Claim No. HC-2012-000165

IN THE HIGH COURT OF CHANCERY

BETWEEN

(1) BANK ST PETERSBURG OJSC

(2) ALEXANDER SAVELYEV

Claimants / Part 20 Defendants

- v -

(1) VITALY ARKHANGELSKY

(2) JULIA ARKHANGELSKAYA

Defendants / Part 20 Claimants

- and -

(3) OSLO MARINE GROUP PORTS LLC

Part 20 Claimant

SKELETON ARGUMENT

ON BEHALF OF THE DEFEDANTS AND OMGP

(references in square brackets are to the trial bundle [volume/tab/page])

Introduction

1. The Court is well aware of the reasons why this trial will be extremely difficult for the Defendants & OMG Ports, for those who have volunteered to assist them, and for the Court itself. There are not many examples of trials at this scale where the inequality of arms was ever so great. The only comparable example that comes to mind is *McDonalds v Steel* libel case, which eventually

was found by ECHR to have been in breach of Article 6. The Defendants and OMGP earnestly hope that the present litigation may have a happier ending.

2. The Court has made it clear that the fairness of the trial will be subject to a 'continuous review' during the trial; and that specific safeguards of fairness will be imposed. In particular, the Claimants were ordered to file an old-fashioned 'impartial' written opening which identifies issues "straight down the middle". At the PTR on 14 December, Hildyard J said about the Claimants' opening (p. 66, lines 18-21): "*I will be disappointed – and I am sure that I will not suffer this, but I would be disappointed if he were to explain the matter in a prejudicial way, which would be his right in the ordinary course*". That direction (as the Defendants understand it) was intended to ensure fairness to litigants in person facing opponents with a very strong legal representation.

3. With respect, the only feature of the Claimants' 246-page-long skeleton argument which seems to echo that direction is that it seeks to avoid counterproductively excessive rhetoric. This is no more than good advocacy. This is an effective way to argue the Claimants' case, but nothing like an 'impartial' opening which might have helped to ensure fairness to the Defendants. With all its virtues, the Claimants' opening is a partisan argument.

4. While it was originally anticipated that the Defendants and OMGP will only need to provide a brief document commenting on such points in the Claimants' 'fair and impartial' opening with which they disagree, that is now impractical. Due to the length of that skeleton (246 pages), it is impossible to comment on it point by point; and due to its partisan nature, virtually every point needs an answer. The Defendants and OMGP make no admissions as to the accuracy, let alone fairness, of various assertions and arguments advanced against them in that document.

5. For these reasons, it is considered that the Court would be better assisted by a full and proper opening submission from the Defendants and OMGP which identifies the key issues for the trial. That submission is made in **Part I** of this skeleton argument.

6. **Part II** addresses the fairness of the trial, which the Court has indicated will be kept under a 'continuous review'. It highlights various issues which threaten the fairness of the trial, including, but not limited to, the partiality and unfairness of the Claimants' skeleton. It includes submissions as to the possible parameters of the Court's 'continuous review' of fairness, and the appropriate course of action in the event that review ultimately produces a 'negative' result.

PART I: THE ISSUES

7. It is no more than a procedural incident of the topsy-turvy history of these proceedings that the Bank and Mr. Savelyev are known as Claimants and Mr. & Mrs. Arkhangelsky as Defendants. This case is, and has always been, principally about the allegations made by Mr. & Mrs. Arkhangelsky and OMG Ports in the Counterclaim.

8. Accordingly, the Counterclaim (and the corresponding issues in the Claimants' claim for negative declarations) will be addressed first. The issues in the Bank's claims (a) against Mr. Arkhangelsky and (b) against Mrs. Arkhangelsky are straightforward and are discussed in the end of this part.

The Counterclaim

9. The primary Counterclaim is brought under Article 1064 of the Russian Civil Code. This is the general tort law provision which provides that persons who cause harm to other persons are liable to pay compensation. As the parties' Russian law experts agree:

> *A party is liable under Article 1064 of the Civil Code, which is a general rule for compensation of harm. If harm is caused by a breach of a contract (or other obligation), Article 393, as well as related articles, such as 401, apply. The elements to establish are the fact of*

harm, unlawfulness, a causal link between the defendant's action (or omission) and the harm, culpability of the tortfeasor[1].

10. The elements of a claim under Article 1064 were summarised as follows by Andrew Smith J in *Fiona Trust v. Privalov* [2010] EWHC 3199 (a case in which the Bank's expert, Professor Maggs, gave evidence) at [94]-[95]:

> "*[L]iability under article 1064 requires (i) harm, (ii) causation, (iii) fault and (iv) unlawfulness... There is no significant issue about what constitutes fault or unlawfulness for the purposes of article 1064. The defendants pointed out, and I accept, that, while intentional actions that cause harm are unlawful (unless permitted by a legal provision), payments made in legitimate business transactions are not unlawful, and a person cannot be said to be at fault on that account. However, it is not disputed that the requirements of fault and unlawfulness would be satisfied if the claimants succeeded in establishing dishonesty, the sole basis upon which they pursue the claims. The significant issues about article 1064, if Russian law applies, concern the requirements of harm and causation."*

11. The burden of proof is on the Part 20 Claimants to show that they suffered harm as a result of the Bank's and/or Mr. Savelyev's acts or omissions. Once the harm and causation are proven, the burden shifts to the Bank and Mr. Savelyev to show that their actions were (a) innocent and/or (b) lawful. In practice, like in *Fiona Trust* case, the question of liability under Article 1064 turns mainly on the issue of honesty or dishonesty of the Bank's and Mr. Savelyev's actions.[2]

12. This much is common ground between the Russian law experts. If the Defendants and OMGP succeed in proving their factual case as to the dishonest conspiracy to steal their assets, the liability under Article 1064 is established. There are a number of disputes between the Russian law experts; but all those disputes either (a) affect only quantum (e.g. a specific head of loss) and not

[1] Joint Memorandum of Experts on Russian Law, paragraph 31

[2] In theory, negligence (as opposed to intent) is a sufficient form of 'fault' under Article 1064; but given the way each party has formulated its case, a finding of negligence is unlikely.

liability, (b) only become material if the Court makes 'mixed' factual findings rather than accepts the substance of either party's factual case.

13. The latter category includes disputes concerning several alternative legal bases of the Counterclaim; and whether the Defendants and OMGP are permitted by Russian law to bring contractual claims in alternative to a claim in tort. However, that would only be material if the Court makes certain 'mixed' factual findings, for example that the Bank and Mr. Savelyev acted honestly and lawfully at all times, but nevertheless breached a legally binding contract for a Moratorium on all payments; or procured the transfer of shares in OMG companies pursuant to an unlawful and void contract.

14. Subject to that, the Counterclaim under Article 1064 turns simply on the facts. It is therefore not proposed to address the very voluminous expert evidence on Russian law in this skeleton, save as may be necessary in relation to specific issues below.

15. As to the inherent probabilities, the courts are increasingly familiar with the realities of Russian commercial life, in general, and the phenomenon of "raiding" in particular. As Mann J noted in *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2014] EWHC 4336 (Ch) at [110], "*there is an apparently respectable body of opinion which considers that the state and individuals are capable of manipulating the system in a corrupt fashion.*" This means that, although the allegations against the Bank are serious and might be viewed sceptically in a western context, it cannot be said that they are implausible. On the contrary, the allegations fall squarely within a standard fact pattern for "raids" identified in the academic literature, whereby politically powerful or well-connected people engineer the take-over of valuable businesses for their own benefit by unlawful means (see below).

16. The factual issues in the Counterclaim can be broken down as follows:

    (1) Financial position and prospects of Oslo Marine Group in 2008-2009

    (2) 'Repo' agreement

(3) Alleged Moratorium

(4) Alleged default

(5) 'Seizure' of Western Terminal and Scan

(6) 'Transfers' of assets from Western Terminal and Scan to Renord et al., and between different Renord/SKIF companies

(7) Valuations

(8) Renord Group

(9) The criminal case against Mr. Arkhangelsky

(10) The role of Mrs. Irina Malysheva

17. These issues are discussed in turns below. It is not proposed to discuss the issues of quantum in this skeleton, as it remains an open question whether quantum can be fairly determined at this trial (see further below).[3]

Financial position and prospects of Oslo Marine Group in 2008-2009

18. It is common ground that, as a result of the global financial crisis towards the end of 2008, OMG was in considerable financial difficulties, to the extent of being unable to meet the deadlines for current payments due to its creditors (including the Bank) without a restructuring and/or refinancing of its indebtedness. The dispute is focusing on two points: (a) the nature and causes of those difficulties and (b) what OMG represented to the Bank about its position at the time.

19. The Bank says that 'Mr. Arkhangelsky's business empire was built on sand' in the first place, that its business projects were not viable, that following the global crisis, the OMG's default on its debts and its ultimate collapse were

[3] The Claimants' skeleton now argues that both the claim and the counterclaim must be assessed in Russian roubles. That is significant, as the Rouble has plunged since the events giving rise to the Counterlcaim. To the best of the Defendants' recollection, this is the first time when a suggestion that damages may only be awarded in roubles has been made. Using currency depreciation to diminish the value of a claim contradicts the principle of 'full compensation' under Article 1064 of Russian Civil Code; the Defendants and OMGP will submit that damages must be assessed in sterling.

inevitable, and accordingly, 'there was nothing to raid'. Crucially, the Bank maintains that, as of late 2008 – early 2009, the Group's liabilities were well in excess of its existing assets.

20. The Defendants and OMGP acknowledge the financial difficulties of the Group at the time, but deny that they were either structural or insurmountable. There were good prospects of obtaining refinancing for the Group's major projects from Western and/or Russian banks; and negotiations to obtain it were at quite an advanced stage. To complete those negotiations (or, as a last resort, to restructure its businesses and sell parts of its assets) the Group needed a moratorium on all repayments of debts for at least 6 months; the Defendant maintain that such a moratorium was agreed with both of its principal lenders – the V-Bank and Bank St. Petersburg. In any event, and crucially, the Defendants and OMGP say that the Group's existing assets were significantly in excess of its liabilities. There was something to raid, and it was raided.

21. Further, the Bank maintains that OMG misrepresented its position to the Bank at the time. The Bank was allegedly assured that OMG's cash-flow difficulties were very short-term, and due to a delayed payment from a particular client for the delivery of one container of timber.

22. The Defendants and OMGP say that they were candid with the Bank as to the Group's difficulties and prospects. Indeed, it was on that basis that the Moratorium was requested and agreed.

23. **Key witnesses**:

- **Defendants'**: Mr. Arkhangelsky, Mr. Bromley-Martin;
- **Claimants'**: Mr. Belykh, Ms. Mironova, Ms. Volodina
- **Experts**: business valuation, asset valuation.

'Repo'

24. In late December 2008 Mr Arkhangelsky had a meeting with Mr Savelyev at which they agreed a restructuring of the Group's debts to the Bank. The exact terms of that restructuring are in dispute (see below). Whatever they were, in exchange for that restructuring, the shares in Western Terminal and Scan would be temporarily transferred, for nominal consideration, to companies nominated by the Bank ("the December 2008 Agreement").

25. The terms of the December 2008 Agreement were partly (but not fully, and notably not including the contentious terms of debt restructuring) set out in a document called the Memorandum which Mr Arkhangelsky and Mr Savelyev signed **[D107/1537]**. The Memorandum included the following provisions:

> *1. In order to secure the loans granted to the Group listed in item 1.1 of this Memorandum, special companies (the Purchasers) purchase shares in the following Group companies:*
>
> - *Western Terminal LLC (100% of shares);*
> - *Scandinavia Insurance Company LLC (100% of shares)*
>
> *For prices specified in the relevant sale and purchase contracts.*
>
> *2. After the complete fulfilment of the Group's obligations to the Bank, sale and purchase transactions in reverse will be carried out for prices specified in reverse sale and purchase contracts which will be signed between the Purchasers and the current owners of Western Terminal LLC and Scandinavia Insurance Company LLC ("the Sellers") simultaneously with the direct sale and purchase contracts.*
>
> *3. The Purchasers undertake:*
>
> - *Not to interfere in everyday commercial activities of the purchased companies on condition that the Group fulfils its obligations to the Bank under the said contacts on time and entirely*

- *Not to dispose in any way of the shares of the purchased Group companies before the date of the repurchase contract on condition that the Group fulfils its obligations to the Bank under the said contracts on time and entirely*

4. *The sellers and the management of the companies on sale undertake:*

    - *Not to sell or transfer to anyone these companies' assets,*
    - *Not to stop their activities, or*
    - *Not to worse in any other way the material and financial situation of the companies.*

5. *The Bank undertakes:*

    - *Not to increase the interest rates on the loans granted to the Group on condition that the Group fulfils its obligations to the Bank under the said contracts on time and in its entirety;*
    - *Not to claim early repayment of the loan specified in item 1.1 of this Memorandum on condition that the Group fulfils its obligations to the Bank under the said contracts on time and entirely.*

26. It is now clear, from the evidence and the admissions made by the Claimants, that at least 5 out of the 7 Original Purchasers were companies of the so-called Renord Group. The Renord Group includes a large number of companies, mainly controlled through offshore entities and/or individual nominees, whose structure of ownership frequently changes. The Claimants say that all Renord companies are ultimately owned and controlled by Mr. Mikhail Smirnov, a former employee of the Bank. Most of other key individuals at Renord are also known to be former top managers of the Bank, or close relatives of the current top managers of the Bank.

27. The other two Original Purchasers are said by the Claimants to be owned and controlled, through nominees, by a Mr. Leonid Zelyenov.

28. The Claimants' evidence, which the Defendants accept, is that the arrangements with Mr. Smirnov and Mr. Zelyenov were made on behalf of the Bank by its Vice President, Mrs. Irina Malysheva. Her husband, Mr. Vladimir Malyshev, was a co-founder and a 75% beneficial owner of Renord-Invest. There is a dispute between the parties as to whether Mr. Malyshev continued to have an interest in Renord-Invest at the time. It is not in dispute that Mr. Smirnov is a family friend of the Malyshevs. The issues in relation to Renord Group are discussed further below.

29. These arrangements between (a) the Bank, (b) the OMG and (c) the Original Purchasers had the following unusual features:

    (1) At least in legitimate banking practices (in contrast to the known patterns of fraudulent raiding – see further below), a Repo arrangement, used as a form of additional security, usually involves a temporary transfer of assets to the bank or its fully owned subsidiary. It is unusual for a transfer to be made to third parties.

    (2) The 'Repo' sale was for a purely nominal consideration, rather than the usual 'repo' sale for the market price with an agreed haircut.

