Neutral Citation Number: [2021] EWHC 2522 (Ch)

Case No: FL-2021-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION (FINANCIAL LIST)

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 21/09/2021

Before:

THE CHANCELLOR OF THE HIGH COURT

- -

Between:

(1) PJSC BANK "FINANCE AND CREDIT" **(2) DEPOSIT GUARANTEE FUND OF UKRAINE**	**Claimants**
- and -	
(1) KOSTYANTIN VALENTYNOVICH ZHEVAGO **(2) FROLD PROJECT LTD** **(3) EASTROAD COMMERCE LLP** **(4) PORTMAN SHIPPING UK LTD** **(5) IAN ANTHONY PELLOW**	**Defendants**

- -
- -

Charles Samek QC, Tetyana Nesterchuk, Nathalie Koh and Gillian Hughes (instructed by **Gateley Legal**) for the **Claimants**
Paul McGrath QC, Tom Ford and James Sheehan (instructed by **Reynolds Porter Chamberlain LLP**) for the **1st to 4th Defendants**
Sa'ad Hossain QC and David Simpson (instructed by **Farrer & Co LLP)** for the **5th Defendant**

Hearing dates: Monday 19, Tuesday 20 and Wednesday 21 July 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE CHANCELLOR OF THE HIGH COURT

Sir Julian Flaux C:

Introduction

1. The first claimant ("the Bank") was the tenth largest bank in the Ukraine prior to its liquidation in 2015. It is now managed by the second claimant, the Deposit Guarantee Fund of Ukraine ("DGF") a state owned body responsible, amongst other things, for the administration of failed banks. The first defendant, a Ukrainian citizen, is a highly successful businessman and billionaire. Amongst the businesses in which he had an interest was the Bank, of which he owned and controlled between 1995 and its liquidation some 95 to 99% of the shares, held through a number of corporate vehicles, including English registered entities such as the second defendant ("Frold") and AP Capital Limited ("AP Capital") a company owned by the fifth defendant, a British citizen resident in England, who provided corporate, accounting and company secretarial services to a number of clients, including the first defendant, for whom he has acted since 2003.

2. Amongst the first defendant's many diverse business interests across many sectors in Ukraine and elsewhere is Ferrexpo, a major iron ore trader and mining company, headquartered in Switzerland, but with its operating base in central Ukraine where it operates three iron ore mines and an iron ore pellet production facility. In 2007, the first defendant was the first Ukrainian national to list one of his companies, now Ferrexpo plc, on a major international stock exchange, the London Stock Exchange. Based on its current share price it has a market capitalisation of about £2.8 billion.

3. The claimants' case in these proceedings is that, using a number of highly sophisticated fraudulent schemes (summarised in more detail hereafter), the first defendant, with the assistance of the fifth defendant and others using a large number of corporate vehicles located in a number of jurisdictions (many such corporate vehicles now being dissolved), extracted enormous sums of money equivalent to in excess of US$500 million from the Bank, which at the time was being propped up by stabilising loans from the National Bank of Ukraine ("NBU"). The corporate vehicles used included Frold, the third defendant ("Eastroad") an English registered LLP and the fourth defendant ("Portman") an English registered company of which the fifth defendant was the sole director.

4. The Claim Form in these proceedings was issued, together with the Particulars of Claim, on 11 February 2021. On the same day the claimants issued an Application Notice seeking a Worldwide Freezing Injunction ("WFO") against the defendants. That application was supported by the first affidavit of Mr Richard Healey, a partner in Gateley Legal, the claimants' solicitors. It is to be noted that, although the causes of action pleaded against the defendants were all torts or delicts under Ukrainian law, the claimants did not serve any expert evidence of Ukrainian law as part of their evidence in support of their application.

5. The defendants having indicated an intention to challenge the jurisdiction of this Court on the grounds of *forum non conveniens*, an Order was made by Marcus Smith J on 11 March 2021 setting out a timetable for service by the defendants of any evidence in opposition to the WFO application (the claimants having decided to proceed with that application at an *inter partes* hearing) and for making any applications under CPR Part 11 to challenge the jurisdiction. This timetable was extended by agreement in a Consent

Order dated 18 May 2021. On 14 May 2021, the first to fourth defendants issued an Application Notice seeking: (i) a declaration that the Court has no jurisdiction over the first defendant and that the Claim Form and Particulars of Claim have not been validly served on him; and (ii) a stay of the claims against the first to fourth defendants.

6. Those applications were supported by the first witness statement of Mr Andrew McGregor, a partner in RPC, the first to fourth defendants' solicitors. That witness statement also responded to the application for a WFO and exhibited a report from a Ukrainian law expert, Mr Alyoshin, which set out, inter alia, his opinion that the claimants had no cause of action against the first to fourth defendants as a matter of Ukrainian law and that their claims were time barred as a matter of Ukrainian law.

7. Also on 14 May 2021, the fifth defendant issued an Application Notice seeking an order that (i) the claim against him be stayed pursuant to Part 11(6)(d) on the grounds that it can more appropriately be heard with the other claims before the courts of the Ukraine; alternatively (ii) that certain paragraphs of the Particulars of Claim setting out the claim against the fifth defendant be struck out under CPR Part 3.4(2)(a) as not disclosing a reasonable cause of action against the fifth defendant. That application was supported by witness statements from Mr John Wilkinson a partner in Farrer & Co, the fifth defendant's solicitors, and from the fifth defendant himself.

8. The claimants responded to the two sets of defendants' applications with a second affidavit from Mr Healey. They also produced a report from their own Ukrainian law expert, Professor Kuznetsova, which took issue with Mr Alyoshin's opinion that the claimants had no arguable cause of action as a matter of Ukrainian law and that the claims were time barred. They also produced witness statements from Ms Olena Chernyavska and Mr Oleg Plotnichenko, both employed by DGF, taking issue with various aspects of the defendants' contentions.

9. This all led to second witness statements from Mr McGregor and the fifth defendant and a further report from Mr Alyoshin. He produced yet another report during the hearing to which Mr Plotnichenko responded on factual matters only.

Summary of the claimants' claims

10. The principal claims involve four schemes by which it is alleged the defendants extracted money from the Bank. The first is the so-called Correspondent Bank Scheme. It is alleged that the first defendant directed and procured that a company called Nasterno Commercial Limited ("Nasterno") applied for loans from two foreign banks, Bank Meinl based in Austria and Bank Frick based in Liechtenstein. Nasterno was incorporated in Cyprus, but the claimants claim the first defendant was its ultimate beneficial owner ("UBO"). It had been incorporated in May 2007 at his direction and, again at his direction, in June 2007 its entire shareholding was acquired by Maxtel Assets limited ("Maxtel") a Belize registered company. At the first defendant's direction the sole shareholder and director of Maxtel was Mr Borysov, a Deputy Chairman of the Management Board of the Bank who acted as the first defendant's nominee. In July 2007, at the first defendant's direction, the shareholding and directorship were transferred to Mr Demchenko who was the first defendant's assistant. During an interview with an investigator from the Ukrainian State Bureau of Investigations, Mr Demchenko said that he had been invited to become owner of Maxtel and Nasterno by Mr Shapkin, then deputy chairman of the Board of the Bank, acting

on behalf of the first defendant. Mr Demchenko said that all instructions in respect of Nasterno came from the first defendant.

11. The Bank then opened correspondent accounts with Bank Meinl and Bank Frick and made deposits into them equalling the amount of the Nasterno loans. The Bank pledged the credit balances in those accounts to Bank Meinl and Bank Frick as security for the Nasterno loans. Following those pledges, Nasterno was able to and did draw down under the Nasterno loans a total of about US$113 million. When Nasterno failed to repay the Nasterno loans, Bank Meinl and Bank Frick debited the total of some US$113 million from the respective correspondent accounts of the Bank.

12. The claimants' case is that the funds borrowed by Nasterno were transferred to other corporate entities owned or controlled by the first defendant: Frold, Collaton Ltd, Integrated Rail Casting Ltd ("Integrated") and Bloomshine Ltd. Collaton is an Isle of Man registered company of which the fifth defendant is the sole shareholder. Integrated is an English registered company now in administration and Bloomshine was an English registered company now dissolved. The first defendant admits that he is the owner or controller of Frold and Collaton but is silent as to Bloomshine. No amounts were ever recovered by the Bank from Nasterno.

13. Mr Demchenko also told the investigatory authorities that the first defendant ordered him to destroy all documents he had in respect of Nasterno and Maxtel, which Mr Demchenko did. The claimants submit that these instructions were obviously given to conceal the fraud.

14. It is to be noted that the claim in respect of the Correspondent Bank Scheme is only pleaded against the first defendant.

15. The second scheme is the so-called Note Replacement Scheme. This scheme also involved Nasterno and took place a few months before the Bank was declared insolvent. The Bank entered two pledge agreements with Nasterno under which part of the debt owed to the Bank under secured loans to entities owned or controlled by the first defendant was replaced with what the Bank contends the first defendant and the officials of the Bank acting on his instructions (who included Mr Shapkin) must have known were worthless loan participation notes issued by F&C Ukraine BV. The effect of the scheme was to accept the worthless notes onto the Bank's balance sheet and that secured loans to entities owned or controlled by the first defendant were discharged. The explanation for these arrangements provided by Mr Shapkin is that they were approved by the NBU to reduce the Bank's liquidity ratio.

16. Again, the only defendant against whom the claim in respect of the Note Replacement Scheme is pleaded is the first defendant.

17. The third scheme was the Clearing Scheme which was similar to the Note Replacement Scheme. Various companies ultimately owned or controlled by the first defendant obtained loans from the Bank. On 6 August 2015, the Bank's Credit Committee (which the claimants contend was acting on the first defendant's instructions) resolved to bring forward the repayment date for these Clearing Scheme loans to 7 August 2015. On 7 August 2015, the Bank entered surety agreements with other companies ultimately owned or controlled by the first defendant under which the sureties guaranteed repayment of the Clearing Scheme Loans. On the same day PJSC Poltava Mining and

Processing Plant OJSC ("Poltava Mining"), another company ultimately owned or controlled by the first defendant, entered a surety agreement under which it guaranteed the debts of each of the sureties under various loan agreements between them and the Bank.

18. A few days later, on 11 August 2015, the debts owed by the sureties were repaid by writing off the funds held by Poltava Mining on deposits with the Bank. The sureties then drew down additional loan advances from the Bank in UAH amounts equivalent to the repayments made by Poltava Mining. The drawdown monies were then paid by the sureties directly back to the Bank as repayment of the Clearing Scheme Loans, purportedly pursuant to the surety agreements. Apart from some US$2.4 million, the entirety of the drawdown monies remain unpaid. The claimants allege that the effect of the scheme is that the Bank's assets in the form of the Poltava Mining deposits and the Clearing Scheme Loans were replaced by new loans to the sureties represented by the drawdown monies which it is to be inferred they had no intention of repaying and which, apart from the US$2.4 million, they have not repaid.

19. As with the Correspondent Bank Scheme and the Note Replacement Scheme, the only defendant against whom a claim is pleaded in respect of the Clearing Scheme is the first defendant.

20. The fourth scheme is the Supply Contracts Scheme pursuant to which it is alleged that some US$280 million of the Bank's funds were misappropriated over the period between 2010 and 2015. Various Ukrainian corporate borrowers obtained credit and loan facilities from the Bank in order for them to enter into supply contracts with non-Ukrainian entities, including Frold, Eastroad and Portman for the ostensible supply of commodities and other goods. The borrower and supplier entities are said all to be ultimately owned and/or controlled by the first defendant. Monies were drawn down by the borrowers under the loans and paid away to the suppliers in purported performance of the supply contracts. However, save in a small fraction (about 0.11% of all goods due to be delivered where there was a partial supply to give the appearance of a supply contract being genuine) no goods were in fact supplied by the suppliers. The claimants contend that the supply contracts were a device used for the purpose of the first defendant's unlawful extraction of the Bank's monies. Apart from a few small payments, none of the borrowers repaid any of the loan monies to the Bank.

21. The claimants' case is that the first defendant owned and controlled the Bank and ultimately owned and controlled the borrowers and the suppliers, so that it should be concluded that he had directed, caused and/or procured the grant of the loans and/or payment of the loan monies to each borrower, the execution of the supply contracts, the payments to the suppliers and the receipt by the suppliers of the loan monies and, it is to be inferred, their onward transmission to and receipt by the first defendant or other nominee or trust entities for him. It was he who instigated, operated and executed the Supply Contracts Scheme.

22. The Supply Contracts Scheme is the one scheme where the claim in delict under Ukrainian law is made not only against the first defendant, but against Frold, Eastroad and Portman and against the fifth defendant.

23. In addition to the claims in respect of the four schemes, the claimants have two further claims against the first defendant alone. The first relates to so-called Related Party

Transactions where it is alleged the first defendant directed, caused and/or procured the Bank to enter transactions with related parties which were entities ultimately owned or controlled by him. These transactions were contrary to an NBU resolution prohibiting "asset-side transactions" with related parties of the Bank. It is alleged that the Bank suffered some US$94 million of harm, being the amount by which its assets were reduced by the Related Party Transactions.

24. The second additional claim is the Accrued Interest Claim. The Bank is alleged to have suffered some US$62.5 million of harm as a result of a widespread practice of prolongation of payment of accrued interest on loans to entities ultimately owned and/or controlled by the first defendant. It is said that in breach of the terms of the loans, the Bank's officials systematically failed to collect accrued and overdue interest on those loans.

25. None of the defendants has served a Defence even in draft, but some intimation of the likely defences is given by the first defendant, through Mr McGregor's first witness statement. Mr McGregor says at [112] that the defendants are not in a position to address the historic factual allegations in detail whilst their investigations continue, but they deny liability and will defend the claim. It is said that the first defendant was not on either the Management Board or the Supervisory Board of the Bank at the relevant time, so the decisions to make the loans of which complaint is made were the legal responsibility of the credit committee or other officials of the Bank, not of the first defendant. To the extent that loans were made to entities connected with him he denies having any intention to harm the Bank. On the contrary, he made significant efforts and undertook financial exposure in order to save the Bank including providing a guarantee to the NBU. He maintains that it was the liquidation of the Bank which was the cause of its losses which resulted from the incorrect decision of the NBU to put it into administration, a view shared by the former Managing Director of the DGF.

26. It is also pointed out by Mr McGregor that the Note Replacement Claim, the Clearing Claim, the Related Party Claim and the Accrued Interest Claim are pursued notwithstanding that the NBU was engaged in close supervision of the Bank's activities at the time, but the NBU did not object to the transactions in question. On the contrary, as noted at [15] above, Mr Shapkin says that the transactions in the Note Replacement Scheme were agreed by the NBU in order to reduce the liquidity ratio of the Bank. In relation to the Correspondent Bank Claim, the first defendant says that the accounts with Bank Meinl and Bank Frick were opened by the Bank's officials, but the use of such correspondent bank accounts was a common practice by Ukrainian banks at the time used to purchase a bank's bonds previously issued by a bank. The first defendant's case is that to the extent that entities connected with him received funds from Nasterno, this was in good faith, in the expectation of funds being available in due course to repay the correspondent banks as had previously been the case prior to the liquidation.

27. In relation to the Supply Contracts Claim, Mr McGregor says that his understanding from the first defendant is that he was not involved in the details of the transactions or the day-to-day management of the borrowers or suppliers. The Bank will have satisfied itself that it was appropriate to lend sums to the borrowers and, as far as he is concerned, the lending was carried out in good faith. There had been no plan of which the first defendant is aware that the Bank would not be repaid.

Ukrainian law

28. All the claims advanced are non-contractual and are made in delict and unjust enrichment. It is common ground that pursuant to the Rome II Regulation, the applicable law for all these claims is Ukrainian law. What is not common ground and is in serious dispute between the Ukrainian law experts is the extent to which the claimants have a good arguable case as a matter of Ukrainian law.

29. The general delict or tort liability under Article 1166 of the Ukrainian Civil Code ("UCC") requires proof of four elements: harm, unlawfulness, causation and fault. The dispute between the parties here centres in particular on the element of unlawfulness. Mr Alyoshin's opinion is that the claimants cannot show this element. He notes that the Ukrainian Supreme Court has repeatedly defined unlawfulness as a "breach of legal provision, that is manifested in commission of acts prohibited by law, or in omission to act in a way that is prescribed by it". The defendants' case is that the specific obligations under the UCC and the Law on Banks pleaded against them in the Particulars of Claim do not apply to them, but to the Bank, its officers and direct shareholders. They also submit that the general provisions of the UCC relied on by the claimants concerning good faith and abuse of rights cannot be relied upon as giving rise to unlawfulness for the purposes of Article 1166, the Constitutional Court having so held. At most they allow the court to limit the exercise of a party's right, for example under a contract.

