.

108. A general theme of Ms Montgomery's submissions was that the Respondent and the SDJ had failed to identify specific representations and that this failure made the decision that there was a *prima facie* case of false representation unsafe.

109. Ms Montgomery submitted that the most obvious error made by the SDJ was that she repeatedly said that KFA represented to the Bank that the loss for year ending March 2009 was 1609 Crores when they knew that it was 2155 Crores. The paragraphs in which this error is made are listed in paragraph 149 of the Appellant's skeleton argument. The difference between the two figures was that the first was post-tax and the second was pre-tax. So both figures were right, and both were provided to the Bank in the Appendix to the Report and Accounts which was provided to the Bank at the first stage. Ms Montgomery took us through the relevant documents. She submitted that this point was obvious from the documents, and that the SDJ made this mistake showed that she had not looked at all the evidence. She had taken into account the letter and not its annexes.

110. Ms Montgomery put great emphasis on the passage in paragraph 93 of the judgment in which the SDJ said that the 1 October letter contained a misrepresentation because it said that the loss for the previous year was "around 1600 Crores" whereas on 3 September Mr Raghunathan told the Appellant that the projected loss was around 1594 Crores, but the actuals revealed a loss of 2155 Crores. Paragraph 3 of the letter of 1 October does not make clear whether the 1600 figure is pre-, or post-tax, but it is clear that IDBI understood the 1600 figure to be a net figure: see, for example, the table on page 115 of bundle A, and the second bullet on page 110 of bundle A. Moreover, that is acknowledged in paragraph 115 of the judgment.

111. Mr Summers told us that the position about those two figures was, in fact, more nuanced than that. The lower figure resulted from the application (by KFA) of a large deferred tax credit to the loss for 2009, which was not replicated in the audited accounts (which were available in about November 2009). The audited figure for the loss in the financial year ending 2009 was 2168 Crores. This was very close to the gross figure of loss contrasted by the SDJ with the net. He accepted that the SDJ made a mistake about the figures to March 2009. But the error was not material. Even setting aside that part of the SDJ's reasoning, there was still a *prima facie* case.

112. In reply, Ms Montgomery submitted that it was clear from the profit and loss account in the auditor's report (dated 28 July 2009), annexed to the Annual Report and Accounts for the year ending 31 March 2009, that the auditors had recorded a pre-tax and a post-tax loss which was consistent with KFA's position.

113. Ms Montgomery's next submission was that the SDJ was wrong to criticise KFA for withholding its H1 FY2010 results in October 2009 when she had found in paragraph 105 that the H1 results were not available in early October 2009. In the perfected grounds of appeal the point is put differently; it is that the SDJ appeared to imply, without specifically finding, that KFA did not disclose the full extent of its losses in H1 FY2010. We will refer to this as "the H1 FY2010 submission".

114. Ms Montgomery then criticised the SDJ for giving emphasis to the lack of any reference in the September emails to engine failure as a cause of KFA's losses (see paragraphs 94 and 147-148 of the judgment). She also criticised the finding that KFA only "later" mentioned aircraft failure as a cause of its losses, when they were

mentioned when the Q2 results were published on the Bombay Stock Exchange on 27 October 2009.

115. Next, Ms Montgomery criticised the SDJ for rejecting the evidence of Mr Rex about the significance of passages in two emails sent on 3 September. One said that the accumulated losses of at least 3250 Crores would not be recouped in five years. The other said that it "may" take ten years if the underwriters insisted on adding to the accumulated losses "in excess of 3500 Crores" which KFA would have by the end of the year by reversing the deferred tax impact (2200 Crores) and the maintenance reserve (900 Crores), and that "the most recent trajectory of the business shows a downward trend…[which] will add to the concerns". Mr Rex's evidence was that this meant that it could take KFA ten years to reverse the negative balances in KFA's reserves, and it did not mean that KFA's losses would continue over that period. This is said to show that the SDJ misunderstood the difference between a balance sheet and a profit and loss account.

116. Ms Montgomery made six criticisms of the SDJ's approach to the application for the loan of 150 Crores.

    a) There is a suggestion that KFA did not provide the Q1 figures to IDBI. They had been published on the Bombay Stock Exchange on 5 August 2009 and a limited review had been published on 18 September 2009.

    b) The SDJ relied on un-noted meetings between the Chairman of IDBI and the Appellant when none of the witnesses present at the meetings gave evidence that the Appellant had made any misrepresentations at them.

    c) She wrongly compared pre- with post-tax losses (see paragraph 110, above).

    d) She wrongly relied on IDBI's memorandum to its credit committee as the basis for an inference that KFA had told IDBI that its performance was improving.

    e) She wrongly found that KFA's reference to an expected increase in load factor was untrue.

    f) No specific false representation can be identified.

117. There are three general criticisms of the SDJ's approach to the third loan. Two are points made in relation to the loan of 150 Crores. The third is that she was wrong to say that the statement that discussions were going on about compensation with the engine manufacturers which were not reflected in the Business Plan or financials must have come from KFA and must have been known to be false.

118. Ms Montgomery also criticised the approach of the SDJ to the brand valuation, the negative lien over 12 aircraft, to the H1 losses and equity infusions by the Appellant, to the personal and corporate guarantees, and to the use to which the loan money was put.

Discussion
Introduction

119. Before we consider Ms Montgomery's specific submissions, we make two general points about the approach of the SDJ to this part of the case.