    (3) On the Bank's evidence, its arrangement with the Original Purchasers was made by a purely oral agreement between Mrs. Malysheva, Mr. Smirnov and Mr. Zelyenov. Nothing whatsoever was recorded in writing, and no documents whatsoever have been disclosed.

    (4) The agreement between the Bank and OMG was not recorded (a) in full in a single document and (b) in a formal contract.

    (5) 'Repo' agreements are typically used by Russian banks as a form of additional security where a loan is only secured by a pledge of shares, so there is a risk of 'asset tunnelling' which would reduce the value of the shares. In such cases, a 'repo' sale of the real estate may be used as

security in addition to the pledge of shares. In the present case, the usual arrangement was turned 'upside down': in addition to the registered pledges of real estate (which are considered the most reliable form of loan security), the Bank required a 'Repo' of the shareholding of the companies which held that real estate.

30. The Bank's original case was that this Repo arrangement was "*conventional and commonly used*" in Russia at the time. In support of that, the Bank relied on the expert report of Mr. Mikhail Matovnikov to discharge the Freezing Order made against Mr. Savelyev in BVI, and to obtain a Freezing Order against the Defendants in these proceedings. Since then, however, that part of the Claimants' case has been significantly watered down.

31. It is now common ground between the parties' banking experts that at least the matters specified in para 22 (1)-(3) above were unusual. The differences between the banking experts are mainly confined to matters of fine detail and emphasis: Professor Guriev describes the arrangement as "not only irregular, but clearly improper" (para 25); Mr. Turetsky uses the phrase "unusual features" and explains the possible reasons for them. In substance, however, the experts agree that the arrangement was unusual. It is fair to say that both experts faced some difficulties in reconciling the facts of this case with the usual and legitimate commercial practice of 'repo' contracts.

32. There is, however, an alternative explanation which covers those facts without difficulty. The 'repo' arrangement and subsequent events fit perfectly into the known patterns of fraudulent 'raiding' in Russia. The Defendants and OMGP rely on the works of reputable experts and NGOs served as hearsay evidence in these proceedings, and in particular, invite the Court to read two articles:

    (1) *Armed Injustice: Abuse of Law and Complex Crime in post-Soviet Russia* by Thomas Firestone, the US Department of Justice resident legal advisor

in US Embassy in Moscow **[D139/2334]**.[4] The Court is invited to read the following parts of the article:

I. *Introduction* (p.p. 555-556)

A. *Commissioned prosecutions* (p.p. 556-557 only)

C. *Corporate Raiding ("Reiderstvo")* (p.p. 563-567)

D. *Collusive Litigation* (p.p. 567-571)

(2) *Domination of banking raiding as a tendency of seizure and redistribution of property in Russia in 2009-2011*, a report by National Anticorruption Committee (NACC), a reputable Russian NGO, co-edited by several eminent figures including the present Federal Human Rights Ombudsman, Ella Panfilova.[5] The English translation is enclosed herewith as **Appendix 1**.

33. In particular the NACC report, on the basis of studying dozens of cases of 'raiding', identifies the four most typical 'schemes', and explains how they apply in cases involving banks. 'Scheme 4' is particularly relevant:

Scheme 4 (Manufacturing of rights under a REPO contract)

1. A large loan is given to a representative of a successfully operating big or medium-size business

2. Securities are formalized:

- pledges of assets which constitute the business;

- personal guarantees of the business proprietors;

- guarantees of companies involved in the business and having significant assets or trading turnover.

3. REPO contracts are made for the shares (at least the controlling shareholding) of the companies controlling the business, on the following terms:

[4]Document 9 in Defendants' hearsay notice and document 660 in Defendants' disclosure
[5]Document 11 in Defendants' hearsay notice and document 662 in Defendants' disclosure. The original Russian report is at [D153/2566]

- usually, at a nominal price;

- repurchase is subject to the condition of repayment of the entire loan;

- always with a counterpart who is not formally affiliated with the bank;

4. The lender bank declares that the debt is overdue. Like in Scheme 2, the lender bank may deliberately create the conditions for an overdue indebtedness to emerge.

5. A demand to repay the debt at a short notice in connection with a breach of the contract;

6. The Bank declares there have been a breach of the loan agreement (the clause on early repayment of the loan) and a breach of REPO contract.

7. Since a company controlled by lender bank is the controlling shareholder of the companies which control the borrower's business, that company is entitled to initiate a shareholders' conference to replace the company's director-general and to approve any transactions with the company's assets.

8. A replacement of director-general, seizure of management in the borrower's company, failure to service the loan, dissipation of assets.

9. An assignment of the principal loan obligation to a third company, along with all the securities for the loan agreement except REPO.

10. Recovery of the debt from the debtor and guarantors/pledgers without giving credit for the assets removed from the borrowers' control using the REPO contracts.

34. It will be noted that those very features of the present case which the banking experts describe as unusual for legitimate banking practices (e.g. the nominal price, and involvement of third parties 'not formally affiliated with the bank') are singled out as characteristic elements of that raiding scheme.

35. Against this background, the key issue is what the intentions of the parties were in this particular case. It is now common ground that the Original Purchasers held the shares "on behalf of the Bank" and to the Bank's instructions (see eg *Smirnov*, paras 29, 33, 34). According to Mr. Savelyev, the purpose of 'Repo' was for the Bank to "*obtain an interest in certain OMG companies*" through the

Original Purchasers (*Savelyev*, para 25). The implications for a wider analysis of the relationship between the Claimants and Renord are discussed further below.

36. The Bank says that the ultimate purpose of the 'Repo' arrangement was to protect its legitimate interests against any potential dishonest attempts to resist the realisation of pledges; that it intended to return the shares to OMG after its obligations would be fulfilled; and that the only reason why the shares were not returned is that the pledges were insufficient to cover the outstanding indebtedness.

37. The Defendant and OMGP will invite the Court to find, in summary, that the purpose was fraudulent, namely, to appropriate the two valuable companies and/or their assets for the benefit of the Claimants and/or Renord; that the market value of the shares was well in excess of the indebtedness; and that neither the Bank nor Mr. Savelyev had any genuine intention of returning the shares to OMG.

38. **Key witnesses**:

- **Defendants'**: Mr. Arkhangelsky
- **Claimants'**: Mr. Savelyev, Mrs. Malysheva, Mr. Smirnov, Mr. Sklyarevsky
- **Experts**: Russian banking practice and procedure.

Alleged Moratorium

39. The terms of the agreement which are recorded in the Memorandum are common ground. However, it is much more difficult to ascertain, and is in dispute between the parties, what it was that the OMG obtained in consideration for transferring the two companies' shares to the Original Purchasers nominated by the Bank. In other words, what were the obligations of the Bank in relation to loan restructuring?

40. The Claimants deny that any specific terms of the restructuring were agreed at the meeting. The Claimants' case is that such terms were only agreed with individual corporate borrowers some time after the meeting, and after the transfer of the shares to 'Original Purchasers'. As Mr. Savelyev puts it in para 29 of his statement, "*At the meeting the Bank was prepared, subject to obtaining the necessary internal approvals, to see what it could do to consider restructuring OMG's debts*". Other than that, the Bank denies undertaking any specific obligations as to restructuring.

41. The Defendants say that it was expressly agreed at the meeting that all payments due from the Group companies to the Bank, including interest payments and capital repayments, would be subject to a general six-months Moratorium until the end of June 2009. On the Defendants' case, that was the only reason why Mr. Arkhangelsky sought a meeting with Mr. Savelyev in the first place; that the 'repo' arrangement was only proposed as a condition of the Moratorium; and that Mr. Savelyev's promise of the Moratorium was the reason why Mr. Arkhangelsky agreed to transfer the shares.

42. There is very considerable circumstantial evidence to the effect that, throughout December, January and February, the parties proceeded on the basis of an agreed Moratorium until the end of June 2009. A few of the addenda appear to be inconsistent in that they only roll up the interest payments to the respective maturity dates in March-May, rather than to the end of June. The Defendants and OMGP say it was intended that further addenda would be prepared and signed in due course. The issue will need to be explored in some detail in cross-examination of both parties' witnesses.

43. Further, contemporaneous documents show that after the alleged default in March 2009, Mr Arkhangelsky and OMG proceeded on the basis that, by demanding repayment of loans at that time, the Bank had breached the terms of December 2009 Agreement:

(1) By an email of 7 April 2009,[6] Mr Arkhangelsky responded to Mr. Belykh's proposal for a meeting: "*What is the point – the Bank is oppressing us – contrary to the agreements reached, and to the human values!!!*". **[D117/1763]**

(2) An internal OMG email dated 21 April 2009[7] shows Mr Arkhangelsky's reaction to being informed about the Bank's demand to Vyborg Shipping for repayment of a loan: "*Perhaps we should use our agreement (of the end of last year) and write to them about this?*" **[D118/1810]**

(3) In June 2009, an OMG in-house lawyer, Mr. Maslov, advised that the Bank's claims against Vyborg Shipping could be resisted on the grounds of "*bad faith*" on the part of the Bank, in light of the Bank's failure to extend the repayment date.[8]

44. If there was an oral agreement on the Moratorium, there is a dispute between the experts as to whether it was legally binding under the Russian law. Ultimately, that dispute is unlikely to be significant for the outcome of the case:

(1) If the agreement was a binding contract, the Bank is liable for breach of contract under Article 393 of the Russian Civil Code.

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[6] Document K287 in the Bank's disclosure.

[7] Document N225 in the Bank's disclosure.

[8] Document N248 in the Bank's disclosure. The provenance of the documents listed as (2) and (3) is curious. A large number of OMG's internal documents, including legally privileged ones, were obtained by the Bank from Olga Krygina, the former Director-General of Vyborg Shipping Co, obviously in breach of confidence; and disclosed in these proceedings. Ms. Krygina's e-mail to Ms. Mironova and Mr. Kolpachkov dated 2 December 2011 (Document M234 in the Claimants' disclosure) makes it clear (using a lot of foul language, especially to refer to Mr. Arkhangelsky) that she was prepared to give the Claimants any assistance. In particular, she writes: "*A request: because of my flood, I moved the archive to my favourite garage and to the neighbours. Give me tasks in advance, and I'll get whatever you need*".

It is noteworthy that the Claimants are not calling Ms. Krygina to give evidence.

The Defendants and OMGP rely on the documents listed as (2) and (3) herein, and therefore waive privilege over Mr. Maslov's legal advice in relation to the Bank's claim *in rem* against *OMG Kolpino*. That waiver does not extend to any other privileged documents obtained from Ms. Krygina, whether or not included in the trial bundle.

(2) However, if the agreement was not binding in law, but the Claimants misled Mr. Arkhangelsky to believe that it was, and/or that the Bank would extend the repayment dates at least till the end of June 2009 in exchange for the transfer of shares under the Repo agreement, that would mean that the transfer of shares was procured by deceit. Accordingly, the Bank would be liable in tort under Article 1064 of the Russian Civil Code.

45. It follows that, on true analysis, the issue of Moratorium is primarily an issue of fact. If the Defendants and OMGP prove that the Moratorium was in fact *promised* to them, they are entitled to succeed on liability regardless of the legal analysis of that promise.

46. If, on the other hand, the Court accepts the Claimants' version of the events, that would be fatal to the alternative counterclaim for a breach of contract, but strengthen the further alternative counterclaim to set aside the transfer of shares as a 'one-sided deal' under Article 179 of the Russian Civil Code (roughly analogous to the doctrine of duress under the English law). If the OMG was in fact induced to transfer the shares of Scan and Western Terminal to the companies nominated by the Claimants for no more than the Bank's promise "*subject to obtaining the necessary internal approvals, to see what it could do to consider restructuring OMG's debts*", the Court would need to consider the lawfulness of such a deal under the relevant Russian law.

47. A factual finding in favour of the Claimant would not be fatal to the counterclaim in tort under Article 1064. Regardless of the findings on Moratorium, the Court would still need to consider the Claimants' actions before and after the alleged 'default', in the light of the allegations of fraud.

48. Assuming that the Defendants and OMGP can properly pursue these three alternative counterclaims for (a) fraud, (b) invalidity of contract and (c) alternatively, breach of contract[9], the Bank's only realistic defence is to prove

[9] As to the Russian law experts' dispute in relation to the alleged rule on 'competition of claims', see the Joint Statement of Dr. Gladyshev and Professor Maggs at [E4/15/7], paras 39-44. In the event Professor Maggs's view is to be preferred, the Court will also need to consider whether the rule against 'competition

its case that the shares were worthless. That obviously depends on the expert **valuation evidence** in relation to the two companies' businesses and assets, discussed further below.

49. **Key witnesses**:

- **Defendants'**: Mr. Arkhaneglsky
- **Claimants'**: Mr. Savelyev, Ms. Mironova, Ms. Volodina, Mr. Guz
- **Experts**: Russian law.

Alleged default

50. On 4 March 2009, the Bank's Management Board resolved to refuse an extension of the loan due from one of OMG borrowers, Petroles. The next day the loan matured and the Bank demanded repayment. On 23 March, the Bank similarly refused an application by Vyborg Shipping for an extension of the 1st Vyborg loan. In April, the Bank relied on the alleged default under the 1st Vyborg loan to demand an early repayment of all other Vyborg Shipping loans. By June 2009, the Bank had demanded early repayment of virtually all OMG loans ('cross-default'). Each demand for repayment was followed by claims for recovery brought in Russian courts.

51. If the Court finds that the parties had agreed a general 6-month Moratorium, the Bank was clearly in breach of the December 2008 Agreement.

52. Whether or not there was a Moratorium, however, it remains the Defendants' and OMGP's case that the Bank acted pursuant to a fraudulent conspiracy to 'raid' Western Terminal and Scan and/or appropriate their assets. In the event the Defendants' case on fraud is accepted, the Court will need to consider what would be the likeliest development *if not* for the fraudulent scheme which the Bank was pursuing; in particular, whether (on the balance of probabilities) the Bank *would have* called a default (not merely whether it had a *right* to do so).

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of claims' is *substantive* of *procedural* law. In alternative to their reliance on Dr. Gladyshev's view, the Defendants and OMGP will submit that any such rule is procedural and does not apply.

Therefore, the circumstances and reasoning of the Bank's decision will need to be investigated in any event.

53. The parties' banking experts are broadly agreed as to the standard practice in a situation of this kind, i.e. where a bank has to make a choice between a default of a major borrower or a further restructuring of its debt.[10] The banks make that choice on the basis of a commercial judgement as to the borrower's prospects of restoring solvency. There seems to be a minor disagreement (possibly just a misunderstanding) between the experts as to where exactly they draw the fine line between (a) the standard practice to exercise a commercial judgement and (b) the substance of that commercial judgement, which by definition, cannot be a matter of standard practice. If there is any substantive disagreement between the experts, it is unlikely to be significant. The real issue is whether, as a matter of fact, the Bank made its decision on the basis of commercial considerations (in which case, it matters not whether its decision was wise or stupid, harsh or benevolent) or for the purpose of a fraud against the Defendants and OMGP. The Bank says it was the former; the Defendants say it was the latter.