30. Mr Alyoshin's opinion is that there is no liability under Ukrainian law for "causing" or "procuring" the commission of torts by third parties and that only the person who personally inflicted the harm is liable under Article 1166. He also disputes that fraud or misappropriation of assets is actionable under Ukrainian tort law unless it has first been proved in a criminal court that a crime has been committed.

31. He also expresses the opinion that the fact that the Bank had suffered loss under its contracts with third parties is a bar to a claim under Article 1166. The Bank cannot bypass the contracts with counterparties by claiming against a third party in tort when the "harm" is caused under the contract in question. Rather the Bank must seek compensation under the contracts.

32. On behalf of the claimants, Professor Kuznetsova disputes all of this analysis. Her opinion is that any conduct which results in harm is unlawful if the tortfeasor was not authorised to act, including, but not limited to, a violation of a statutory provision such as the UCC. She also says that an unlawful act or omission is presumed to have taken place where harm has been caused unless the defendant can prove that he was authorised to act. She seeks to derive those two propositions from a decision of the Supreme Court of Ukraine of 29 January 2019. Her opinion is that the general provisions of the UCC such as Articles 3 and 13 upon which the claimants rely constitute peremptory norms to be observed by all parties, having as much legal force as more specific provisions.

33. Professor Kuznetsova recognises that there is no special ground of liability for causing or procuring the commission of tortious acts, but expresses the opinion that someone responsible for such causing or procuring could be liable under Article 1190 as a joint tortfeasor where it can be said that his actions and the actions of the immediate tortfeasor are governed by the same intent.

34. She disputes Mr Alyoshin's analysis that fraud or misappropriation of assets is not actionable unless a criminal court has already determined that a crime has been

committed. She says that liability under Article 1166 is a standalone liability if the four elements are established and that "fault" does not need to be established by a criminal verdict, the facts may be proved in a civil court.

35. She also disputes that the contracts with third parties are a bar to tortious liability because the defendants' alleged tortious conduct was not subject to any contract with the Bank and the contracts in question here were the means by which the wrongdoing was perpetrated. She also relies upon the fact that the claimants have alleged that the contracts are invalid.

36. Article 1190 of the UCC provides in translation: *"1. Persons by whose joint actions or failure to act harm was caused shall bear joint and several responsibility to the victim".* Mr Alyoshin's opinion is that to be jointly and severally liable all defendants must commit the same unlawful acts and omissions and must have caused the same amount of damage.

37. That analysis is disputed by Professor Kuznetsova whose opinion is that, to be liable as joint tortfeasors, the defendants need not have committed the same unlawful act or omission. Rather the acts or omissions must be interconnected and cumulative or committed with unity of intent or both, citing the decision of the Supreme Court of Ukraine of 29 May 2019. She is also of the view that indivisibility of harm does not mean that to be joint tortfeasors the defendants must inflict the same amount of harm, just that it is impossible to determine what action and to what extent led to the harm.

38. Liability for unjust enrichment is governed by Article 1212 of the UCC. It is common ground between the Ukrainian law experts that a claim for unjust enrichment depends upon showing that the loan agreements under which the Bank lent monies are void. The dispute between the parties concerns two related issues: whether, before a claim for unjust enrichment can be pursued, the transactions forming part of the four schemes must first have been declared void by a court and whether by assignment of contractual rights under loan agreements the claimants have affirmed those agreements as valid.

39. Mr Alyoshin's opinion is that before such a claim can be pursued, a Ukrainian court must have declared the loan agreements invalid. The defendants contend that the fundamental problem which this part of the claimants' case faces is that the Bank has brought successful claims in the Ukraine to enforce the agreements against every borrower and has also entered into agreements for value to assign claims against all the borrowers bar one. They point out that it is common ground that the assignments presupposed that the loan agreements were valid as a void claim cannot be assigned. Accordingly, they contend that the Bank has affirmed the loan agreements and the claim in unjust enrichment is completely inconsistent with that conduct.

40. Professor Kuznetsova's view is that where an agreement is invalid at law it is deemed invalid *ab initio* without the need for a court ruling to that effect. She also considers that if the loan agreements are invalid, any assignment of them is equally invalid and that it matters not that the claimants considered them valid at the time of assignment.

41. The other area of Ukrainian law in issue between the parties concerns whether the claims are time barred under that system of law. The period of limitation under Article 257 of the UCC is three years and it is now common ground that the period runs from when a person became or could have become aware of the violation of his rights and of

the identity of the alleged wrongdoer. The test for constructive knowledge is objective and a person is presumed to know what could have been known by a reasonable person making efforts to be aware of and monitor the status of his rights. This is consistent with the finding on this provision of the UCC by Picken J in *Avonwick Holdings Limited v Azitio Holdings Limited* [2020] EWHC 1844 (Comm) at [448].

42. Where the parties differ in particular is on the issue whether in applying that test, the knowledge of officials within the Bank who may have committed wrongful acts on the instructions of the first defendant is to be attributed to the Bank. Mr Alyoshin's opinion is that, for limitation purposes, the knowledge of the management of the Bank is to be attributed to it. Professor Kuznetsova disputes this analysis, contending that if the management of a corporate entity are acting wrongfully and contrary to its interest, the knowledge of the individuals in question will not be attributed to the corporate entity. To attribute to the Bank the knowledge of officials who had defrauded the Bank would be an unjust result that a Ukrainian court could not reach. She also contends that for the purpose of the running of time what matters is when the DGF knew or could have known matters.

43. In addition to the claims under the UCC, the claimants bring claims against the first defendant as a related party of the Bank (because he is the UBO of 95% of its shares) under Article 58(6) of the Law on Banks and Article 52(5) of the DGF Law. It is common ground between the Ukrainian law experts that the same requirement to show "unlawfulness" arises under those two Articles as under Article 1166 of the UCC.

44. The defendants are critical of Professor Kuznetsova, suggesting that her evidence is selective compared with the evidence she gave in *Avonwick* and in some respects the opposite of that earlier evidence. They also contend that a number of paragraphs of her report appear to have been taken from an earlier report by Mr Beketov, a Ukrainian lawyer who has acted for the Bank. Given that the present applications are all interlocutory and neither expert has given evidence, those sort of issues as to credibility cannot be resolved now, any more than I can decide, simply by reading the expert reports, what Ukrainian law is on the issues raised. What is clear, as I said during the course of argument, is that the claimants have demonstrated sufficient to establish a "good arguable case" in relation to the Ukrainian law causes of action they rely upon for the purposes of their WFO application.

45. Beyond that it is not possible to reach any definitive conclusions on the issues of Ukrainian law other than that they are complex and, in many regards hotly contested. Although Mr Charles Samek QC on behalf of the claimants argued that the judges in the Financial List and the Business and Property Courts had considerable experience of determining difficult issues of Ukrainian or Russian law (such as in *Avonwick*), I consider that where such difficult issues of Ukrainian law arise, as in the present case, it is far more appropriate that they are determined by the Ukrainian courts. This is an issue to which I will return in more detail below in dealing with the overall issue of *forum non conveniens*.

Has the first defendant been validly served?

46. Logically, the first issue for consideration is whether service of the proceedings on the first defendant at 55 St James's Street, London SW1 (the registered address of Ferrexpo plc also shown in Form 288a as his "usual residential address") was good service under

section 1140 of the Companies Act 2006. At the time that the proceedings were served at that address on 12 February 2021, the first defendant was not in the jurisdiction, but was living in Dubai.

47. Section 1140 provides, so far as material, as follows:

> "Service of documents on directors, secretaries and others
>
> (1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.
>
> (2) This section applies to—
>
> (a) a director or secretary of a company;
>
> (4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.
>
> (8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction."

48. The first defendant's case is that Form 288a was filled in as part of bulk company filings as an administrative exercise, without the first defendant having been consulted or appreciating that there was a possibility that giving the registered office of the company as his usual residential address would mean that service could be effected upon him there without the need to obtain permission to serve him out of the jurisdiction. On this interlocutory application and without having heard evidence from the first defendant, it is not possible for the Court to reach any conclusion as to whether the first defendant was aware that the form filed with Companies House gave the St James's Street address as his usual residential address, although I note that the Form 288a exhibited by Mr McGregor giving that as his usual residential address is dated 14 February 2020 and appears to have been signed by the first defendant. However, irrespective of what the first defendant did or did not know about the consequences of the Form being filed giving that address, this is what was done on his behalf for which he must take responsibility. In April 2021, revised documents were filed with Companies House showing the first defendant's residential address as in Dubai, but at the time of service in February 2021, the Companies House records showed his residential address as the St James's Street address.

49. The argument on behalf of the first defendant by Mr Paul McGrath QC is that section 1140(8) expressly preserves the common law requirement that if the defendant is not present in the jurisdiction, permission to serve him out of the jurisdiction, in this case in Dubai, must be obtained under one of the jurisdictional gateways in para. 3.1 of PD6B of the CPR. The difficulty with that argument is that it is contrary to a number of decisions at first instance. Mr McGrath QC invited me to determine that those cases were wrongly decided and to decline to follow them, so it is necessary to consider that line of authority in a little detail.

50. The principal authority upon which the claimants rely is the decision of Richard Salter QC sitting as Deputy High Court Judge in the Commercial Court in *Idemia France SAS v Decatur Europe Limited* [2019] EWHC 946 (Comm) which concerned service of proceedings on a director who was resident out of the jurisdiction but who had given an address within the jurisdiction as his "registered address" under section 1140. The judge recognised that he was bound by the decision and reasoning of the Court of Appeal in *SSL International Plc v TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842 where Stanley Burnton LJ stated the principle:

> "It is a general principle of the common law that, absent a specific provision, as in the rules for service out of the jurisdiction, the courts only exercise jurisdiction against those subject to, i.e. within the jurisdiction."

51. However, the judge found at [121] to [124] of his judgment that section 1140 was a "specific provision" which provided for the Court to exercise jurisdiction over persons who had given a registered address within the jurisdiction and that someone can be "subject to" the jurisdiction, here under section 1140, even if not physically present within the jurisdiction.

52. As for the defendant's reliance on section 1140(8) the judge considered that the answer to that point had been given by Master Marsh in his earlier judgment in *Key Homes Bradford Ltd v Patel* [2015] 1 BCLC 402 as supported by the DTI consultation paper on Company Law Reform in 2005 and the commentary on what became section 1140 when it was going through Parliament. The judge said at [125] and [126]:

> "125. As for Mr Clarke's reliance upon s 1140(8), the answer to that submission was cogently provided by Master Marsh in his judgment:
>
> > 'Section 1140(8) is explicable for the very reason that a director may opt to provide a service address which is outside the jurisdiction. Subsection (8) is designed to make clear that by providing a foreign address, a director is not agreeing that the English court will have jurisdiction to deal with any dispute concerning him. As the subsection makes clear, the general rule relating to permission for service outside the jurisdiction will still apply.'
>
> 126. Section 1140 was a new provision in company legislation and was brought fully into force on 1 October 2009. In paragraph [13] of his judgment, Master Marsh quoted the DTI's consultation paper on Company Law Reform dated March 2005 which, at paragraph 5.3, stated under the heading "Directors' Home addresses":
>
> > '... [I]t is important that the service address functions effectively, and the law will be tightened to increase the obligation on directors to keep the records up-to-date, and ensure that the address on the public record is fully effective for the service of documents …'

> Master Marsh also quoted the commentary on clause 747 of the Bill (which eventually became s 1140 of the Act) as it was going through Parliament:
>
> > 'This clause is a new provision. It ensures that the address on the public record for any director or secretary is effective for the service of documents on that person. Sub-section (3) provides that the address is effective even if the document has no bearing on the person's responsibilities as director or secretary.'

53. The same conclusion as the judge reached in that case had been reached some three weeks earlier, albeit apparently without argument, by Jacobs J in *Arcelormittal USA LLC v Essar Steel* [2019] EWHC 724 (Comm). Permission to appeal was given in *Idemia* but the case settled before any judgment was given by the Court of Appeal. In the subsequent case of *Njord Partners SMA Seal v Astir Maritime* [2020] EWHC 1035 (Comm), Foxton J referred to those two cases and said:

> "It is fair to say that the statutory effect which section 1140 has been held to have or assumed to have is surprising, albeit when the wording of the section is read, it is easy to see why such findings or assumptions have been made, I have decided to follow those judgments at first instance."

54. Both Waksman J in *Republic of Mozambique v Safa* (2020) 30 July (unreported) and Bryan J in *Abu Dhabi Commercial Bank v Shetty* [2020] EWHC 3423 (Comm) considered that these cases had placed the correct interpretation on section 1140 and followed them. More recent cases which have followed them have been where only one party was represented.

55. Despite the argument to the contrary by Mr McGrath QC, I consider those cases are correctly decided. The whole point of section 1140 is that where a director has provided a "registered address" in the sense set out in subsection (4), which encompasses the "usual residential address" provided for in Form 288a, and that address is within the jurisdiction, the effect of the section is that the director can be served with proceedings at that address even if he is not physically present within the jurisdiction at the time of service. The position is different if the address given on the Form or in the records held at Companies House is an address outside the jurisdiction. As Master Marsh explained in *Key Homes* that is the situation covered by section 1140(8): if the "service" address provided is outside the jurisdiction, section 1140 cannot be used to effect service and the normal rules requiring permission to serve out of the jurisdiction to be obtained apply.

56. In the circumstances, I consider that the first defendant was properly served with the proceedings at the St James's Street address under section 1140, even though he was resident in Dubai at the time.

Has the fifth defendant submitted to the jurisdiction?

57. It seems to me that logically, the next matter to consider is whether, as the claimants contend, it is not open to the fifth defendant to seek a stay of these proceedings under

CPR Part 11 on the grounds of *forum non conveniens* because, by applying at the same time to strike out the proceedings, the fifth defendant has submitted to the jurisdiction of this Court.

58. In support of this submission, Mr Samek QC relied upon the decision of the House of Lords in *Williams & Glyn's Bank v Astro Dinamico* [1984] 1 WLR 438, a case in which the defendant sought in the same application to set aside the proceedings on the ground that the Court had no jurisdiction and to stay the proceedings pending the determination of proceedings in Greece. The only question before the House was which application should be heard first. In the course of dismissing the appeal against the Order of the Court of Appeal that the stay application should be heard first, Lord Fraser of Tullybelton, giving the main speech, addressed the argument by the appellants that by merely applying for a stay the defendant had submitted to the jurisdiction. In rejecting that argument, Lord Fraser said at 443H-444F:

> "A case which was concerned with waiver of the right to object to the jurisdiction of the court also contains observations adverse to the appellants' contention. The case is *Rein v. Stein* (1892) 66 L.T. 469 where Cave J. in the Divisional Court said, at p. 471:
>
> > "It seems to me that, in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all."
>
> Applying that to the present case, the stay is not *only* useful if the objection to jurisdiction has been waived, because one principal purpose of the stay would be to postpone the inquiry into the questions upon which jurisdiction depends until the outcome of the Greek proceedings is known. In *In re Dulles' Settlement (No. 2)* [1951] Ch. 842 the question was whether a father, who was an American resident outside England, had submitted to the jurisdiction of the English courts in a dispute about payment of maintenance to his child in England. He had been represented by counsel in the English court, who argued that he was not subject to their jurisdiction. Denning L.J. (as he then was) said at p. 850:
>
> > "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all."
>
> That observation seems very apposite in the present case where the respondents have from the beginning been vigorously

> protesting that the English courts have no jurisdiction over them. The fact that they have simultaneously asked for a stay is, in the unusual circumstances of this case, in no way inconsistent with that protest."

59. Mr Samek QC also relied upon the decision of the Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 where at [159] Lord Collins stated that:

> "The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have "taken some step which is only necessary or only useful if" an objection to jurisdiction "has been actually waived, or if the objection has never been entertained at all": *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, 444 (HL) approving *Rein v Stein* (1892) 66 LT 469, 471 (Cave J)."

60. He submitted that the fifth defendant could not "box and cox" by making an application to strike out the claim (which was invoking the jurisdiction) at the same time as challenging that jurisdiction on the grounds of *forum non conveniens*, at least without expressly stating in the Application Notice that the strike out application was without prejudice to the challenge to the jurisdiction. The fifth defendant had not made that express reservation, in contrast with the correspondence from the first to fourth defendants' solicitors which consistently stated that nothing in the relevant letter was to be taken as a submission to the jurisdiction. Mr Samek QC submitted that by making the application to strike out the fifth defendant had taken a step which was only necessary or useful if his objection to the jurisdiction had been waived.