120. First, we have already held that she did not misdirect herself in law in her approach to finding a *prima facie* case. But this is not merely a point bearing on that paragraph of Ground 1: it carries over into her approach to the evidence, which was if anything more exacting than was required. In the judgment, she made many positive findings. By asking herself whether she could make positive findings, we consider that, in practice, she imposed a more demanding test on the Respondent than she was required to. In effect, she put herself in the position of the fact-finder, rather than merely asking whether there was a case to answer. We consider that her positive findings easily equate to a decision that a properly instructed jury could find that there was a case to answer. In some instances, she did not feel able to make a positive finding (see, for example, her reference to "a possible misrepresentation" in paragraph 252). We consider that in such cases the SDJ must be taken also to have found that a properly instructed fact-finder could, but would not be obliged to, find that the Appellant had made (for example) a misrepresentation. As Mr Summers reminded us in paragraphs 6-9 and 12-14 of his skeleton argument, the evidential threshold for a *prima facie* case is low, and, it follows, the threshold for interference with a conclusion of a District Judge that the threshold has been met is commensurately high. It also follows that it is not enough for Ms Montgomery to cast doubt on some of the SDJ's findings, or for her to submit that the evidence should be interpreted in a different way from the way in which it was interpreted. It also follows that the question for us is not whether there might be material on which the Appellant might be acquitted after a trial (he having given no evidence at the extradition hearing).

121. Second, Ms Montgomery submitted that the SDJ did not make any findings about specific misrepresentations. It will be already clear that we consider that she did so, in paragraphs 243-253 of the judgment.

Are the conspiracy and misrepresentation cases mutually exclusive?

122. We do not consider that the conspiracy and misrepresentation cases are mutually exclusive. That argument would only work, as a matter of logic, if the alleged conspirators in IDBI were the same officers as the officers who were the guiding mind of IDBI for the purposes of the decisions to authorise the loans. But they were not all the same people.

Was a finding that the Appellant personally authorised the misrepresentations necessary?

123. Nor do we consider that it was necessary to show, for the purposes of a *prima facie* case, that there should be direct evidence that the Appellant personally had authorised the misrepresentations. As Mr Summers points out, the GoI's case was that the fraudulent misrepresentations were a joint enterprise. In any event, this submission is, in our judgment, an artificial submission in the context of this case. The Appellant was clearly, on the evidence before the SDJ, very much in control of KFA. We refer to paragraph 99 of the judgment which shows the close interest of the Appellant in

getting the loan of 950 Crores, and to the September emails, and to paragraph 94, in which the SDJ found that the Appellant got Mr Raghunathan to send the letter of 1 October 2009. It seems to us that there was material from which a properly instructed jury could draw a secure inference that the Appellant was knowingly behind all the steps that led to the applications for the loans being made in the forms in which they were.

Was the SDJ wrong about the figures of 1600 and 2155 Crores?

124. We have touched briefly on this topic above. We cannot accept without qualification that the SDJ was wrong, in paragraph 93 of the judgment, to conclude that the difference between the 1600 odd Crores and the 2155 Crores was a misrepresentation, because the first was a post-tax, and the second, a pre-tax figure. We do accept that this finding influenced the SDJ in her conclusion that misrepresentations were made to IDBI (see paragraph 244). The post-tax/pre-tax distinction, however, is not the whole story.

125. First, the September emails which the SDJ analysed clearly reveal an anxiety that the post-tax figure might not survive the scrutiny of the underwriters.

126. Ms Montgomery is right that the auditors did not remove the post-tax loss from the audited accounts for the year ending 31 March 2009. But, second, in our judgment, the position is not as clear-cut as that might suggest.

127. In paragraph 13(a) of their Report on the accounts for the year ending 31 March 2009, the auditors drew the attention of members to note 19 of Schedule 19. That note considers the recognition of a deferred tax credit aggregating to just short of 600 Crores for the year ending March 2008 and just short of 560 Crores for the following year. In paragraph 13(a) they said, "In view of explanation 1 to clause 17 of Accounting Standard 22, we cannot express any independent opinion in the matter". Note 19 is headed "Deferred taxes". It says, "Deferred tax asset on unabsorbed depreciation and business losses has been recognized on the basis of the business plan prepared by the management, which takes into account certain future receivables arising out of contractual obligations. The management is of the opinion that there is virtual certainty supported by convincing evidence that sufficient future taxable income will be available against which the deferred tax asset can be realized".

128. In other words, the auditors recognised the deferred tax credit in the profit and loss account, but also drew members' attention to the fact that they could not express any independent opinion about the justification for that recognition, since it depended on the "virtual certainty" expressed by management "supported by convincing evidence that sufficient future taxable income will be available against which the deferred tax asset can be realized". In other words, it depended on KFA's assertions to its auditors that it would generate taxable profits in the future.

129. Third, we consider that Mr Summers' submission, that it was no accident that the application of the deferred tax credit reduced the loss from 2155 to 1600 Crores, ie close to what had been projected in January 2009, means that it would be open to reasonable jury to infer that the figures were being manipulated to further a fraudulent misrepresentation about KFA's financial soundness.

130. As an aside, we mention at this point that the auditors' reasoning about whether or not KFA should be valued as a going concern was similarly qualified. In paragraph 9 of the Report, drawing attention to note 30 to the accounts (which explained why they had valued the business as a going concern), they stated that they had valued it as such "notwithstanding the fact that its net worth is completely eroded". Note 30 explained that KFA had incurred "substantial losses and its net worth is eroded." Nevertheless, having regard to the Scheme (that is, the Scheme of Arrangement referred to in note 2 to the accounts) and "the synergies expected therefrom", recently launched international operations, loans granted after 31 March 2009, further loans which were being negotiated, group support, and capital raising plans, the business had been valued as a going concern.

131. One question for us is whether, if we assume that the SDJ was wrong to describe the difference between 1600 odd and 2155 Crores as evidence of a misrepresentation, she was wrong, on the basis of the other material in the judgment, to consider that there was a *prima facie* case of false misrepresentation against the Appellant. We do not consider that this error by the SDJ (which despite being an error, proved uncannily close to the truth as matters turned out) would make her decision on misrepresentation wrong, if there were other grounds on which that decision can be upheld. We will now consider whether there are, which will require us to consider Ms Montgomery's other submissions.