54. The Banks' explanation of its decision is that between December and March, it discovered two matters which caused a loss of trust in Mr. Arkhangelsky and OMG:

    (1) That in 2006, Mr. Arkhangelsky had been subject to a criminal investigation for alleged tax evasion. It is common ground that no charges were brought.

    (2) In December 2008 a Vyborg Shipping vessel, *OMG Tosno*, was arrested in Tallinn pursuant to a claim by a bunkering company. The vessel had been pledged to the Bank under one of the Vyborg loans. The Claimants allege that OMG failed to inform them of the arrest of *OMG Tosno*, and thus misrepresented the seriousness of its financial difficulties.

[10]Compare paras 63-64 of Professor Guriev's report at [E2/10/22] and paras 5.1-5.3 of Mr. Turetsky's supplemental report at [E2/9/6]

55. The Defendants and OMGP say that explanation is false, and the Bank had been well aware of both those matters for a long time. Mr. Arkhangelsky's evidence (*Arkhangelsky 16th*, para 159) is that:

(1) The tax investigation was fabricated by the head of St. Petersburg police, Gen. Piotrovsky, in the circumstances described in *Arkhangelsky 16th*, paras 61-68 as part of an attempted extortion racket against OMG. Not only was Mr. Savelyev informed of it, but it was Mr. Savelyev who used his influence to protect Mr. Arkhangelsky from Gen. Piotrovsky.

(2) Mr. Arkhangelsky discussed the arrest of *OMG Tosno* with at least three employees of the Bank: Ms. Borisova, Ms. Prokhor, and Mr. Platonov. The Bank is not calling any of them to rebut Mr. Arkhangelsky's evidence. He also thinks he discussed the arrest of the vessel at the meeting with Mr. Savelyev.

56. **Key witnesses**:

- **Defendants'**: Mr. Arkhangelsky
- **Claimants'**: Ms. Mironova, Ms. Volodina
- **Experts**: Russian banking practice and procedure

'Seizure' of Western Terminal and Scan

57. In parallel to the events of the 'cross-default', the following important events took place in March-April 2009:

(1) The Bank instructed the Original Purchasers of Scan to 'sell' the shareholding to six other companies ('Subsequent Purchasers'), for the same nominal price as in the original 'Repo' contract;

(2) SKIF LLC and its director, Mr. Sklyarevsky, became involved in "the project" as one of the 'Subsequent Purchasers' but also in other roles (see his witness statement);

(3) Mr. Zelenov was unwilling to continue to participate in the arrangement, and withdrew from it.

(4) The Bank instructed the Original Purchasers to replace the management of Western Terminal and Scan;

58. The circumstances of each of those events, and the purposes pursued by the key actors, will need to be explored in some detail. In each case, the crucial issues are whether the Bank acted (a) honestly and (b) otherwise lawfully.

59. As regards **the onward 'sale' of Scan** to the 'Subsequent Purchasers', Mr. Sklyarevsky admits in para 33 that "the key motivation" was to frustrate any potential legal claim by OMG to set aside the 'Repo' arrangement. This issue is whether such a purpose was honest and lawful.

60. As regards the **replacement of management**, the Claimants rely on the evidence of Mr. Sklyarevsky, who explains in para 42 that the Bank's purpose was to "*protect the Bank's security and… force Mr Arkhangelsky to the negotiating table*". The Defendants and OMGP will invite a finding that the management was replaced pursuant to the fraudulent scheme to 'raid' the two companies and/or their assets. In particular, the new management would cooperate with the Claimants in arranging such transfers or sham 'sales' of their assets to different Renord companies as subsequently occurred (see below).

61. **Key witnesses**:

- **Defendants'**: Mr. Arkhangelsky
- **Claimants'**: Mr. Sklyarevsky, Mr. Smirnov

Subsequent transfers of assets

62. The subsequent history of transfers of assets from Western Terminal and Scan to Renord, and between different Renord/SKIF companies, is rather opaque. The Claimants have given virtually no disclosure in relation to those transactions. The requests made to Mr. Smirnov, Mr. Sklyarevsky and their

respective companies pursuant to the Court's disclosure order of 23 October 2015 **[J1/20]** have also yielded no material results. Nor did the Claimants disclose any substantial material in response to the Court's order for specific searches for documents relevant to each of the known transactions.

63. The Defendants and OMGP have only been able to reconstruct the sequence of events (which is not necessarily a complete sequence) from sketchy Russian media reports and very limited hints found in the Claimants' existing disclosure.

64. It is convenient to follow the structure of Schedule C to the Court's specific disclosure order of 23 September 2015 **[J1/20/12]** in dividing these transfers into two categories (a) Scan/Onega transfers and (b) Western Terminal transfers. However, the parallels between the both sequences of transfers are evidentially significant and should not be ignored.

Scan/Onega transfers

65. The land at Onega Terminal was partly owned by Scan, and partly by another OMG company, LPK Scandinavia. Both halves were leased to yet another OMG company, Onega LLC, which operated the terminal. Both parts of Onega Terminal, as well as some (but not all) of the other real estate owned by Scan, were pledged to the Bank. All those assets were 'sold' or 'transferred' to the Renord Group, whether as part of the purported realisation of pledges to the Bank or otherwise:

66. At the 'public auction' on 26 October 2009, Scan land at Onega Terminal and in Sestroretzk was sold to a Renord company, Solo LLC. The Claimants' evidence confirms that the only other bidder (Kiperort LLC) was also a Renord company.

67. Claimants' Disclosure Nos. RPC20002787 and RPC20002793 indicate that Scan land at Onega Terminal and in Sestroretzk may have been transferred to

another Renord company, Naziya CJSC (one of the Subsequent Purchasers of Scan)

68. Scan land in Tsvelodubovo, which had not been pledged to the Bank, was 'sold' to a company called Meridian LLC on 26 December 2009 (the legal basis of that sale is not clear from the disclosure), and then to Evgeny Kalinin on 27 August 2012. Mr Kalinin is the Financial Director of Renord-Invest CJSC, and held the land on behalf of Renord as a nominee. The land is now identified on Renord-Invest's website as one of the company's real estate development projects.

69. In January 2011, the LPK land at Onega Terminal (a 3.4 Ha plot) was sold for RUB 99,000 to Mercury LLC, a company then legally owned by Mr. Sklyarevsky. It is not known what was the legal basis of the sale, which apparently was not intended to be a realisation of the pledge to the Bank.

70. In April 2011, Mr. Sklyarevsky 'sold' Mercury LLC to Renord (*Sklyarevsky* para 53 and *Smirnov* para 72)

71. In June 2011, the Bank assigned the loans secured on the 3.4ha plot to Mercury LLC, and the pledge was automatically released.

72. Mr. Smirnov's witness statement states in para 72 that "*Renord Invest sold Mercury to ROK No. 1-Prichaly CJSC*", without any further detail or explanation. It appears from documentary evidence that, around the same time, the other half of Onega Terminal (previously bought by Solo LLC) was also sold to ROK No. 1 Prichaly CJSC; and that it was the Bank who lent ROK the money for the purchase.

73. The Claimants' evidence and disclosure do not adequately explain the purposes of most those transactions, which will need to be explored in cross-examination of the relevant witnesses. It appears that the Bank gave formal consent to each transaction, and lent the money for some of the 'purchases'. In all cases, the Defendants and OMGP say that the transactions were fraudulent collusive deals between connected parties, at gross undervalue, and ultimately aimed at

appropriating the Onega Terminal without paying full and proper consideration. The Claimants maintain that all their actions were aimed at maximising the recovery of debts due from OMG companies. As regards the 'intermediate' transfers other than purported 'realisation of security', it appears to be the Claimants' argument that they are irrelevant to the Counterclaim.

Western Terminal transfers

74. The real estate assets of Western Terminal can be divided into the following three categories:

    (1) Berth SV-15 and the land at the Terminal ('SV-15 et al') were pledged to the Bank.

    (2) Berth SV-16 and two railway tracks ('SV-16 et al') were unencumbered. Under the Russian cadastral rules, those assets were registered separately from the land they were located in, which was registered as a single plot and pledged to the Bank. Berth SV-16 and the railway tracks would significantly increase the capacity of any business operating the Terminal, if owned by the same business as SV-15 et al.

    (3) A valuable plot of agricultural land at Seleznevo ('Seleznevo'), was owned by Western Terminal LLC but otherwise was not connected to its business. It was unencumbered.

75. In 2010-2011 Sevzapalians (the Original Purchaser of Western Terminal) took the following actions affecting both SV-15 et al and SV-16 et al:

    (1) Between July 2009 and December 2010, Sevzapalians filed a claim in a Russian court against Western Terminal LLC pursuant to the assigned creditors' rights under a loan from Morskoy Bank to Western Terminal. The writ of execution was issued on 3 December 2010. (Claimants' Disclosure No E182).

    (2) In February 2011, Sevzapalians transferred the Western Terminal shareholding to an offshore entity called Ultriva Limited.

(3) On 26 December 2011, there was a purported 'public auction' to enforce the writ of execution against Western Terminal LLC. A company called Avrora LLC sold both SV-15 et al and SV-16 et al to Nefte-Oil CJSC, for the nominal price of RUB 161,000. preserving the pledge to the Bank (Claimants' Disclosure, No. E184)

76. As regards SV-15 et al, i. e. the pledge to the Bank, the following transactions took place:

(1) On 20 August 2009, Western Terminal apparently leased SV-15 et al to a BVI company called Gunard Enterprises Ltd., which appears to be part of Renord Group. The terms of the lease were US$20,000 rent per month, with the entire rent payable at the end of the term (49 years, later reduced to 30 when the Bank gave consent to the lease in November 2009). In view of the uncommercial terms of the lease, the purpose of the lease appears to have been to lower the value of the land artificially.[11]

(2) On 6 June 2012, Nefte-Oil 'sold' SV-15 et al to another Renord company, Vektor-Invest LLC, for RUB 2,300,000.

(3) On 20 August 2012, the Bank and Vektor-Invest apparently entered into a settlement agreement whereby the Bank would sell its right to enforce the pledge to Vektor-Invest for RUB 1,210,000,000. However, Vektor-Invest apparently failed to pay the money by the agreed date 28 August 2012 (i.e. one week after the agreement), and the Bank terminated the agreement.

(4) On 29 September 2012, SV-15 et al was sold at a 'public auction' as realisation of the Bank's pledge. According to the documents initially disclosed by the Bank, the only bidder appeared to be Kontur LLC; however, other documents subsequently disclosed by the Claimants suggest that there was another bidder, Globus-Invest. Kontur LLC bought

[11]The Claimants point out (para 668 of the skeleton argument) that Mr. Millard took no account of the Gunard lease agreement in his valuation of the assets – see his report at [E6/23/51]. This is correct, but does not explain (a) the purpose of the transaction in the first place and (b) less importantly, why the Claimants provided the lease agreement to Mr. Millard with his instructions, apparently **without** instructing him to disregard it in his valuation.

SV-15 et al for RUB 674,500,000. It appears that both Kontur and Globus-Invest were companies controlled by Renord.

77. Both SV-15 et al and SV-16 et al are now known to be part of a profitable business operated by Baltic Fuel Company LLC.

78. As regards Seleznevo, the Claimants have disclosed no information or documents whatsoever regarding the fate of that asset. However, the publicly available land registry records **[D192/2918.2/124-126]** show that since 29 November 2010, the land has been owned by Mercury LLC.

79. It appears that the Bank gave formal consent to each transaction. Like in the case of Scan/Onega transfers, that complex series of transactions is not adequately explained in the Claimants' disclosure or in evidence. It will need to be investigated in some detail in cross-examination of the relevant witnesses. The Defendants and OMGP will invite a finding that the ultimate purpose of those transactions was to appropriate Western Terminal at gross undervalue, and to disguise the fraud against them as legitimate business deals. However, the Claimants seem to argue that, except the purported realisation of the pledge to the Bank, all those transactions are irrelevant.

'Realisation of security'

80. Amidst those complex series of purportedly public or unquestionably private 'sales', the Bank purportedly realised the pledges under its loans to OMG companies. It is common ground that all pledged assets were sold to connected parties: Renord companies and (on fewer occasions) SKIF companies. Mr. Smirnov's evidence is that, having initially held the shares on behalf of the Bank, Renord became interested in the assets for its own purposes, and bought them at public auctions for a fair market price.

81. A mortgagee who sells to a connected party is under *"a heavy onus... to show that in all respects he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable"*: ***Tse Kwong Lam v. Wong Chit***

Sen [1983] 1 WLR 1349, 1355G). The desire to obtain the best price must be given *"absolute preference over any desire that an associate should obtain a good bargain"* (***Meretz Investments NV v. ACP Ltd*** [2007] Ch 197 at [271]-[272]). There are non-controversial evidential principles, based on the obvious inherent probabilities of commercial life. They remain applicable to a claim governed by Russian law as much as they would be to an English claim. In any event, there is no evidence that the Russian law on that point is different.

82. **Key witnesses**: Mr. Smirnov, Mr. Sklyarevsky, Mrs. Kosova

Valuations

83. It is fairly clear from the above that if any single issue is the crux of the case, that is the valuation of the relevant OMG assets, be that businesses or real estate. The disparity between the values put by the parties' respective experts on the most substantial of the relevant assets is striking. In particular:

- **Western Terminal** is valued by Mrs. Simonova at almost $144 m. and by Mr. Millard at just over $21 m.
- **Onega Terminal** is valued by Mrs. Simonova at around $200 m. and by Mr. Millard at just under $4 m.

84. Clearly, one of the two experts is very seriously mistaken.[12] There are disputes in relation to other real estate as well, but it is, on any view, much smaller in value than the two Terminals. The value of the Terminals is therefore central to the issue of liability. If Mr. Millard is right, the Counterclaim is likely to be wiped out completely; but if Mrs. Simonova is right, it follows that:

(1) The shares in Western Terminal and Scan had very substantial value reflecting (if nothing else) the value of their real estate assets;

[12]The disparity of the parties' respective valuations of businesses is even greater, but the Defendants and OMGP are not in a position to discuss it at this stage. Their business valuation expert, Mr. Steadman, has not (at least as yet) volunteered to assist them or to attend the trial *pro bono*; it is difficult to criticise him as that was not the basis on which he has been engaged. It is therefore possible that the final determination of quantum will need to be split off from the trial of liability.