61. In support of his case that the fifth defendant had taken such a step and waived his objection to the jurisdiction, Mr Samek QC relied not only on the Application Notice and attached draft Order, neither of which contained an express reservation, but on the terms of Mr Wilkinson's witness statement in support which sought to deal with the strike out application first. Although the fifth defendant sought to rely upon the fifth recital to the Consent Order of Marcus Smith J dated 18 May 2021 which stated: "AND UPON nothing in this order constituting a submission to the jurisdiction by the defendants", Mr Samek QC submitted that this came too late as the fifth defendant had already submitted to the jurisdiction.

62. To the extent that the fifth defendant sought to rely upon what was said on the issue of when there was a submission to the jurisdiction by Patten J in *SMAY Investments v Sachdev* [2003] EWHC 474 (Ch); [2003] 1 WLR 1973, that was inconsistent with *Williams & Glyn's* which was not cited in that case.

63. On behalf of the fifth defendant, Mr Sa'ad Hossain QC submitted that Mr Samek QC's submissions that the fifth defendant had submitted to the jurisdiction by making the strike out application were based on a misunderstanding of the law and a tendentious selection of authority. The correct test was that a party would not be taken to have submitted to the jurisdiction unless the step taken could be said to be a wholly unequivocal submission to the jurisdiction. He relied upon what Patten J said in *SMAY Investments* at [41]:

> "It seems to me that when a Defendant has complied with CPR Part 11 with a view to challenging the jurisdiction of the Court, and the time for making his application under CPR Part 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal."

64. That test has been recently applied by Bacon J in *WWRT Limited v Tyshchenko* [2021] EWHC 939 (Ch) at [81]. Mr Hossain QC submitted that nothing in *Williams & Glyn's* or *Rubin* was inconsistent with that being the test and neither case was authority for the proposition that, if a defendant makes an application in the alternative, as here, he submits to the jurisdiction. Furthermore, in determining whether the defendant's conduct was wholly unequivocal conduct demonstrating an intention to have the case tried in this jurisdiction, the Court was entitled to look at the totality of the conduct, here not just the Application Notice and witness statement but the terms of the subsequent Consent order. This was clear from the analysis of Bacon J in *WWRT*.

65. In any event, the submission that by making alternative applications challenging the jurisdiction and seeking to strike out the claim the fifth defendant had submitted to the jurisdiction was one which Mr Samek QC had himself made in similar circumstances to those in the present case in *Tsareva v Ananyev* [2019] EWHC 2414(Comm) where it was roundly rejected by Andrew Baker J at [60]:

> "Mr Samek QC in his Skeleton Argument cited *Briggs*, "*Civil Jurisdiction and Judgments*" (6th Ed.) at para.5.30, for the proposition that applying to strike out a claim or for its summary dismissal as hopeless, in the alternative to a challenge to jurisdiction, "*is fatal to [a defendant's] ability to pursue jurisdictional challenges*". I agree with Prof. Briggs that a defendant should always consider carefully what it does and says in response to proceedings if it wishes or may wish to challenge jurisdiction and so needs to avoid doing or saying anything that might be taken as a submission. However, with respect to Mr Samek's argument, it simply does not follow that a defendant submits who (a) objects to jurisdiction, but also (b) indicates that if there were jurisdiction over it the claim should properly be struck out as hopeless anyway. Such a defendant does not submit to the jurisdiction, so as to defeat its primary application challenging jurisdiction, by making the alternative application (strike-out)."

66. In my judgment the test derived from *Rein v Stein* applied in *Williams & Glyn's* and *Rubin* that there will be a submission to the jurisdiction if the step is "only necessary or only useful if the objection has been waived" and the test formulated by Patten J in *SMAY Investments* that the conduct must be a wholly unequivocal submission to the jurisdiction are not different tests but the same test. The latter is just a more succinct and modern statement of the same test. This is made clear by Colman J in *Advent Capital v Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm); [2005] 2 Lloyd's Rep 607, a case to which I drew attention in argument. At [78] Colman J said:

> "The relevant test is whether the party has by his conduct in the proceedings acted in such a way which is only necessary or only useful if objection to the jurisdiction of the court in question has been waived or has never been entertained at all: see *Williams & Glyn's Bank v. Astro-Dinamico* [1984] 1 WLR 438 at p444 approving *Rein v. Stein* (1892) 66 LT 469 at p471. The essence of the test is that – reflected in the word "only" – there has to be an unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction."

67. The issue of an application to strike out the claim at the same time as an application to challenge the jurisdiction cannot conceivably be described as "only necessary or only useful" if the objection to the jurisdiction made in the same application and is clearly not being abandoned. Putting it another way, where both applications are being made, the fifth defendant's conduct is at best equivocal. Whilst he could have made it absolutely clear by expressly stating in the application notice that the application to strike out was without prejudice to his challenge to the jurisdiction, the fact that he did not do so does not make his conduct wholly unequivocal. Andrew Baker J was correct to reject the similar argument which Mr Samek QC ran in *Tsarova*. Furthermore, the suggestion that somehow the fifth defendant had submitted to the jurisdiction by making the alternative application to strike out is, as I pointed out during the course of argument, inimical to proper case management.

68. There is also nothing in the point as to the order in which Mr Wilkinson dealt with the applications in his witness statement. As Mr Hossain QC pointed out, Mr Wilkinson explained at [15] that he did so because the arguments about whether there should be a stay on grounds of forum non conveniens depend to a degree upon the nature of the claims being advanced, which he then explained in the context of the strike-out application. The suggestion that by dealing with it first, the fifth defendant somehow submitted to the jurisdiction, verges on the nonsensical.

69. In the circumstances, there is no question of the fifth defendant being precluded from making his stay application because he had submitted to the jurisdiction of this Court.

Forum non conveniens

Applicable principles

70. I will consider together the applications by the first to fourth defendants and by the fifth defendant for a stay of the present proceedings on the grounds of *forum non conveniens.* The applicable principles were established in the famous speech of Lord Goff of Chieveley in the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 476-478:

> In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.
>
> (a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent

jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the *Société du Gaz* case, 1926 S.C.(H.L.) 13 , 21, *per* Lord Sumner; and *Anson, Private International Law* (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant,": see Scoles and Hay, Conflict of Laws (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see *Castel, Conflict of Laws* (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the *Société du Gaz* case, 1926 S.C.(H.L.) 13 , 21, where he said:

> "All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer."

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in *The Atlantic Star* [1974] A.C. 436 (Belgium); in *MacShannon's* case [1978] A.C. 795 (Scotland); in *Trendtex* [1982] A.C. 679 (Switzerland); and in the *The Abidin Daver* [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon's* case [1978] A.C. 795 , *per* Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's* case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] AC 398, 415, when he referred to the "natural forum" as being "that with which the action had the most

> real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v James Scott Engineering Group Ltd* 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.
>
> (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356 . It is difficult to imagine circumstances where, in such a case, a stay may be granted.
>
> (f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see *The Abidin Daver* [1984] AC 398, 411, *per* Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."

71. The principles were more recently reiterated by the Privy Council in *Altimo Holdings v Kyrgyz Mobil* [2011] UKPC 7; [2012] 1 WLR 1804 and by the Supreme Court in *Lungowe v Vedanta Resources* [2019] UKSC 20; [2020] AC 1045. These cases all emphasise that the test is a two limb one addressing separate enquiries:

(1) Whether there is another available forum which is clearly and distinctly more appropriate than the English forum. The burden of proving this first limb rests on the defendants.

(2) If the defendants discharge that burden, then the Court will normally grant a stay unless there are circumstances by reason of which justice requires that the case is tried here. On that second limb, on which the burden is on the claimants, the Court will look at all the circumstances of the case including those which go beyond those taken into account when considering connecting factors with other jurisdictions.

The parties' submissions

72. The overall submission made by Mr McGrath QC for the first to fourth defendants was that there was an overwhelming case, on the first limb of *Spiliada*, that Ukraine was clearly and distinctly the appropriate or natural forum for the determination of the dispute. On the basis that the defendants are right about the first limb, he submitted that there was no credible second limb argument available to the claimants. What the claimants now put forward was a contrived argument developed as a belated afterthought in their skeleton argument to the effect that the case would be decided against the claimants in Ukraine.

73. In relation to the first limb of *Spiliada*, Mr McGrath QC submitted that there were a substantial number of connecting factors with Ukraine. It was an available forum. The first to fourth and fifth defendants separately undertook to this Court that they would submit to the jurisdiction of the courts of Ukraine. So far as the parties were concerned, the claimants were both Ukrainian entities, the DGF being state-owned. The first defendant is a Ukrainian national who although living temporarily in Dubai is ordinarily resident in Ukraine where he has his permanent home.

74. The claimants sought to argue that he has closer ties to England than to Ukraine, but this was not borne out by the evidence. In the years up to 2019 he spent more than half his time in Ukraine, where his family are based, save for his children's schooling in England and he was and remains tax resident in Ukraine. In 2020 he spent more time in England, principally because of the Covid-19 pandemic, but even then, less than half the year and he has spent no time here at all in 2021. It was true that at one stage he was looking for a residence in London but that was no longer the case. His involvement with Ferrexpo did not provide a real connection with England. Although it is registered and listed here, it is headquartered and tax domiciled in Switzerland and its operating base is in Ukraine.

75. Furthermore, other than in the case of the Supply Contracts scheme, the first defendant was the only defendant to the other claims. Although the claimants attempted to suggest that monies may have been channelled through the second to fifth defendants, this was speculation with no evidential basis and no claim against them on that ground was advanced in the Particulars of Claim. Although the second to fourth defendants are English registered companies, the relevant operations of Frold and Eastroad were conducted in Ukraine and Macedonia. The fourth (and fifth) defendants' involvement was limited to one supply contract for the supply of a floating dock to a shipyard in Crimea, then part of Ukraine. Although the fifth defendant is a British national resident in England, he is prepared to submit to the jurisdiction of the courts of Ukraine.

76. Mr McGrath QC noted that, in their submissions the claimants sought to elevate the role of Nasterno in a number of the claims, no doubt so that they could point to the fact that it was a Cypriot company. However, he pointed out that it had been dissolved and, in any event, on the claimant's own case, it was a Cypriot shell company owned and managed by officials of a Ukrainian bank for the benefit of the first defendant, a Ukrainian national, so that, to the extent Nasterno had a role, that points back to Ukraine, not to Cyprus.

77. The officials of the Bank who are said to have acted on the first defendant's instructions such as Mr Demchenko and Mr Shapkin are all in Ukraine as are any witnesses from

the DGF and the NBU. Even if some of these Ukrainian witnesses can speak English, in all probability if they were required to give evidence in England and be cross-examined, they would wish to give evidence in their mother tongue, Ukrainian, so that interpreters would be required at trial. In contrast, if the claims proceed in Ukraine, all those witnesses will be able to give evidence there, crucially without the need for their evidence to be translated. The only potential witness in England is the fifth defendant who is prepared to be sued in Ukraine. Mr McGrath QC submitted that the fact that with that one exception the witnesses were Ukrainian nationals residing in Ukraine was an important factor pointing to Ukraine as the appropriate forum. As Lord Mance JSC said in *VTB Capital v Nutritek* [2013] UKSC 5; [2013] 2 AC 337 at [62]: *"[the location of witnesses] is at the core of the question of appropriate forum*".

78. The claimants identified at [81] of their skeleton other potential witnesses in the form of Frold's sole director the Belizean Jorge Castillo, and Marshall Islands entities behind Eastroad (together with the Belgian dentist Ali Moulaye who signed its accounts) saying it was highly unlikely any of them would want to give evidence in Ukraine. However, as Mr McGrath QC pointed out, the claimants do not explain what relevant evidence they would have to give.

79. Mr McGrath QC also points out that since the actions of which the claimants complain (in terms of what was done by Bank officials on the instructions of the first defendant) nearly all occurred in Ukraine, most of the relevant documents are in Ukrainian or Russian, as the claimants themselves said in Mr Healey's first affidavit, necessitating translation into English. He submits that this demonstrates the inconvenience of an extensive disclosure process taking place in England. He disputes the suggestion that the vast majority of relevant documents have already been translated into English, which accords with my own experience which suggests that, at what is still an interlocutory stage, nothing like full disclosure has yet been given, meaning that many more documents will need to be translated if the case proceeds here. In any event, Mr McGrath QC submits that it would be far better and less time consuming and costly for Ukrainian witnesses and the Ukrainian court to work from documents in their native language.

80. So far as the Supply Contracts Scheme claim is concerned, the claimants' loss was clearly caused in Ukraine by lending money to borrowers all of whom were Ukrainian. The loan agreements were all marked as entered into in Ukraine. Apart from the contract between Portman and Zaliv Port for the supply of the drydock which was marked as entered in England, all the supply contracts were marked as being entered in Ukraine and all were to be performed in Ukraine, Belarus or Russia. Apart from the second to fourth defendants which were English registered companies, the suppliers were Logistic, a BVI company, Bridgeholm, an English LLP, Velinsa, a Hong Kong company and Rou, a Macedonian company. However, Mr McGrath QC submitted that the location of the suppliers was irrelevant to the claims as the Bank's loss was suffered when the borrowers obtained the loans or their proceeds and the Bank also relies on the borrowers' failure to repay the loans in Ukraine.

81. Next, Mr McGrath QC relies upon the fact that, on the claimants' own case, all the claims, including the Supply Contracts Scheme claim are governed by Ukrainian law under the Rome II Regulation on the basis that the direct damage occurred in Ukraine and the claims are not manifestly more closely connected with any other country. He submitted that, although the Business and Property Courts now had considerable

experience of deciding issues of Russian and Ukrainian law, it remained preferable that cases were tried in the country whose law applied. This is particularly so where, as here, the issues of Ukrainian law are sufficiently complex that they cannot be determined summarily on this interlocutory application. Furthermore, some of the law is relatively recent, specifically Article 58 of the Law on Banks and Article 52 of the DGS Law upon which the claimants rely and which has been recently amended. At the time of the hearing these amendments were awaiting signature, but they were signed by the President of Ukraine on 2 August 2021 and became law on 5 August 2021. Mr McGrath QC also points out that Article 52 of the DGS Law has been the subject of a decision by the Supreme Court of Ukraine published on 13 July 2021, with other claims suspended in the meantime and Article 58 of the Law on Banks is awaiting consideration by the Supreme Court of Ukraine in a case involving the first defendant as a related party of the Bank.

82. Mr McGrath QC submitted that, in the circumstances, the analysis of Cockerill J in a very recent case on forum conveniens, *VTB Commodities Trading v JSC Antipinsky Refinery* [2021] EWHC 1758 (Comm) at [191]-[202], particularly at [201], was extremely apposite:

> "…it is a particularly unappealing prospect to ask a judge of this Court to express a view as to an area where Russian law appears to be hotly contentious and indeed in the process of development. This is the more so when any appeal from a decision on Russian law here would be impeded by being a decision on facts and expert evidence, where the Court of Appeal is very unlikely to interfere, whereas in Russia the full appeals process would be available."

83. Mr McGrath QC submitted that in a case like the present, the chances of the party who loses at trial wishing to appeal were very high. If it proceeded in Ukraine, any appeal court would be well-placed to consider any issues of Ukrainian law, as the Supreme Court of Ukraine is currently doing. In contrast a trial in England would lead to the artificial and unsatisfactory position where issues of foreign law are treated as questions of fact for the trial judge, with which the Court of Appeal would be unlikely to interfere, as Cockerill J said.

84. He submitted that justice could be done in Ukraine at *"substantially less inconvenience and expense"* (*Spiliada* at 477G-H). He made the point that to fight this case here with issues wholly governed by foreign law and serious allegations of fraud would involve vast expense, citing the recent *Tatneft* litigation where the overall costs were some £120 million. In contrast the unchallenged evidence of Mr Alyoshin was that the case would cost dramatically less to fight in Ukraine, about £1 million per party.

85. One of the issues in relation to whether Ukraine was clearly the appropriate forum which was the subject of some considerable dispute concerned the extent to which there are related and overlapping proceedings in Ukraine. Mr McGrath QC accepted that *lis alibi pendens* is not a decisive factor at common law, but submitted that it is a material factor in assessing convenience of forum.

86. He submitted that there are a number of ongoing criminal investigations in Ukraine into the events surrounding the failure of the Bank. Two of those, investigations 279 and

890 are of particular relevance, since, in accordance with established principles of Ukrainian law, the Bank has obtained victim status in those investigations, giving it the right to file a civil claim in the criminal proceedings. The defendants' case is that the Bank has filed a civil claim in criminal proceedings 279. The Bank asserts that it has not and that all it has done is lodge papers setting out the amount of its loss. Mr McGrath QC submits that the problem with that explanation is that the Kiev Court of Appeal has determined that the Bank has filed a civil claim in the criminal proceedings, albeit in investigation 890. In its judgment of 9 December 2020, the judges expressly rejected the argument of the representative of DRI LLC (the appellant in that case) that no civil claim had been filed by the Bank and the DGF in those criminal proceedings. Furthermore, the document filed by the Bank with the criminal prosecutor in November 2016 is headed in translation "Civil Suit" and contains at the end a prayer asking the prosecutor to consider the civil claim.