The HI FY2010 submission

132. We do not consider, on a fair reading of the judgment, that the H1 FY2010 submission is well founded. What KFA did know in October 2009 (see the September emails) were the Q1 results for FY2010. The losses were 300 Crores, against a projected net loss for the whole year of 174 Crores. We consider that, on fair reading of the judgment as a whole, the reference in the last line of paragraph 112 to "a larger than expected first half loss" must be a slip for "first quarter". Moreover, as the perfected grounds of appeal recognise, there is no express finding that this was a misrepresentation: it is not mentioned in paragraphs 243-253.

Engine failure

133. In paragraph 94, the SDJ observed, correctly, that the September emails do not refer to engine failure as a cause of KFA's financial difficulties. In paragraph 148, she compared those emails with what was said, later, about engine failures being the cause of the reduction in seats and passengers in H2 FY2010. She reminded herself that the September emails were "admittedly very few". She said, in paragraph 149, that Mr Raghunathan did not mention engine failure in his note of 1 October 2009 to Mr Batra of IDBI, though he did mention other issues besetting KFA.

134. When the SDJ referred to the absence of any reference to engine failure in the September emails and the 1 October 2009 note, we do not consider that she did, or intended to, describe a misrepresentation in September or October 2009. As she also noted, in paragraph 154, there was no such reference in Mr Raghunathan's letters of 1 October and 7 October 2009 "when no unprojected loss had to be explained". What she intended, rather, was to describe a representation which was made to IDBI "later", because it was mentioned in the long memorandum (paragraph 176.l.). It is also

important to bear in mind that the SDJ considered the material relating to engine failures at some length in paragraphs 151-154.

135. She listed the misrepresentations which she found were made to IDBI in paragraphs 243-253. In paragraph 252, she said that "a possible misrepresentation" was the explanation for the H12010 loss, which was many times more than the projected FY2010 loss. She accepted that there was evidence that there were planes which suffered engine failure. She referred to the claim against International Aero Engines, but she did not "consider that the half-year loss was due to the grounded aircraft". She then said, "This is not a significant point when looking at whether there is a prima facie case against [the Appellant]". What was clear was that IDBI were given a positive picture. She also noted, in paragraph 324, that International Aero Engines never paid any compensation to KFA, but, instead, were paid money owed.

136. We consider that it was open to the SDJ to draw attention to the fact that the earlier documents do not mention engine failure. The documents she referred to in this context were in September and early October. The references to engine failure as a cause of the relevant losses, whether in November (when the application for the 750 loan was made and considered) or on 27 October 2009 (when the results were published), were both "later" than the earlier documents. The point is that this explanation was first advanced once the results were publicly known, and not before. When the SDJ used the phrase "possible misrepresentation", we consider that this is the same as saying that this was material from which a fact-finder could, but would not be obliged to, find that there was misrepresentation. We do not consider that that approach was wrong. Nor was she wrong to say that this was not a significant point. It follows, in any event, from that statement that she did not give this "possible misrepresentation" great weight.

Did the SDJ err in rejecting Mr Rex's evidence in paragraph 96 of the judgment?

137. We consider that there is some force in Ms Montgomery's criticism of paragraph 96 of the judgment. Mr Rex may have been correct to say that these passages in the 3 September emails discuss not the time it would take for KFA to make operating profits, but the time it would take KFA, from any operating profits, to clear the negative balances in its distributable reserves, and thus be in a position to start paying dividends again.

138. But we do not consider that this greatly helps the Appellant. One email was saying that the (smaller figure of) accumulated losses would not be recouped in five years, and the other, that if the losses were even greater, they might be recouped in ten years, but that the recent downward trend in the business might threaten that. Both emails were sent by Mr Nedungadi. The email referring to the five-year period was sent to the Appellant. Even if this is an error by the SDJ, it does not undermine any of the misrepresentations which she listed in paragraphs 243-253 of the judgment. Most significantly, even if paragraph 96 is wrong, that casts no doubt on the key finding that KFA were not expecting to become profitable in the mid-term (judgment, paragraph 243).

The loan of 150 Crores

139. It is not an answer to a finding that the Q1 results were not given to IDBI to assert that they were published on the Bombay Stock Exchange. Contributory negligence is not a defence to a charge of making false representations in order to make a gain for oneself. We could see no evidence in the documents that the Q1 results were communicated to IDBI. The finding in paragraph 105 that the Q1 financials were not provided to IDBI is not, therefore, undermined by this argument. We were referred by Ms Montgomery to a Powerpoint presentation which was given to IDBI (CF2, tab 24, pages 203-204). The most relevant section of text, on page 202, headed "KFA performance in the Domestic Operating Environment' reads, "KFA showed a positive EBITDAR at domestic level for quarter ending June 2009 whilst Q2 FY10 will reflect a seasonality cycle". The figures, however, were not provided on either page 203 or 204, as far as we can see. Her submission was that the reference here to the Q1 results suggests that the figures must have been given to IDBI. This passage provides no support for that submission.

140. The SDJ referred to un-noted meetings between Mr Agarwal and the Appellant in the run-up to the loan application in paragraph 74, and in paragraph 110 to discussions between KFA and Mr Raghunathan referred to in the letter of 7 October 2009. Both references are factually correct. The complaint is that the Respondent's witnesses gave evidence of what was discussed and do not refer to fraud. We consider (and reject) this submission in paragraph 174, below, in the section of this judgment dealing with the conspiracy case.

141. We consider that it was open to the SDJ to draw an inference from IDBI's memorandum to its credit committee that KFA had told IDBI that its performance was improving. We also consider that, even if, as the Appellant submits, there was some improvement in KFA's year-on-year results, the SDJ was entitled to find that there was a mis-match between what KFA knew and what it was telling IDBI.

142. Ms Montgomery relies on statistics from the Ministry of Civil Aviation to show that, between September and December 2009, "the expected increase" in load factors in fact occurred. The international statistics for 2009 show a level fluctuating between 55.5 and 75.8, and an average of 66.6. The domestic figures fluctuate between 64.2 and 80.2, with an average of 70.6. Both improve after September but dip again in December. The point is that, in the September email, Mr Nedungadi was not expressing optimism about an "expected increase" in load factors, but dismay about a drop in August from 70+ to "a mere 62%". In any event, the SDJ made it clear in her conclusions about misrepresentation in paragraph 249 that she was "ignoring" the possible misrepresentation about KFA expecting its load factors to increase.