(2) The Claimants' fundamental contentions that the Group's liabilities far exceeded its assets, that it had hardly any prospect of restoring solvency, and that 'there was nothing to raid' all fall to the ground;

(3) All the collusive 'sales' of assets between different Renord companies, at 'public auctions' or otherwise as outlined above, were at gross undervalue;

(4) The fact of harm is proven for the purposes of Article 1064 of the Russian Civil Code, and it is for the Claimants to show that they acted honestly at all times;

(5) It is unlikely in the extreme that the Claimants could have undervalued the assets as a result of an honest mistake – not at such a scale, not for so many times over a number of years, not in relation to so many assets, and not in the face of the correct valuations by a reputable Russian valuer, Lair, on which the Claimants had relied at the time they accepted the pledges. Such an extraordinary series of honest mistakes leading to such a profitable result is hardly more than a purely theoretical possibility.

85. The Counterclaim thus in substance boils down to the dispute between valuation experts over the value of the two Terminals; and that in turn boils down to the issue of correct methodology.

86. The key difference between the approaches adopted by the experts is that Ms Simonova treats a terminal as "trade related property" and as a complex of income-generating assets with synergistic value. She therefore applies an income-based approach and discounted cash flow methodology to ascertain its value. Her valuation is predicated on the concept of "highest and best use" provided for by IVS and RICS standards. She undertakes analyses of current and potential operations on the land.

87. By contrast Mr Millard treats the land as vacant and uses a "sales and offer" comparable approach. He takes no account of the "highest and best use" analysis and performs no analysis of the commercial operations carried out on the land. Rather, Mr. Millard has valued the land by reference to the average

price of "normal industrial/warehouse land" in Leningrad Region (in the case of Western Terminal, with a 100% premium for the presence of the berths, calculated by comparison to berths in Southampton).

88. It is not proposed to recite the substance of the experts' respective reports (and supplemental reports with their respective mutual criticisms) in this skeleton. The Court is simply invited to read the expert reports and supplemental reports in full, at least insofar as they concern the two Terminals:

- Experts' joint statement at [E8/29]
- Mr. Millard's report at [E6/23];
- Mrs. Simonova's at [E8/26];
- Mrs. Simonova's valuation of Western Terminal [E8/27]
- Mr. Millard's supplemental report at [E7/24]
- Mr. Millard's supplemental report on Western Terminal at [E7/25]
- Mrs. Simonova's supplemental report at [E8/28]

89. Whereas the Claimants' opening contains a very detailed argument inviting the Court to prefer their valuations, the Defendants and OMGP shall for the present confine themselves to making the following basic points:

90. Both the '*income approach*' and the '*comparable approach*' are universally recognised methods of valuation which cannot sensibly be questioned in principle. If those methods were correctly applied, they were bound to produce the same result: no asset may have more than one market value at a time. One of the experts has made a fundamental error in the application of his/her chosen method. The question is, which expert and which method.

91. The Defendants submit that the 'comparables' used by Mr. Millard are not legitimate comparables at all. There is all the difference in the world between a sea-port Terminal and a plot of 'industrial land' elsewhere. It is sufficient to look at the globe to see Mr. Millard's error. Russia occupies 1/8th of the world's land mass; but its Baltic shoreline is very short. The difference in

supply is therefore enormous: Russian market of industrial land is more or less infinite, whereas the Big Port of St. Petersburg is a small dot on the map where mainland Russia touches the Baltic Sea. It is not proposed to recite all the epic poems composed over the centuries to glorify it as Russia's 'window to Europe'. Rather bloody wars have been fought in Russian history for access to the Baltics; and St. Petersburg itself was built (rightly or wrongly) for that very reason.

92. The terminals in the Big Port and the industrial land outside the Big Port are two very different markets which never overlap. No potential buyer or investor who is interested in the Port would consider, as an alternative, a plot of industrial land even half a mile inland from it. It is precisely because the land in the Big Seaport is in such short supply and at such high demand that any sales of it are extremely rare and there is no publicly available information about the prices paid for it. The terminals cannot be properly valued on the basis of 'comparable approach' simply because there are no comparables on the market.

93. As regards the 'income approach', the issue between the experts is whether or not seaport terminals can properly be categorised as 'trade-related property' (TRP). In that respect, both experts rely on the definition set out (in identical terms) in *International Valuation Standards* (IVS) published by the International Valuation Standards Council, and *Valuation – Professional Standards* published by the Royal Institute of Chartered Surveyors (RICS). A trade-related property is

> "***any type of real property designed for a specific type of business where the property value reflects the trading potential for that business.***"

94. Mrs. Simonova says that a seaport terminal fits perfectly into that description. However, Mr. Millard further points out the following passage from section 6 of RICS standards (*"RICS global valuation practice guidance – applications (VPGA's)"*), which describes TRPs as

> *"Certain properties… normally bought and sold on the basis of their trading potential. Examples include hotels, pubs and bars, restaurants, nightclubs, casinos and theatres and various other forms of leisure properties"*

95. It will be observed that this passage does not purport to give a definition, but rather a guidance on the application of a method defined elsewhere; and that the "examples" given in it do not purport to be an exhaustive list. Mrs. Simonova writes in her supplemental report:

Although trade related properties do indeed include the examples of hotels, pubs and bars, this is no way disqualifies the Onega international trading Terminal for classification as what it is: trade related property. The Guidance Notes are intended to be helpful to appraisers in applying the RICS Standards. The reason they focus on hotels, pubs, bars, restaurants, night clubs, casinos, theaters and various other forms of leisure properties as examples of trade related property – is because there are a great many more hotels, theaters, cafes and casinos than there are trading terminals.

In my opinion, a purchaser of a restaurant, hotel or other 'leisure property' would adopt the same basic economic approach when considering the value of a target asset as a purchaser of the land at Onega Terminal: both purchasers would want to know how much annual net income the business is likely to generate. This would be based on, for example, the 'price per night charged to rent a room' in relation to the hotel, or the 'tariff charged to unload a container or the tariff charged per day for storage of the container' in relation to the terminal. In my experience, appraisers recognize and value assets as trade related property whether they need to appraise hotels, restaurants, gas stations or terminals, because there is no other more reasonable approach than to use a discounted cash flow ('DCF') approach for these type of income-generating assets.

It should be noted that, if performed correctly, the valuation result for an asset using the income approach (DCF model) and the valuation result using the comparable approach should yield similar results. The reason they do not in this case is that Mr. Millard has not used appropriate comparable land plots and has made inappropriate adjustments to them.

96. Such is the principal dispute between the valuation experts. It is submitted that Mrs. Simonova's analysis is correct, and her valuation must be preferred to that of Mr. Millard.

97. There are further disputes in relation to other properties, and the Court is respectfully invited to read the valuation reports **[E6-E8]**.

Renord Group

98. It is now belatedly admitted by the Claimants that nearly all companies who acted as 'Original Purchasers', 'Subsequent Purchasers', various 'intermediary' purchasers of former assets of Western Terminal and Scan, the 'ultimate purchasers' of pledges at 'public auctions' and 'unsuccessful bidders' at those auctions have all been controlled by one company (Renord) and/or one individual (Mikhail Smirnov). Collectively, all such companies are referred to as 'Renord Group'.

99. On a number of recent occasions the Claimants sought to argue that the Counterclaim, as now advanced, is materially different from the pleaded one, because the allegations of fraud are now made against Renord rather than the Bank. With all due respect, this argument is disingenuous and misleading.

100. Until recently, the very existence of Renord Group was not admitted by the Claimants. The Defendants and OMGP had to plead their case by reference to dozens of individual companies, and also to plead and to prove their connections with each other and with the Claimants. Accordingly, the pleaded Counterclaim separately addressed (a) the Original Purchasers of shares, (b) the Subsequent Purchasers of shares, and (c) the ultimate purchasers of assets; the interconnections between them and also the Claimants; and inferences as to their respective roles in the alleged conspiracy.

101. The development of pleadings in this case was notoriously long and complicated; in part, it began from the BVI proceedings, and continued through

the Claimants' claim for negative declarations into the Counterclaim. The pleadings therefore require a careful analysis.

102. In relation to the Original and Subsequent Purchasers, the Counterclaim is virtually identical with the BVI claim. Relevantly, it is pleaded:

[122…] As further pleaded below, it is strongly to be inferred from the Memorandum, and in particular clauses 2 and 3 thereof and the fact that the Bank and/or Mr Savelyev were able to and did make promises about and on behalf of each of the Original Purchasers in the Memorandum, and were able to and did procure the Original Purchasers to enter into the various sale and purchase agreements, that the Original Purchasers were wholly directed and controlled by the Bank and/or Mr Savelyev and that the Bank and/or Mr Savelyev were their directing minds and wills. […]

103. Following the pleadings as to the transfer of shares from the Original to Subsequent Purchasers, it is averred:

[130] Given that these sales took place at the same price as the original purchases (which had always been intended to be at a nominal price rather than one reflecting the actual value of the shares), the proximity of the dates of these sales and the connections between many of these companies in terms of actual or previous shareholders/directors, the Counterclaimants will contend that these were not arms' length commercial transactions but transactions at a gross undervalue between connected parties which were aware of and involved in the fraudulent conspiracy to seize ownership and control of Western Terminal LLC and Scandinavia Insurance LLC. Accordingly these sales were also shams, in the sense that they were a cloak for the Bank's and/or Mr Savelyev's wrongdoing and that the real owners and controllers of the shares remained the Bank and/or Mr Savelyev

104. Most of the 'public auction sales' only became known (and in some cases, only occurred) after the BVI claim was made. The case in relation to the ultimate purchasers of assets at 'public auctions' was therefore not pleaded in BVI; but is pleaded in the Counterclaim as follows:

Subsequent dissipation of assets

[150] Many or all assets of Scan, Western Terminal, and other assets ultimately owned by the Counterclaimants have since been fraudulently dissipated. The transactions were conducted without informing the Counterclaimants. It is averred that all such transactions were sham and/or that the ultimate beneficiaries of those transactions were the Bank, Mr Savelyev, their other co-conspirators, and/or those connected with them.

[151] It is averred that the purported 'public auction sales' of the seized assets were conducted not in accordance with the Russian law, but as fraudulent insider dealings, and/or fraudulently at a gross undervalue. For example, and without limitation:

[152] The prima facie purchasers of the assets at public auctions, including Solo LLC, Mercury LLC and Kontur LLC as pleaded below, are closely connected with the Clamaints and/or 'Original Purchasers' and/or 'Subsequent Purchasers' through the 'Renord' group of companies. The ***Renord Group*** *includes:*

a. *Renord-Invest CJSC ('Renord-Invest'), a company trading from the Bank's office at 15A Ispolkomskaya ul., St. Petersburg. 75% shareholder of Renord-Invest is Vladimir Malyshev, the husband of Vice President of the Bank Irina Malysheva. 25% shareholder and CEO of Renord-Invest is Mikhail Smirnov, a former employee of the Bank and the nominal owner of 'Original Purchasers' SPVs. The management of Renord-Invest consists of persons closely connected with the Bank and/or 'Original Purchasers' and/or 'Subsequent Purchasers', including:*

    (i) *Svetlana Guz (sister of deputy chairman of the Bank Vladislav Guz),*

    (ii) *Elena Goncharuk (a representative of the Bank, and the nominal owner and director of a 'Subsequent Purchaser', Khoritza LLC),*

    (iii) *Konstantin Solovyev (ultimate owner and/or controller of 'Original Purchasers' Medinvest LLC and/or Akva-Ladoga LLC),*

(iv) *Evgeny Kalinin (50% shareholder of 'Subsequent Purchaser' SKIF LLC),*

(v) *Dmitry Gubko (former owner of 'Original Purchaser' Medinvest LLC),*

(vi) *Igor Kolmakov (director of Razvitie Sankt-Peterburga LLC, the parent company of 'Subsequent Purchaser' Dom na Moloy Moyke LLC).*

b. Baltic Fuel Company LLC, advertised by Renord-Invest as one of its 'business projects'. The present and former shareholders and ultimate owners/controllers of Baltic Fuel Company include the following persons and entities:

(i) *Sredni 44 LLC. Sredni 44 is or was owned by Razvitie Sankt Peterburga LLC, the parent company of 'subsequent purchsser' Dom na Maloy Moike LLC. A former director of Sredni 44 is Mr Andrey Shevchenko, who is also a former director of 'original purchasers' SPVs Akva-Ladoga LLC; Graham Bell LLC and Severo-Zapadnaya Agrarnaya Kompaniya LLC*

(ii) *Stanislav Korneev*

(iii) *Neva Oil LLC*

(iv) *Igor Vladimirovich Malyshev - the son of Vice President of the Bank Irina Malysheva*

(v) *IK Renord CJSC,*

(vi) *Mikhail Smirnov*

c. IK Renord CJSC - former controlling shareholder of Baltic Fuel Company

105. The specific 'sales' alleged to be collusive and fraudulent are then particularised in paras 153-164. That included the particulars of the alleged connections between the ultimate purchasers (Solo, Mercury and Kontur

respectively) on the one hand and the Claimants, Original Purchasers, Subsequent Purchasers and/or Renord Group on the other.

106. The BVI claim was brought not only against the Bank and Mr. Savelyev, but also against each of the Original and Subsequent Purchasers and their nominal corporate shareholders (one of whom was a BVI company and the 'anchor defendant'). The BVI proceedings were stayed before any defence was pleaded.

107. However, the Bank and Mr. Savelyev responded to the allegations in their present claim for negative declarations. Their Particulars of Claim read in para 67.6: "*The Original Purchasers were not owned and/or controlled by the Bank or by Mr. Savelyev but were companies controlled by well-established clients of the Bank who were prepared to assist the Bank in ensuring that its security was effective, namely Mr. Mikhail Smirnov and Mr. Leonid Zelyenov*". The Subsequent Purchasers are pleaded in para 67.12 to be "*also owned by established clients of the Bank who were willing to assist the Bank… namely Mr. Smirnov and Mr. Sklyarevsky*". Finally, it is pleaded in para 69: "*it is to be inferred that Mr. Arkhangelsky was aware of the true ownership, business and date of incorporation of the Original Purchasers and Subsequent Purchasers, as these are matters of public record*".

108. In the light of Claimants' admissions made in their response to the RFI over three years later, the assertion that "the true ownership" of the Original and Subsequent Purchasers was a "matter of public record" was plainly untrue. With the possible exception of SKIF, it is now admitted that all 'shareholders' of all those companies, as they appear from public records, are mere nominees. None of them is either Mr. Smirnov or Mr. Zelyenov. Most of the nominal shareholders are now admitted to be nominees of Renord/Smirnov.