87. The defendants also relied on an internal report of the DGF into the liquidation of the Bank dated 18 September 2019, which referred to the Bank having filed 22 civil lawsuits including in criminal proceedings 279 where in November 2016 the Bank's claim was joined to those criminal proceedings and it was recognised as a civil law claimant.

88. In addition to the civil claims in the criminal proceedings, the defendants relied upon the fact that the Bank had brought numerous claims against the borrowers in respect of the loans the subject of the Accrued Interest Claim and against all the borrowers in the Supply Contracts Claim. A number of depositors have brought claims against the first defendant including the claim under Article 58 of the Law on Banks and Article 52 of the DGS Law currently before the Supreme Court (with at least 6 other such claims stayed pending that decision). There are also proceedings between Poltava Mining and the DGF regarding the priority given to Poltava Mining in the ranking of creditors of the Bank, which is in liquidation in Ukraine.

89. Mr McGrath QC submits that the existence of all these related and overlapping civil proceedings in Ukraine will lead to a risk of inconsistent judgments if the current proceedings continue in England, a risk which will not exist if all the proceedings are heard in Ukraine.

90. The defendants' final point as to why Ukraine is overwhelmingly the appropriate forum is that the claimants' case against the first defendant that he has caused or procured Bank officials or credit committees to behave in ways which were in breach of their duties to the Bank raises issues of the potential liability of non-officers or indirect shareholders in a Ukrainian company for breaches of duty by the company's officers. This in turn raises issues of the internal management of Ukrainian companies which are peculiarly best dealt with in the courts of the place of incorporation. Mr McGrath QC relied upon the judgment of Mr Jonathan Sumption QC (as he then was) sitting as a Deputy High Court Judge in *Ceskoslovenska Obchodni Banka AS v Nomura International Plc* [2003] 1 L. Pr. 20 at [12]:

> "In my judgment, the Czech Republic is a distinctly more appropriate forum for the trial of this dispute than England. Indeed I think that it is the only appropriate forum. My reasons are as follows:

> …
>
> (2) The common feature of all the legal heads under which the claimant advances its claim in respect of the March 1998 transactions is that they all involve an allegation that those transactions were improper acts for IPB to enter into or its management to authorise in IPB's interest. If the claimant is right, the essence of the wrong done against IPB by the defendants was that they induced IPB's management to act in breach of its duties to IPB or improperly benefited from their spontaneous decision to behave in this way. This is, therefore, fundamentally a dispute about the internal management of a Czech company. Moreover, the assets of which IPB is said to have been wrongfully deprived, consist of companies which are not only incorporated in the Czech Republic, but carry on a substantial business there."

91. In relation to the second limb of *Spiliada* Mr McGrath QC submitted that, once it was shown that Ukraine was clearly and overwhelmingly the appropriate forum, it was for the claimants to show by cogent evidence that Ukraine should be displaced, which they could not do. The claimants had originally sought to argue, by reference to evidence given by the first defendant as to problems with obtaining justice in Ukraine in *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm); [2012] 2 Lloyd's Rep 588 and statements made since, that the first defendant was contending that the case should not be tried in Ukraine. However, as Mr McGrath QC pointed out those arguments were made nearly ten years ago whereas the judicial system there has changed and they were in any event rejected by Andrew Smith J.

92. Furthermore, whatever he had said in the past, the first defendant was now positively asserting that he wanted the present case tried in Ukraine and would submit to the jurisdiction of the Ukrainian courts. Mr McGrath QC submitted that the argument which seemed to being made by the claimants that the first defendant's desire to litigate the case in Ukraine was a clever ruse whereby, having lost in Ukraine, he could somehow avoid enforcement of a Ukrainian judgment here or elsewhere on the grounds that the judgment was contrary to public policy, was nonsense. That argument would be given short shrift in circumstances where the first defendant had asked for the case to be sent to Ukraine.

93. Mr McGrath QC pointed out that his solicitors had pressed the claimants' solicitors in correspondence as to whether they were going to make a case that one could not obtain a fair trial in Ukraine, but the claimants' solicitors had refused to tell them, saying their case would be set out in evidence. In the event, no such case was made out. The furthest the claimants went was in the statement of Mr Beketov, their external lawyer in Ukraine, that disclosure was a more limited process in Ukraine than in England, being generally limited to documents supporting a party's case with no obligation to disclose documents adverse to the party's case. Mr Beketov also said that generally the Ukrainian courts would not draw adverse inferences from a failure to produce relevant evidence. Mr Beketov also said that witnesses were not required to produce witness statements on which they could be cross-examined and, in effect, cross-examination was a more limited procedure than in this jurisdiction.

94. Mr McGrath QC submitted that this came nowhere near establishing that the procedure in Ukraine caused substantial injustice. In this context he relied upon what Mr Sumption QC had said in *Nomura* at [17] about similar arguments in that case:

> "It remains to deal with the alleged absence of proper procedures for cross-examination and disclosure. In my judgment the Claimant's criticisms on these counts are not justified. The evidence on this application discloses a state of affairs which is fairly typical of civil law jurisdictions. Judges have a discretion, either on the application of a party or of their own motion, to order the production of broadly defined categories of documents, but it is more common for them to order the disclosure of specific documents known to exist. As to oral evidence, the judge decides which witnesses are to be called, but the parties may propose witnesses and their proposals are usually accepted. The judge questions the witnesses, but the parties may do so after he has finished. Cross-examination is, on the evidence before me, a good deal less confrontational than it is in England, and subject to tighter control by the judge. It is plain that in the Czech courts both oral and documentary evidence will be deployed only to the extent that the Judge considers that the proper determination of the case requires it. The tenor of the evidence is that Czech judges are less inclined than English ones to allow latitude to advocates to follow up a line of investigation which cannot be seen in advance to be productive. None of this means that the interests of justice are not served by their proceedings. Criticisms such as the Claimant makes need to [be] kept in perspective. Cross-examination and disclosure of documents are both features of the common law tradition of England, and of other jurisdictions which ultimately derive their forensic procedure from England. They reflect an approach, now rather less fashionable even in England, which left the conduct of litigation, and in particular the obtaining and deployment of evidence, in the hands of the parties. In civil law jurisdictions the obtaining and deployment of evidence is controlled by the Judge who may be less exhaustive in his pursuit of relevant material than the parties would have been in their own interests. English procedure is exceptionally thorough, but it is also exceptionally expensive and demanding of court time. All judicial systems are more or less imperfect, because they represent a compromise between competing objectives. It is certainly not possible to say that the absence of extensive facilities for disclosure of documents and discovery makes substantial justice unobtainable, even in cases which are evidentially complex or arise out of commercial fraud."

95. The claimants in fact went further than criticising these aspects of Ukrainian civil procedure, contending in effect that the Ukrainian courts had no experience of trying cases of complex international fraud such as the present whereas the Business and Property Courts here had immense experience of trying such cases including those

involving Ukrainian and Russian parties. In effect, the claimants argued that the Ukrainian courts, when compared to the English court, were not competent to try a complex dispute such as the present one, so that the claimants would not get justice in Ukraine.

96. The claimants relied upon the recent decision of Saini J in *Qatar Airways Group v Middle East News* [2020] EWHC 2975 (QB) at [377]-[378] comparing the level of justice available in UAE courts unfavourably with that available in England, as a case where the English court had taken account of the procedures and experience of the foreign court in assessing the issue of a stay on the grounds of *forum non conveniens*. Mr McGrath QC submitted that that case turned on its own particular facts. It concerned the ability of a Qatari entity to obtain justice in the UAE at a time when the UAE was imposing sanctions and embargoes on Qatar and Qatari entities. He pointed out that the judge had made it clear at [372] that he was not saying that there was a real risk of injustice before the UAE courts, rather that a Qatari entity would not have access to justice because of what he described in [374] as the hostile environment for Qataris in the UAE. The extreme position in that case was demonstrated by the finding at [377] that no local UAE lawyer would be prepared to act for a Qatari entity.

97. Mr McGrath QC submitted that the present case was in no sense comparable. It simply could not be said that the claimants as Ukrainian entities, one of them state owned, could not get justice before their own courts. He submitted that what this argument about competence really came to was an attempt by the claimants to have the case heard here because they believe they will get a more favourable outcome in England than Ukraine. This was the kind of forum shopping which the principles of *forum non conveniens* were aimed at preventing.

98. The claimants contend that there is a lack of independence in the Ukrainian judiciary because of a real risk that the first defendant will attempt to pervert the course of justice by influencing Ukrainian judges. The claimants through Mr Plotnichenko's evidence relied upon the first defendant's alleged previous attempts to influence judges and other state officials to obtain a ruling in his favour in relation to the investigations. They also rely upon a hearsay statement of something the first defendant is alleged to have said to Mr Demchenko about matters being "sorted out with law enforcement".

99. The defendants strenuously deny what they say are such unsupported allegations, but Mr McGrath QC noted that, in any event, there is no evidence whatsoever, let alone the cogent evidence that would be required, that the Ukrainian judiciary would succumb to such an improper attempt to influence them. He relied upon my analysis in *Erste Group Bank AG v JSC VMZ "Red October"* [2013] EWHC 2926 (Comm); [2014] BPIR 81 at [224]:

> "That leaves Mr Salzedo's first point, which is essentially that an entity such as RT, if it has participated in a conspiracy to strip its affiliates of their assets, is unlikely to stop there if proceedings are on foot which would have the effect, if successful, of unravelling the conspiracy, but would seek improperly to influence the outcome of those proceedings if it could. Mr Salzedo submitted that what emerges, particularly from the work of Professor Hendley is that there is a completely different cultural background and history in Russia compared with the

> United Kingdom in terms of influence being brought to bear on the judiciary. This is a point of some force, but ultimately I have concluded that, even if RT wanted to try to improperly influence the judges and their decisions, there is simply no cogent evidence of a risk that they would be able successfully to do so."

100. The claimants made much in their skeleton argument of the relative ease of enforcement of an English judgment compared with a Ukrainian judgment against the defendants' assets. They identified as assets of the first defendant in England: (i) a 50.3% shareholding in Ferrexpo plc worth some £1.4 billion and (ii) a private jet. In relation to enforcement in England, they submit that the relative ease of enforcement is a key factor particularly where the first defendant has a history of failing to honour payments due under his personal guarantee and of challenging enforcement of orders of the Ukrainian court.

101. The claimants served expert evidence of Cypriot and Singapore law as to the difficulties of enforcing a Ukrainian judgment as opposed to an English judgment in those jurisdictions being the jurisdictions where enforcement against the main asset, the Ferrexpo shareholding, was likely to be sought. Mr McGrath QC submitted that the claimants had overplayed the difficulties of enforcing a Ukrainian judgment, not least because their skeleton argument ignored completely that the defendants had agreed to submit to the Ukrainian jurisdiction. It had also ignored that the first defendant disputed that the 50.3% shareholding was his asset. The shareholding has been owned since May 2007 (long before any alleged wrongdoing) by the Minco Trust and the claimants are not suggesting that it is a sham. Mr McGrath QC contends that the terms of the Trust Deed are wholly inconsistent with an allegation that the first defendant retains beneficial ownership of the trust assets. The trustees' powers are exercisable in their absolute discretion, subject only to limited veto rights of the first defendant as protector, Meinly in relation to addition or removal of beneficiaries and a power to change the trustees.

102. Mr McGrath QC submitted that since the proper law of the Minco Trust was Singapore law, but the trust assets were located in England, any proceedings in Singapore (or for that matter Cyprus) would not be about enforcement of any Ukrainian judgment but about a challenge to the validity of the Trust Deed. Any actual enforcement proceedings against the trust assets would have to take place here in England since the shareholding is located here.

103. The last point with which Mr McGrath QC dealt was a point which he says surfaced for the first time in the claimants' skeleton, that this Court should not grant a stay because any claim in Ukraine would be time-barred. He submits that to succeed on this point the claimants would have to show (a) that it was reasonable to issue proceedings here but also (b) that they acted reasonably in not issuing proceedings in Ukraine, even protectively: see per Lord Goff in *Spiliada* at 483H-484A and per Lord Collins in *Altimo Holdings* at [88].

104. He submitted that it had not been reasonable for the claimants to commence proceedings in England when everything in the case really pointed to Ukraine, all the more so when, on the claimants' own case, the claim became time barred under Ukrainian law on 26 April 2021, but they did not issue the proceedings until 11 February 2021. As he put it graphically, the Court should not reward forum shoppers

particularly when they only went shopping just before closing time. Furthermore, once the claimants knew that the defendants were challenging the English jurisdiction which they knew at the latest by the time of the acknowledgment of service on 26 February 2021 indicating an intention to challenge the jurisdiction, if they had acted reasonably, they would at least have issued protective proceedings in Ukraine. Their failure to do so was all the more remarkable because when Gateley were instructed in 2020 it was to consider potential proceedings not just in England, but in Ukraine.

105. In relation to *forum non conveniens*, Mr Hossein QC on behalf of the fifth defendant adopted Mr McGrath QC's submissions. He made a few additional submissions, pointing out that the fifth defendant's application for a stay was contingent on the first to fourth defendants' application. In other words, he submitted that if the Court acceded to the first to fourth defendants' application and determined that the case against them should be tried in Ukraine, then the case against the fifth defendant should not be left in England. If it were, that would lead to fragmentation in the way in which the claims are determined and the risk of inconsistent judgments, which would be an undesirable outcome. The importance of avoiding that risk as a factor in ensuring that the proceedings against all defendants take place in one jurisdiction was emphasised by the Supreme Court in *Vedanta* and reiterated by the Court of Appeal in *E D & F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2019] EWCA Civ 2073.

106. In relation to the first limb of *Spiliada* Mr Samek QC for the claimants submitted that the merits were relevant to an assessment of the nature of the case that would be tried, wherever that trial took place and that it was important not just to focus on the particulars of claim but what the issues were likely to be at trial. He relied upon what was said by the Supreme Court in *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] UKSC 37 at [94]:

> "Leaving aside questions as to the burden of proof, at common law the forum conveniens doctrine requires the English court to decide whether its jurisdiction or that of the suggested foreign court is the more suitable as a forum for the determination of the dispute between the parties. The traditional way in which this question has been framed speaks of the "forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice" (per Lord Collins JSC in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, para 88, adopting the language of Lord Goff in *Spiliada Maritime Corpn* v *Cansulex Ltd ("The Spiliada")* [1987] AC 460). The requirement in complex litigation to define, at the outset, what is "the case" to be tried runs the risk that the court will by choosing a particular definition prejudge the outcome of the forum conveniens analysis, as the Court of Appeal decided had occurred at first instance in *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72. Harman J had characterised "the case" as a petition under the English Companies Act for relief for unfair prejudice in the conduct of the affairs of an English registered company, which made it "blindingly obvious" to him that England was the appropriate forum. But the company carried on business entirely in Argentina. The matters

> complained of all occurred there, where there was a parallel jurisdiction to provide relief under Argentinian legislation. So the Court of Appeal preferred Argentina as the appropriate forum. Like the Court of Appeal in the present case, we therefore prefer for present purposes to identify the dispute between the parties as the matter to be tried, lest reference to "the case" should introduce undue formalism into the analysis of a question of substance."