The third loan

143. We consider that it was open to the SDJ to express the scepticism which she did, for the reasons which she gave, about the extent to which KFA thought it would be compensated by the aircraft manufacturers. We note her finding in paragraph 324 that, in the event, KFA received no compensation. We do not accept the submission that the statement in question is a record of what IDBI's auditors found. The relevant passage is under the heading "YTD Performance". In context, it is a narrative account which, it was open to the SDJ to infer, had come from KFA. The "Auditors' observation if any" on the preceding page, listed in eight bullets, are not observations by IDBI's auditors. That text is clearly a summary of KFA's auditors' observations on

KFA's accounts (see, for example, the reference to the recognition of deferred tax of 1670 Crores and to the auditors' inability to express an independent opinion on it).

144. Nor do we consider that she was wrong to make the findings which she did about the brand valuation. The simple point is that KFA suggested to IDBI that the brand had been independently valued by more than one valuer and that it was worth 3400 Crores. The SDJ was entitled to infer as, succinctly, she did (judgment, paragraph 185) that that statement was a misrepresentation, and that it was known to be untrue, for two reasons. First, it was significantly out of date (and based, as Mr Summers pointed out, not on figures from the January 2009 business plan, which had been given to the consortium of banks, but on April 2008 figures, that is, figures before the financial crash), and second, it was the highest of the valuations, and did not give a true view of the range of valuations which KFA had in fact been given. Whether or not IDBI relied on the inflated valuation is irrelevant.

145. The misrepresentations found in paragraphs 243-253 do not include a representation about the value of the negative lien over the 12 aircraft. So the SDJ found that the relevant representation was, in effect, part of the background, and not one of her key findings. In paragraph 186, the SDJ recorded that IDBI had asked for the details of the HP agreements but KFA did not provide them. If IDBI had checked, they would have found that the length of the HP agreements exceeded the term of the loan, so that if KFA defaulted on the loan, the aircraft would not be available to IDBI. She said that the question was what KFA were doing offering a worthless security in the first place.

146. Ms Montgomery suggested that IDBI knew the lengths of the operating leases of the 12 aircraft, not because KFA told IDBI anything about that, but because note 17 in Schedule 19 to KFA's annual accounts for FY 2009 says "Lease periods range up to 12 years and are normally non-cancellable". This is a bad point, for two reasons. First, there is no document in which KFA informed IDBI about this. Second, the note on which Ms Montgomery relies does not reveal (as turned out to be the case) that the terms of 11 out of the 12 leases were longer than the term of the loan. On the contrary, we consider the implication of the wording is that the majority of the leases are for less than 12 years. We consider that, even though the SDJ did not regard this as a key misrepresentation, she was entitled to find that a reasonable jury, properly instructed, could be sure that it was.

147. The next submission concerns paragraphs 187-188 of the judgment. Paragraph 187 draws a contrast between what KFA said about equity infusions in the first and third loan applications. In the first, KFA said it would raise $400m, whereas only seven weeks later they were representing that 1880 Crores would be infused. The SDJ did not err in noticing, or in questioning, this difference. The underlying point is that, given KFA's accumulated losses, it was to say the least unlikely that KFA really thought it would be able to attract investment on that scale, yet that is what the applications suggested.

148. In paragraph 188, the judgment refers to a different point: the induction of 200 Crores in 2009 and the promised further inductions of 200 Crores in 2010 and 2011. The SDJ recorded that the Respondent's point was that the money was going round and round between accounts ("a round robin"). She said that there was some evidence of that, and that Mr Rex accepted that it might have happened, but without knowing why the money was circulating it was difficult to say that it was dishonest. She added that

KFA was facing its problems by borrowing money from one bank and, contrary to the conditions of the loan, paying some to another. In paragraph 246, she listed this as one of the misrepresentations which were made to IDBI, repeating that it was questionable whether the infusions had been made as it had been represented that they would be, adding, "Mr Rex accepted that there was some evidence there was money going from one account to another, he said the detail would have to be looked at to uncover what had happened. [The Appellant] did not give evidence, so it was not possible to ask him about this".

149. The Appellant makes two points in writing. First, the "equity infusions" actually made by the Appellant exceeded the value of the lending, so statements about equity infusions are no basis for a case of dishonest and false representation. Second, it is wrong to elide equity infusions with the use to which the loan from IDBI was put. In our judgment, neither of these points affects, still less undermines, the findings in paragraph 187 of the judgment. There is force in the submission that the last sentence of paragraph 188 does not follow from the rest of paragraph 188. But that does not detract from the point being made in the preceding sentences, which is that, on the evidence, it was not clear that 200 Crores had been infused every year. If it had not been, this was evidence from which a jury might infer that there had been a misrepresentation.

150. The argument about the personal and corporate guarantees is based on paragraphs 189-193 of the judgment. In paragraph 189, it was noted that the Appellant signed a guarantee on 4 November 2009. Attached was a list of his assets and liabilities, showing a total of nearly 1400 Crores. That list was given to IDBI. IDBI rejected that guarantee on legal grounds. A new guarantee dated 2 December 2009 was given, without a list of assets. According to the Respondent's case, SBI was told, only a week after the list of assets was sent to IDBI, that the Appellant's net worth was just under 250 Crores. In paragraph 251, the SDJ summarised the position by saying that there was either a misrepresentation to SBI or to IDBI about the Appellant's net worth.

151. The complaint is that the SDJ "re-cast" the Respondent's case. It is said that the Appellant was able to show that the figure of 1400 Crores was not inflated, because it included the value of two holding companies, to which the Respondent wrongly attributed no value. There was no record of the Appellant having told SBI he was only worth less than 250 Crores. The reference in the papers was, in fact, to an assessment by IDBI, the provenance of which has not been shown, nor any evidence it originated from the Appellant. It runs contrary to the Respondent's case that the Appellant should have reduced his net worth, in any event.