109. As for the Defendants' and OMGP's pleadings in relation to the ultimate purchasers of assets, the Claimants responded by generally worded denials of the allegation that the 'realisation of pledges' was fraudulent or at gross undervalue, but their pleadings are silent as to the ownership or control of the 'ultimate purchasers' of assets (Solo, Mercury and Kontur). It was only in the

Claimants' witness evidence that those companies (as well as some other participants of 'auctions', i.e. 'sellers', 'pledgors' and 'unsuccessful bidders') were admitted to be companies in the Renord Group.

110. Accordingly, on the strictest view of the pleadings, four broad issues arise:

(a) whether the Original Purchasers were "*wholly directed and controlled by the Bank and/or Mr Savelyev"* (para 122 of RADCC);

(b) whether the Bank and/or Mr Savelyev remained "*the real owners and controllers of the shares"* through the Subsequent Purchasers (para 130);

(c) various 'connections' between the 'ultimate purchasers of assets' (e.g. Solo, Mercury and Kontur) on the one hand and the Claimants on the other. That issue is collateral to whether the relevant 'public auctions' were collusive and fraudulent.

(d) Whether (as expressly alleged in para 177 of the Counterclaim) all those companies were involved in a conspiracy with the Claimants to steal the Defendants' assets.

111. The admissions now made by the Claimants in relation to Renord effectively concede issues (a), (b) and (c). Those are matters from which (among others) the Defendants and OMGP seek to infer (d) (which is effectively the ultimate issue of this case).

112. In particular, the Claimants now admit that:

(1) Renord and (to a more limited extent) Mr Sklyarevsky, between themselves, owned and controlled:

i. Most of the original and subsequent purchasers of shares;

ii. the ultimate purchasers of the assets at public auctions (e.g. Solo, Mercury and Kontur);

iii. various intermediary purchasers of those assets such as Nefte-Oil, Vektor-Invest, etc.

(2) The Original and Subsequent Purchasers of the shares in Western Terminal and Scan held the shares 'on behalf of the Bank' and subject to the Bank's instructions (eg *Smirnov* paras 29, 33, 34). The arrangement was that, through those companies, 'the Bank would obtain an interest in certain OMG companies' (*Savelyev*, para 25)

(3) The transfer of shares from the Original to Subsequent Purchasers took place on the Bank's instructions (*Sklyarevsky*, para 33)

(4) Subsequently, Renord became interested in the assets for its own purposes, and ensured that those assets were sold by Renord companies to other Renord companies at public auctions. (*Smirnov*, paras 53 and subsequent paragraphs).

113. Given those admissions, it is now much more convenient to refer to 'Renord' rather than to the dozens of companies named in the pleadings, and the connections between those companies as pleaded. That does not amount to a substantive change of the pleaded Counterclaim. It may be said that 'Renord Group' is simply a shorthand reference to the substantial part of the pleaded case on conspiracy which has now been finally admitted (as it should have been admitted years ago).

114. Further, the Defendants and OMGP will seek to prove at the trial that, even now, the Claimants fail to admit the whole truth. The Defendants will say that the Claimants' latest attempt to distance themselves from Renord Group and SKIF is simply an attempt to distance themselves from their own fraud. The Defendants will seek to demonstrate that the connections between the Bank and Renord are so close and so numerous that it should be inferred that they are controlled by the same group of people and/or members of the same conspiracy,

to the extent that, for all practical purposes, it is unnecessary to distinguish between them.

115. The Claimants, however, are adamant that Renord, SKIF and Mr. Zelyenov were no more than the Bank's well-established clients and independent parties.

116. Two broad issues remain in dispute and will need to be explored at the trial. Firstly, in what sense did various Renord companies (and companies performing similar roles which are denied to be part of Renord, e.g. SKIF) act "on behalf of the Bank"? That issue was previously considered by the Court in the context of 'control' for the purposes of a disclosure application, and presented some difficulties: see paras 33-38 of the judgement of 23 October 2015 **[K1/11]** In response to a direct question from the Court, the Claimants, through their Counsel, firmly denied any suggestion that Renord, or individual Renord companies, acted as the Bank's agents or nominees. Their case on that point remains unclear. The description of those companies as "clients" who "assisted" the Bank hardly amounts to a legal analysis of their relationship whereby Renord companies held shares "on behalf of the Bank" and to the Bank's instructions, which is undoubtedly relevant to the Counterclaim.

117. Secondly, there is a broader issue of whether Renord and SKIF were genuine 'clients' dealing with the Bank at arms length, or effectively parts of the same business, owned and operated by the same people. In this context, a complex factual picture of (a) corporate structures, (b) nomineeships, (c) shared business addresses, (d) migration of top managers between companies and (e) family relations between directors and shareholders will need to be explored. Three examples out of dozens may be briefly recalled:

    (1) Mrs. Malysheva's husband, Vladimir Malyshev, was a co-founder of Renord-Invest CJSC (with Mr. Smirnov), and its 75% shareholder at least until March 2008. Whether and when his involvement ceased is one of the matters which need to be explored.

    (2) Mrs. Malysheva's son, Igor Malyshev, held and may continue to hold an interest in companies which became direct or indirect owners of Western

Terminal assets, namely Kontur LLC **[D/2918.1T/1551]**, Kontur SPB LLC **[D/2918.1T/1625**], Neva Oil LLC **[D/2918.1T/1823]** and Baltic Fuel Company LLC **[D/2918.1T/1907]**.

(3) Renord-Invest traded, at all material times until 2010, from one of the Bank 's offices at 15 Ispolkomskaya St. (the 'Olymp Office'). It was initially denied in evidence that the Bank had an office at that address. However, when confronted with the evidence, the Claimants admitted that its Olymp Office had operated from that address. Further assertions were then made to the effect that (a) Olymp was only a 'branch' of the Bank dealing with customers, and not one of its central offices housing any of its central departments; and (b) that all its documents have now been "archived and destroyed". Both those assertions have now been admitted to be incorrect.

118. Many more examples might be given, but may as well be saved for cross-examination of relevant witnesses.

119. As the Court will recall, at the time the Defendants and OMGP were legally represented and had some funds, they commissioned an investigation by FTI of the links between various alleged conspirators. Unfortunately, that investigation was never finished. Such matters as have been established are graphically presented in the draft charts prepared by FTI, and disclosed in these proceedings pursuant to the Claimants' successful application for specific disclosure. The FTI draft charts are now enclosed to this skeleton as **Appendices 3 to 9**.[13] Of course, the Defendants and OMGP cannot rely on those charts as evidence of the matters graphically presented in them; those will need to be demonstrated by other evidence and put to the relevant witnesses in cross-examination. However, the charts give a convenient roadmap through the complex evidential picture the Defendants will seek to present at the trial. At the very least, they will hopefully assist the Court in identification of the relevance of questions put to various witnesses.

[13]Defendants' disclosure Nos 1118 to 1124 respectively

120. It will be observed that the general issue of relationship between the Claimants and Renord does not in itself determine the Counterclaim one way or the other. It is perfectly possible that the Bank and Renord were independent parties and still jointly defrauded the Defendants and OMGP. Similarly, it is possible that they are part of the same business controlled by the same people, and still innocent. However, the issue remains highly relevant in two ways:

121. Firstly, if those parties were a part of the same business, the inherent probability of the conspiracy is much higher. Even now, the Claimants seek to ridicule the Counterclaim by implicit suggestions that allegations of a conspiracy involving such a long list of parties are implausible. In fact, of course, the majority of the alleged conspirators are now admitted to be Renord companies or Renord employees, directed (on the Claimants' case) by one man, Mr. Smirnov. Essentially, all the Defendants and OMGP now need to show is a conspiracy between the Bank and Mr. Smirnov. If the Bank and Renord were part of the same business in the same sense as the various Renord companies are part of the same business, such a conspiracy is even likelier.

122. Secondly, if the Defendants and OMGP succeed in demonstrating the falsity of the Claimants' present case (the description of Renord as a client dealing with the Bank at arms length, and the denial of any closer connection), the Court will need to consider their motive for advancing an untrue case. The Defendants and OMGP will say that the motive was to conceal the fraud.

The criminal proceedings against Mr. Arkhangelsky

123. In February or March 2009, Mr. Arkhangelsky procured Western Terminal LLC to take a relatively small loan (RUB 56.5 m.) from a different bank, Morskoy Bank. Under the Russian corporate governance regulations, such a transaction required a consent of the shareholders of Western Terminal. Such a consent was obtained from OMGP, but not from the relevant Original Purchaser, Sevzapalians.

124. Mr. Arkhangelky's evidence (*Arkhangelsky 19th*) is that Sevzapalians's consent was not required, as it was not a genuine shareholder but merely a 'special company' holding the shares on trust, subject to the undertakings recorded in the Memorandum, including:

- The undertaking of the 'Original Purchasers' not to interfere with the day-to-day commercial activities of the companies; and
- The undertaking of the OMGP and Western Terminal not to stop its commercial activities or otherwise worsen its economic position.

125. However, the Claimants' evidence seems to suggest that the Claimants will invite a finding that Mr. Arkhangelsky's actions were dishonest.

126. Following the replacement of the management of Western Terminal, the new Director-General appointed by Renord, Mr. Maslennikov, made a criminal complaint against Mr. Arkhangelsky, alleging fraud **[TB/D129/2085]**. Criminal proceedings were initiated. The Investigator took evidence (subject to the criminal liability for the Russian offence analogous to perjury) from, *inter alia*:

(1) Mr. Savelyev **[D138/2305]**

(2) Mrs. Malysheva [**D137/2278]**

(3) Mrs. Stalevskaya **[D137/2279]**

(4) Mr. Gavrilov, a Renord employee and the director-general of Sevzapalians **[D135/2224]**

(5) Mr. Maslennikov, a Renord employee appointed as the new director-general of Western Terminal **[D132/2167]**

(6) Mr. Chernobrovkin, a Renord employee appointed as the new deputy director-general of Western Terminal **[D134/2218]**

127. All six witnesses gave evidence as to the circumstances of the 'sale' of Western Terminal from OMGP to Sevzapalians. All six testimonies perfectly

corroborate each other and give substantively the same version of events, which is, in summary, as follows:

(1) In December 2008, Mr. Arkhangelsky decided to sell Western Terminal and approached the Bank asking for help in finding a buyer.

(2) Mrs. Malysheva, as a favour to him, put him in touch with Mr. Gavrilov.

(3) There followed a genuine sale from OMGP to Sevzapalians at the fair market price of RUB 10,000.

(4) Other than that, the Bank had no involvement in the deal. It had no interest in the sale other than helping its borrower.

128. Each witness testimony only occupies 2-3 pages, and the Court is respectfully invited to read all six. The Defendants will invite the following important inferences:

(1) A perjury by six witnesses telling substantively the same lie can only result from a collusion.

(2) The only purpose of that perjury was to conceal the so-called 'Repo' arrangement.

(3) The reason for concealing it was because it was fraudulent.

(4) Three different employees of the Bank gave the same false evidence because the Bank was responsible for that fraud.

(5) Three different employees of Renord gave the same false evidence because Renord was also responsible for that fraud.

(6) A conspiracy involving, at least, the Bank, Renord, and the six individuals is, by far, the most probable explanation.

129. Mr. Savelyev gives the following explanation in his witness statement:

46.3. I have also been shown minutes of a witness interview of me by Sub-Colonel Levitskaya, the Chief Investigation Officer of the 7th Division of Investigation Part on Investigation of the Organised Criminal Activity of the Main Investigation Department by

GUVD in St Petersburg and Leningrad District, in connection with a criminal investigation into the activities of Mr Arkhangelsky and the Oslo Marine Group [106-112]. While I cannot now be certain, I believe that I only met Ms Levitskaya briefly since she needed evidence from me as the Chairman of the Bank and that after that, she dealt mainly with my subordinates in this regard (I do not now recall who). While I acknowledge that I signed these "minutes", I have no recollection of these minutes being prepared and do not now know who did so. I cannot recall whether I read the document before signing it.

47. In the course of preparing this witness statement, I have realised that there were some errors in the previous accounts which I gave in the other proceedings referred to above, in terms of my knowledge of and dealings with Mr Arkhangelsky and OMG.

[…]

50. As regards the minutes of my interview with Ms Levitskaya, not only is this incorrect as regards the timing and number of my meetings with Mr Arkhangelsky, it is also incorrect as regards discussions at our 25 December 2008 meeting. I have not been able to identify now, given the long passage of time, why these errors were made and why I did not notice them at the time. I acknowledge that I signed this document but I could not have read it carefully at the time. I did not give the interview my full attention or properly explain what happened. I apologise for any confusion caused by these errors.

130. Ms. Stalevskaya gives the following explanation:

43. I previously gave an interview on 26 March 2010 to the Russian prosecutor, Lt-Col Levitskaya, as part of criminal proceedings into Mr Arkhangelsky [148-153]. I note that in this interview I made reference to OMG selling one of the corporations owned by the group. I do not know now why I made reference in this interview to selling shares since this did not reflect the complete nature of the transaction that I have explained in the statement above.

44. I do not think that I was properly paying attention at the time and wanted to get through the interview quickly. I had not reviewed the documents as I have now done so.

131. It should also be noted that the false evidence of those six witnesses was (and still is) crucial for the continuation of the criminal case. Whether or not Mr. Arkhangelsky's analysis as to the implications of the Memorandum for the rights of Sevzapalians as the 'shareholder' was legally correct (and it is submitted that it plainly was), the criminal case on fraud could only proceed so long as there was evidential basis for an allegation of dishonesty; i.e. that he knew Sevzapalians was a genuine shareholder but misrepresented the position to Morskoy Bank. There is no such basis save for the false evidence of the six witnesses.

132. It was on the basis of that very criminal case that Russia issued an Interpol 'red notice' against Mr. Arkhangelsky (see the International Arrest Warrant at [**TB/D/2293]**); and applied for his extradition from France. That extradition request, ultimately unsuccessful, nevertheless resulted in his arrest and two weeks' imprisonment until the bail was paid. The Bank was active in the extradition proceedings through its French lawyers, and sought to arrest the bail money pursuant to the Russian judgements.

133. The criminal file was disclosed to the Bank in 2013. None of the six witnesses is known to have taken any steps to inform the Russian authorities that their evidence had been untrue and should not be relied on. The criminal charges, and the Interpol 'red notice', remain in place. It is for that reason that Mr. Arkhangelsky cannot be present at this trial.

Irina Malysheva

134. It will take some weeks for the Court to hear all the witness evidence in this case. However, it will take no time at all to note what is undoubtedly the fact of greater evidential significance than anything any of them may say - the fact that Mrs. Irina Malysheva is not here.

135. Mrs. Malysheva was, at all material times, Vice President of the Bank. She was personally in charge of handling all the arrangements with Renord, Mr.