107. Mr Samek QC also relied upon what Lord Clarke said in *VTB Capital* at [192] to [194]:

> "it appears to me that it is important for the court to know what issues are likely to arise at the trial of the action on the merits. Only when the issues are identified will it be possible to compare the two jurisdictions. This principle is now stated in *Dicey, Morris & Collins* on *The Conflict of Laws*, 15th ed (2012), para 11-143, in which, having stated the general principles much as above, the editors say that, in practice, the defendant should identify the issues which are appropriate to be tried in the foreign court. In the footnote to that sentence the editors referred to *Limit (No 3) Ltd v PDV Insurance Co* [2005] EWCA Civ 383, at para 73 and *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch), [2006] 1 L. Pr. 129, at para 54. See also *Islamic Republic of Pakistan v Zadari* [2006] EWHC 2411 (Comm), at para 138 and *Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] EWCA Civ 122. Lawrence Collins J or Lawrence Collins LJ is the author of the relevant passage in each of those cases except the *Limit (No 3)* case, in which I admit to being the author.
>
> 193 I adhere to the view I expressed in that case, now supported by *Dicey*. As Eder J put it in *Mujur Bakat Sdn Bhd v Uni Asia General Insurance Berhad* [2011] EWHC 643 (Comm), at para 9
>
> > "…in considering whether or not England is the most appropriate forum, it is necessary to have in mind the overall shape of any trial and, in particular what are, or what are at least likely to be, the issues between the parties and which will ultimately be required to be determined at any trial. These were originally set out in two letters …"
>
> I stress that I do not mean that a defendant must set out his evidence in great detail, whether of foreign law or of fact. The purpose of the exercise is simply to state what the issues of fact are likely to be, so that the court can gauge whether England is clearly or distinctly the appropriate forum for the trial of the issues. This is of some importance in this case because no evidence was put before the court on the merits of the claims by or on behalf of Mr Malofeev. Moreover, Mr Hapgood QC submitted to the court in the course of the argument that Mr Malofeev was perfectly entitled to say and he does say to VTB,

> "You are accusing me of being a swindler, you get on and prove it." Mr Hapgood added that the matter proceeded in both courts below on the clear understanding that VTB will have to prove its case. As he put it, they will have to prove all five ingredients of a claim for fraudulent misrepresentation and a sixth ingredient in the case of conspiracy. It appears from what Mr Hapgood said that, at any rate at present, he has no positive case. It is of course true that a defendant in the position of Mr Malofeev is not bound to advance a positive case but, in the absence of a positive case, the focus of the court can only be on the ingredients of the claim. It should not speculate about the nature of any positive case that might be advanced in the future.
>
> 194 It was suggested in the course of the argument that the defendants could not plead a case or put forward a positive case because of the risk that they would submit to the jurisdiction. There is, in my opinion, no such risk. There is no reason why defendants should not put in a draft defence or evidence on the express basis that they are doing so without prejudice to their case on jurisdiction. I note in passing that it is the duty of the parties under CPR 1.3 to help the court to further the overriding objective, which is to deal with cases justly."

108. Although Lord Clarke was in a dissenting minority, Mr Samek QC pointed out that Lord Neuberger, one of the majority, had made much the same point at [90]-[91]. He submitted that the defendants here had, in Lord Neuberger's phrase "kept their powder dry" but that the main line of the first defendant is that he was not aware of what was going on in the Bank which he controlled and that he did not know about the day-to-day operations of a plethora of offshore companies that he owned and controlled. In the circumstances, given that the defendants were not telling the Court what the defence is, Mr Samek QC submitted that the Court should treat with a large pinch of salt the assertion that there were going to be so many witnesses and documents from Ukraine required at trial. He disputed the suggestion that this was a case like *Nomura* raising issues of internal management of the Bank. It was not, but a case of whopping wrongdoing over a number of years involving the theft of over half a billion dollars where the first defendant had instructed the officials to do his bidding. It was not an issue of internal management but whether the first defendant told the relevant instrument of his will to do his bidding or not.

109. To the extent that it was necessary for witnesses from Ukraine to give evidence at trial, he said on instructions that there would be no problem with their coming to England or giving their evidence over video-link.

110. He submitted that when one looked at the characterisation of the claims, this was not simply a Ukrainian matter but, particularly in relation to the Supply Contracts Scheme, a major international fraud involving the use of a number of English registered entities including the second to fourth defendants and their involvement in this fraud should be a matter to be investigated by the English Court. The directors and officers of these entities were elsewhere than Ukraine, as were their bank accounts. When one was looking at the characterisation of the claim, it was not just a question of looking at the schemes but at what had happened to the monies and the claimants would be seeking

to enforce against the entities to whom funds had been distributed, including the second to fourth defendants. None of those entities was a Ukrainian company.

111. Mr Samek QC maintained the case that the first defendant had ties with this jurisdiction and contended that the reality was that the first defendant did not want to return to Ukraine to fight this case, given that there was an outstanding arrest warrant against him which he had not appealed, nor had he surrendered to the Ukrainian authorities.

112. In relation to the fact that all the claims are governed by Ukrainian law, he submitted that the English Courts were extremely experienced in determining issues of foreign law, particularly Ukrainian and Russian law. The fact that there might in the abstract be changes in Ukrainian law was not a good reason for concluding that the issues of Ukrainian law should be determined in Ukraine. Equally, the fact that the claimants' expert evidence on Ukrainian law was contested by the defendant's expert so that there was a labyrinth of issues over which there was disagreement was not a good reason for defeating this Court's jurisdiction. Whilst Mr Samek QC saw the force of the point made by Cockerill J in *Antipinsky* in a really complex case of foreign law, he submitted that this case was not in that territory, but involved relatively tried and tested issues of Ukrainian law.

113. In relation to Mr McGrath QC's point about the costs of the litigation being far cheaper in Ukraine, Mr Samek QC submitted that this point carried little weight because one simply did not know what the costs would be. In any event, the first defendant had very deep pockets and the fifth defendant's costs were, on his own admission, being paid by the first defendant.

114. In support of his submission that the issue of which was the most convenient forum also included consideration of where any judgment could most easily be enforced, Mr Samek QC relied upon what Morritt LJ said in *International Credit and Investment Co (Overseas) Ltd v Adham* [1999] 1 L. Pr. 302 at [25]:

> "The new defendants contend that in the *Spiliada* case, Lord Goff, in dealing with the question of the treatment of what had become known as a legitimate personal or juridical advantage, was in terms considering the trial of the action and not its aftermath. It is pointed out, correctly, that all the examples he gives relate to what might be described as the pre-judgment stage. I have no hesitation, though, in rejecting the submission. Litigation is not an end in itself. A plaintiff is concerned not only to obtain judgment in his favour, but to enforce it by whatever means are available to him so as actually to receive the compensation the court thought fit to award him. Advantages in the mechanics of enforcement in one jurisdiction, as opposed to another, are no less advantageous than advantages in the procedure whereby the judgment is obtained in the first place. The fact that Lord Goff did not advert to them expressly because they did not arise in the case with which he was dealing is no reason for denying legal recognition to the factually obvious."

115. Mr Samek QC also relied upon the decision of the Court of Appeal in *Sharab v Prince Al-Waleed* [2009] EWCA Civ 353. In that case the judge at first instance had held that

the ease of enforcement of an English judgment in England where the defendant had assets was a factor favouring England as the appropriate forum, whereas the prospect of invoking the common law jurisdiction to enforce a judgment from the alternative forum, Libya, was at best theoretical. That decision was upheld on appeal.

116. It was not just the Ferrexpo shareholding which was in England but also any assets of the second to fourth defendants which were English registered entities and the fifth defendant whose assets were also in England. In terms of ease of enforcement of a Ukrainian judgment in England, Mr Samek QC referred to the common law rule confirmed by the Supreme Court in *Rubin* that a foreign judgment will only be enforced here, if the defendant was present in the foreign jurisdiction when proceedings were served or had submitted to the jurisdiction of the foreign court. He disputed whether this Court could rely upon assurances about submission to the Ukrainian court by the first defendant, a fugitive from justice in Ukraine. He sought to cast doubt on whether any of the defendants is really submitting to the Ukrainian jurisdiction. I should say at once that I consider that it is quite clear from the material before the Court that all the defendants are stating that they will submit to the jurisdiction of the Ukrainian courts. However, as I indicated during the course of argument, to put the matter beyond doubt, I would require formal undertakings from all the defendants to submit to the Ukrainian jurisdiction, to be recorded in the Court Order.

117. In relation to the second limb of *Spiliada* Mr Samek QC maintained that, despite any undertaking given to this Court as regards submission to the jurisdiction of the Ukrainian courts, there was no assurance that the first defendant would not raise public policy defences to any attempt to enforce a Ukrainian judgment in another jurisdiction on the ground that he had been unable to obtain justice in Ukraine. He took the Court at some length to the evidence the first defendant had given in the *Ferrexpo* case decided by Andrew Smith J. During the course of argument, I put to Mr Samek QC that that case was one of a direct challenge to the Ukraine where the judge held that there would have to be very compelling evidence to demonstrate that there could not be a fair trial in Ukraine and that there was not such evidence. I suggested to Mr Samek QC that the same test should apply here where it is not being said now that the defendants cannot get a fair trial in Ukraine but that is something which might be said later, when it was sought to enforce a Ukrainian judgment. Mr Samek QC disputed that the same test should apply because what was in issue here was the first defendant's attitude. He submitted that the applicable test should be whether there is a real as opposed to a fanciful risk that the defendants will run arguments at the enforcement stage that they did not get a fair trial in Ukraine or that the judges were politicised or biased against them.

118. He submitted that there was such a real risk here, not just because of what the first defendant had said the best part of ten years ago, but more recent criticisms levelled by him at the Ukrainian authorities. He relied on an article which referred to his press service saying that adding the first defendant to the wanted list in relation to the collapse of the Bank was "political persecution". A Forbes magazine article in March 2020 about the first defendant stepping down as CEO of Ferrexpo refers to off the record statements by those close to Ferrexpo that the attack on the company was inspired by the unprecedented move by politically motivated prosecutors to freeze its assets and put pressure on the first defendant. The article also quoted his lawyer as referring to cases

being postponed due to the absence of prosecutors and judges as a deliberate attempt to deprive the first defendant of his access to justice.

119. His lawyers had also complained in April 2020 about the amount of a court fee to file an appeal as restriction of his access to justice and in June 2020 about the decision of the Pechersky District Court of Kiev despite the complete absence of evidence on the first defendant and gross procedural violations and fabrication of evidence by investigators.

120. Mr Samek QC also relied upon a passage in the Ferrexpo 2020 annual report which was critical of the Ukrainian legal system in these terms:

> "The independence of the judicial system and its immunity from economic and political influences in Ukraine remains questionable and the stability of existing legal frameworks may weaken further with future political changes in Ukraine. Because Ukraine is a civil law jurisdiction, judicial decisions generally have no precedential effect on subsequent decisions, and courts are generally not bound by earlier decisions taken under the same or similar circumstances which can result in the inconsistent application of Ukrainian legislation to resolve the same or similar disputes. In addition, court claims are often used in the furtherance of political aims. The Group may be subject to such claims and may not be able to receive a fair hearing."

121. Mr Samek QC also submitted that if the first defendant really had confidence in the Ukrainian judicial system, he would have willingly attended the interview with the Ukrainian prosecuting authorities in September 2019. Instead he fled the country, leading to the arrest warrant. No explanation had been provided as to why he had done so and why he had not gone back to Ukraine.

122. Mr Samek QC submitted in summary that the first defendant's attitude was that if he gets what he perceives as a raw deal from something to do with the Ukrainian state (and in this context he regards the DGF and the NBU as working hand in glove) this is political and not consistent with a fair trial or justice. There is a real risk that if he loses the case before the Ukrainian courts, he will do everything he can to argue that courts in other jurisdictions should not enforce the Ukrainian judgment because it offends public policy.

123. He also submitted that, although the first defendant might undertake to submit to the jurisdiction of the Ukrainian courts, there was a very real possibility that he would not take part in any proceedings in Ukraine leaving the claimants with the problem, as regards enforcement, that any judgment would not have been decided on the merits.

124. Mr Samek QC contrasted the position before the Ukrainian courts where there may be these potential issues of political influence with the position before the English Courts. He placed particular reliance on what Saini J said in the *Qatar Airways* case at [378 (i)], in effect substituting for the reference to UAE courts the Ukrainian courts:

> "England is an available forum and the whole claim can be tried here. It is also a neutral, and highly respected, forum with no

> political commitment to either the Qatar or the Blockading States side in the Gulf crisis, giving its judgment a greater vindicatory worldwide force. In contrast a judgment from the UAE courts would not have that valued perceived international neutrality."

125. He submitted that there can be no argument about political influence before the English courts, with no political commitment to either the claimants or the first defendant, so that an English judgment would have much greater vindicatory worldwide force and greater prospects of being enforced quickly.

126. In relation to the claimants' case that if the case proceeded in Ukraine the first defendant would seek to influence the judiciary improperly, Mr Samek QC relied upon the witness statement of Mr Plotnichenko who says that the law enforcement authorities in Ukraine have been far from cooperative with the claimants in their investigations and that investigation 890 had been suspended because the first defendant could not be found. It was also in this context that he raised what the first defendant is said to have told Mr Demchenko about "sorting out" law enforcement and reminded the Court of Mr Demchenko's evidence that the first defendant had instructed him to destroy documents. The implication of all this was that the first defendant had already brought influence to bear on the law enforcement authorities in Ukraine. Mr Samek QC said that he was not suggesting that the Ukrainian justice system is endemically corrupt, just that there is a real risk that the first defendant will use his vast financial resources and influence to try to secure whatever forensic advantage he thinks he might not be able to secure otherwise. That risk was completely absent if the case proceeded in England.

127. Mr Samek QC emphasised the limitations on disclosure and cross-examination in the Ukrainian courts to which I have already referred and, in particular, that even if the first defendant did not disclose relevant documentation, the Ukrainian courts would not draw any adverse inferences against him. This could prove fatal to the claimants' case if it were litigated in Ukraine, particularly where the first defendant's defence was that he did not have day to day dealings with the suppliers or supervise day to day activities, so that justice would not be done.

128. On the issue of limitation, Mr Samek QC submitted that it had not been unreasonable to commence proceedings in England and not in Ukraine, because the claimants believed that a Ukrainian judgment would not give them the vindicatory force of an English judgment on the facts. Also, it would generally be abusive to pursue parallel proceedings. He placed considerable emphasis on the fact that critical documents upon which the claimants rely for their WFO application such as the transcript of Mr Demchenko's interview with the investigators were only available to the claimants and their lawyers at the end of last year.

Discussion

129. So far as the first limb of *Spiliada* is concerned, despite the contrary submissions advanced by Mr Samek QC, I am entirely satisfied that Ukraine is overwhelmingly the appropriate forum for the determination of this dispute, for the reasons which follow. Dealing first with the characterisation of the dispute, it is important, as the Supreme Court emphasised in *Unwired Planet* to identify what is the matter to be tried, not simply focus on the formal pleaded particulars of claim. In identifying what will be in issue at trial, contrary to the claimants' submissions the defendants have not simply

"kept their powder dry". I have summarised at [25] to [27] above what Mr McGregor says about the defendants' case. Mr Samek QC was critical that the first defendant had not produced a witness statement, although I did not understand him to be contending that he should have served a draft defence as Lord Clarke suggested in *VTB Capital*. In my judgment, it would not be usual to expect a defendant to do so in a *forum non conveniens* challenge to the jurisdiction. As Lord Neuberger (in the majority in that case) said at [91]:

> "I agree with Lord Clarke that a defendant could exhibit draft points of defence, but in many cases, it may be disproportionate to expect him to incur the costs of doing so before it has been decided whether the claim is to proceed at all."

130. As Mr McGregor correctly said at [112] of his first witness statement, before summarising the first defendant's case: *"within the confines of the applicable test, for the most part, the Court is not going to be in a position to make a meaningful assessment of the strength or weakness of those factual averments at this interlocutory hearing."* As I pointed out to Mr Samek QC during the course of argument, the problem with his criticisms of the first defendant for failing to engage with some of the really important allegations against him is that the Court cannot engage in a mini-trial on an interlocutory challenge to jurisdiction such as this, as the Courts have said repeatedly over the years. As I said, if the first defendant had produced a 45 page witness statement setting out his case on every single point, the claimants would only have come back with a 90 page statement in response and the Court simply could not resolve, at this stage, the factual disputes to which that would give rise.

131. As it is, the broad nature of the defence is clear. The defendants deny any wrongdoing. The first defendant was not involved in the day to day operations of the Bank and decisions about loans were the legal responsibility not of the first defendant but bank officials and the credit committee. He was not involved in the day to day operations of the borrowers or suppliers. The losses suffered by the Bank were caused not by the defendants' wrongdoing but by the incorrect decision of the NBU to put it into administration and then liquidation. The first defendant makes the point that at the time when many of the impugned transactions took place, the Bank was under the close supervision of the NBU. Furthermore, as Mr McGrath QC pointed out, the first defendant's concerns about the actions of the NBU in putting the Bank into administration and liquidation do have a basis in reality, in that, as Mr McGregor notes, on at least three occasions, the Ukrainian courts have held that the NBU acted illegally by declaring certain banks insolvent during the 2014 to 2016 reform programme.

132. The claimants and their legal advisers are sceptical about the first defendant's case and it may well be that after a trial, that scepticism proves justified and the defendants are held liable. However, at this stage, without embarking on a mini-trial with witnesses being called and cross-examined, which is impermissible on a jurisdiction challenge, it is impossible for the Court to reach any conclusion about the strength or weakness of any party's case beyond the conclusion that the claimants do have a good arguable case, a matter to which I will return later in the judgment.