152. The point here is a simple one. If we assume that Ms Montgomery is right, and that far from the Appellant having told SBI that he was worth about 250 Crores, IDBI's contemporaneous assessment was that he was worth that amount, then there was evidence to support the SDJ's finding that the Appellant misrepresented his worth; he was saying he was worth nearly 1400 Crores, whereas IDBI's assessment was that he was only worth about 250. That is capable of being a misrepresentation by him, even if it did not convince IDBI in the end.

153. The final point concerns the use to which the loan was to be put. There were extensive written and oral submissions about this point. In the end, we consider that the point is

a short one. It is clear from the documents we were shown that KFA gave IDBI the clear impression that the money was needed to enable KFA to pay its pressing trade creditors in order to be able to continue trading. Whether or not, as Ms Montgomery sought to persuade us, IDBI approved the payments out of the account into which the loan was paid, the reality is that some, at least, of the money was not used to pay pressing trade creditors, that the opacity of flows between accounts meant that there might well be "round robins", and that it would be open to a reasonable jury to be sure that it was all along the intention that KFA would use the loan money in any way it wanted to, whatever the terms of the loans (see paragraphs 239-241 of the judgment). Apart from the figures of 10.34 Crores and 54.86 Crores referred to in paragraphs 228 and 232 of the judgment, respectively, it is difficult to know how much money was used contrary to the terms on which it was lent, but on the basis of the evidence which the SDJ accepted, it was a significant amount of money.

154. Mr Summers submitted that the SDJ was wrong to have accepted, in paragraph 206, the evidence of Mr Rex that the creditors described in the SBI appraisal note must have been paid off by the time the loans were disbursed. There were no documents to support that, he said. The evidence of Mr Rex was based on the age of those debts alone, and they were already old at the date of the appraisal note. On 1 October 2009 KFA said in its loan application that it had deferred payment to creditors. He submitted that the purpose of the loan was to pay those who, IDBI understood, were unpaid creditors. Condition (u) made no sense otherwise; there was no auditor's certificate that they had been paid, and it was nonsense to say that condition (u) meant 'to pay like creditors'.

155. Condition (u) (bundle A, p 135) required KFA, by 31 March 2010, to submit a statutory auditor's certificate that the creditors described in the appraisal note had been paid. No such certificate was submitted. The end-user certificates referred to by the SDJ in paragraphs 219 and 220 of the judgment are not such a certificate. We consider, in those circumstances (and disagreeing in this respect with the SDJ), that it would be open to a reasonable jury to find that the creditors described in the appraisal note had not been paid off by the time the 750-Crore loan was advanced, and had not been paid by 31 March 2010. Condition (f) required KFA to undertake to use the loan "for the intended purpose"; that is, for paying pressing creditors (paragraph 3, bundle A, p 129) and not for "pre-payment of dues to banks or other institutions/associate concerns other than those permitted by IDBI, if any, or for extending loans to subsidiary companies or making any other inter-corporate deposits". We consider that, as a matter of the construction of conditions, there is force in the SDJ's conclusion that the conditions did not limit the uses to which the loan could be put simply to paying the creditors referred to in the appraisal note. The purpose of the loan was not just to pay those creditors, but also to pay "pressing creditors", including the creditors referred to in the appraisal note, if and to the extent that the creditors referred to in the appraisal note had not already been paid. In our judgment, it would be open to a reasonable jury to find, on the evidence, at least to some extent, that the loan had not been used for paying the creditors described in the appraisal note, or for paying pressing creditors; and that it had been used contrary to the undertaking imposed by condition (f).

Conclusion on misrepresentation

156. For those reasons, in our judgment, the SDJ was entitled to find that there was a prima facie case of fraud by false representation.

Ground 1, paragraph 4: was there a prima facie case of conspiracy to defraud?
The SDJ's approach

157. In paragraph 254, the SDJ said that the question was whether there was prima facie evidence that some executives of IDBI were complicit in the fraud alleged against the Appellant and his colleagues: "Were Mr Agarwal and other top executives at IDBI, for example, having meetings and corresponding and in some way working out a corrupt agreement with [the Appellant] and his colleagues Mr Raghunathan and Mr Nedungadi or did the bank executives believe that the UB Group had the commitment to KFA that it would step in if KFA had trouble re-paying the loans?". She asked whether the bank executives were taken in by the Appellant's flashy appearance so that they thought that "this very rich man would step in and not allow KFA to fail".

158. She recorded the Appellant's argument (judgment, paragraph 255) that this allegation was "intrinsically problematic". There was no evidence that Mr Agarwal gained anything. The loans were part of lending by a consortium. It was not alleged that the other banks were dishonest. The contention that IDBI's executives lent the money intending that it should never be repaid was "genuinely extraordinary". The allegation relied heavily on witnesses' statements that were identical. The Appellant had "various strong arguments". No reasonable jury could conclude that such a conspiracy was proved. In particular, there was no evidence of any personal gain. "This has been the question which has troubled me from the beginning" (judgment, paragraph 259). She said that there was no doubt that there had been "a catalogue of failures of the bank at different levels", before, and after, the loans were sanctioned. On the other hand, there was "not a great deal of evidence from which I could draw inferences that various bank executives were involved in a fraud to defraud their own bank and that when they sanctioned the loans they intended KFA not to repay the loans…"

159. The SDJ summarised the arguments the other way (judgment, paragraphs 260-262). The bankers' bending of the rules was inexplicable. There were secret unrecorded meetings. Inferences could be drawn from those. The loans were obtained by knowing misstatements of profitability and of the value of the securities KFA was to provide. The loans were then misused. The Appellant's conduct after the default supported the inference that he had never intended to re-pay the loans. The loans were granted in the knowledge that IDBI's criteria for lending were not met. The misconduct by public officers of a state-owned bank was "so stark and so divergent from their public duties" that it supported the inference that at least some of the bankers knew what the Appellant was up to and helped him (judgment, paragraph 262). The SDJ acknowledged that there was no direct evidence (judgment, paragraph 263).