Zelyenov and Mr. Sklyarevsky on behalf of the Bank. Her BVI witness statement is at **[B2/14]**. The Court is invited to read it. It is submitted that the statement invites what might have been a very interesting cross-examination.

136. As a Vice President of the Bank, Mrs. Malysheva was personally responsible for most of the Bank's actions which, on the Defendants' case, implemented the fraudulent scheme against them. As mentioned above, there is evidence that members of her family were among the beneficiaries of the fraud through their interest in Renord and in Baltic Fuel Company. She was also one of the six perjurers in Morskoy Bank criminal case.

137. Tellingly, when Mr. Pasko sought to interview Mr. Savelyev as part of his investigation of the dispute between the Bank and Mr. Arkhangesky, Mr. Savelyev referred him to Mrs. Malysheva as the person who dealt with that issue on behalf of the Bank (*Pasko*, para 11 **[C1/5/3]**).

138. An audio-recording of Mrs. Malysheva's interview with Mr. Pasko is the Defendants' disclosure document 459. The English transcript is appended to this skeleton as **Appendix 2**, and the Court is respectfully invited to read it in full. Alas, this is the closest the Court will ever get to a cross-examination of the Bank's most important witness; but in that respect, it is very illuminating. The Bank's executive, who had the most involvement in the events giving rise to the Counterclaim, puts the Bank's case against Mr. Arkhangelsky intelligently and persuasively. Yet, when she does so in her own words and not through the lawyers, the falsity of that case is obvious.

139. The evidence of Mrs. Malysheva's dishonesty is overwhelming. All that evidence was duly disclosed in these proceedings. By the time Mrs. Malysheva allegedly refused to give evidence for the Claimants, she knew everything there was to know about the serious allegations made against her personally. She chose not to respond. In the circumstances, this is as good as an admission.

140. It is, perhaps, with this in mind that the Claimants now take a further 'pleading point'. After Mrs. Malysheva's apparent disappearance in 2015, it has been suggested for the first time, after years of litigation, that the Bank is not liable

for her actions as its Vice President. In support of that argument, the Claimants rely on the following passage in para 177 of the pleaded Counterclaim:

The Counterclaimants contend that at least the following entities were party to the conspiracy and that their roles in the execution of the conspiracy were (without limitation and to the best the Counterclaimants' knowledge at the time of pleading) as follows:

a. *The Bank: the Bank (**acting primarily through Mr Savelyev, its Chairman**) had the following roles to play in the execution of the conspiracy* […]

[Emphasis added]

141. It is now said that such pleadings do not leave it open to the Defendants and OMGP to impute liability to the Bank for Mrs. Malysheva's actions on its behalf. All allegations that the Bank acted by Mrs. Malysheva are now characterised as a 'new' and 'unpleaded' case based on vicarious liability. It is further asserted that Mrs. Malysheva's fraud was "*(on the Defendants' case) against the employer*", i.e. the Bank. See further paras 418-421 of the Claimants' skeleton argument.

142. This argument is both unfair and incorrect.

143. Firstly, it is not and has never been the Defendants' case that the Bank was a victim of a fraud by Mrs. Malysheva or any of its other executives. It has always been the Defendants' case that the Bank, acting by its executives, and/or jointly with its executives, including Mrs. Malysheva, has defrauded the Defendants and OMGP. Most importantly, it has always been common ground that Mrs. Malysheva et al were acting on behalf of the Bank vis-à-vis various third parties, with apparent and actual authority to do so. Until very recently, the Bank always accepted full responsibility for all the relevant acts done through its executives. Its defence was to deny that those actions were fraudulent. It is the Bank, not the Defendants, who is now trying to run a new and unpleaded defence.

144. The only suggestion that the Bank may have been defrauded by its executives comes from the expert report of the Defendants' and OMGP's banking expert,

Professor Guriev. Asked whether the 'Repo' was a 'conventional and commonly used arrangement' in Russian banking, the expert says that it was highly unusual, to the extent that the circumstances of the transaction would inevitably lead the Board of Directors and the banking regulator to suspect that the Bank was defrauded by its executives. This is not either party's pleaded case, but an opinion of an independent expert. Moreover, the question put to the expert was not whether there was a fraud, or who was the victim of the fraud. The question was whether the Bank's admitted actions, which the Bank defends as 'conventional and commonly used', were in fact conventional and commonly used. The answer is no. The rest is the reason why not. That is not even evidence of fact.

145. After the expert report was served, Mr. Stroilov suggested in passing [L8/39/79, line 20 on p. 78 to line 17 on p.79] that the 1st and 2nd Claimants might now wish to obtain separate legal representation and see whether the Bank might want to run a defence based on an assertion that it was itself a victim of fraud by its executives. No doubt, that possibility was carefully considered by the Bank and its legal advisors in any event. Nevertheless, the Bank's pleaded case remains what it is: it is based on a denial that its actions through Mrs. Malysheva were fraudulent. The present attempt to run a new and unpleaded defence is a very late afterthought and should not be permitted.

146. Secondly, the Defendants' and OMGP's pleadings must be considered as a whole. The central allegations of the Counterclaim have always been that the Repo arrangement, the onward sale of Scan from the Original Purchasers to Subsequent Purchasers, the replacement of management and seizure of the two companies, were all fraudulent acts, and that the Bank was behind them all. It then became known, from the Claimants' own evidence, that the Bank did all those acts through its Vice President, Mrs. Malysheva.

147. It is in the nature of any conspiracy claim that a plaintiff cannot know all the internal workings of the conspiracy; or which particular executive within a corporation was personally in charge of a particular act done by or on behalf of

that corporation. The allegations were pleaded against the Bank; the Bank has admitted them in substance, but denied fraud. The fact that it was acting by a particular Vice President is evidentially significant, but does not alter the fundamental issue between the Claimants and Defendants.

148. Thirdly, the 'allocation of roles' within the conspiracy was pleaded expressly "*without limitation and to the best the Counterclaimants' knowledge at the time of pleading*". The Bank was pleaded to have been acting "*primarily*" through Mr. Savelyev. Such indicative pleadings cannot be taken to exclude any of the Bank's actions taken through another executive, even though those actions have been duly pleaded elsewhere.

149. Fourthly, where it is pleaded that there was a conspiracy, and the conspirators were

> *(a) The Bank (acting primarily through Mr. Savelyev);*
>
> *(b) Mr. Savelyev, President of the Bank;*
>
> *(c) Mrs. Malysheva, Vice President of the Bank;*
>
> *(d) Other senior employees of the Bank;*

it would be an unfairly technical approach to interpret this as meaning that all executives except Mr. Savelyev were acting in their individual capacities and the Bank is only liable for Mr. Savelyev's actions. The Bank could have been in no doubt as to what was alleged against it in substance, whether or not the form of the pleadings is quite correct.

150. A corporate liability for fraud is always, in one sense, a 'vicarious' liability. In the strictest sense of the words, 'the Bank' can never be dishonest because it has no mind or conscience of its own. The Bank is dishonest where its executives, acting on its behalf, do so dishonestly. It is implicit in an allegation of fraud against the Bank that the dishonesty of its executives must be imputed to the Bank.

Claimants' disclosure

151. The Court is aware of the Defendants' concerns over the inadequacy of the Claimants' disclosure. Two matters are of particular concern:

152. Firstly, it has transpired that throughout this litigation, as well as the earlier litigation between the parties in various jurisdictions, the Claimants were destroying potentially disclosable documents at a massive scale, purportedly under their usual policy on retention/destruction of documents: see the Defendants' submission to the Court dated 6 November 2015. At the hearing of 6 November, Mr. Justice Hildyard required the Claimants to provide information as to what directions were given within the Bank in relation to retention/destruction policies. The Claimants responded by the 6th witness statement of Mr. McGregor. They refused to provide the required information and referred to legal professional privilege. The Defendants and OMGP make two comments about that:

    (1) Legal professional privilege should of course be respected; but inferences should be drawn on such information as is available. The Claimants were advised by English solicitors (Baker and MacKenzie) at least since March 2010. It should be inferred that the Claimants were fully aware of the need to introduce a 'litigation hold' and disapply the usual retention/destruction policies; but have wilfully chosen to destroy the potentially disclosable documents.

    (2) It is understood that the information required by Mr. Justice Hildyard was not privileged legal advice, but any internal instructions given by the Bank to its staff in relation to non-destruction of documents (or destruction of documents, as the case may be). No such information has been provided. It follows that either (a) no such instructions were given or (b) the contents of those instructions were such that the Bank is now unwilling to reveal them to the Court.

153. Secondly, the Claimants' disclosure in relation to the key events of the Counterclaim, listed in Schedule C to the Order of 21 October and discussed

above in this skeleton, has been negligible. In substance, the Claimants have simply ignored their obligations of standard disclosure on those issues, and most of the headings of specific disclosure in the order of 21 October.

The Bank's claim against Mr. Arkhangelsky

154. In substance, little can be said about the issue of alleged forgery by way of opening the case. Either Mr. Arkhangelsky signed the disputed documents or he did not. The evidential analysis should take into account (a) inherent probabilities, (b) handwriting expert evidence and (c) factual witness evidence.

155. The Defendants acknowledge the hurdle they need to overcome in terms of **inherent probability**. A large bank has admittedly been lending to a group of companies and seeks to recover an alleged debt from the former owner of those companies. His response is a denial of 'his' signature under the guarantees. As a starting point, scepticism of that defence is no more than a matter of common sense. As a rule, banking business consists in lending and recovering debts, not in manufacturing bogus debts. To deny a signature is a hopeless, childish, but typical defence of a defaulting debtor. The Defendants will need to displace these stereotypical assumptions by demonstrating that:

    (1) This dispute takes place in the context of a much larger fraud committed by the Bank against Mr. Arkhangelsky, and an 'all-out war' waged by the Bank against him by most dishonest and unlawful means; and/or

    (2) Fabrication of documents is well within the Bank's arsenal of means used in its dispute with Mr. Arkhangelsky and the OMG. What is inherently improbable is that a large bank would indulge in fabrication of documents **at all**. However, if it is proven to have fabricated various other documents, it is a fairly trivial issue of fact whether certain alleged guarantees should be added to the list of its forgeries.

156. The hopes that the **handwriting expert evidence** would give a conclusive answer to that question are now gone:

(1) Where the experts used the agreed set of comparators, the conclusions are mainly 'inconclusive', except one or two documents where there is 'weak' evidence of authenticity.

(2) With the exception of a few signatures, the Claimants' expert report finds substantial evidence of authenticity on the basis of a disputed set of comparators. The Claimants refused to engage in an effort to obtain comparators from independent third parties, and insisted on using documents held by the Bank, selected at one time by Mr. Browne using an admittedly incorrect methodology. All experts (Dr. Giles, Mr. Radley and Mr. Browne himself) share the view that methodology was flawed; so there is no proper basis for using those comparators.

(3) The experts agree that (a) there is positive evidence that most of Mrs. Arkhangelsky's signatures had been forged, but (b) cannot rule out a possibility that they were forged by Mr. Arkhangelsky. The latter sounds sensational; but is not positive evidence. It is merely a possibility, one of perhaps a thousand of other possibilities. The experts do not venture into assessing its probability (which would require a similar comparison with handwriting of any other potential forger). **All** it means is that: (i) if, **and only if**, other positive evidence proves that Mr. Arkhangelsky forged his wife's signature, the experts have nothing to say to contradict that; and (ii) while Mrs. Arkhangelsky's signature has clearly been forged, the inference that it was forged by the Bank does not follow automatically without other evidence supporting it.

157. In the end of the day, the handwriting expert evidence lends little support to either party's case, is consistent with either party's case, and is therefore ultimately unhelpful. The issue will have to be resolved on the basis of cross-examination of **factual witnesses**.

158. Further, what ultimately matters are the witnesses' factual recollections, not their opinions, nor the strength with which those opinions are held. The strength of Mr. Arkhangelsky's opinion on the issue of forgeries has admittedly

changed. His factual evidence, now as before, is that (a) he had expressly agreed with Mr. Savelyev that no personal guarantees would be required and (b) he has no recollection of signing any of the disputed documents. On both points, he is contradicted by several of the Claimants' witnesses. It is cross-examination of the witnesses on both sides that is likely to be determinative of this issue.

PART II: FAIR TRIAL

159. The Court is well aware of the difficulties arising out of the fact that the Defendants and OMG Ports are impecunious litigants in person whereas the Claimants enjoy very powerful legal representation. In the judgement of 27 November 2015, the Court held in para 36 "*that though the circumstances are imperfect and regrettable, a fair trial should be possible,* ***even if the question whether it continues to be so must be kept under continuous review***" (emphasis added).

160. In reaching that conclusion as to the possibility of a fair trial, the Court emphasised (para 32) two crucial requirements: (a) extra reading time and (b) "*the greatest possible assistance*" of the Claimants in identification of the issues "*as fairly and fully as possible*" in an old-fashioned '*dispassionate*' opening. Mr. Justice Hildyard held in para 32:

There will be obvious and formidable difficulties, and even though I have had the benefit of having had the conduct of this case from its inception, I will require very great assistance and constructive contribution, as well as more reading time, to seek to put myself in a position which achieves the difficult tightrope trick of both assisting the litigant in person and also not descending into the arena. It seems to me that that necessitates the judge being afforded more than usual opportunity to acquire a comprehensive grasp of the case from the inception of the trial and for the Court to be given the greatest possible assistance by the party most able to do it, that is to say the Claimants who have the benefit of powerful legal representation, in identifying the issues both factual and legal and any issues with regard to the experts, upfront and as fairly as

fully as possible. I shall also require a clear and comprehensive and dispassionate opening, and a careful and comprehensive written identification of the factual issues and the findings respectively sought, and of the points in issue between the various experts. The nature of the assistance required was, I hope, made clear to the Claimants and their legal counsel during the course of the hearing.

161. The judgement reiterates in para 41 that the decision to proceed with the trial is made "*with the reserved right that if at any time I considered that the trial could not proceed fairly or had to be sliced up or dealt with in some other way, then despite the costs I would feel free to do so.*"

162. In refusing leave to appeal that judgement, Hildyard J re-iterated that fairness of the trial "*must be kept under constant review*". In the Court of Appeal, Elias LJ also relied heavily on that indication in refusing leave.

163. Since then, further practical difficulties have become apparent. Worryingly, some difficulties arise in relation to those very matters on which the Court relied most heavily in its "earnest hope" that a fair trial was possible.

The Claimants' opening

164. As indicated above, the Defendants and OMGP do not accept that the Claimants' 246-page-long skeleton argument identifies issues "old style straight down the middle", impartially, or fairly, as directed by the Court.