133. Although in determining an issue as to *forum non conveniens* the Court has to identify the issues which will need to be tried and not simply be wedded formulaically to the particulars of claim, that pleading does provide an important starting point for the

characterisation of the dispute. As Mr McGrath QC reminded the Court, this is not a case where the claimants rely upon criminal liability to establish civil claims. Rather the case is based upon the bank officials having breached their internal codes and being in breach of the Law on Banks and the UCC and upon the first defendant having caused or procured them to act as they did so that he was himself in breach of the Articles of the UCC, the DGF Law and the Law on Banks upon which the claimants rely.

134. Taking that pleading and what is said by Mr McGregor as to the defence together, it is clear that at any trial wherever it takes place, there will be factual issues, inter alia, as to whether the Bank's officials were acting on instructions from the first defendant and as to the extent to which he caused or procured them to act as they did. There will also be issues as to the involvement of the NBU in the supervision and management of the Bank, as to whether the transactions of which complaint is now made were known to and/or approved by the NBU and as to whether the losses suffered by the Bank were caused by the NBU decision to put it into administration and then liquidation. All those factual issues will require evidence primarily from witnesses who are Ukrainian nationals living in Ukraine. Although it is said on behalf of the claimants that their witnesses would be willing to give evidence before the English court either in person or by video link, it would be more convenient for them to give evidence before a Ukrainian court. Equally, although some of them may speak English, the overwhelming likelihood is that they will want to give evidence in Ukrainian as their mother tongue. It is surely much better for such witnesses to give evidence in Ukrainian before the Ukrainian court without the need for interpreters.

135. The resolution of factual issues such as I have identified is also likely to involve a considerable amount of documentation, particularly from the Bank and the NBU. Although Mr Samek QC said that a great deal of relevant documentation had already been produced and translated, he quite understandably was not able to provide the Court with an assurance that there would not be more disclosure of documentation, most of which will be in Ukrainian or Russian. Experience of litigation of this kind suggests that there will be a considerable amount of further disclosure which, if the case proceeds in England, will require translation at considerable expense. The cost of translation would be avoided if the case proceeds in Ukraine and it is far better for documents in Ukrainian and Russian to be considered by the Ukrainian court.

136. So far as the defendants are concerned, with the exception of the fifth defendant, it is unlikely that any witnesses will be from jurisdictions other than Ukraine. The first defendant is Ukrainian and would wish to give his evidence in Ukrainian. Given the nature of his defence, it seems likely that any witnesses he would be likely to call would be from Ukraine. Although the claimants sought to suggest that he had closer connections with England than Ukraine since he left Ukraine, that suggestion is unsustainable on the evidence as to how much time the first defendant has spent here (other than during lockdown in the pandemic). Whilst it is true that the first defendant is a fugitive from justice in Ukraine, that is still the jurisdiction with which he has his closest connection and where he and his family are ordinarily resident.

137. As I noted at [78] above, the claimants identified potential corporate officers of the second to fourth defendants who would be potential witnesses, but as Mr McGrath QC pointed out, the claimants did not explain what relevant evidence such witnesses would be giving. Certainly the claimants themselves would be unlikely to call such witnesses, given that their case is that the second to fourth defendants and other entities such as

Nasterno are corporate vehicles for the first defendant, of which he is the UBO. It is equally difficult to see what relevant evidence they would be required to give on behalf of the defendants.

138. The fact that the fifth defendant is a British national resident in England does not tilt the balance very far towards England in terms of convenience of forum, particularly when the fifth defendant has agreed to submit to the jurisdiction of the Ukrainian courts. On the claimants' pleaded case the fifth defendant's involvement was limited to the supply contact between Portman and Zaliv Port for the supply of a floating dock to a shipyard in Crimea, with a value of some US$30 million. Although his involvement was limited in that way, the claimants sought to broaden his potential liability to make him a joint tortfeasor under Article 1190 of the UCC in respect of the entire Supply Contracts Scheme. It is difficult to see how this broader case would be sustainable. Overall, notwithstanding that four of the five defendants are English, the most appropriate forum so far as witness evidence and documentation are concerned is Ukraine.

139. As McGrath QC noted, on the claimants' own case, all the claims, including the Supply Contracts Scheme claim are governed by Ukrainian law under the Rome II Regulation on the basis that the direct damage occurred in Ukraine and the claims are not manifestly more closely connected with any other country. This is important for two reasons. First it means that, if this case proceeds in England, all and any legal issues will be of Ukrainian law, upon which expert evidence would be required (to which I turn below). Second, although the claimants sought to make much of the case involving a widespread international fraud with the use of corporate entities all over the world by the first defendant, the loss which the Bank suffered was suffered in Ukraine through the lending of money which has not been repaid. There are no proprietary claims seeking to trace funds into the hand of those corporate entities. In other words, the claims and the dispute are essentially Ukraine centric.

140. Contrary to Mr Samek QC's submissions, I do not consider that the issues of Ukrainian law which emerge from the expert evidence before the Court can really be said to be relatively tried and tested issues of Ukrainian law so far as this Court is concerned. Amongst the issues raised which are not straightforward are: (i) what is required to demonstrate the element of unlawfulness under Article 1166 of the UCC; (ii) whether there is a presumption of unlawfulness; (iii) whether there is any liability under the UCC for causing or procuring others to commit torts and, in particular, whether that liability can be established via Article 1190; (iv) whether the fact that the Bank has suffered loss under contracts with third parties is a bar to a claim under Article 1166; (v) whether to be joint tortfeasors under Article 1190, the parties in question must have committed the same act or omission; (vi) whether a claim for unjust enrichment can only be pursued if a Ukrainian court has declared the loan agreements invalid; (vii) whether under the test for constructive knowledge in the Ukrainian law of limitation the knowledge of bank officials will be attributed to the Bank. There are also issues concerning Article 58 of the Law on Banks and Article 52 of the DGF Law. The latter has been very recently amended and consideration of the former is apparently pending before the Ukrainian Supreme Court.

141. These issues are complex and hotly contested between the parties' Ukrainian law experts. Contrary to Mr Samek QC's submissions, I consider that it is far more appropriate that these complex issues of Ukrainian law are determined by the Ukrainian

courts rather than this Court, essentially for the reasons given so cogently by Cockerill J in the passage from her judgment in the *Antipinsky* case which I cited at [82] above. These are issues of Ukrainian law which either party might well want to appeal. Their ability to do so in England is severely constrained by the principle that issues of foreign law are issues of fact, in relation to which appellate courts will rarely interfere with the decision of the trial judge. No such constraint would impede an appeal in Ukraine on issues of Ukrainian law.

142. Furthermore, contrary to Mr Samek QC's submissions, it is clear, even from the limited exposition of the defence set out in [112] of Mr McGregor's first witness statement, that at trial, issues of the internal management of the Bank will arise. Given that it is a Ukrainian company, the Ukrainian court is clearly the more appropriate court to deal with those issues, as Jonathan Sumption QC held in the *Nomura* case in the passage cited at [90] above. It is also clear that the first defendant is highly critical of the decision of the NBU to put the Bank into administration and liquidation and says that it is that decision which has caused the Bank's loss. To the extent that, as appears to be the case, this will involve a contention that the NBU acted unlawfully, or at least wrongfully, the Ukrainian court is clearly the more appropriate court to determine issues in relation to the conduct of the national bank. It would be invidious for this Court to have to resolve issues of that kind.

143. Much was made by the claimants, in disputing that Ukraine was the most appropriate forum, of the relative ease of enforcement of an English judgment as opposed to a Ukrainian judgment. As I have noted above, reliance was placed upon the decisions of the Court of Appeal in *Adham* and *Sharab*. The principal asset against which any judgment is likely to be sought to be enforced is the 50.3% shareholding in Ferrexpo which the claimants contend is beneficially owned by the first defendant. The claimants served expert evidence of Singapore and Cyprus law as to relative ease of enforcement, on the basis that those were the jurisdictions in which enforcement against the shareholding is most likely to be sought. According to Mr Healey's evidence, the shareholding is held by Fevamotinico, a company owned by the Minco Trust, whose Trust Deed is governed by Singaporean law. The sole shareholder in Fevamotinico is a Cyprus registered company. However, although the shareholding is held through those Singaporean and Cypriot entities, since Ferrexpo is an English registered company, enforcement against the shareholding is likely to be in England. The relevance of Singapore and Cyprus will not be to enforcement of any judgment but to potential proceedings to determine, for example, the effect and validity of the Minco Trust Deed.

144. Although some reference was made to enforcement against the other defendants, apart from the fifth defendant's assets (which include his half-share in his house) there is no evidence that the second to fourth defendants have any substantial assets against which enforcement would be worthwhile, either in England or elsewhere. As I have said, the principal asset against which enforcement would be likely to be sought is the Ferrexpo shareholding in England. So far as that asset is concerned, the real issues are likely to be as to the validity of the trust and as to whether the first defendant is or is not its UBO and those are issues which will arise (whether here, in Singapore or in Cyprus) irrespective of whether the judgment sought to be enforced is an English or a Ukrainian judgment.

145. So far as the enforceability in England of any Ukrainian judgment is concerned, it is not disputed that, if the defendants have submitted to the jurisdiction of the Ukrainian

court, a Ukrainian judgment is enforceable at common law. As I have indicated, any concern that the claimants have as to the genuineness of that submission is easily addressed by requiring the defendants to give an express undertaking to this Court to submit to the jurisdiction of the Ukrainian court. Accordingly, a Ukrainian judgment would clearly be enforceable in England and there is no question of any valid analogy with a Libyan judgment in *Sharab*. In my judgment, relative ease of enforcement, although a factor favouring England as the appropriate forum, is not a factor of any great weight.

146. The claimants also expressed a concern that, if the case goes to Ukraine, even though the first defendant will have undertaken to submit to the Ukrainian jurisdiction, he might not participate in any proceedings in that jurisdiction, making it difficult to obtain a judgment on the merits which is enforceable in other jurisdictions. That concern could also be addressed by requiring from the first defendant an undertaking to participate fully in any proceedings in Ukraine.

147. Mr Samek QC sought to rely upon an alleged lack of experience of the Ukrainian courts in trying cases of international fraud in contrast to the immense experience of trying such cases amongst the judges of the Business and Property Courts. Quite apart from the fact that this allegation was disputed by the defendants, it is at best an invidious comparison which cannot displace what is otherwise the appropriateness of Ukraine as the forum for determination of this dispute. A similar point was roundly rejected by Jonathan Sumption QC in the *Nomura* case at [15] in a passage which equally applies, with appropriate modifications, in the present case:

> "…it is accepted by both experts that a Czech judge hearing this dispute would probably not come to it with anything like the same background knowledge or the same experience of commercial documents and large-scale litigation as a Judge of the Commercial Court. However, I decline to deduce from this that Czech judges lack the experience to do justice in a case like this one. For different reasons, the same points could be made about many jurisdictions, including some with highly developed legal systems. In most state jurisdictions of the United States and in England for much of the nineteenth century a commercial dispute would be likely to come before a judge with no personal experience in the field and a jury with no experience of civil litigation at all. In France the tribunaux *de commerce* which routinely try commercial disputes are staffed by part-time laymen. These courts have to educate themselves by hearing the case, which is in the nature of judicial life. This state of affairs no doubt diminishes the efficiency of the system. But it would be absurd to say that substantial justice is not to be had in these places. Specialist Courts such as the Commercial Court are rare in the world of litigation, but even in the Commercial Court, judges have to deal from time to time with complex and wholly unfamiliar fields of business."

148. In this context, as I have said, the claimants placed considerable reliance on the judgment of Saini J in the *Qatar Airways* case. However, as Mr McGrath QC correctly pointed out, the result in that case was driven by its own rather extreme facts,

specifically the hostile environment for Qatari entities before UAE courts, even to the point where no local lawyer would act for them. The case is certainly not authority for the proposition that the experience and independence of the English judiciary should give rise to some presumption that England is the appropriate forum in preference to a forum whose courts have less experience of trying commercial disputes, but which is otherwise clearly the appropriate forum, as is Ukraine in the present case.

149. Furthermore, I consider that the claimants somewhat overplayed this alleged lack of experience of Ukrainian courts of trying disputes of the present kind. Even the claimants' own Ukrainian lawyer, Mr Beketov, whilst saying that the Ukrainian courts did not have experience of trying international fraud cases, did accept that those courts are "experienced with handling claims from losses made against related parties of insolvent Ukrainian banks". Furthermore, as I have already said, it is clear that Ukrainian courts do have experience of dealing with cases where criticism has been levelled against the NBU in relation to its approach to the liquidation of Banks and have been prepared to conclude that the NBU has acted illegally in that regard.

150. As I have said, Mr McGrath QC also relied upon the existence of other civil proceedings in Ukraine as a factor favouring Ukraine because if all proceedings are in that jurisdiction, the risk of inconsistent judgments is likely to be removed. Despite the claimants' submissions to the contrary, I am quite satisfied that the claimants have made a civil claim in the criminal proceedings in Ukraine. This is clear from the documents referred to at [86] above, specifically the "civil claim" filed with the prosecutor in November 2016 and the decision of the Kiev Court of Appeal in December 2020. It is also clear from that decision that the civil claim is being made against, inter alia, the first defendant. As Mr McGrath QC pointed out the civil claim included allegations about the instructions given by the first defendant which reflect allegations in the present proceedings. It is also clear from [57] of Mr McGregor's first witness statement that a whole series of other claims have been brought in Ukraine which relate to the same underlying factual allegations as made in the present proceedings.

151. Mr Samek QC continued to dispute, even during Mr McGrath QC's reply submissions, that there were civil claims in the criminal proceedings notwithstanding what the Kiev Court of Appeal had said last December and the fact that that Court had upheld a freezing order in favour of the claimants. He relied upon a letter from the Prosecutor General dated 29 January 2021 saying that criminal proceedings in investigation 890 had been suspended. However, he also offered an undertaking on behalf of the claimants, if the case stayed in England, not to commence, continue or pursue any civil claims in Ukraine against any of these defendants.

152. Mr McGrath QC pointed out that, nevertheless, a number of depositors in the Bank had brought civil proceedings in Ukraine against the first defendant. Furthermore, the Bank had sold its rights under a number of the loan agreements the subject of these proceedings. This presented an obvious difficulty for the Bank's unjust enrichment claim which depended upon the relevant agreements being invalid. Even if the Bank sought to contend in the present proceedings that the agreements were invalid, as Mr McGrath QC said, the assignees of the agreements might very well wish to take issue with that contention.

153. I agree with Mr McGrath QC that, notwithstanding the offer of an undertaking, there is still a risk of inconsistent findings or judgments and of double recovery if the case

proceeds here with other proceedings in Ukraine. It is far better if all proceedings are in one jurisdiction, Ukraine. As he accepted, this is not a determinative factor, but it is another pointer toward Ukraine being the most appropriate forum, particularly when taken with the complex issues of Ukrainian law.

154. So far as concerns the issue of costs, whilst I accept Mr Samek QC's point that it is not possible to say what the costs of this litigation would be if it proceeds in England, it seems to me inevitable that, with the need for the vast majority of the disclosure to be translated into English and for most of the witnesses to give evidence through interpreters, the costs would be much higher in England than in Ukraine. Furthermore, as Mr McGrath QC pointed out, the claimants have not produced any evidence challenging the defendants' evidence that it would be cheaper to litigate in Ukraine. Again, although this is not a determinative factor, it is a further pointer towards Ukraine being the most appropriate forum.

155. In conclusion in relation to the first limb of *Spiliada*, for all those reasons, Ukraine is overwhelmingly the more appropriate forum for the determination of this dispute.

156. In relation to the second limb, the burden is clearly on the claimants to show that justice requires that nonetheless the case should be tried here rather than in Ukraine. The claimants advance a number of criticisms of Ukrainian civil procedure, specifically the limits on disclosure and cross-examination. However, the alleged failings are ones shared by many if not most civil law systems. The claimants also suggest that a further failing of the Ukrainian system is that the courts do not draw adverse inferences. For the reasons given cogently by Jonathan Sumption QC in the *Nomura* case cited at [94] above, these criticisms fall a long way short of demonstrating that there is a real risk of injustice in Ukraine.

157. Likewise, the alleged lack of experience of Ukrainian judges of trying complex fraud cases as compared with their English counterparts (a matter which I have already rejected as of no relevance on the first limb of *Spiliada*) cannot begin to demonstrate a real risk of injustice in Ukraine. In the interests of comity, the English Court is extremely cautious before reaching such a serious conclusion and will require cogent evidence before doing so: see per Lord Collins in *Altimo Holdings* at [95] and [101]. There is no such cogent evidence in the present case. Furthermore, although the claimants placed considerable reliance on the *Qatari Airways* case, that turned, as I have said, on its extreme facts, specifically the inability of a Qatari entity to get access to justice in a UAE court. There is no comparable issue with Ukrainian courts in the present case.

158. The claimants essentially rely upon two matters which they contend demonstrate a real risk of injustice in the Ukraine: (i) that there is a real risk that, if the first defendant loses the case in Ukraine, he will seek to resist enforcement of any judgment by contending that, for whatever reason, he has not had justice in the Ukraine and (ii) that there is a real risk that the first defendant will seek to influence the Ukrainian judiciary in some improper manner.

159. So far as the first matter is concerned, it is striking that the claimants themselves are not contending that they cannot obtain justice in Ukraine. Indeed, that would be, to say the least, a surprising contention to be made by the DGF as a state owned entity. Nor is it contended (which coming from the claimants would be even more surprising) that the

first defendant cannot obtain justice in Ukraine. Rather it is said that there is a real risk that he will run that argument to avoid enforcement hereafter. It seems to me that, on analysis, this is not really an argument under the second limb, but rather an aspect of the claimants' argument about ease of enforcement under the first limb, but I will deal with it here since that is how all parties approached the matter.

160. The claimants relied upon the evidence of the first defendant in the *Ferrexpo* case decided by Andrew Smith J nearly ten years ago and upon various statements made on his behalf of the handling of criminal proceedings by state prosecutors. I agree with Mr McGrath QC that this does not provide evidence, let alone the sort of cogent evidence that would be required, that the first defendant will in future level allegations of bias or corruption against the Ukrainian judiciary deciding a civil case. Whatever his concerns at the time of the *Ferrexpo* case, the first defendant now has an avowed desire that this case should be tried in Ukraine and is prepared, with the other defendants, to submit to the jurisdiction of the Ukrainian courts.

161. I agree with Mr McGrath QC that, in circumstances where the first defendant wants the case tried in Ukraine and will submit to the Ukrainian jurisdiction, any court where the claimants sought to enforce a Ukrainian judgment against him would be likely to give pretty short shrift to any inappropriate or fanciful argument on the part of the first defendant that, notwithstanding, he had not obtained justice in Ukraine. However, there might be circumstances in which the first defendant had a legitimate cause for complaint about how the case was dealt with and it seems to me that it would be wrong for this court to seek to second guess what such circumstances might be or to preclude the first defendant from raising legitimate arguments hereafter.

162. The second matter raised by the claimants is the alleged risk of the first defendant seeking to influence improperly the Ukrainian judiciary, presumably with a view to the case being decided in his favour. In my judgment there are two fundamental problems with this allegation. The first is the paucity of evidence that there is a real risk of the first defendant seeking to influence the judiciary improperly. What is relied upon is essentially that alleged lack of cooperation of state prosecutors with the claimants and the suspension of investigation 890 is somehow to be explained by the first defendant having brought influence to bear upon them, but that is no more than innuendo, unsupported by any cogent evidence. The claimants seek to bolster their case by relying on what Mr Demchenko alleges the first defendant told him about sorting out law enforcement. This seems to me a shaky basis for reaching the serious conclusion that the first defendant would seek to influence the judiciary improperly. In any event, there is considerable force in Mr McGrath QC's submission that there must be some doubt as to the reliability of Mr Demchenko's evidence, given that he was detained for five months, then decided to cooperate with the authorities following which charges against him were dropped. The Court cannot possibly determine on this interlocutory application where the truth lies but I would be loath to place reliance on his evidence to conclude that there was a real risk of improper influence of the judiciary by the first defendant.

163. The second fundamental problem with this allegation is that there is absolutely no evidence whatsoever that, even if the first defendant did seek to exert some improper influence, the Ukrainian judiciary would succumb to the temptation. As Mr McGrath QC said, my analysis in *Erste Group Bank* cited at [99] above is apposite. In my

judgment, the claimants come nowhere near establishing, by cogent evidence, a risk of improper influence of the Ukrainian judiciary.

164. So far as concerns the issue of whether, if the case goes to Ukraine, the claim will be time barred, ultimately that will be an issue for the Ukrainian courts. However, applying the principle expounded by Lord Goff in *Spiliada* at 483H-484A referred to at [103] above, whilst I would not go as far as saying that the claimants acted unreasonably in commencing proceedings here notwithstanding that Ukraine is the more appropriate forum, it does seem to me that the claimants should have issued protective proceedings in Ukraine at the end of February this year once they knew that the defendants were challenging the jurisdiction. It seems to me that none of the arguments put forward by Mr Samek QC addressed this point. Commencing protective proceedings to avoid the time bar could hardly be described as abusive parallel proceedings and the fact that Gateley may not have had all the material now relied upon until late in 2020 is no answer to why a protective claim was not made in Ukraine at the end of February 2021.

165. For all those reasons, I do not consider that the claimants have shown that justice requires that a stay of the present proceedings not be granted. Accordingly, the first to fourth defendants are entitled to the stay they seek on the grounds of forum *non conveniens*.

166. The position of the fifth defendant can be dealt with briefly. On the basis that the first to fourth defendants are entitled to the stay they seek, justice clearly requires that the fifth defendant also be granted a stay so that all the claims can be heard together in Ukraine, especially given his willingness to submit to the Ukrainian jurisdiction. The need to avoid multiplicity of proceedings and the risk of inconsistent judgments is an important factor in considering which is the appropriate forum, particularly in a case in which fraud is alleged against a number of defendants: see [44]-[46] and [49] of my judgment in *E D & F Man Capital Markets*. I did not understand Mr Samek QC to be arguing that if the Court granted a stay in favour of the first to fourth defendants, the claim against the fifth defendant should nonetheless remain in England, but even if he were, I would not be prepared to countenance such a bifurcation of proceedings.

The WFO application

Applicable legal principles

167. Given that I have concluded that there should be a stay of these proceedings against all defendants on the basis that Ukraine is overwhelmingly the most appropriate forum for the determination of the dispute, there is no question of the Court granting the WFO sought. Nevertheless I will deal with the issues in relation to that application (and the fifth defendant's strike out application) on an *obiter* basis, albeit briefly, since the issues were fully argued.

168. Three issues arose in relation to the WFO application: (i) whether the claimants had a good arguable case; (ii) whether the claimants had shown sufficient risk of dissipation and (iii) whether justice and convenience supported the grant of an injunction.

169. Before dealing with those issues in turn, I should note that the fifth defendant offered the claimants an undertaking in relation to the preservation of his assets, in the event

that the case remained in England. That undertaking was acceptable to the claimants, so the WFO application was not pursued against the fifth defendant.

170. The test of whether a claimant has shown a "good arguable case" for the purposes of obtaining a freezing injunction was recently confirmed by the Court of Appeal in *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203. At [37]-[38] Haddon-Cave LJ said:

> "37. There has been much discussion of the meaning of the 'good arguable case' test since Mustill J's well-known observation in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep 600 at 605, namely that a good arguable case is a case "which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success".
>
> 38. The 'good arguable case' test was the subject of a comprehensive review by the Court of Appeal recently in *Kaefer v. AMS* [2019] 3 All ER 979 in the context of jurisdictional gateways. Green LJ (who gave the leading judgment, Davis and Asplin LJ concurring) conducted a magisterial analysis of the recent authorities, including *Brownlie v. Four Seasons Holdings* [2017] UKSC 80 and *Goldman Sachs International v. Novo Banco SA* [2018] UKSC 34. He observed at [59] that a test intended to be straightforward "had become befuddled by 'glosses', glosses upon gloss, 'explications' and 'reformulations'". The central concept at the heart of the test was "a plausible evidential basis" (see paragraphs [73]-[80])."

171. During the course of argument, I indicated that I was satisfied that, despite the arguments raised by the first to fourth defendants as to the arguability of the claimants' case, the claimants could show a "good arguable case" applying that test. Taking a realistic approach, Mr McGrath QC did not seek to persuade me to the contrary.

172. The issue which was particularly in dispute at the hearing was as to the risk of dissipation of assets. The applicable legal principles were not in issue. They were summarised by Haddon-Cave LJ in these terms in *Lakatamia* at [34]:

> "I also gratefully adopt (as the Judge did) the useful summary of some of the key principles applicable to the question of risk of dissipation by Mr Justice Popplewell (as he then was) in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm) (subject to one correction which I note below):
>
> (1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
>
> (3) The risk of dissipation must be established separately against each respondent.
>
> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets [may be][*] dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
>
> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
>
> (6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.
>
> (7) Each case is fact specific and relevant factors must be looked at cumulatively.
>
> ([*] Note: I have replaced the words "are likely to be" in sub-paragraph (4) with "may be").”

173. A claimant will satisfy the burden of showing a risk of dissipation if it can show that:

> “(i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by

> injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business…
>
> (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes…"
>
> ([49] of my judgment in *Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M")* [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602).

174. The fact that a claimant makes an application for a WFO on an *inter partes* basis does not, without more, militate against there being a risk of dissipation of assets: see [156(1)] of my judgment in *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm):

> "(1) The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard *inter partes*, does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it;"

Parties' submissions

175. Mr Samek QC submitted that the nature of the alleged wrongdoing in this case demonstrated the existence of such a risk of dissipation, in particular the use of offshore shell companies, the destruction of documents and the movement of substantial sums of money between companies owned by or connected with the first defendant after the application for a WFO was issued. He relied upon [61] of Haddon-Cave LJ's judgment in *Lakatamia*, submitting that the present case was four-square with that one:

> "There was clear scope for an inference of dissipation in the present case. The wrongdoing here comprised not merely dishonest conduct (or what Patten J in *Field Press* called 'an unfocussed allegation of dishonesty or fraud'), but wrongdoing which went to the very *heart* of the question of the risk of dissipation (in the words of Lloyd LJ in *VTB Capital*). It was the dishonesty which "pointed" to the risk of dissipation (in the words of Popplewell J in *Fundo, supra* at paragraph [86(4)]). In other words, both Lakatamia's claims or causes of action against Madam Su bore directly on the question of dissipation itself: both the unlawful means conspiracy and *Marex* causes of action themselves concerned her assisting in the act of dissipation, albeit of her son's funds, but dissipation nevertheless. The Judge had found (at paragraph [25] of his judgment) that that there was a good arguable case that Madam Su had previously helped her son, Mr Su, to hide or dissipate €27,127,855.01 of his assets, *i.e.* the Net Sale Proceeds. In these circumstances, common sense would suggest that there was a strong inference that there was a

> risk that she would do exactly the same in relation to her own assets in order to frustrate the enforcement of any judgment against her."

176. Mr Samek QC also placed particular reliance on the decision of Jacobs J in *The Public Institution for Social Security v Al-Rajaan* [2019] EWHC 2886 (Comm) where the application for a WFO was also made *inter partes* and the judge rejected at [63] the suggestion that this somehow assisted the defendant. That was a case where, like the present, the nature of the wrongdoing pointed to the risk of dissipation.

177. Reliance was also placed upon what the claimants characterised as the falsity in a tax declaration made by the first defendant to the Ukrainian authorities in 2019 which sought to give the impression that he did not own any assets and which did not make any mention of his private jet or the Aston Martin with a personalised number plate or of the fact that he was the UBO of a number of companies. In addition, the first defendant had not cooperated with the Ukrainian investigating authorities and had indeed lied to them in interview before fleeing the jurisdiction of Ukraine.

178. On the basis that there was a real risk of dissipation, Mr Samek QC submitted that there was no question of justice and convenience not requiring a WFO. There had been no material delay in making the application. The liquidation of the Bank had been complex and time-consuming. The application was then issued as expeditiously as possible in February 2021, key documentation only having become available to the claimants in December 2020. Given these legitimate explanations for the time taken in preparing the application, this was not a case in which it would be appropriate to draw any inference that the claimants did not genuinely consider there to be a real risk of dissipation. In any event, as Longmore LJ said in *Ras al Khaimah Investment Authority v Bestfort Development* [2017] EWCA Civ 1014; [2018] 1 WLR 1099 at [55]:

> "Delay on the part of a party applying for a freezing injunction gives rise to rather more elusive considerations. It can be said that any serious delay means that an applicant does not genuinely believe there is any risk of dissipation or conversely (and more cynically) that, if a defendant is prone to dissipate his assets, such dissipation will have already occurred by the time a court is asked to intervene. This latter argument assumes that a defendant is already of dubious probity and it is a curious principle that would allow such a defendant to rely on his own dubious probity to avoid an order being made against him. The former argument is also open to the objection that it is the fact of the risk rather than a claimant's apprehension of it that should govern the court's decision."

179. One of the points made by the defendants is as to the inadequacy of the cross-undertaking in damages offered by the claimants, which they sought to limit to the assets of the Bank's liquidation, some US$221,000. Mr Samek QC asked the Court to note that the DGF is balance sheet insolvent with net current liabilities of some US$1,267 million. The claimants had given consideration to whether they could obtain the support of the Bank's creditors but did not consider that possible. Accordingly, applying the principles summarised in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139; [2016] 1 WLR 160, it was appropriate for the cross-

undertaking to be limited in that way. Mr Samek QC also submitted that no fortification of the cross-undertaking was necessary. Applying the principles confirmed by the Court of Appeal in *Energy Venture Partners v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295; [2015] 1 WLR 2309, there was no evidence of any likely loss that would be suffered as a result of the WFO by the first to fourth defendants.

180. In his measured and careful submissions in opposition to the granting of a WFO, Mr McGrath QC emphasised that the risk which had to be considered was not simply dissipation of assets, but unjustifiable dissipation. He did not dispute that where there was an arguable case of wrongdoing of the kind alleged here, the Court would normally be receptive to the submission that the risk of such dissipation should be inferred. However, that was a point which diminished in weight and importance in a case such as the present where the alleged wrongdoing occurred some 10 or 11 years ago.

181. In relation to the passage of time since the defendants were first on notice of the claims, Mr McGrath QC submitted not that the claimants should be penalised for delay, but that it was relevant to consideration of whether there was a real risk of dissipation that the claimants could not show that the first defendant had engaged in unjustifiable dissipation since becoming aware, as long ago as 2015, that claims were likely to be made against him in respect of the collapse of the Bank and attempts made to freeze his assets. The key assets identified by the claimants, specifically the Ferrexpo shares, had remained in place for some years, a point on which Mr McGrath QC placed particular emphasis.

182. He submitted that the matters relied upon by the claimants were an unimpressive array not supporting a case that there was a real risk of dissipation. Contrary to the claimants' submission, the first defendant had engaged with the criminal proceedings in Ukraine and had attended for interview twice. The fact that he had left the jurisdiction did not demonstrate a risk of dissipation of his assets. There was nothing in the points made by the claimants about alleged defalcation by the first defendant in other civil proceedings in Ukraine. He had had genuine defences to the claims made by the NBU and Caterpillar and had negotiated settlements of those proceedings. The fact that the Caterpillar debt was not settled until April 2021 was not indicative of reprehensible conduct since the timing of the payment was pursuant to the negotiations which had taken place.

183. So far as the asset declarations for tax purposes was concerned, these had been prepared by the first defendant's professional advisers. Any failure to disclose assets if there was any, was to do with tax or privacy issues and had nothing to do with disclosure pursuant to a court order.

184. The claimants rely on CHIPS disclosure in support of allegations of circular payments of large sums of money between various companies of which the first defendant is said to be the UBO, specifically Collaton and Nasterno, which it is said is suggestive of money laundering. This is disputed by the first to fourth defendants, Mr McGregor saying on instructions that these were payments made pursuant to genuine loan agreements made in the ordinary course of business.

185. The first to fourth defendants offered an undertaking, in the event that the Court did retain jurisdiction over the claims, to maintain the Ferrexpo shareholding and not change its ownership pending the determination of the claims. Mr McGrath QC submitted that since the shares were worth US$1.4 billion which was considerably in

excess of the claims, the claimants would be better off with the undertaking than they would if the Court granted a WFO. He submitted that it was no answer for the claimants to say that the undertaking was not of equivalent worth to a WFO because the first defendant did not accept that the shareholding was his asset and hence available for a judgment to be enforced against. This was because it was open to the claimants to make an application at any time under the *Chabra* jurisdiction for a determination as to the ownership of the shareholding.

186. In relation to the cross-undertaking in damages, Mr McGrath QC submitted that the default position is that it should be unlimited and that the claimants had not shown any basis for bringing themselves within one of the exceptions to that default position. He relied upon the relevant legal principles as set out by Lewison LJ in the Court of Appeal in *Pugachev* at [68] to [85]. He submitted that the DGF was an entity owned by the Ukrainian state and that there was a substantial body of creditors of the Bank who would be likely to benefit from the grant of a WFO and from the success of the claim. The claimants had not shown that an unlimited cross-undertaking could not be funded by the Ukrainian state or by the creditors. Having heard those submissions and the interchange with the Court, in his reply submissions, Mr Samek QC said on instructions that his clients now accepted that the cross-undertaking should be unlimited.

Discussion

187. I consider that there is force in Mr McGrath QC's submission that the fact the Ferrexpo shareholding has not been interfered with and the ownership structure has not been changed, even though the first defendant has known for some six years that claims were likely to be made against him and attempts made to freeze his assets, militates against there being a real risk of unjustifiable dissipation of assets. However, notwithstanding the force of that point, I consider that on balance the claimants have satisfied the test in *The Nicholas M* set out in [173] above.

188. I have reached that conclusion on the basis of a number of factors. Whilst the Court cannot determine disputed issues of fact on this application, the claimants have a good arguable case that the first defendant has committed or procured the wrongdoing alleged, which by its very nature justifies the inference of there being a real risk of dissipation, as does the alleged use of offshore entities to facilitate the wrongdoing. The use of offshore companies is not in isolation an indication of a risk of unjustifiable dissipation of assets given their prevalence in international commerce, but when taken with the nature of the alleged wrongdoing and the other factors in this case, their use is an indication of the existence of the risk of dissipation. There is also an arguable case that the first defendant has not cooperated with the Ukrainian investigatory authorities, particularly given that he fled that jurisdiction and has not so far returned notwithstanding the arrest warrant. No explanation for this conduct was proffered by or on behalf of the first defendant and the conduct does cast doubt on the first defendant's integrity. There is also an arguable case that he ordered the destruction of documents. Furthermore, although the asset declaration may have been prepared by his professional advisers, ultimately the correctness of its contents is his responsibility and, at least arguably, it contains false information. As I pointed out during the course of argument, the Ukrainian law on prevention of corruption expects a candid disclosure of assets. All

those matters point to there being a real risk of dissipation, notwithstanding the points made by Mr McGrath QC.

189. I also agree with Mr Samek QC that the undertaking being offered by the defendants is not an adequate substitute for a WFO. In the usual case (as indeed is the case with the undertaking which the fifth defendant was prepared to give if the Court assumed jurisdiction and which was acceptable to the claimants) the defendant identifies an asset or funds up to the amount sought, against which any enforcement could be readily pursued. Here the first to fourth defendants are offering no more than an undertaking in relation to an asset which they do not even accept is the first defendant's asset. In those circumstances the claimants would be entitled to a WFO not least to obtain disclosure of any other assets against which enforcement might more easily be pursued. As Mr Samek QC said, the undertaking should not be accepted by the Court essentially for the same reasons as I gave in *The Nicholas M* at [59]-[60].

190. Accordingly, if I had not been prepared to grant a stay on the grounds of *forum non conveniens* and had concluded that the English Court should have taken jurisdiction over this dispute, I would have been prepared to grant a WFO, although almost certainly not on the somewhat draconian terms sought by the claimants. Before doing so, however, I would have required the claimants to give an unlimited cross-undertaking in damages. I agree with Mr McGrath QC that, given that the DGF is an entity owned by the Ukrainian state and given that there is a substantial body of creditors of the Bank who would be likely to benefit if a WFO were granted and if the claim were successful, the claimants have not even begun to demonstrate that the funds to back such a cross-undertaking could not be provided by those creditors or by the Ukrainian state. As I have said, ultimately Mr Samek QC accepted on behalf of the claimants that the cross-undertaking should be unlimited. Whether that cross-undertaking in damages should be the subject of fortification would be for another day, as Mr McGrath QC sensibly recognised.

191. However given my conclusion that the defendants are entitled to a stay on the grounds of *forum non conveniens* and that the English Court should not take jurisdiction in this case, the application for a WFO must be dismissed.

Fifth defendant's strike-out application

192. That leaves the fifth defendant's application to strike out the pleading against him as failing to disclose a reasonable cause of action. Again, given that I am prepared to grant a stay in his favour on the grounds of *forum non conveniens*, this application too is academic.

The parties' submissions

193. The essential basis of this application was that the claim against the fifth defendant involves allegations of dishonesty and that the pleaded case fails to comply with the rules as to pleading fraud, as summarised in paragraph 8.2 of Practice Direction 16 to the CPR. Mr Hossain QC placed particular reliance on my judgment in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), which cited and applied the principles set out by the House of Lords in *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1. I summarised the relevant test at [20]:

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge. This is made absolutely clear in the passage from Lord Hope's speech at [55]-[56]…"

194. Mr Hossain QC also relied upon the judgment of Leggatt J (as he then was) in *E D & F Man Sugar Ltd v T & L Sugars Ltd* [2016] EWHC 272 (Comm), a case of unlawful means conspiracy where, although at [32]-[33] of the judgment the judge concluded that, as a general matter an allegation of unlawful means conspiracy could not be equated with an allegation of fraud, where, as in that case, the conspiracy was said to have involved deception, all the strictures which apply to pleading fraud directly applied. Mr Hossain QC submitted that where deception was alleged, as it was in the present case, in a case before the English courts these strict rules about pleading fraud applied even where, as in the present case, the relevant cause of action was under a foreign system of law rather than English law. He submitted that this was the effect of Article 1.3 of Rome II.

195. He submitted that, although fault under Article 1166 of the UCC can be based on intent or negligence, the claimants had chosen to plead their case against the fifth defendant on the basis of intent. The plea of intentional wrongdoing is in [166] of the Particulars of Claim:

> "By reason of the facts and matters above, fault on the part of Mr Pellow, who was Portman's sole registered director and immediate controller (albeit acting as directed and instructed by Mr Zhevago) is presumed. In any event, and without prejudice to the burden on Mr Pellow to prove lack of fault, in relation to Portman's said unlawful conduct Mr Pellow acted intentionally because he knowingly sought to, and did, carry out Mr Zhevago's instructions in directing, causing and/or procuring Portman to participate in the Supply Contract Scheme. In this regard the Claimants will also rely on the fact that (i) Mr Pellow was at all material times accustomed to act on Mr Zhevago's instructions; (ii) Mr Pellow had approved filings and financial statements with Companies House representing that Portman was a dormant company in circumstances when he was executing documents on Portman's behalf relating to its Supply Contract with Zaliv Port, and thus he must have known such filings to be false and misleading; (iii) Mr Pellow caused

> Portman to execute the Supply Contract with Zaliv Port in the knowledge that Portman had no intention, let alone ability, to comply with the same; (iv) Mr Pellow permitted Portman to receive the Payment of USD $3 million and in circumstances when he must have known that he and Portman were facilitating misappropriation of the Bank's monies."

196. Although the word "dishonesty" is not used, Mr Hossain QC submitted that this was clearly a plea of dishonesty. There was no alternative plea of negligence. He submitted that taken individually or together the four particulars were not an adequate plea of dishonesty in compliance with the strict rules of pleading on which he relied. The first, that the fifth defendant was accustomed to act on the first defendant's instructions was entirely neutral. Acting on the client's instructions was not surprising or unusual for a professional corporate services provider. This plea was equally consistent with honesty.

197. The second particular was that the fifth defendant had approved filings for Portman as a dormant company when he was executing documents on its behalf under the relevant supply contract so he must have known the filings were false and misleading. Mr Hossain QC submitted that the supply contract had not been performed because the Zaliv Shipyard had been expropriated in the Russian invasion of Crimea. The filing of dormant accounts did not lead to an inference that, at the time that the supply contract was entered into, the fifth defendant knew it was part of a dishonest scheme to defraud the Bank. On the contrary, if the fifth defendant was part of a dishonest scheme whereby false and misleading documents were being produced to give the appearance of genuine transactions, one would expect him to do the opposite, namely file accounts reflecting the fictitious transactions. Filing dormant accounts was equally consistent with honesty. Mr Hossain QC submitted that there was no question of the fifth defendant having entered the supply contract at the same time as filing the dormant accounts. The supply contract was entered on 29 October 2013 and the dormant accounts were not filed until a year later in October 2014, by which time the invasion of Crimea and expropriation of the shipyard had occurred.

198. In relation to the third particular, that the fifth defendant caused Portman to enter the supply contract in the knowledge that it had no intention or ability to fulfil the contract, Mr Hossain QC submitted that these were not primary facts but bare assertions, not properly particularised.

199. The fourth particular is that the fifth defendant permitted Portman to receive the payment of US$3 million, when he must have known they were facilitating misappropriation of the Bank's monies. Mr Hossain QC submitted that the necessary facts to support an inference of knowledge were not pleaded and this was just a circular assertion. Furthermore, there was no allegation that the fifth defendant had any involvement in the payment or was aware of it and, indeed, in his witness statement, he said that he did not know about it.

200. Mr Hossain QC submitted that if the case under Article 1166 was struck out, there was no basis for the additional claim under Article 1190 that the fifth defendant was liable as a joint tortfeasor for the totality of the loss under the Supply Contracts Scheme, since there was no further wrongdoing alleged against the fifth defendant other than in relation to the Portman contract. The plea against the fifth defendant is only what is stated in [168] of the Particulars of Claim:

> "Further or in the alternative, the actions as aforesaid of Mr Zhevago, Frold, Eastroad, Portman and Mr Pellow (together with the other Suppliers and the said Bank officials) were (i) interconnected and cumulative acts and/or (ii) actions with unity of intent to cause the Bank harm and accordingly caused the Bank indivisible harm in the total sum of not less than USD 280,116,773 as set out in Section F above, for which each of them is jointly and severally liable pursuant to Article 1190 UCC."

201. Mr Hossain QC submitted that this was an incoherent and unparticularised plea on three grounds. First, since the Supply Contract Scheme involved a series of separate loans in respect of separate supply contracts with separate suppliers, it could not be said that the Bank was caused "indivisible harm". The claimants asserted in their skeleton argument that whether the harm was divisible or indivisible was a mixed question of fact and law which could not be decided on this application, but Mr Hossain QC submitted that it was simply a question of fact: was the harm indivisible, to which the clear answer was no. It was difficult to see how the fifth defendant could be liable for a whole load of losses under separate contracts which were nothing to do with him.

202. Second, he submitted that the allegation of unity of intent to cause the Bank harm was clearly an allegation of dishonesty. It amounted to an allegation that the defendants all acted with the same objective, which, as set out in [149] of the pleading, was the wrongful misappropriation of the Bank's monies for the first defendant's personal gain. Third, given that the fifth defendant was only involved in the Portman supply contract, it could not be said that he had committed acts which were "interconnected and cumulative" with acts of other defendants in relation to other supply contracts.

203. Mr Samek QC began this part of his submissions by taking the Court to the relevant documents. He made the point that the company accounts of Portman were for the period to 28 February 2013 and these were filed with Companies House signed by the fifth defendant as dormant company accounts on 29 October 2013, the same day as the date of the supply contract for the floating dock which was also signed by the fifth defendant. Under the terms of that contract, the first advance payment of US$12.5 million was due 30 days after signature of the contract and the second advance payment of a further US$12.5 million within 90 days of signature. He submitted that the fifth defendant would thus have known that US$25 million was due to Portman before the end of January 2014. The claimants had only found evidence of payment of US$3 million, but that is not to say that more may not have been paid which might emerge in due course. The entry of the supply contract and the amounts received and due to be received by Portman were completely inconsistent with it being a dormant company, if the supply contract were genuine.

204. On 13 January 2014, the fifth defendant signed a letter to the shipyard asking it to sign an addendum to the supply contract. There is no suggestion that the first advance payment has not been received and the letter is written as if the contract is going ahead and the fifth defendant has been in touch with it about the timing of the supply. The attached document, also signed by the fifth defendant, suggested that the supply of the floating dock had been sub-contracted by Portman to Cosco, the Chinese shipyard and would be assembled there by 20 February 2015. The fifth defendant in his witness statement says he has no recollection of signing these documents, which as Mr Samek

QC says, is rather surprising if they related to a genuine supply contract for the supply of a floating dock at a cost of US$30 million.

205. It was correct that the shipyard was expropriated by the Russians on 24 August 2014 and that the second set of dormant accounts were signed by the fifth defendant on 20 October 2014. However, as Mr Samek QC pointed out, the accounts were for the annual period to 28 February 2014, during which period, under the terms of the supply contract, Portman should have received US$25 million, which was inconsistent with it being a dormant company. Mr Samek QC submitted that the reason for filing dormant accounts was obviously to conceal that Portman was receiving millions of dollars.

206. Mr Samek QC also referred the Court to another contract dated 18 August 2014 ostensibly between Logistic Solution International Ltd and Zaliv Metal Ltd which appears to be for the supply of the same floating dock, which is something of a mystery.

207. As I said during the course of Mr Samek QC's submissions, on the basis of the documents which he showed the Court, even if Mr Hossain QC were correct about the inadequacy of the pleading in [166] of the Particulars of Claim, the claimants could easily amend the pleading to plead their case based on these documents, which would satisfy the requirements of English rules of pleading in relation to fraud or dishonesty. Mr Samek QC could see the force of this, but submitted that the pleading was in no sense inadequate. He submitted that the fifth defendant's application proceeded on a fundamentally misconceived basis of seeking to attack the pleading as if the claims were being made under English law. The authorities relied upon were all cases where English causes of action in unlawful means conspiracy or fraudulent misrepresentation or deceit were pleaded.

208. The present case was not such a case, as the causes of action pleaded were solely based on Ukrainian law. The fifth defendant was not suggesting that there was any deficiency in the pleading of the relevant Ukrainian law under Article 1166. Although the fifth defendant's submissions said that they were focused on the ingredient of "Fault" in the Ukrainian delict, what they actually focused on was not what had to be pleaded as "Fault" under Ukrainian law but criticisms of the pleading, as if what was pleaded was an intentional tort such as unlawful means conspiracy under English law. Mr Samek QC submitted that if, as was the case, particularly given the presumption of fault under Ukrainian law, the plea in [166] was a sufficient plea of the delict under Article 1166 UCC, it was not necessary to go on to satisfy the English rules of pleading in relation to fraud or dishonesty.

209. Mr Samek QC submitted that the criticism of the plea under Article 1190 of the UCC was equally misconceived. The Portman contract was a bogus contract which was part of the overall scheme and in that sense the fifth defendant's acts were interconnected and cumulative with those of the other defendants in relation to the other bogus contracts and taken with the same unity of intent, since the defendants all intended by the Supply Contracts Scheme to extract monies from the Bank.

Discussion

210. Given that the Court will be staying the present proceedings on *forum non conveniens* grounds, there is no question of the Court having to decide whether to strike out the

claims against the fifth defendant. It follows that I can deal with my conclusions on this part of the case relatively briefly.

211. So far as the plea under Article 1166 of the UCC in [166] of the Particulars of Claim is concerned, I agree with Mr Samek QC that this proceeds on a fundamentally misconceived basis for two reasons. First, as is accepted by the fifth defendant, there is a presumption of fault under Ukrainian law, preserved by Article 22 of Rome II. The claimants could simply have pleaded the presumption and left it to the fifth defendant to show absence of fault. It is difficult to see how, by pleading a positive case without prejudice to that presumption, their whole case becomes vulnerable to being struck out. There is no logic to that approach.

212. Second, if the pleading is one which sets out the relevant foreign law sufficiently (and the contrary is not suggested on behalf of the fifth defendant) it is simply not necessary that the claimants also comply with English rules of pleading as regards torts such as deceit or unlawful means conspiracy as if such English causes of action were being relied upon when they are not. None of the authorities relied upon supports let alone mandates such an approach.

213. In any event, even if I had thought that there was any force in the criticisms of the pleading in [166], as I indicated, in the light of the documents upon which the claimants rely, a pleading which complied with the English law requirements for a plea of dishonesty could easily have been produced by amendment and I would have given leave to amend rather than striking out the pleading.

214. The further plea under Article 1190 of the UCC is in a somewhat different category in the sense that, notwithstanding Mr Samek QC's submissions, it is difficult to see how the ingredients of "indivisible harm", "unity of intent" and "interconnected and cumulative acts" could be made out against the fifth defendant given that he is not alleged to have been involved in any of the other supply contracts apart from the Portman contract. However, given that the application of Article 1190 is a question of Ukrainian law, on balance I would not have struck out [168] of the Particulars of Claim. In any event, given that I am staying the proceedings and that any trial will take place in Ukraine, any issue as to the adequacy of the claimants' case against the fifth defendant under Article 1190 is a matter for the Ukrainian court.

Conclusion

215. The applications by the first to fourth defendants and the fifth defendants for a stay of the present proceedings on the grounds of *forum non conveniens* are granted. I invite submissions from counsel as to the form of the undertakings to be provided by the defendants.

216. In the circumstances, the other applications, which would only arise if this Court took jurisdiction, do not arise and are academic. Had they arisen, I would have granted the claimants' application for a WFO upon them giving an unlimited cross-undertaking and subject to discussion of the terms of any injunction. The fifth defendant's application to strike out the claim against him would have been dismissed.