160. She summarised the conclusions of the audit report by the Reserve Bank of India ("RBI"), produced by RBI's inspection team, headed by Mrs Sinha (whose section 161 statement was in the papers) (judgment, paragraphs 265-269). IDBI was inspected between October 2010 and January 2011, in the exercise of RBI's statutory powers. RBI was concerned with IDBI's position as at 31 March 2010. The inspection led to the audit report. That report was critical of the appraisal and supervision of the KFA account.

161. The SDJ summarised the evidence of Mr Kashyap in paragraphs 270-274. He was from IDBI's Internal Audit and Regulatory Compliance Department ("IARCD"). He did an operational audit of the LCG in Mumbai in January 2010. He "sounded some alarm bells". His work was put before the Audit Committee who asked the LCG to monitor the KFA account because of the "large exposure coupled with low credit rating". The SDJ said it was relevant that though alarm bells were rung, that led to nothing other than the monitoring of the account. The IARCD did a 'second quick review" leading to a report dated 17 June 2010. No risk rating was available when the 150-Crore loan was sanctioned. The Risk Department then rated KFA and gave it BB (2.47 out of 6). The Risk Department said it did not comply with the norm for new clients (BBB). KFA's financial position was unsatisfactory. Bankers' reports had been asked for but not received. Mr Kashyap commented on the security offered. Two securities had still not been executed as at 16 June 2010. Indeed, some were still pending in June 2016. The loan was disbursed without the creation of a security and without compliance with pre-disbursement conditions. From his examination of the documents, this had been allowed by Mr Ananthakrishnan (head of the LCG) and Mr Batra (one of the alleged co-conspirators).

162. The SDJ summarised the evidence of Ms Kabra and Mr Gupta in paragraphs 275-285. She was an assistant manager in the LCG in late 2009, appraising loans of 100 Crores or more. Mr Gupta was General Manager of the Appraisal Department of the LCG. According to Ms Kabra, IDBI Guidelines made the rating of borrowers mandatory. There should be a "flash report" before considering a loan to a new borrower. This was not done. KFA's losses, its weak financials, negative net worth, and previous defaults meant that it should not have been recommended for a loan. Yet Mr Sridhar told her they had positively to recommend the loan because KFA had the strong support of the UB group and the Appellant, who were offering guarantees for securing the loans. She and Mr Gupta considered IDBI's Guidelines and set out in a table whether or not KFA met the rules. Any lending to a new client should have complied with those rules. KFA did not do so, in a number of respects (see paragraphs 278 and 279). In particular the timing of a sacrifice of 491 lakhs, after a meeting between Mr Batra and Mr Bundellu (both alleged co-conspirators) on 8 September 2009, was significant, enabling a "no dues" certificate to be issued in October 2009, just before the processing of the loan of 150 Crores.

163. The evidence was significant because it showed that KFA was being treated differently from other new clients (paragraph 279). The SDJ summarised Mr Gupta's evidence about the loan of 200 Crores in paragraphs 282-283. There was no risk rating. The proposal went from Mr Sridhar to Mr Batra. It was said that the rating report was awaited. Mr Batra wrote on the proposal, "It needs to be expedited". The proposal then went from Mr Batra to Mr Agarwal (all three being alleged co-conspirators). When the loan was sanctioned on 4 November 2009, there was still no risk rating and there were no credit reports from existing bankers. There had still been no credit report when the loan of 750 Crores was being considered. The rating of the loan of 150 Crores was only done on 7 November 2009. The Rating Department gave KFA a BB rating and a score of 2.47.

164. In paragraphs 286-291 the SDJ considered the evidence about contact between executives of IDBI and of KFA. It was clear from emails between the Appellant and Mr Agarwal that the 150-Crore loan was outside the consortium because the

Appellant had spoken to Mr Agarwal, despite Mr Sridhar emailing Mr Raghunathan saying that that loan should be part of the overall corporate loan. The 2009 diary, in which any meetings between the Appellant and Mr Agarwal would have been noted, had not been found as at 23 August 2016. This might or might not be a coincidence. There was no dispute that there had been such meetings. The SDJ summarised the evidence of Mr Colaco about the Appellant's visits to IDBI in paragraph 288. A letter dated 1 October 2009 from Mr Raghunathan to Mr Batra referred to a meeting between them before the loan request was submitted.

165. When approving the loan of 200 Crores, Mr Agarwal said that the proposal for the loan of 750 Crores "may be put up". After that, Mr Sridhar told Ms Kabra that "we have to process and recommend the proposal to sanction the Corporate Loan of 750 Crores…before the next CC/EC meeting positively". They had to stay late to prepare it. KFA managers would come and discuss it with them. According to Mr Gupta, the Guidelines required credit reports from existing bankers for new proposals. Credit reports are not mentioned in the proposals for the 7 October or 4 November 2009 loans. The memorandum for the 750-Crore loan said that credit reports had been asked for and were awaited.

166. In paragraphs 292-338, the SDJ reviewed in great detail the evidence showing that IDBI treated KFA differently from other new customers. That review shows, in sum, examples of IDBI yielding to pressure from the Appellant (about the pledge of KFA's unencumbered shares and about whether the loan of 150 Crores should be recovered from the corporate loan), failing to act in its own financial interests (in relation to the IATA and credit card receivables), doing what it should not have (failing to insist on compliance with pre-disbursement conditions and security conditions), and apparently crucial interventions by various co-conspirators.

167. The SDJ's conclusions are in paragraphs 339-344 of the judgment. When she introduced her conclusions on conspiracy, she echoed the doubt she had expressed in paragraph 259, saying that this was the most difficult decision in the case (judgment paragraph 339). In paragraph 340, she put the question she had posed in paragraph 254 in a somewhat different way: "It is either a case that the various continuing failures were by design and with a motive (possibly financial) which is not clear from the evidence…or it is a case of a bank who were in the thrall of this [flashy] ostensibly billionaire playboy who charmed and cajoled these bankers into losing their common sense and persuading them to put their own rules and regulations to one side".