165. The Claimants were required to produce an opening that identifies the issues impartially; and because it would be impartial, it was allowed to be 'comprehensive', rather than limited to 20 pages as provided for in the Chancery Guide. The practical result is a 246-page-long partisan argument, presenting the Claimants' case with such force and skill as could be expected from two eminent QCs and one experienced junior. That aggravates, not mitigates, the Defendants' disadvantage. The Defendants could have, with some difficulty, answered a 20-page skeleton argument. It is utterly unrealistic to expect that they can adequately answer a 246-page one.

166. The points made below are not intended as a comprehensive response to the Claimants' skeleton, but rather (with all due respect to its learned authors) as an illustration of its partiality and unfairness.

Style and tone

167. Time and again, contentious factual assertions of the Claimants are made in the text of the submission as background facts, whose truth the Counsel are seemingly prepared to certify by their signatures. To take one random example out of a hundred, it states in para 255: "*Further, Mr Arkhangelsky's allegation that Mr Savelyev told him the Bank would not insist on personal guarantees is untrue.*" Quotations from witness statements are typically introduced in such terms as "Mr. Arkhangelsky claims", "Mr. Arkhaneglsky alleges", "Mr. Savelyev explains", or "Ms. Volodina recalls". The Claimants' witnesses never 'allege' anything; the Defendants' witnesses never 'recall' anything.

168. In introducing the parties' witnesses in paras 198-221, the Claimants describe their own witnesses by reciting their contentious evidence, e.g. "*She sent to Mr. Arkhangelsky the various notices of demand under the guarantees*" (para 207). By contrast, Defendants' witnesses are introduced in demonstratively sceptical terms, e.g. "*Mr Grigory Pasko is a Russian investigative journalist who says he is a former political prisoner. He says he has been involved in investigating Mr Arkhangelsky's case*" (para 220).

169. Whether or not the Claimants agree with Mr. Pasko's evidence, he is a well-known public figure whose background is readily verifiable. Mr. Pasko was infamously imprisoned by the FSB for his investigation of environmental abuses by the Russian Navy, such as dumping of nuclear waste into the Pacific. He was universally recognised as a *prisoner of conscience* (including by Amnesty International, which is acknowledged to be the highest authority on such matters). Mr. Pasko's evidence about his investigation in relation to the dispute between the Bank and Mr. Arkhangelsky (including interviews with Mrs. Malysheva, Mrs. Shabalina, and attempts to interview Mr. Savelyev) has

not been contradicted. The Claimants are entitled to challenge his evidence, but his background can be non-controversially described as heroic, his name stands for everything that is worthy and honourable in journalism, and deserves some respect.

170. In introducing the parties (as if they needed any introduction to this Court), Claimants' introduce the Bank in two advertisement-style paragraphs, succinctly boasting of its size, clientele, and notable foreign shareholders (paras 24-25). There is no mention of the Bank's and Mr. Savelyev's alleged political links, and the Defendants' pleaded assertion that the Bank's rapid success in 2000s was due to the influence of Mr. Savelyev's friend, Mrs. Valentina Matviyenko, who was the governor of St. Petersburg in that period.

171. Of Mr. Arkhangelsky and Oslo Marine Group, however, it was thought necessary to say (by way of introduction): "*The Claimants' business valuation expert (…) observed (…) that 'considerable effort was made to disguise the origin of incoming funds (port and lumber businesses) as well as certain underlying investments (in the form of land and real estate developments).*" (para 27). Para 28 then seeks to insinuate a link between Mr. Arkhangelsky and Mrs. Matvienko. That 3-page long introduction concludes in para 34: "*OMG's businesses, its financial structures, prospects, and relationships with various financial institutions, will be the subject of investigation at trial*".

"Factual background"

172. The first 66 pages of the skeleton are devoted to an introduction and 'background'. By a rough calculation, the assertion that Mr. Arkhangelsky signed the personal guarantees is repeated approximately 20 times in that section (prior to the actual discussion of the issue at p.p. 80-106). Commendably, the Court is left in doubt as to what the Claimants' case on that point is.

173. This said, the skeleton does not set out the background facts of real importance, such as the circumstances in which Western Terminal assets were pledged to the Bank:

(1) It was originally intended and agreed, at the time the Bank opened the credit line for Vyborg Shipping, that each loan would be secured by a pledge of a vessel operated by that company.

(2) My mid-2008, Vyborg Shipping run into difficulties, and the vessel intended as a pledge for the 4th loan was not delivered in time.

(3) Western Terminal assets were offered as a substitute pledge *ad hoc* and at a very short notice.

(4) It was clearly understood between the parties, and reflected in the Bank's internal documents, that the amount of the loan was no more than 38 per cent of the value of the pledge.

(5) Under the Russian cadastral rules, Western Terminal being designated as a single land plot, it was only possible to pledge it as a whole and with virtually all its infrastructure (despite its being described simply as a 'land plot').

(6) It was envisaged and agreed between the parties that (a) the OMG would take steps to divide the Terminal into several land plots for cadastral purposes and (b) the part of the Terminal relating to Berth 16 would then be released from the pledge.

(7) It is therefore clear that the Terminal was only pledged to the Bank *ad hoc*, that the intention of the parties was that only a part of it should be pledged, it was only due to an incident of cadastral rules that the whole Terminal was formally pledged, and that the parties recognised at the time that such a pledge was excessive.[14]

174. While the Bank now argues that 2008 valuations were erroneous, these circumstances are of some importance as background to the events of the

[14]Claimants' disclosure document K169 at [TB/D93/1166/6]

Counterclaim. They should have been disclosed to the Court in the Claimants' 'impartial' opening.

175. The document then proceeds to argue, repeatedly and emphatically, that all OMG assets of value had already been pledged to the Bank or other creditors, and there was nothing to 'raid'.

Comments on the draft investigation report by FTI

176. In para 402, the Claimants' skeleton comments on the draft FTI report as follows:

The Claimants say that the draft FTI report does not advance the 'conspiracy' case. In particular, it does not show that the Bank 'owns' or 'controls' the Renord-Invest group, which is as the Claimants understand it, the centre of the conspiracy case. The draft also notes:

> *'We cannot presently confirm the following:*
>
> *…*
>
> *That Alexander Savelyev owns and operates the Baltic Fuel Group.'*

The Claimants will say that, if anything, the draft FTI report disposes of the 'conspiracy' allegations.

177. Even as a partisan argument, this is misleading in several ways:

(1) The relevant page in the draft FTI presentation **[TB/D173/1895.1/15]** is headed *'Unconfirmed links'*. It is evidently intended not as a summary of factual conclusions, but as an aide memoire listing matters which need to be further investigated. The alleged link between Mr. Savelyev and Baltic Fuel is listed among a number of other alleged 'links', many of which have since been admitted by the Claimants. For example, FTI also could not "presently confirm":

- *that Vector Invest LLC (INN 7842367080) as owned by Andrey Belogolov and Valeriy Rudoy is a relevant company;*

- *that Igor Malyshev is the son and Vladmir Malyshev the husband of Irina Malysheva*
- *that Svetlana Guz is the sister of Vladislav Guz*
- *that BSPB and IC Renord-Invest shared offices on Ispolkomskaya Street*

All these matters have now been admitted.

(2) It may well be the case that Mr. Savelyev ultimately owns or operates Baltic Fuel Company; that would no doubt be a relevant fact; it was right to ask FTI to investigate that possibility; but **it has never been part of the Defendants' or OMGP's pleaded case**, **let alone "the centre" of it**. The closest the pleadings come to that alleged averment is in para 177(h), where Baltic Fuel Company is listed among 21 companies and individuals averred to be "*vehicles for the ultimate beneficial ownership of other co-conspirators by the Bank and/or Mr Savelyev and/or other co-conspirators, and for the concealment of such ownership and control*". This is a much wider case than is represented in the Claimants' skeleton.

(3) By the very definition of a conspiracy, allegations that one conspirator owns or controls another can hardly be crucial to a conspiracy case. A conspiracy is an agreement between different parties; one party's ownership and/or control of another is nearly always relevant and hardly ever crucial. Ultimately, the issue is what the two parties (e.g. Bank and Renord) agreed to do; who exactly owns and controls them is no more than a relevant collateral fact.

(4) The Claimants' repeated pretence not to understand the case advanced against them in relation to their conspiracy with Renord is disingenuous and false. The Claimants seek to cause confusion by playing on the complex structure of Renord Group (whose very existence they sought to conceal for years) and the reflection of that complexity in the Defendants' pleadings – see above.

Reliance on comments of Bannister J

178. In para 357, the Claimants' skeleton quotes the comments of Bannister J from the judgement of BVI High Court dated July 2011, expressing his scepticism of the Defendants' case on Moratorium. This might have been a legitimate makeweight for a partisan argument, but for one thing: the skeleton omits to mention that the judgement was then overturned by the Eastern Caribbean Court of Appeal, on the grounds that Bannister J inappropriately conducted a 'mini-trial' of the claim.

179. In these circumstances, (a) with respect, the comments of Bannister J carry little or no weight and (b) it is misleading to rely on those comments without disclosing the fact that the judgement was overturned on appeal.

Comments on 'Onega claim'

180. The Court will recall that in July 2015, the Defendants and OMGP amended their counterclaim to introduce the loss of the business of Onega LLC as a new head of loss. The business was lost as a result of the takeover of Scan, who owned approximately half of Onega Terminal and leased it to Onega LLC. The Claimants say the claim for the loss of Onega is a new claim, and as such, is limitation-barred.

181. The issue is introduced in the Claimants' skeleton in these words (para 703):

In February 2014, the Claimants served their valuation evidence, from which the Claimants say it was clear that there was no value in the businesses of Western Terminal or Scan. Accordingly, Defendants and OMGP needed to search for some other OMG business which they could say had some value. On 17 July 2015, in one of the many iterations of their draft Re-Amended Defence and Counterclaim, the Defendants and OMGP sought to make a claim for the value of OMGP's shares in Onega LLC

182. The skeleton then proceeds to make a partisan argument as to the alleged difficulties of the alleged new claim in terms of limitation and causation. It is silent as to the Defendants' side of the argument.

Mr. Berezin

183. An argument repeatedly made in the Claimants' skeleton is to take a particular allegation out of the overall context of the Counterclaim, characterise it as a 'new case' advanced by the Defendants and OMGP, and attack it as 'unpleaded'. As discussed above, such criticism is even made against some of the central allegations of the Counterclaim, such as those concerning the role of Irina Malysheva.

184. Some other criticisms are even more far-fetched:

185. In his witness statement for the trial, Mr. Sklyarevsky describes his contacts in 2009 with Mr. Alexey Berezin, OMG financial director (with whom Mr. Sklyarevsky had shared a dormitory in university), and asserts that he was seeking to negotiate an amicable settlement between the Bank and OMG. In his witness statement in response (*Arkhangelsky* 19th at **[C1/9]**), Mr. Arkhangelsky responds to Mr. Sklyarevsky's evidence in some detail, including in para 37:

Mr. Sklyarevsky' s evidence about his contacts with Mr. Berezin in the spring of 2009 reinforces my suspicion that Mr. Berezin had been his ' spy' in the OMG for some time, possibly ever since his employment in 2007. It would not be surprising for a professional raider to infiltrate various businesses with such ' spies', in case he may later wish to raid those businesses. Mr. Berezin gave evidence for the Bank in BVI proceedings. At the time I employed him, I did not know about his friendship with the "notorious raider" Mr. Sklyarevsky.

186. The Claimants' skeleton argument reads in para 424: "*it appears that Mr Arkhangelsky may now seek to make another (unpleaded) case, alleging that Mr Sklyarevsky, whom he describes as a 'professional raider' may have 'infiltrated' the various OMG businesses by way of OMG's finance manager,*

Mr Berezin, 'ever since [Mr Berezin's] employment in 2007'. This second new case also contradicts the 'conspiracy' claim currently advanced.".

187. This comment is unfair in a number of ways:

(1) It is perfectly appropriate for a reply witness statement to comment on the opposition's witness evidence, to contradict it, and/or to offer an alternative interpretation of the events described in it.

(2) The Claimants relied on Mr. Berezin's witness statement in BVI and in the application for a freezing order in these proceedings. He was also listed as one of their witnesses for the trial in the Allocation Questionnaire. The fact that they are not calling him is in itself noteworthy, and raises questions as to his true role in the relevant events.

(3) The suggestion that Mr. Berezin may have been a 'spy' inside the OMG is not new. For example, in his 2nd affidavit of 20 June 2012 **[G1/20]**, Mr. Arkhangelsky says in para 78: "*I believe the Bank has pressured and/or induced Mr. Berezin to give that false evidence (**and possibly also to assist them secretly while he still worked for Oslo Marine Group**). In Russia, where the Bank and its friends enjoy almost unlimited power and resources, it would not be difficult to do that*". [emphasis added]

(4) It has always been the Defendants' and OMGP's pleaded case that Mr. Sklyarevsky is "a well-known raider" who assisted the Claimants in their fraud against the Group.

(5) Therefore, the allegations against Messrs. Sklyarevsky and Berezin are anything but new allegations.

(6) Even if those were new allegations, it is impossible to see how they can be fairly described as a new "unpleaded case".

(7) It is also impossible to see how those allegations contradict (rather than support) the pleaded Counterclaim.

Chattels

188. On 21 December 2011, as part of the Bank's purported recovery under Mr. Arkhangelsky's alleged guarantees, the Defendants' chattels from their apartment in St. Petersburg were sold at a purported public auction for RUB 22,000 (approx. £440 by the then exchange rate). That auction is duly pleaded as one of the allegedly fraudulent auctions where the Defendants' assets were allegedly sold at gross undervalue (para 160). The list of chattels is set out in Appendix 3 to RADCC **[A1/2/77]**.

189. The matter has been discussed previously in Court. Thus, the transcript of the hearing on 20 December 2013 reads in part **[L4/25/7]**:

MR JUSTICE HILDYARD: It is a very arresting business, the chattels list.
MR MARSHALL: Yes, I recognise the fact –
MR JUSTICE HILDYARD: Very arresting.
MR MARSHALL: -- the figures –
MR JUSTICE HILDYARD: Something of a window, I think, in prospect has discomforted me very much to see the values thought to be attributed to assets which one would expect to be of substantial as opposed to nominal value.
MR MARSHALL: Yes.
MR JUSTICE HILDYARD: For the purpose of it is a (inaudible) application, I do not say that this would be the result in the end, but for the purpose of it is a (inaudible) application suggests enforcement proceedings which are less than one might expect in terms of fairness.
MR MARSHALL: My Lord, I hear what your Lordship says. Our answer in relation to it was this. The process of realisation of those assets was one conducted by an official, a bailiff appointed by the court.
MR JUSTICE HILDYARD: Yes, so much the worse because at an interlocutory stage without the most secure evidence that works of art, Jacuzzis, assets of substantial apparent value should go for these derisory figures and it be conducted in an apparently official way is very very uncomfortable. I say no more than that. It is (inaudible) observations the smell may be dispelled, but there is a smell.

190. There is, perhaps understandably, no further evidence in relation to that issue. The chattels are gone, and at least the Defendants are not in a position to find out to whom they were 'sold'. They cannot be traced and cannot be shown to a valuer. Nor have the Claimants adduced any evidence on this point to 'dispel the smell'.

191. It is now suggested in the Claimants' skeleton (para 553(3)) that, since no valuation evidence has been adduced in relation to chattels, "*it is assumed that in those circumstances there is no live dispute as to the sale price*". With respect, this is a nice try to sweep an unhelpful fact under the carpet.

192. It is submitted to be a fact capable of judicial notice that £19 for a jacuzzi is a rather good bargain, and that even the most extraordinary level of asceticism does not quite explain a sale of the entire contents of a multi-millionaire's dwelling for less than £500.

193. It is not suggested that the Defendants should recover the value of the chattels on top of the value of the other assets. However, as the Learned Judge has said, this is a small window from which a large view opens. There is no dispute as to the sum for which the credit was given, and the Defendants and OMGP will invite inferences from that agreed fact as to the lawfulness of the Bank's 'recovery' as a whole.

Other concerns

194. The Defendants and OMG Ports highlight the following concerns in relation to the practicalities and fairness of the trial:

195. Firstly, as submitted above, the Claimants have failed to provide a fair and impartial **opening submission** which the Court required and relied on as a safeguard of fairness.

196. Secondly, as regards **judicial reading**, it has transpired that most of the disclosure documents included in the trial bundle are not accompanied by reliable or intelligible English **translations**. The Court is invited to read the inter-party correspondence on that issue **[I20/22/2]** and **[I20/23/3-5, 42, 54-55]**. The Claimants do not deny that they have only provided 'human translations' for the documents on which they seek to rely as supporting their own case. As for any other documents, the Claimants take the view that it is for the Defendants to arrange for translations. **[I20/23/54-55].** That is obviously

something the Defendants cannot afford; the lack of funds for disbursements such as these was the reason why the Defendants previously submitted that a fair trial is not possible without some funds being made available.

197. The Defendants are assisted by one *pro bono* translator, whose capabilities are obviously limited. The Claimants have demanded that, if any such translations are to be added to the trial bundle, they must be identified and disclosed to them "on the rolling basis". When pressed, the Claimants' solicitors did not deny that at least one of their purposes in making that demand was to alert their witnesses about the documents which would be put to them in cross-examination **[I20/23/55]**.

198. Thirdly, even ignoring the problem of translation, the Defendants' and OMGP's resources are wholly insufficient to prepare an adequate **cross-examination** of the Claimants' witnesses. There are thousands of documents which need to be reviewed to select those which need to be put to witnesses. The available time is insufficient for adequate preparation.

199. Fourthly, very serious deficiencies in the **Claimants' disclosure**, briefly summarised above, also undermine the fairness of this trial. Especially in the Defendants' position, having to prepare and conduct complex cross-examinations as litigants in person, it is vital to have all relevant documents available. Where disclosure is deficient, facts which should have been clear from the relevant documents must instead be investigated through indirect clues scattered over numerous documents on other issues. This is an impossible task for the Defendants.

200. Ultimately, all that can be done about disclosure failures is inviting inferences at the trial. However, given the limitations of the Defendants' ability to review the Claimants' disclosure without professional assistance, identification of and reliance on *absence* of documents is even more difficult than finding and using any relevant documents.

201. Fifthly, the Claimants now firmly object to any further involvement of **Pavel Stroilov** in these proceedings. The substance of those objections is without

merit, and the Claimants' motive for making them is unfortunately quite obvious.

202. Sixthly, the Claimants continue to take purely technical **pleading points** against the Defendants. When the Defendants proposed to amend the pleadings to avoid any further argument, the Claimants simply refused to engage with that in correspondence, and indicated they would only consider the proposed amendments if an application supported by evidence is made. The application has been duly made, and the Claimants then made it clear that they intend to fight to the end over every comma (*McGregor 8th*).

203. Seventhly, the revised **trial timetable** proposed by the Claimants does not divide the time fairly between the parties. 10 days (including reading but excluding travel) are allocated for cross-examination of the Defendants' witnesses; 18 days (including reading) are allocated for cross-examination of the Claimants' witnesses. This is proportionate to the respective volume of the parties' witness evidence, but ignores (a) the fact that nearly all Defendants' evidence will be given in English, while the cross-examination of the Claimants' witnesses would be delayed by simultaneous translations; and (b) the disadvantage of the Defendants acting as litigants in person. Beyond all doubt, the Claimants' Counsel team will use the time available to them with infinitely greater efficiency.

204. Eighthly, The Defendants' still have not received any confirmation from their **business valuation expert**, Mr. Steadman, that he is prepared to attend the trial and give evidence *pro bono*. It is not unlikely that his silence means 'no'. Unless any reassurance from him is forthcoming, the Defendants will have no choice but to ask the Court to split off the trial on quantum, but to order an interim payment following the trial on liability. The new point taken on behalf of the Claimants as to the currency of the claim and the counterclaim (see fn 3 above) also suggests that may be necessary.

205. Likewise, the Defendants' **handwriting expert**, Mr. Radley, has not confirmed his preparedness to attend *pro bono*. The Defendants sought to agree with the

Claimants (in line with what had been suggested in Court by their own Counsel) that the handwriting experts need not give oral evidence. The difference in their conclusions is due to being instructed to use different sets of comparators. What needs to be considered at the trial is the adequacy of their respective instructions, not of their opinions, and that can be done without cross-examination. However, the Claimants refused, on the grounds that there is a difference of opinion in relation to one document, where the experts used the same comparators, Mr. Radley said the evidence was 'inconclusive', an Dr Giles found 'weak evidence' of authenticity. It is submitted that requiring a cross-examination of the experts to resolve this minor issue is completely disproportionate, especially given the Defendants' financial difficulties.

The Claimants' non-compliance with a duty of fairness

206. It will be observed that (a) the list of difficulties has grown considerably since the last time the issue was before the Court and (b) most of those difficulties could have been removed or mitigated by constructive cooperation between the parties.

207. It is submitted that, if a fair trial is possible at all in present circumstances, one of the fundamental preconditions is that the parties cooperate in good faith to make it happen and to find pragmatic solutions to such numerous difficulties as will arise. Unfortunately, the Claimants' approach has been the opposite of that.

208. Overall, the Claimants and their legal team are litigating this case without any special consideration of the fact that their opponents are litigants in person. Indeed, they have been candid throughout the recent months about the stance they take. They do not accept, as a matter of fact, that their opponents are litigants in person. They act upon an assumption that there is a secret team of professionals equal to themselves, who assists the Defendants behind the scenes. On that basis, they do not consider themselves to be under any special duty of fairness towards the unrepresented Defendants, and litigate this case in

the usual adversarial way. They hardly make any secret of the fact that they feel free to 'play hardball'.

209. This is unacceptable. The Claimants are under a duty to assist the Court to further the overriding objective: CPR 1.3. The overriding objective includes "*ensuring that the parties are on equal footing*" (CPR 1.1(2)(a)) and "*dealing with the case in ways which are proportionate… to the financial position of each party*" (CPR 1.1(2)(c)(iv)). Those provisions would be of no substance if a party was free to assert unilaterally that the parties are already on equal footings and that the financial position of their opponents is not as black as it is painted.

210. Given the guidance given by the Court in its judgement of 27 November as to the parameters of the trial and ensuring its fairness, the Defendants are determined to do their best to assist the Court at the trial. However, whether or not a fair trial is possible in present circumstances, it is certainly not possible without an effort from the Claimants' side aimed at achieving it. The approach evidently taken by the Claimants in recent weeks indicates that their objective is the very opposite: to avoid a fair trial, but only to go through the form of a trial to obtain what is in substance a default judgement.

Reliance on 'continuous review', and the potential remedies of unfairness

211. Such duties as conducting litigation fairly, reasonably, and/or in good faith are notoriously hard to enforce. The Defendants' only remedy is to rely on the Court's 'continuous review' of the fairness of the trial. Unless the Claimants' approach undergoes a dramatic change before long, it is likely that a time will come when that review will produce a 'negative' result.

212. This being so, it is not inappropriate to briefly address what should happen then.

213. The judgement of 27 November envisaged that, if the Court eventually finds that the trial cannot proceed fairly, it may need to be "*sliced up or dealt with in some other way*" (para 41). The possibility of a split trial has been examined by

the Court at December PTR, and found to be impractical. The remaining remedy is '*some other way*'.

214. It is submitted that, in such a case, the Defendants should be permitted to restore their application for an advance costs order, refused on 27 November. At that juncture, the Court found that it had jurisdiction to make such an order; that was un unlikely order in a case without a 'common pot' or its equivalent, but it was "always dangerous to say never"; and the application was refused because the Defendants failed to prove that a fair trial was impossible without such an order.

215. It is submitted that, if the Court later finds that the trial cannot proceed fairly, and especially if that is due to the Claimants' unreasonable tactics, that would be a material change of circumstances which should trigger a reconsideration of that issue. Further:

    (1) The conduct of the parties is a matter which the Court is bound to take into account in the exercise of its discretion as to costs (which, it has been held, goes far enough to order advance costs where that is in the interests of justice).

    (2) In the ordinary course of events, it would be but a triviality for a party to be penalised in costs for its unreasonable or unfair conduct of litigation. This case is being litigated by the Claimants without any such risk, which impairs the Court's ability to control their conduct of litigation. In such circumstances, it is not a step too far to penalise them by ordering a comparable amount to be paid in advance costs rather than retrospective costs; especially if the consequences of their misconduct are as grave as making a fair trial impossible.

    (3) The Claimants have refused to try resolving this case at a mediation, where the Defendants would be assisted by professional lawyers. A failure to engage in ADR must have adverse consequences in costs: *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. While that did not warrant

advance costs to be ordered in November, that refusal should continue to weigh against the Claimants in any future exercise of costs discretion, and/or remains a relevant factor in the 'continuous review' of fairness.

(4) If the trial proceeds as far as the cross-examination of Mr. Savelyev, the Court will be in a position to make findings as to the Claimants' responsibility for the Interpol 'red notice' being issued against Mr. Arkhangelsky as a result of their false evidence in the Russian criminal case against him. That would mean that Mr. Arkhangelsky is unable to attend his own trial as a result of the Claimants' crime against him. That is another 'conduct' issue which affects the exercise of costs discretion; and such extraordinary misconduct as a perjury measures the extraordinary penalty of an advance costs order.

216. Finally, given the Court's findings as to the impracticality of a split trial, the only alternative solution (in the event the 'continuous review' produces a 'negative' result) seems to be an adjournment *sine die*. That would be a very serious interference with both parties' rights to access to justice. The Defendants did not ask for it in November and will not ask for it now or in the future. The Claimants also say that they are opposed to it.

217. It may look like an attractively 'softer' option, compared to an advance costs order, to make the provision of funds a condition of a continuation of the proceedings. However, in a case with mutual allegations of dishonesty, both parties are likely to say that they want a fair trial to take place, but only one is likely to be telling to truth. Having repeatedly assured the Court that they want a trial, having falsely accused the Defendants of putting off the evil day, the Claimants should not be allowed to choose whether a trial is to take place. They must be held to their assurances that they want it; and made to put their money where their mouth has been.

218. The Defendants say that the Claimants' pretended impatience for a trial has been pure hypocrisy. The Claimants have insisted on an immediate trial for the same reason as why the Defendants opposed it: because both parties thought

that such a trial cannot be fair. Now that the Defendants are seeking to agree practical ways to proceed despite all the difficulties, the Claimants' reaction is obstructive. One can sense panics in the Claimants camp at the prospect of getting the trial they had been hypocritically asking for not so long ago.

CONCLUSION

219. Civilised men are accustomed to take the rule of law for granted. When told about the daily life of a country deprived of it, the mind may accept that as a logical consequence of lawless dictatorship, but at the same time, resists accepting it as a reality of modern life. References to shareholders, investment projects, and bankruptcy administrators seem to imply some kind of civilisation. It is difficult to reconcile with the fact that nobody's life, liberty and property are safe there - that the friends of the Governor may at any time help themselves to any enterprise in the city, and prosecute the lawful proprietor on trumped up charges.

220. At the PTR on 26 November 2015, the Claimants' Counsel characterised the events which ruined Oslo Marine Group and give rise to this Counterclaim as no more than "*a typical and perhaps rather sad story about a business that went bust in the credit crunch*" (p. 155, lines 22-24). True it is that the sad story of OMG's death is typical for Russia; but the credit crunch was no more than a background to it.

221. The unlawful 'raiding' of private businesses by corrupt officials and oligarchs is endemic in modern Russia. It is estimated that no fewer than 70,000 Russian businesses have been taken over in this way, often resulting in the imprisonment or death of lawful owners. About 15% of all Russian entrepreneurs have been subjected to criminal prosecution between 2000 and 2012. A judge of Russian Constitutional Court, Tamara Morschakova, has famously compared that purge against an entire social class to Stalin's genocide

of Russian peasantry in 1930s.[15] Whatever else Mr. Arkhangelsky may or may not be, he is a survivor of a national disaster; and as such, his testimony deserves a fair hearing.

222. To any Russian, fair trial is a rarer and more precious commodity than even the land in the Big Port of St. Petersburg. It is a treasure as sacred and miraculous as the Holy Grail, only ever attained by the chosen few through a series of incredible adventures.

223. More is at stake at this trial than money; or even than the reputation of businessmen involved in it. To many people who will follow the course of this trial from a remote and unhappy land, the very possibility of a fair trial between anyone in the position of Mr. Savelyev and anyone in the position of Mr. Arkhangelsky will be a distant flicker of hope. Not only for the sake of justice between the parties, but also for the sake of thousands of people who will never come to tell their grievances before an independent and impartial tribunal established by law, justice must be seen to be done.

Pavel Stroilov (on behalf of the Defendants and OMGP)

18 January 2016

Appendices:

Appendix 1: *Domination of banking raiding as a tendency of seizure and redistribution of property in Russia in 2009-2011*, a report by National Anticorruption Committee (NACC)

Appendix 2: Irina Malysheva's interview with Grigory Pasko

Appendices 3-8: FTI draft charts

Appendix 9: FTI draft master chart

[15] Quoted in *Pasko*, para 7, at [TB/C1/5]