168. The SDJ described some of IDBI's failings in paragraph 341. These included failing to ensure guarantees were formally taken up when they should have been and failing to investigate the representations made by KFA at various stages. For example, "With a bit of care, the worthless negative lien on the aircraft would have been exposed". There was a failure to obtain credit reports from other banks. Funds were disbursed when sanction terms and conditions had not been complied with. She referred to the correct test in paragraph 342. She applied that test and considered what inferences could properly be drawn from the evidence as a whole. She found that there was a case to answer on which a jury could properly convict. "The catalogue of failures… are so numerous and fundamental, not just prior to sanctioning the loans, but also after the loans had been granted" that a reasonable jury on one possible view of the evidence could decide that the alleged co-conspirators were involved in a conspiracy

to defraud (paragraph 343). If the criteria had been applied, and background checks done, the loans should not have been granted. If the post-sanction conditions had been applied, the loans would not have been misapplied in the way that they were. The evidence was not as strong as the evidence supporting the other allegations, but there was still a *prima facie* case.

Submissions

169. Ms Montgomery had two overarching submissions. The first was that the SDJ should not have found a *prima facie* case, given the burden and standard of proof, the law on inferences, her own ambivalence, and the obvious alternative explanation which was consistent with the Appellant's innocence. The second is that the Respondent's case on conspiracy was "outlandish" and ought to have been rejected. It was also described as "extraordinary".

170. The problems with the Respondent's case are said to have been summarised in the Appellant's closing submissions to the SDJ.

a) No reasonable jury could conclude that the Chairman of IDBI would lend money to KFA as part of a dishonest agreement knowing that none of it would be re-paid.

b) No reasonable jury could conclude that having done that he would honestly agree to lend more to KFA as part of the MDRA.

c) Although senior managers of IDBI knew that the money lent to KFA would never be re-paid and that KFA would collapse, they lent more as part of the MDRA the following year.

d) Although senior managers at IDBI knew this, they nevertheless agreed to take shares in KFA as part of the MDRA.

e) The Appellant knowing all this increased the risk to him and to UB Group by giving personal and corporate guarantees and by putting in further money from Force India.

f) Knowing all this, the Appellant directed KFA to make long-term investments such as joining the Oneworld Alliance.

171. Ms Montgomery criticised the SDJ for not having identified the possible alternative explanation, that (given that IDBI was one of six lenders with the SBI-led consortium) IDBI had good commercial reasons for lending to KFA despite the risks, risks which they all recognised. They were all willing to lend further money to KFA in the shape of the MDRA under which the lenders exchanged part of their debt for shares in KFA. The Appellant does not dispute "any of the evidential findings" of the SDJ (skeleton argument, paragraph 133), but asserts nevertheless that her conclusion was wrong.

172. It is submitted that the SDJ's findings on misrepresentation (if and to the extent that they are suspect), also infect her conclusions on conspiracy. The suggestion that there was anything untoward in the meetings between the Appellant and Mr Agarwal is unsustainable. They are described in two letters and in the evidence of Mr Agarwal

and Mr Colaco. Many of the SDJ's findings that IDBI broke its own rules are not supported by the evidence. To say that the applications were waved through is a mis-characterisation of the evidence. Ms Kabra explained that long hours were worked and many emails sent. The points relied on by the SDJ did not prove a conspiracy. The last complaint is that the SDJ did not refer in the judgment to a number of points which had initially been made by the Respondent and had been shown to be wrong (skeleton argument, paragraph 138).

Discussion

173. Many if not all of the submissions about the conspiracy case are really disagreements with the SDJ's assessment of the evidence, and in particular, with her assessment of whether, in an inferential case, a reasonable jury could, on one possible view of the facts, convict. They are jury points for an eventual trial, but none, in our judgment, delivers a knock-out blow to the *prima facie* case which the SDJ found. The fact that the SDJ acknowledged the difficulty of this part of the case, far from being a point in favour of the Appellant, is a point in the Respondent's favour. It shows that she approached the question with great care, and was alive to the potentially problematic nature of the case (having absorbed and reflected on the arguments in the Appellant's closing submissions). Far from failing to "grapple with extremity of GoI case" (as Miss Montgomery put it in argument), the SDJ did exactly that. The issue is not whether the SDJ excluded the possibility that KFA's business was viable. It is whether there was a *prima facie* case that the Appellant and the others charged did not believe that the business was viable, and capable of repaying the loans. Having scrutinised the conspiracy allegation with the appropriate care, the SDJ accepted that there was such a *prima facie* case.

174. We reject the Appellant's submission about the meetings. The two letters relied on (7 October and 3 November 2009) are short; somewhat less than a page long. They do not describe the meetings in any detail. The fact that the letters reveal to people who were not alleged co-conspirators that the meetings took place, does not mean that everyone knew everything that was discussed in them. The descriptions of the meetings in the evidence, such as they were, do not preclude an inference that other things were discussed. We note that Mr Agarwal is a defendant, and hardly likely in the brief description in his s.161 statement of his meeting with the Appellant in October 2009 to have implicated himself in the indicted conspiracy.

175. The fact that many hours were spent working on the applications and that many emails were sent does not undermine the thrust of the evidence, which was that many of IDBI's rules about lending to new customers were broken. The RBI's 2010 Report found that there had been many irregularities, as Mr Summers pointed out in his submissions. Moreover, since it is not suggested that all the executives of IDBI were conspirators, work had to be done to convince those who were not alleged to be conspirators. Further, as Mr Summers pointed out in writing, there was evidence that the decision had been made in advance.

176. It may be that taken on its own, none of the points relied on by the SDJ "proved" a conspiracy. That was not the question for the SDJ, however. The question, rather, was whether the evidence, taken as a whole, was such that a reasonable jury, on one possible view of the facts, could draw a safe inference that there was a conspiracy. Again, the criticisms of the SDJ are, in truth, jury points for an eventual trial. Finally,

the question for the SDJ was not whether the Respondent was maintaining its initial case. If the SDJ's decision is otherwise sustainable, ignoring any bad points which the Respondent might have taken initially and then have abandoned, the fact that the SDJ did not refer to those bad points cannot make her decision wrong.

Conclusion on the conspiracy case

177. For these reasons, we reject the submission that the SDJ was wrong to find a *prima facie* case of conspiracy to defraud.

Ground 1, paragraph 5: was there a *prima facie* case of money laundering?

178. The SDJ considered this allegation in paragraphs 345-355 of the judgment. She concluded that "There is clear evidence of dispersal and misapplication of the loan funds". She therefore found a *prima facie* case that the Appellant was involved in a conspiracy to launder money.

179. Neither side made any substantive oral submissions to us about this part of the case. The Appellant submitted in writing that the SDJ's approach was wrong. The parties had agreed at the extradition hearing that this allegation depended on showing that there was a *prima facie* case of either fraudulent misrepresentation, or of conspiracy to defraud. If either was established, it was conceded there was a *prima facie* case that the Appellant's use of the money amounted to money laundering. In our judgment it does not matter if the SDJ went further than she needed to, or, indeed, if her approach was wrong. We have held there is a *prima facie* case both of misrepresentation and of conspiracy, and thus there is also a *prima facie* case of money laundering.

Ground 1, paragraph 1: was the *prima facie* case found by the SDJ at the extradition hearing different from the case being prosecuted in India?

180. We have referred at some length to the documents setting out the case in India. We have also summarised the findings of the SDJ. We consider that while the scope of the *prima facie* case found by the SDJ is in some respects wider than that alleged by the Respondent in India, there is a *prima facie* case which, in seven important respects, coincides with the allegations in India.

a) The three loans were disbursed as the result of a conspiracy between the named conspirators.

b) The loans were made despite KFA's weak financials, negative net worth and low credit rating.

c) The loans were made despite the fact that KFA, as a new customer, did not meet the norms of IDBI's Corporate Loans Policy.

d) The Appellant was party to false representations to induce the loans that funds would be inducted by way of unsecured loans, global depository receipts and equity.

e) The Appellant was party to false representations about inward investment, an exaggerated brand value, misleading growth forecasts, inconsistent business plans (including the January 2009 business plan).

f) The Appellant was party to the offer of "symbolic" and "grossly inadequate security" in the form of a negative lien on 12 hire purchase aircraft, despite knowing that KFA would not get title to them during the period of the loan.

g) The Appellant's dishonest intention not to repay the loans is shown by his later conduct in trying to avoid the personal and corporate guarantees.

181. We therefore consider that paragraph 1 of ground 1 is not made out.

Overall conclusion

For these reasons, we dismiss the appeal.

ANNEX 1

IN THE WESTMINSTER MAGISTRATES' COURT

BETWEEN:

THE GOVERNMENT OF THE REPUBLIC OF INDIA

v

VIJAY MALLYA

SCHEDULE OF NOTIONAL CHARGES

VIJAY MALLYA, you are accused in a category 2 territory of the commission of offences constituted by conduct which, had it occurred within the jurisdiction of the United Kingdom, would have constituted the following offences:

l. That you on divers days between 1 September 2009 and 24 January 2017 conspired together and with A. Ragunathan, S. Borkar, A. Nadkami, A. Shah, Y. Agarwal, B. Batra, O Bundellu, S. Srinivasan, R. Sridhar and others to defraud such corporations, companies, partnerships, firms and persons as might deposit funds with the IDBI Bank ("the Bank") by dishonestly causing and permitting the Bank to sanction and disburse loans to Kingfisher Airlines in the order of (a) INR 1500 million on 7 October 2009, (b) INR 2000 Million on 4 November 2009 and (c) INR 7500 million on 27 November 2009, with intention not to repay the said loans as agreed and required. In particular by:
   a. Supplying to the Bank and/or permitting reliance by the Bank on false information in respect of Kingfisher's profitability;
   b. Supplying to the Bank and/or permitting reliance by the Bank on false information in respect of the value and/or availability of securities to be relied upon by the Bank.

[contrary to section 12 of the Criminal Justice Act 1987]

2. That you between 1 September 2009 and 24 January 2017 dishonestly made representations to the Bank which were, and which you knew were or might be, untrue or misleading, namely:
   a. Supplying false information to the Bank in respect of Kingfisher's profitability;
   b. Supplying false information to the Bank in respect of the value and/or availability of securities to be relied upon by the Bank.

   intending thereby to make a gain for yourself or another or to cause loss to the Bank or to expose the Bank to a risk of loss by causing and permitting the Bank to sanction and disburse loan funds to Kingfisher Airlines in the order of (a) INR 1500 million on 7 October 2009, (b) INR 2000 Million on 4 November 2009 and (c) INR 7500 million on 27 November 2009, which loans you did not intend to repay as agreed and required.
   [Contrary to sections 1(2)(a) & 2 of the Fraud Act 2006]

3. That you between 1 September 2009 and 24 January 2017 conspired with A. Ragunathan, Y. Agarwal, B. Batra, O Bundellu, S. Srinivasan, R. Sridhar and others to conceal, disguise, convert, transfer or remove criminal property, namely the (direct or indirect) proceeds of the said loans obtained dishonestly by Kingfisher Airlines from the Bank.

[contrary to section 1 of the Criminal Law Act 1977 and sections 327 and 334 of the Proceeds of Crime Act 2002]

Within the jurisdiction of the Republic of India.

ANNEX 2

84 Case where person has not been convicted

(1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.

(2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—

(a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and

(b) direct oral evidence by the person of the fact would be admissible.

(3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard—

(a) to the nature and source of the document;

(b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;

(c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;

(d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);

(e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings.