IN THE SUPREME COURT OF GIBRALTAR

Claim No 2012 O No 10

In the Matter of Council Regulation (EC) No 44/2001
And in the Matter of a Judgment given in the High Court of Justice of England and Wales on 15th December 2011 in Proceedings numbered 2011 Folio 1182

Between:

(1) OTKRITIE INTERNATIONAL INVESTMENT MANAGEMENT LTD
(A company incorporated in the British Virgin Islands)
(2) OTKRITIE CAPITAL INTERNATIONAL LTD
(A company incorporated in England and Wales and formerly called Otkritie Securities Ltd)
(3) OTKRITIE HOLDING
(A company incorporated in the Russian Federation and formerly called Otkritie Financial Corporation JSC)

Claimants

-and-

(1) GEORGY URUMOV
(2) DENNING CAPITAL LTD
(A company incorporated in the British Virgin Islands)
(3) DUNANT INTERNATIONAL SA
(A company incorporated in Panama)
(4) YULIA BALK

Defendants

-and-

(1) VANDRY INVESTMENTS LTD
(2) IVORY KEY HOLDINGS LTD

Interested Parties

JUDGMENT

(Approved subject to formal handing down on 9th June 2016. In the meantime the judgment is not embargoed.)

Mr Nathan Pillow QC and Mr Anton Dudnikov for the Claimants

Mr Neil Calver QC and Mr Raymond Triay for the Second Interested Party

The Defendants and the First Interested Party did not appear

JACK J:

1. This is a claim to determine the true ownership of assets totalling some US$5 million.

The background and overview

2. On 10th February 2014 Eder J, sitting in the Commercial Court in London, gave judgment against Georgy Urumov ("Mr Urumov"), the first defendant, for just over US$151 million. At the same time he gave judgment for just under US$37 million against Yulia Balk ("Yulia Balk" or "Ms Balk"), the fourth defendant. She is Mr Urumov's wife. In each case interest and costs were also payable.

3. The judge found that the claimants (together "Otkritie") had been the victim of two frauds committed by Mr Urumov and others. The first ("the signing-on fraud") consisted of obtaining US$25 million from Otkritie by fraudulent misrepresentations, as a sign-on fee when Mr Urumov and his dealing team joined the bank in October 2010. The second ("the Argentine warrants fraud") involved the sale of Argentine warrants at an inflated price on 9th March 2011. The loss caused by this fraud was just under US$151 million. The judge found that Ms Balk knowingly assisted her husband in the disposal of the proceeds of the frauds.

4. The exact amounts owed to the individual claimants is set out in Schedule A to the Order of Eder J dated 14th March 2014, which gives effect to the judgment of 10th February 2014. It is not necessary to set out the details. It is common ground that, although Otkritie have made substantial recoveries, there is still much more than US$5 million owed by Mr Urumov and Ms Balk to the three claimants.

5. Dudley CJ, by Order of 17th June 2014, registered the judgment as a judgment of this Court pursuant to the Brussels-I Regulation (Council Regulation (EC) 44/2001). Otkritie now seek to enforce the judgment in this Court against a portfolio of securities ("the GDPM portfolio") and cash worth in total some US$5 million held by the second interested party ("Ivory Key") at the Jyske Bank (Gibraltar) Ltd ("Jyske Bank"). Mr Alexander Kotton ("Mr Kotton") had originally on 30th May 2012 transferred US$5 million to the first interested party ("Vandry"). After initially putting the bulk of that money on deposit for a month, Vandry invested US$4.9 million in the GDPM portfolio. On 28th January 2013 the GDPM portfolio valued at US$4,998,547.62 and cash of US$12,962.80 was transferred to Ivory Key's account at the same bank. It is common ground that Ivory Key is under Mr Kotton's control.

6. By Order of Dudley CJ made on 8th December 2014 he directed that:

> "there be a trial of the issue between the Claimants and the Interested Parties as to whether the judgment made in favour of the Claimants against the Defendants in the High Court of Justice of England and Wales, and registered in Gibraltar in this action, can be enforced against either or both of the Interested Parties."

Pursuant to this Order, I am trying the question whether the GDPM portfolio and the cash held in Ivory Key's account at Jyske Bank is liable to enforcement at the suit of Otkritie.

7. Otkritie's case is that the US$5 million is in reality the Urumovs' money. The key factual issue for me to determine is whether that is true. The basis in law for Otkritie's claim also needs to be examined.

8. Mr Kotton says that the money results from business dealings which he had with Ms Balk's father, Iosif Balk ("Iosif Balk" or "Mr Balk"), whom he had known since 1995. The US$5 million was money advanced by Mr Kotton to Mr Balk, for a proposed joint venture between them for the development of land in or near Moscow in Russia ("the Profsoyuznaya land"). The money was paid at Mr Balk's request to Vandry on 30th May 2012. It was initially a loan, he said, but would be converted into a share of the Profsoyuznaya land project once the project came to fruition. The joint venture came to naught when a problem of squatters on the land came to light. As a result Mr Kotton and Mr Balk agreed to document that the US$5 million was a loan made by Mr Kotton to Vandry. The loan agreement is dated 15th November 2012, although it was signed slightly later, probably on 6th December 2012.

9. Otkritie do not accept that. They say that the US$5 million represents money which Mr Kotton laundered for the Urumovs.

The Morenco monies

10. Originally Otkritie argued that the money represented the actual proceeds of the frauds on Otkritie. It is now accepted by Otkritie that the source of the US$5 million was completely legitimate. The money paid to Vandry came from a Cypriot company controlled by Mr Kotton called Morenco Ltd ("Morenco").

11. Morenco opened an account with Crédit Suisse on 1st January 2012. On 31th January 2012 US$30,669,997.50 was paid in by Hyperglobus, the well-known retailer. On 12th March 2012 Leroy Merlin, another well-known retailer, paid US$22,999,997.50 into the account. These payments were pursuant to share sale agreements dated 5th July 2011 and 5th August 2011 respectively. The share sale agreements gave effect to the sale to Hyperglobus

and Leroy Merlin of two plots of land adjacent to each other in Moscow. The US$5 million came from these monies.

Ivory Key, Vandry and Birch Key

12. Ivory Key was incorporated in Gibraltar on 19th May 2000 by T&T Management Services Ltd ("TTMS"), the company and trust administration arm of Triay & Triay, Ivory Key's lawyers. On 23rd May 2000 TTMS declared that they held the shares on trust for Mr Kotton. On 31st May 2000 Mr Kotton created the Ivory Key Trust. T&T Trustees Ltd ("TTT"), TTMS's trustee company, were declared trustees. The beneficiaries were Mr Kotton's three children, but the trustees had the power to resettle the trusts, so that they could add Mr Kotton as a beneficiary if they thought that appropriate.

13. On 8th January 2009 TTT did add Mr Kotton as a beneficiary of the Ivory Key Trust.

14. The Ivory Key Trust was the main vehicle through which Mr Kotton conducted his business. As shown by TTMS's letter of 14th November 2005, the trust held all the shares in Ivory Key and four other companies which have featured in this case: Henbury Investments Ltd ("Henbury"), Plasma Surgical Ltd, a UK company ("Plasma UK") and Plasma Surgical Investments Ltd, a BVI company ("Plasma BVI"), and Solaria Ltd ("Solaria"). In addition the trust had at that time a one third interest in Knightsbridge Holdings Ltd ("Knightsbridge"). Knightsbridge in turn held all the shares in Perth Holdings Ltd ("Perth"). (It seems Mr Kotton by 2011 had acquired a 100 per cent control of Perth but how that occurred was not explored in evidence: see transcript, day 3, page 42, line 19ff.)

15. Vandry was incorporated in Gibraltar on 2nd May 2000. Initially Ivory Key held 71 shares in Vandry with the remaining 29 shares held by two Swedish gentlemen. On 8th August 2002 these 29 shares were transferred to Ivory Key, which became sole shareholder in Vandry. On 23rd October 2002 Ivory Key transferred all the shares to Alexander Lundin ("Mr Lundin"). I shall come back to the evidence in relation to Mr Lundin's rôles; however, it is common ground that he was never a TTMS employee. He declared that he held the shares on trust for the Ivory Key Trust.

16. On 15th November 2002 Iosif Balk created a trust ("the Birch Key Trust") in similar form to the Ivory Key Trust. The beneficiaries were his daughters, Yulia Balk, and her half-sister, Sofia Balk ("Sofia Balk"). Sofia Balk is the only child of Mr Balk's second marriage to Natalia Balk ("Natalia Balk"). Again the trustees had the power to resettle the trust. On 26th February 2013 TTT appointed all the shares in Vandry and Vandry's funds at Jyske Bank to Mr Balk absolutely.

17. The Birch Key Trust held all the shares of Birch Key Holdings Ltd ("Birch Key"). In turn Birch Key held all the shares of Vandry. Birch Key also initially held one third of the shares in Knightsbridge. (The other third of the shares in Knightsbridge was -- at least initially -- held for another of Mr Kotton's business partners, Mr Rubiner, or one of his trusts.)

The status of Eder J's judgment

18. It is convenient at once to deal with the status in the proceedings before me of Eder J's judgment of 10th February 2014 and the consequential Order of 14th March 2014. It is important in my judgment to distinguish between the Order resulting from the judgment and the reasons given in the judgment.

19. I have no hesitation in holding that the Order of 14th March 2014 is determinative of the fact that Mr Urumov owes Otkritie over US$151 million and that Yulia Balk owes Otkritie over US$37 million. This follows from the fact that Dudley CJ registered the Order as a judgment of this Court on 17th June 2014.

20. The parties diverge as to approach which this Court should take to the reasons given by Eder J. Otkritie submit that Mr Urumov and Ms Balk are bound by the findings and that Vandry should be treated as the privy of, at least, Ms Balk, so that Eder J's conclusions are equally binding on Vandry. Ivory Key dispute both propositions.

21. The background to what Eder J was saying in relation to Vandry is this. One of the assets into which Otkritie sought to trace the proceeds of the frauds against them, was an expensive property in St John's Wood, London. Mr Urumov and his wife sought to argue that this was purchased as part of a genuine investment by third parties pursuant an investment management agreement, the Sun Rose IMA. At para [380], the judge held:

> "Third, as I have already concluded, the Sun Rose IMA is a fake or a sham. It bears all the hallmarks of a document designed to disguise money-laundering. Moreover, the document bears a strong similarity in many respects to a large number of other purported contracts between third parties viz Vandry…, Tarmilona Ltd… and Lamen Ltd… (the 'VTL material') which, say the claimants, were produced by Ms Balk on previous occasions for the specific purpose of money-laundering. The VTL material was discovered by the Swiss prosecutor either in hard copy or on a USB stick in the Dunant safe deposit box. In total there are some 60 purported contracts with dates ranging from 2006 to 2010. I do not propose to identify all of them: a full list was attached as Schedule B of the claimants' closing submissions. It is important to note that the claimants accept that this material does not relate to any money-laundering in relation to the fraud proceeds in the present case but other quite separate money-laundering exercises. Nevertheless, they say that they are

> entitled to rely upon Ms Balk's involvement in the production of these purported 'contracts' and payments (totalling more than US$ 6 million) as evidence going to her credibility and, more specifically, to show her significant previous connection to Tarmilona, one of the other recipients of the fraud proceeds; her ownership and control (with Mr Urumov) of both Lamen and Vandry; her past involvement (with Mr Urumov) in disguising the source and destination of money transfers, including by the use of shell companies and sham contracts; her knowledge that Mr Urumov engaged in such activity; her propensity to engage or assist in such activity; and, ultimately, her dishonest involvement in the Argentinean Warrants Fraud and the laundering of the fraud proceeds. In effect, the claimants seek to use this evidence as similar fact evidence."

22. As can be seen from the judgment, the VTL material related to earlier transactions, which were said to be money-laundering designed to conceal the proceeds of earlier frauds (unrelated to Otkritie) committed by Mr Urumov or Ms Balk in Russia. The judge concluded at para [385]:

> "So what does the VTL material show? In essence, Ms Balk's evidence is that with regard to Lamen, the documents in question were, in effect, all genuine consultancy agreements. However, she was unable to produce a single report, note, email or other document which could support such assertion; and, apart from a vague reference to some work she said she did for Heidelberg Cement and Barratt Homes, she was unable to recall any of the work which she said she had done with any specificity whatsoever. With regard to Vandry, her evidence was, in effect, that this was her father's company and that she must have put the relevant documents in the Dunant box by mistake. In my judgment, her evidence with regard to both Lamen and Vandry (and also Tarmilona) is a deliberate lie. These documents – both individually and collectively – bear all the hallmarks of having been created as part of a money-laundering exercise. If they were genuine consultancy agreements, they would have generated at least some further documents which Ms Balk would have been able to produce or at least recall in at least some detail which she was unable to do. In cross-examination, she sought to explain her inability to produce certain of these documents on the basis that she had put the reports on a memory stick which she posted to Tarmilona in Eastern Europe. In my judgment, that seems most improbable; but even if it were true, it does not explain her inability to produce copies from her own computer. It is

> simply not credible that all relevant documents that might support her evidence have apparently vanished into thin air."

23. It can be seen that the use (as found by the judge) of Vandry by Ms Balk was not necessary to his decision; it was supporting evidence and therefore collateral. As such, his determinations in relation to Vandry would not in my judgment give rise to an issue estoppel, even as between Otkritie and Ms Balk. "Only determinations which are necessary for the decision, and fundamental to it, will [create an issue estoppel]": *Spencer Bower & Handley on Res Judicata* (4th Ed, 2009) at para 8.23.

24. There is also a problem of timing. The transactions on which Eder J was focussing involving Vandry were all in 2006 to 2009. The transactions with which I am concerned are in 2012 and 2013. There is a real possibility that, whereas Yulia Balk may have been using Vandry as a front in the earlier period, by the later period Vandry was the vehicle of Iosif and Natalia Balk. I discuss this further below.

25. Further, there is no privity between Otkritie and Vandry; Vandry was not a party to the English litigation. Mr Pillow QC, for Otkritie, sought to get around this difficulty by saying that Eder J's conclusion that Ms Balk had ownership and control of Vandry could be relied on to bind Vandry. In my judgment that is a boot-straps argument: the existence of privity must be proven otherwise than by the judgment said to establish privity.

26. Mr Pillow cited a number of authorities to argue against these propositions. He started with *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. This is authority for the proposition that, at common law, a conviction of the defendant in a criminal case is not admissible against that defendant in subsequent civil

proceedings. This holding has been reversed by statute: Civil Evidence Act 1968 (UK) section 11. (The 1968 Act applies in Gibraltar: English Law (Application) Act 1962 section 3(1)(a) and Schedule Part II item 2, but the substantial changes wrought by the Civil Evidence Act 1995 (UK) do not.) Similarly a finding of criminal guilt in France was held binding on a defendant in English proceedings brought under the Proceeds of Crime Act 2002 (UK): *Asset Recovery Agency v Virtosu* [2008] EWHC 149 (QB), [2009] 1 WLR 2808. Neither this case nor the 1968 Act assists where the determinations in an earlier *civil* case are relied upon. Nor in my judgment do they allow an escape from the rules on privity in civil cases.

27. I accept that in some circumstances a judgment can be relied upon to explain the nature of an underlying transaction. In *Pritchard v Hitchcock* (1843) 6 M & G 151, William Hitchcock borrowed money from Pritchard secured on two bills of exchange accepted by William Hitchcock. The bills were subsequently guaranteed by George Hitchcock. On falling due, William paid the bills. However, at that time William was hopelessly insolvent. After his bankruptcy, the assignees of his estate obtained a judgment against Pritchard for the return of the monies on the basis the payment by William was a fraudulent preference. Pritchard then sought payment of the bills from George, who argued that the bills had been satisfied by the payments made by William. The Court of Common Pleas held that the judgment obtained by the assignees was admissible but not conclusive of the fact that the bills had not in truth been paid by William and that "what appeared at the time to be a good and satisfactory payment, was perfectly illusory": *per* Tindal CJ at p 166. This judgment does not assist in my judgment where the findings of the judgment are (as here in relation to Vandry) purely collateral.

28. Accordingly, I hold that I am not bound by Eder J's determinations in relation to Yulia Balk and Vandry. Indeed his judgment is not even admissible on those questions. I need to make my own determination of the true ownership and control of Vandry.

The evidence for Otkritie

29. A surprising feature of this case is that each side only proffered one witness. Okritie served a witness statement from Mr Neil Dooley. He is a solicitor at Steptoe & Johnson, the solicitors who, since the date of the trial before Eder J, took over the running of the English proceedings from Hogan Lovells International LLP ("Hogan Lovells"). Mr Dooley had worked on the case whilst at Hogan Lovells and knew the background of the case intimately.

30. Mr Dooley's witness statement for trial contained a large number of comments and submissions which were wholly inappropriate in a witness statement served for the purposes of a trial. As a result there were negotiations between the parties' respective solicitors which resulted in substantial redactions to his witness statement. In the event, Mr Calver QC for Ivory Key did not seek to cross-examine Mr Dooley on his witness statement. There were various items of hearsay in the redacted witness statement to which Mr Calver objected. Neither side served any notices under the Civil Evidence Act 1968, which, as I have said, governs the admissibility of hearsay in Gibraltar.

Mr Kotton's evidence

31. Only Mr Kotton himself gave evidence on behalf of Ivory Key. Vandry did not appear and were not represented.

32. Mr Kotton gave evidence over two and a half days. He was clearly an extremely intelligent man and a very successful businessman, specialising in property development and investment. He was born in 1965 in Leningrad (now St Petersburg) and was originally a citizen of the Union of Soviet Socialist Republics. His mother tongue was Russian. In 1973 he emigrated with his parents to Israel, but in 1976 the family moved to Sweden. There he learnt Swedish and English, both of which he speaks to a high standard. He acquired Swedish nationality and later Swiss nationality. He has some German and Spanish.

33. In 1988, in the twilight of the Soviet Union, he started to build up contacts in Russia. He saw an opportunity to provide high class residential accommodation to foreigners coming to live in Moscow after Russia's opening to the West. He appears to have been extremely successful. More recently he has extended his operations into commercial real estate in Russia. He has also had a number of developments in Spain around Málaga.

34. In 2004 he moved to Switzerland, in part at least in order to take advantage of the lower rates of taxation in that country. After living away from Sweden for five years, as he expressed it, he became "a free man", no longer subject to close review by the Swedish tax authorities: transcript, day 2, page 53, line 31ff.

35. Apart from a legal dispute with the Swedish tax authorities, which he won, he has never been involved in any litigation. He is a man of good character.

36. His method of doing business is to use single purpose vehicles for individual property developments. How this worked can be seen from an example at transcript, day 4, page 21, line 21ff. Ivory Key, it will be recalled, held shares in Perth. On 12th February 2011, Mr Kotton faxed Giovanna Wright ("Ms Wright"), his bank

manager at Jyske Bank, with an instruction to pay €16,000 from Perth to the account at Jyske Bank of another Gibraltarian company, Evercon Ltd ("Evercon"), the money being described as "loan as agreed". By the same fax, he instructed her to make a further transfer of €16,000 from Evercon to the Spanish bank account of Esmeraldalace Inversiones SL, a Spanish company, with the rubric "Budget Aloha Park 332 + Payment Loan Aloha Park 332": bundle H/1/10.

37. The cross-examination proceeded as follows:

> Q This time it is a connection, evidently, with the Aloha Park development, right?
> A Wrong.
> Q You tell the judge what the second payment was for.
> A The development of Aloha Park was finished many years ago. Evercon is the owner of Esmeraldalace Inversiones SL. Esmeraldalace Inversiones SL is the owner of my apartment in Aloha Park. The apartment has costs. That is why it is written: budget Aloha Park 332, that is the number of the apartment, and payment Aloha Park loan 332 because this structure is having a credit for buying that apartment.
>
> So what I actually do is that I transfer -- excuse me, your Honour, I need to explain. Once again, this model is built up because this is a way of owning apartments or real estate in Spain through off-shore companies which is practised by many, many people, okay. So what I do actually here is that I ask the owner of Esmeraldalace to transfer funds to Esmeraldalace. Esmeraldalace is a Spanish company with full bookkeeping. They have it in their books. They have paid community costs, they have paid loans, they have paid electricity, they have paid garbage. That is exactly what it is.
>
> It is a beautiful apartment, penthouse, 240 square metres, two floors, with a beautiful view over the sea.
> Q That is all very interesting, Mr Kotton, but not anything to do with the question I am going to ask you about this. I don't have any quibble with you on all those matters, my point is that when you paid Evercon from your pocket which you describe as Perth at the top and describe it as a 'loan as agreed', you knew it was no such thing?
> A But of course it is a loan.
> Q Mr Kotton, how can a company that owns property and say, that the money given to Evercon was a loan, was there? It was just a gift, a transfer?

A It is a loan; exactly what it is. Mr Pillow, I don't know how many times I need to... as you see, when I see this transaction for me it is very simple. If it would be a return, Mr Pillow, I will tell you, if the apartment is sold for €1.5 million, a profit of €700,000 is made, okay. Then Esmeraldalace Inversiones SL, the first thing they will do by Spanish law is repay all debts to Evercon. In that case Evercon can repay all debts to Perth, if I choose to do so. Since Evercon and Perth are mine I could also say, you know, you can even out the loan, you can appoint them to me. In that case I am free to do what I want to do. That is by the law.

Q I am talking about the Evercon to Perth transaction, Mr Kotton, the two pockets of yours. You are not suggesting, are you, that you kept a record of the amount Evercon owed Perth?

A There is no problem for me to keep the record.

Q Listen to my question, please, Mr Kotton. Are you suggesting that you kept a record of the amount Evercon owed to Perth?

A No, I didn't keep the record.

Q You are saying you didn't keep a record because you didn't consider that the monies were really loans, they were just pocket-changing exercises, weren't they?

A They were loans and they were be [*sic*] able to repay. If I need to do that, I can go to the bank, ask them for all this, as obviously you have done, and see the transactions. But the essential issue of this, Mr Pillow, is like this: My goal in this transaction is that Esmeralda Inversiones SL is to sell the apartment with profit. As soon as the profit arrives, that is my final goal, to make money; very simple. Or maybe that was also a money laundering exercise.

Q What this is an example of, Mr Kotton, is using Perth as a source of monies for a particular purpose, on this occasion to pay those charges at Aloha Park, but routing it through a middle company so that the monies appeared to be the monies of Evercon but were, in fact, the monies of Perth?

A Your Honour, I need to explain that. Since Evercon is the holder of Esmeraldalace Inversiones SL nobody else can make loans to Esmeraldalace Inversiones SL than Evercon by Spanish legislation. So, Evercon as the owner makes an owner's loan into Spain. That is the legislation of the Spanish authorities, sorry. To make loans from Gibraltar to Spain, for example, nowadays it is even more difficult than it was those years, but you need to have it in order. It is therefore Evercon owning Esmeraldalace, and Evercon is supplying Esmeraldalace for funds to run the apartment. That is exactly what it is.

Q I certainly don't accept, Mr Kotton, that the Spanish legislation prevents a company from borrowing from others but I can't argue the point with you and I don't intend to.

A You don't accept it but unfortunately others are not Gibraltar. Gibraltar is considered by Spain as a very, very,

> very special entity and you need to be very, very thorough when you transfer funds from Gibraltar to Spain. This is simple, this is a clear, clear transaction; no doubt about it.

38. I have reproduced this rather long extract from the cross-examination of Mr Kotton for a number of reasons. Firstly, I found Mr Kotton's explanation of the monies being passed down the chain Perth-Evercon-Esmeralda entirely convincing. Unless Apartment 332 was let out, there would otherwise be no means of paying the outgoings on the flat. As a property investor, obviously Mr Kotton's commercial purpose was to sell at a profit if he could.

39. Secondly, it undermines an important part of Otkritie's case. Otkritie say that one of the techniques of money-launderers is to advance what are described as loans, without any intention that the loans should ever be repaid. When that occurs, then money appears to be ostensibly "clean" in the hands of the recipient, the ostensible borrower. I am happy to accept that this is a technique used by money-launderers (as indeed I said when I rejected the need for expert evidence to that effect in my judgment of 22nd March 2016). However, one of the reasons such techniques are used by money-launderers is that the making of open-ended loans also has perfectly legitimate uses. The current example is a case in point.

40. Thirdly, it is an example of Mr Kotton's mastery of technical detail in the running of off-shore companies and minimising tax liabilities. He explained in the transcript, day 2, page 55, line 15ff:

> "I own a lot of companies and a lot of businesses worldwide. My scheme is built up in the following way. For example, I have a special purpose vehicle for every project, every real estate project, every house, in any location. To take an example, Russia. A Russian company owns a real estate project, a house as an example. Since Russia has a perfect double taxation agreement with Cyprus, it is in turn owned by

> a Cypriot company. That Cypriot company may be owned by a Gibraltar company so, when I for example sell the asset of the Russian company, the Russian company pays its taxes and transfers the funds to the Cypriot company. The Cypriot company gives a dividend to, for example, a Gibraltarian company. That Gibraltarian company keeps the funds. For example, if I invest in another project then, I obviously use those funds to lend from one of my companies to another of my companies. You can be fair and say it like this: there are times when my companies are not having – what do you call it? – active business, but they're still my companies. They belong to me or are influenced by me, and they are doing legitimate transactions between sister companies or mother and daughter companies."

Again this is a legal and (subject to people's personal views on the morality of mitigating tax in this way) legitimate use of off-shore companies.

41. Fourthly, it tends to undermine Otkritie's central argument that the US$5 million transferred by Ivory Key to Vandry was (in Mr Pillow's words) just a "pocket-changing exercise". Yes, in one sense, Mr Kotton was just moving monies he controlled around in order to fund Apartment 332, but in another sense these movements of money had a commercial purpose and a commercial reality. From a tax and accounting point of view, it was necessary to move funds in this way, so that each single purpose vehicle could properly show the profits and losses on that individual project. Since the ultimate beneficial ownership of Apartment 332 was (at least initially) split between trusts controlled by Mr Kotton, Mr Balk and Mr Rubiner, this was important, not just for tax purposes, but also for transparency.

Mr Kotton's knowledge of Mr Urumov and Ms Balk

42. Mr Kotton's case throughout is that he has never met Mr Urumov and does not even know what he looks like. I shall in due course

consider whether I accept that evidence, but Otkritie adduced no evidence to gainsay what he asserts.

43. The position in relation to Yulia Balk is more complicated. Mr Kotton accepted that she worked for Plasma UK between October 2003 and August 2008. His evidence was that Plasma BVI was the holding company for Plasma UK as well as similarly named companies in the United States of America and France. He was a director of Plasma UK until 14th January 2013, when he became a director of Plasma BVI. The group's business was the development of the inventions of Nikolay Suslov, a Russian scientist. Mr Suslov's wife, Natalia Suslova, was his assistant. Neither spoke English.

44. Mr Kotton's evidence was that Mr Balk had asked him back in 2003 whether he could offer his daughter, Yulia, a job. Mr Kotton was able to arrange her appointment as company secretary of Plasma UK. An important part of her job, however, was liaising with the Suslovs, since she spoke both Russian and English. Mr Kotton said that he had not seen her since she left the job in 2008. Ms Balk's *curriculum vitae* (dating from after 2008) suggested that her rôle at Plasma UK was much more extensive than that, but since she is a fraudster and since it is Otkritie's case that she was an out-and-out liar, I cannot attach any weight to what she might have put in that document.

45. Again I have to consider whether I accept Mr Kotton's evidence, but again Otkritie adduce no evidence showing any contact between him and her since 2008.

Mr Balk

46. It was common ground at trial that Mr Balk was an extremely wealthy man. Mr Kotton's evidence was that he had known Mr

Balk since 1995. They had been involved in property deals together since then, including a US$100 million project. That evidence was not challenged.

47. The commercial relationship can be shown from the following extract from Mr Kotton's cross-examination (transcript, day 3, page 9, line 36ff):

> Q …I want to carry on asking you about Iosif Balk for a moment. You know that he has made lots of money in property development over the years, don't you?
> A Yes.
> Q He is a very wealthy man, is he not?
> A I think so.
> Q Part of those developments, a large number of them in fact, have been in Russia, haven't they?
> A Yes.
> Q He has done lots of those projects over the years as far as you know?
> A Yes.
> Q Is he still doing Russian construction projects?
> A As far as I know, as far as I know he is still a co-owner of some commercial properties in Russia. I do not know if he today actively is involved in a commercial project of real estate.
> Q Did Mr Balk ever really work for you as a freelance consultant, Mr Kotton?
> A Yes.
> Q On what sort of projects do you say he did work for you in that capacity?
> A Many projects. In order to understand that, you need to understand Russia. There is a difference between consulting and consulting. In Russia, door opening and contacts is the most important thing. At a long stage in his life he was a great door opener and acquirer of information.
> Q When you refer to him in your evidence as being a consultant, a freelance consultant, he was really a door opener in that sense for you; is that what you are saying?
> A Not only but he could also seek out projects, evaluate them, propose them to me, I would take a consideration. It is not that difficult to take consideration.
> Q How much would you pay him for this kind of service of opening doors or identifying projects?
> A I would say that I have paid him hundreds of thousands during over the years.
> Q Over the years, right.
> A Yes.

> Q In 2011 to 2012 did he do any such work for you of that nature?
> A 2011/2012, yes definitely.
> Q What was that? You can obviously remember something so what was it?
> A Well, we have a big ongoing construction going on. One of our construction sites is planned for 1,700,000 square metres of living; the other one will be eventually 900,000. There are a lot of things to do with it. We have a small villa development, we have developments in an area called Tservynaya [*sic* in transcript: possibly Serebryany Bor] in Moscow. That the most prime area, I would say, in Moscow where all big bodyguards [*sic* in transcript: probably oligarchs] and politicians live. So, I can tell you one thing: He fulfilled his missions without error.
> Q When you say we had these projects, are they joint projects you had with Mr Balk or are you talking about something else?
> A No. Many of the projects was by myself, many with other partners.
> Q When he was giving you freelance consulting services, for what exactly in 2011/2012 were you paying him?
> A For freelance consulting services.
> Q Which were what?
> A Introducing me to people who could solve right problems.
> Q How would you agree the price to be paid for that service?
> A He told me what he wanted and I pay.
> Q You paid whatever he asked for, did you?
> A No, I don't pay whatever people asked for but I pay a reasonable amount if it is necessary.
> Q How would that figure be arrived at? On what basis would it be arrived at?
> A Negotiations.
> Q What sort of numbers are we talking?
> A It could be everything from $50,000 to $500,000 to $1 million. I don't recall, I can't remember exact numbers.
> Q We are talking quite large sums, aren't we?
> A Yes, we do.
> Q You don't deal in a couple of thousand here and there, that is small change for this sort of work?
> A Definitely.

48. There is, in my judgment, no inherent implausibility about what Mr Kotton is describing here. Among property developers with an ongoing relationship the payment of bonuses and introductory fees

in an informal way is common. The only unusual feature here is that the payments are of a greater order of magnitude than might be normal, but that is explained by the size of the projects. At any rate, Otkritie adduce no evidence to contradict what Mr Kotton says.

49. On a personal level, Mr Kotton said, the two men were friends. It was Mr Kotton who introduced Mr Balk to TTMS in 2002. Mr Balk spoke no English, so he needed Mr Kotton to assist him there. Moreover, because of the bad reputation in general of Russians at that time, Mr Kotton explained that Mr Balk needed a good introduction, such as that which Mr Kotton was able to give, if a company like TTMS was going to agree to take Mr Balk on as a client.

50. Once Birch Key was set up, Mr Kotton said he was happy to give him Vandry. Vandry was simply one of the numerous companies which Mr Kotton had, effectively on stand-by. As and when he needed a single purpose vehicle for a new project, he would have the likes of Vandry ready to be used and importantly equipped with a bank account already opened.

51. Mr Kotton's involvement with Vandry initially and his ongoing relationship with Mr Balk are said to provide an explanation for the fact that TTMS seem to have continued to send letters, such as that of 24th October 2005, to Mr Kotton about matters like their company management fees. Mr Pillow argued that this showed Vandry remained in truth Mr Kotton's company, but there is no evidence of Mr Kotton giving any instructions in relation to Vandry after he gave the company to Mr Balk. Moreover, Mr Balk did not speak English, so sending documents in that language to Mr Kotton (who had introduced Mr Balk to TTMS) would have been sensible. Mr Pillow also pointed out that the director of

Vandry was Mr Lundin. I shall return later to Mr Lundin's function and his involvement with Mr Kotton and Mr Balk.

52. Mr Kotton also said that he would from time to time make transfers of money to Mr Balk. Sometimes these transfers were personal loans; sometimes Mr Balk would pay out cash in roubles in Russia in accordance with Mr Kotton's instructions. He took care to keep personal transactions separate from his business arrangements with Mr Balk. The US$5 million was treated as a unit, because it was a business advance. He would not thus allow any sort of set off against other personal transactions. Okritie say these transfers are evidence of money-laundering. I shall again come back when I make my conclusions as to this part of Mr Kotton's evidence.

Disclosure by Mr Kotton

53. Mr Pillow relied, in undermining Mr Kotton's credibility, heavily on the deficiencies in Mr Kotton's disclosure. Mr Kotton's evidence was he kept his emails with their documentary attachments on a server with the website wilsonsweden.com. This was a server run by a longstanding friend of his, David Wilson, who was also a Russian *émigré.*

54. Mr Kotton said he directed Mr Wilson physically to destroy the server every two years. The reason for this was his fear of the Russian state and others. He explained (transcript day 3, page 63, line 21ff):

> "I do not store correspondence because one reason: security, security, security. I do not want my information, information that many other people maybe are relying on to fall in the wrong hands."

The last server was probably destroyed about 7th July 2013, which is the time from which documents on the new server exist (as shown by Mr Triay's affidavit of 21st April 2016), however, it is not quite clear when Mr Kotton gave Mr Wilson directions to change the servers in this way: see transcript, day 3, page 63, line 34ff. It is likely to have been somewhat earlier, but probably not as early as May 2013.

55. Mr Pillow submitted firstly that, what he described as, this "paranoia" was wholly unbelievable: this "incredible" evidence showed that Mr Kotton was not a believable witness. He secondly relied on this as evidence of deliberate concealment of disclosable documents.

56. As to this first submission, I agree that Mr Kotton's ostensible reason for having the server destroyed seems improbable. I do, however, have to bear in mind Mr Calver's observation that it is dangerous to look at evidence of Russian business practices through Western eyes. Mr Kotton is an extremely wealthy businessman operating in a place where such people, I am prepared to accept, are potentially vulnerable to state and non-state interference. I am not therefore prepared to reject out of hand Mr Kotton's explanation for changing servers in such a dramatic fashion. However, the improbability of his explanation is something which I will need to take into consideration when deciding whether Mr Kotton is a witness of truth.

57. As to the second submission, there are a number of issues which arise. The first is whether there was a duty to disclose documents on the server at all. This problem arises because the party giving the disclosure is Ivory Key, the limited company, not Mr Kotton, the individual. As I said in para [16] of my judgment of 19th September 2015, dealing with an application by Otkritie for specific disclosure:

> "When I pre-read for the application, it seemed to me that there was a potential problem in that many of the documents sought were likely to be in the possession, power or control of Mr Kotton rather than of Ivory Key. Mr Pillow, however, said Okritie were proceeding on the basis that Mr Kotton and Ivory Key were effectively one. The notes to CPR rule 31.8 in *Civil Procedure 2015* suggest that the question of control is a matter of the reality of the matter (see the quotation from *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 at [40]), so it may be that Mr Pillow is right as a matter of law. In the event Mr Calver did not press the point. If Ivory Key do take this point when they provide further disclosure, then Otkritie will merely issue an application for third party disclosure against Mr Kotton personally. There may also be questions as to whether inferences should be drawn against him at trial.

58. Neither counsel sought to reargue the issue before me at trial. It seems to me at least arguable that Mr Kotton was only liable to a third party disclosure order, but in the light of the concession by Mr Calver in September 2015 I will proceed on the basis that Mr Kotton did potentially owe a personal duty of disclosure and of preservation of documentation.

59. The second issue, which was urged on me by Mr Calver, is that there was no duty to preserve documents in June/July 2013. The duty to preserve documents is imposed by CPR Part 31 Practice Direction B para 7, which provides in relation to electronic documents:

> "As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents."

60. In terms of timing, the first involvement of Ivory Key in the case was as a result of two Orders made by Dudley CJ on 13th May 2013. The first was described as a *Norwich Pharmacal* order (see *Norwich Pharmacal Co v Customs and Excise Commissioners*

[1974] AC 133) directed to Jyske Bank (although it is possibly more properly a third party disclosure order under CPR rule 31.17: see *Chevron Corp v DeLeon*, unreported, 10th November 2014). It required Jyske Bank to provide disclosure of the whereabouts of the US$5 million. Pursuant to that Order, Ivory Key's involvement became known to Otkritie. The second order was an extension of the freezing injunction so that it attached to the monies in Ivory Key's account with Jyske Bank. It was shortly after the service of those Orders on Jyske Bank that Mr Kotton learnt from the bank that Ivory Key's accounts had been frozen. By an Order of 17th May 2013, the Court clarified that the freezing order covered assets in the GDPM.

61. The return date on the freezing order was 10th June 2013, again before Dudley CJ. Ivory Key appeared. The Chief Justice made no substantive determination as to whether the injunction should stand. Instead he gave directions for the filing of evidence. (An oddity of this Order is that it does not appear to provide for the freezing order of 13th May 2013 to be extended. This is because there is no change to the definition of "Return Day", which remained 10th June 2013. On the face of the Orders, the injunctions may have lapsed. However, Jyske Bank understandably continued to treat the Ivory Key assets as frozen.)

62. The substantive determination of the application to discharge the freezing order was delayed until 7th November 2014. After handing down of his reserved judgment on that day, by Order of 8th December 2014 the Chief Justice continued (or revived) the freezing order and gave directions, including the service of pleadings, for the trial of the issue which is now before me.

63. Mr Calver submitted that it was only at this point that litigation between Otkritie and Ivory Key came into contemplation. I do not accept that submission. Once Ivory Key's account at Jyske Bank

was frozen, it would have been apparent that litigation between Otkritie and Ivory Key was likely, unless either side backed down.

64. Whether Triay & Triay were obliged under para 7 of the Practice Direction to advise *Mr Kotton* in his personal capacity of *Ivory Key's* obligations is more difficult. Triay & Triay's client was Ivory Key, not Mr Kotton. However, Mr Calver did not make this point. In the light of the concession which I recorded in the passage cited above from my judgment of 19th September 2015, it would be wrong to assume that Mr Kotton was not warned.

65. Accordingly I will proceed on the basis that Mr Kotton permitted the destruction of the server after his duty to preserve documents (a) arose and (b) was communicated to him by his lawyers.

66. Even, if I were wrong in that, there are other breaches of his disclosure obligations which Mr Pillow has identified. A very surprising feature of disclosure on the part of Ivory Key is the fact that Mr Kotton appears to have been left to do the searches for documents himself. Given that there had been on 19th September last year an extremely expensive application for specific disclosure, for which both Queen's Counsel, Mr Pillow and Mr Calver, had been flown in from England, it is baffling that Mr Kotton's lawyers did not thereafter assist him in carrying out the disclosure which I ordered.

67. I am not going to itemise all the deficiencies in Ivory Key's disclosure. They include the failure to identify the memory stick used by Mr Kotton to hold information from the server and a wholesale disregard for the need to disclose documents which had been but no longer were in the control of Ivory Key. Mr Kotton's witness statement of 5th October 2015 is deficient and misleading. Even if I were wrong about the server, these other deficiencies would have been serious.

68. Mr Pillow also complains that the witness statement of 5th October 2015 was not (as ordered) an affidavit, but this in my judgment is a make-weight. No objection was made prior to trial as to Mr Kotton making the witness statement rather than a sworn affidavit.

69. What follows from all this? *Hollander on Documentary Evidence* (12th Ed, 2015) at para 11.10 says that the Court can in some circumstances strike out a claim, however, the learned author notes that the Courts take a restrictive approach to the striking out of claims based on destruction of documents. In the event Mr Pillow made no application to strike out, so I do not need to consider this further.

70. *Hollander* at para 11.25 says:

> "The judge can always rely on the wrongdoing of the party in destroying or forging documents when assessing the credibility of the party in question. But the principle goes significantly further. In *British Railways Board v Herrington* [[1972] AC 877], a case which did not involve document destruction, Lord Diplock said:
>
> > 'The appellants who are a public corporation elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.'
>
> There is a line of cases not involving document destruction which follows *Herrington*. In *Wiszniewski v Central Manchester Health Authority* [1996] PIQR P324, Brooke LJ set out the principles as follows:
>
> > '(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> >
> > (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by

> the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.'"

71. *Hollander* suggests that a similar approach would be appropriate in cases of document destruction. However, at para 11-28 the author comments that the limited number of authorities:

> "in the document destruction context gives rise to a number of unresolved questions. First, is the rule limited to the drawing of inferences or can it ever involve a presumption, a point left open by the Court of Appeal in *General Tire*? Secondly, what is the effect of the view of the court in *General Tire* that the maxim probably could not be used to prove the wrongful act itself (there copyright infringement) as opposed to using it in the assessment of damages? Surely the principle is applied in inferring what the contents of the missing documents were? Thirdly, it seems that there must be some evidence before the court 'however weak' other than the inference."

The reference is to *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] RPC 203 at 267 (appealed to the House of Lords on other points: [1976] RPC 197). He concludes at para 11-30 that definitive guidance is needed from the Court of Appeal.

72. I shall discuss my approach as I consider individual items.

Otkritie's primary case

73. The primary case put forward by Otkritie is simple. Mr Urumov and his wife were established fraudsters, who had committed

major frauds in Russia prior to October 2010, when Mr Urumov committed the signing-on fraud. They had laundered monies from those frauds through various companies, as outlined in Eder J's judgment in the passage cited. It can be inferred, Otkritie say, that they passed at least US$5 million to Mr Kotton for him to launder. It is this money which was returned to Mr Urumov and Ms Balk via the fake loan made by Mr Kotton to Vandry on 30th May 2012.

74. There are a number of problems with this primary case. Firstly, the *sole* evidence of the pre-October 2010 frauds which was sought to be adduced at the trial before me is one single paragraph of Mr Dooley's witness statement. This says:

> "55. During the course of the English proceedings, it became apparent that the Urumovs had been engaged in other fraudulent schemes and that they had used numerous offshore entities and bank accounts – many of which were in Gibraltar – to launder millions of dollars of the proceeds of these frauds. This was dealt with in the Claimants' evidence served before trial in the English proceedings, by Dmitriy Popkov, a senior Otkritie officer, in his second witness statement dated 11 March 2013 at paragraphs 220-241… In that statement Mr Popkov described how Mr Urumov (and others) had used bogus loans and consultancy agreements to launder millions of dollars from their other frauds and that they had developed a well-established *modus operandi*. These frauds are the subject of criminal proceedings in Russia."

75. Mr Popkov's witness statement was not put in evidence to me. As can be seen, no details are given of who the victims of these earlier frauds were or their nature. Insofar as Mr Popkov is reporting what he has heard from others, which is likely, Mr Dooley is giving multiple hearsay. As such this evidence is not admissible, since section 2 of the Civil Evidence Act 1968 only permits first hand hearsay. Further no Civil Evidence Act notice was served, so there is no evidence as to what parts of Mr Popkov's witness statement (if any) are direct testimony by him, which would potentially be admissible.

76. Even if the evidence was admissible, the fact that it was hearsay would go to weight (as would be the position under the Civil Evidence Act 1995 (UK), if that Act applied in Gibraltar). I would not consider that the existence of these earlier frauds was adequately proved. Not one single fraud is adequately identified. However, even if I were wrong as there having been earlier frauds, there is no evidence *whatsoever* showing any monies from these frauds (assuming they happened) going to any entity having any connection with Mr Kotton. (Mr Kotton's control of Vandry had ended long before Ms Balk used it as a money-laundering vehicle.)

77. In these circumstances, whatever view I take of Mr Kotton's credibility, Otkritie has not established this element of their primary case. Nor can they, on this aspect of their case, rely on inferences from the destruction of the server. Firstly, a *Wisniewski* inference can only be drawn if a claimant establishes a case to answer, and Otkritie have not. Secondly, there is no reason to suppose that in May 2013 there would have been any documents on the server to show a pre-October 2010 transfer of tainted money to Mr Kotton. Quite apart from the inherent unlikelihood of such documents existing where there is no case to answer, the relevant previous server would have been destroyed on Mr Kotton's evidence two years earlier in 2011.

78. There is potentially another problem with Otkritie's primary case. If the US$5 million did represent the proceeds of these earlier frauds, then it may be that the victims of those frauds would have a proprietorial claim to the money. If they did have such a claim, the US$5 million would not be subject to execution at Otkritie's suit, because it would not have been the Urumovs' money.

79. The point arises in this way. It always used to be thought that in order to trace money it was necessary to show identifiable monies passing from A to B to C to D to E. If, for example, the money was paid by B into an overdrawn account of C, then the money lost its identity. Thus even if C were to pay exactly the same sum out to D the next day, tracing would no longer be possible.

80. The Privy Council in *Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297 held that this is not an invariable rule of law. It held that "backwards tracing" was potentially legitimate and explained:

> "38. The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry."

81. This would imply that the payment from C to D in the above example (assuming it was always intended to represent the monies originally coming from A) could be relied on as part of a tracing claim against E. Further in a money-laundering case it may be arguable that there is a presumption that monies paid in at one end are represented by the monies paid out at the other end. In other words, in the above example, suppose the claimant who was seeking to trace was unable to prove the way in which monies moved from B to C (say, because B converted the money into cash) or did not even know of the existence of C. So long as A could show that B and D had an intention to launder the money, it may be possible for the Court to presume that the money in E's

hands represented the money transferred by A to B, without any need to prove C's rôle or even C's existence.

82. If that is right, then the Russian victims of the earlier frauds might have a claim to the US$5 million. However, in the light of my conclusions about failure of Otkritie to prove that the money did come from such frauds, I do not need to consider whether Ivory Key could establish a defence of *ius tertii*.

Otkritie's secondary case

83. Otkritie's secondary case is more pared back and does not rely on showing whence the monies transferred by Mr Kotton came. As counsel put it in their final submissions on law:

> "[W]hen c US$5 million was transferred by Vandry to Ivory Key in January 2013, that transfer was not in repayment of any genuine loan, had no legal basis, and therefore gave rise to a resulting or constructive trust of the funds in favour of:
>
> 9.1 the Urumovs directly because, at the time of receipt by Vandry of US$5 million from Mr Kotton in May 2012, the Urumovs' relationship with, and use of, Vandry – and their control of its bank accounts for their personal purposes – was such that the proper conclusion is that the US$5 million were received for the benefit of, and were due to, the Urumovs…;
>
> 9.2 alternatively, the Urumovs through Vandry, because Vandry's corporate veil is to be pierced in accordance with the 'evasion principle' identified by Lord Sumption in *Prest*…"

84. In *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, Lord Sumption, giving the only judgment of the UK Supreme Court, said:

> "27. In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are *obiter*,

because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.

28. The difficulty is to identify what is a relevant wrongdoing. References to a 'façade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'façade', but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

…

34. These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about…

35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal

> obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil… I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course… For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

85. One difference between the concealment principle and the evasion principle may be evidential. Suppose various payments to the company are said to have been in truth to have been (as is alleged here) to the Urumovs, so that the concealment principle applies. In a concealment case of this sort, it would be necessary to consider each payment individually and decide whether the particular payment was in truth to the Urumovs. By contrast, if the company was being used to evade the law, then it could be assumed that all payments were subject to evasion.

86. I would not wish to exaggerate the differences, which may amount to no more than the burden of proof. If, for example, payments 1, 2, 3 and 5 can be shown to be concealed transfers to money-launderers, then it would not be difficult to conclude evidentially that payment 4 was also a concealed transfer, but the *claimant* would still need to prove that. Similarly, if the evasion principle applied, then the Court will "pierce the corporate veil for the purpose, and *only for the purpose*, of depriving the company or its

controller of the advantage that they would otherwise have obtained." Thus in an evasion case it would be for *a defendant* to show that, in the example, payment 4, was legitimate.

87. I shall return to my conclusions on the transfers in 2012 and 2013.

Yulia Balk's money-laundering

88. Mr Pillow in opening took me on a detailed inspection of the documents on which Otkritie relied to show that Ms Balk had laundered monies in the period 2006 to 2010. I do not propose to visit all the transactions, many of which concerned transfers to other defendants in the English action and various companies around the world used in the attempt to launder the proceeds of the frauds against Otkritie. Instead I shall confine myself to, what Eder J referred to as, "the VTL material" insofar as these concern Jyske Bank or Vandry. Their provenance was a safe deposit box in Switzerland rented by Dunant International SA ("Dunant"). (Dunant is the second defendant in the current proceedings but has taken no part in this action.) In October 2013, a Swiss prosecutor obtained a warrant to search the deposit box and some sixty agreements purportedly for loans or the services of independent contractors were found.

89. The sixty agreements are particularised in Otkritie's schedule to their Particulars of Claim. The metadata obtained off a memory stick, also found in the box by the prosecutor, shows most of the agreements were backdated. The first agreement can be treated as representative. It is a four year loan, ostensibly for US$164,000, from Mr Urumov to Vandry and is dated 10th April 2006. The metadata shows it was created on 23rd September 2009 by "George". The agreement is clearly a backdated sham. It was prepared at the same time as a purported "loan prepayment agreement", which was used as a cover for the transfer of monies

to Mr Urumov. As I have noted above, because Otkritie have not proved any pre-2010 frauds involving the Urumovs, there is no evidence as to how these monies came to be tainted. However, the number and size of these transactions is such that an improper purpose can be inferred.

90. In earlier interlocutory proceedings in this matter, Mr Lundin made an affidavit dated 12th December 2013 on Vandry's behalf as Vandry's sole director deposing to the genuineness of the loans and their repayment. In the light of the above, Mr Lundin appears to have been lying on oath.

91. The independent contractor agreements were equally bogus. Typical are three agreements dated 22nd June 2009, 2nd July 2009 and 13th July 2009 between Tarmilona and Vandry, whereby in consideration of a total of US$2,626,470.17, Vandry agreed to provide "financial consulting services and general management advice" to Tarmilona. The money due under the third contract, US$1,458,470.17, was paid into Vandry's account at Jyske Bank on 14th July 2009. The third contract was signed by Mr Lundin on Vandry's behalf, but only after the money had been transferred to Jyske Bank. Mr Lundin took instructions from Ms Balk and must have been an accomplice to Ms Balk's money-laundering efforts.

92. An example of Ms Balk's *modus operandi* was a purported ten year loan of US$444,000 made by Lamen (which was her company) to Vandry under an agreement dated 31st October 2009. The bogus nature of the loan can be seen from the fact that Ms Balk had Lamen liquidated in March 2011 without the loan ever having been repaid or any evidence of the benefit of the loan having been assigned.

93. There are many other examples of Ms Balk's use of companies to launder money. They are summarised in Part F of Otkritie's

opening submissions. I do not propose to set them out. Ms Balk and her husband were money-launderers on a grand scale.

94. Iosif Balk had given Ms Balk limited rights on Vandry's account on 24th June 2009. These appear to have allowed her to move monies (at least between currencies) without reference to him. However, Ms Balk's money-laundering activities at Vandry stopped after 2009. There is no evidence of her giving any instructions in relation to Vandry's account after 2009. Whether she had control of Vandry in 2012 and 2013 is an issue to which I shall come back.

95. In the meantime, however, there was other money-laundering which did not involve Vandry. Some of the actual proceeds of the frauds against Otkritie had been paid to Dunant and to Denning Capital Ltd ("Denning"). (Denning is the third defendant, but did not appear at trial.) In August 2011, Ms Balk transferred three tranches of money amounting to US$500,000 from Dunant's and Denning's accounts in Switzerland to Ms Balk's personal account at Jyske Bank. Then she transferred the money to her father's personal account at Jyske Bank. Finally her father transferred the money to the Urumovs' joint bank account in England. By transferring money in this way, the monies in England appeared to have no connection to the monies obtained by the frauds against Otkritie. This was necessary because on 5th October 2011 His Honour Judge Mackie QC, sitting as a High Court judge in the English Commercial Court, had granted a proprietorial freezing injunction against Mr Urumov alone for US$23 million.

96. A similar device was used on 9th December 2011. This date has significance, because on 7th December 2011, Burton J in the English Commercial Court granted a world-wide freezing order for over US$213 million against Mr Urumov, Denning, Dunant and Ms Balk. On 9th, Ms Balk transferred US$180,000 of the

fraud proceeds from her personal account at Jyske Bank to her father's account at Jyske Bank, whence it went to the Urumovs' joint account in England. Ms Balk and her father gave diametrically conflicting accounts of why these monies were transferred. Ms Balk told Jyske Bank that she was repaying monies to her father, but in her evidence to Eder J at trial she said it was a loan from her to her father.

97. By contrast Mr Balk told Giovanna Wright at Jyske Bank on 24th February 2012 that "he knew about his daughter's court order about the freezing of [her] account here with us and the investigation. He advised [Ms Wright] that it is difficult times for her and she needed some cash therefore he was helping her out and thus sending her funds." Subsequently on 28th February 2012, Iosif and Natalia Balk transferred £56,148 (the exchange value of €90,000) to the Urumovs' joint account with Coutts Bank in London.

The events of late 2011, 2012 and 2013

98. The various defendants to the English proceedings, and Mr Urumov and Ms Balk in particular, had been subject to world-wide freezing orders made on 6th October 2011, 21st October 2011, 7th December 2011 and 15th December 2011 made by various judges in the English Commercial Court. The first involvement of the Gibraltarian Court was on 9th February 2012. On that day Ramagge Prescott J made two orders. Firstly, she registered the English Orders of 7th December 2011 and 15th December 2011 as a judgment of this Court. Secondly, she granted *Norwich Pharmacal* relief against Jyske Bank. This required the bank within twenty-one days to produce all correspondence between the Urumovs and the bank from 1st January 2011 "relating to any account at the Bank in the name of [Mr Urumov] and/or [Ms Balk] or to which [Mr Urumov] and/or [Ms Balk] is or has been

signatory." Various other documents, such as bank statements and transfer instructions relating to such accounts, were also to be produced.

99. Jyske Bank did not reveal the existence of Vandry pursuant to that Order. Whether that failure was a breach of the *Norwich Pharmacal* order is not clear. Mr Balk gave some rights over Vandry's account to his daughter on 24th June 2009, but that may not be sufficient to constitute her a "signatory" on the account. Nothing, however, turns on this. What is important is that Otkritie and their advisors did not know Vandry existed at this stage.

100. On 29th May 2012 Mr Kotton transferred US$100,100 from his personal account with Jyske Bank to Iosif Balk's personal account at the same bank. The descriptions on the corresponding bank statements were simply "payment order" and "remittance order" respectively.

101. The following day Mr Kotton transferred the US$5 million, which is in dispute in this case, to Vandry's current account at Jyske Bank. The description on Mr Kotton's payment instruction and on his bank statement is "loan as agreed". On 7th June 2012 the money was put into a one month dollar deposit account. That left some US$7,800 in the current account.

102. From 26th June 2012, the Vandry current account was used for purchases at various shops. The purchases start in Nice (where Iosif and Natalia Balk had a house), continue in Paris and in July reach London. It is not possible to say from the bank statements who was making the purchases. It could have been Yulia Balk, but is more likely to have been Iosif and Natalia Balk. In the meantime, on 29th June 2012, Mr Kotton transferred a further US$100,000 from his personal account to Vandry's account. This transfer was merely described as "transfer Alexander Kotton". On

9th July 2012 US$23,678.80 was transferred from the Vandry account to Iosif and Natalia Balk. Subsequently on 10th July 2012, the US$5 million which had been placed on deposit was paid back into the current account with just over US$1,000 of interest.

103. On 23rd August 2012, Iosif and Natalia Balk attended Jyske Bank for a meeting with Giovanna Wright and a colleague of hers. Ms Wright's memorandum of the meeting says:

> "Iosif and Natalia came to the bank to meet with us to discuss their accounts... We updated ourselves as to their current lifestyle. They mention that due to Iosif's work they will be temporarily moving back to Moscow with the children as work is so demanding on his side. He wants to keep a close eye on his business. They still have the villa in France which they will visit on their family holidays. We spoke at length about investments as they wished to invest USD 4.9m. The suggestion of GDPM was agreed and accepted by them after we explained how it is invested. They wish to conserve their capital, which they do not need as they have other funds available to them, and wish to diversify from his usual projects, i.e. land developments in Moscow. We went thru IVT and they came out as stable to which they agreed to invest this strategy in GDPM. Required documents were signed. Then we went to T&T Mgmt who are the trustees for Iosif's trust. Vandry falls under the trust, although he is also a signatory. They were in agreement as to the GDPM and they have signed the portfolio management mandate. They will eventually close Vandry and transfer all to Mystical Journey, hence paperwork for GDPM and IVTs were also signed under that name."

104. Mystical Journey Inc was a company incorporated in Belize in 2006. Ms Duran at TTMS organised the incorporation on the instructions of Natalia Balk. TTMS provided the management and Ms Duran was the sole director. The shares were held by TTT on trust for Natalia Balk, who in turn held them on trust for Birch Key. Mr Kotton was nominated as the addressee for correspondence from TTMS in relation to the company.

105. On 10th September 2012 Mr Balk requested that Jyske Bank make a transfer of US$30,000 from his and Natalia Balk's joint account to the Urumovs' personal account at Coutts in London. The instruction was not carried out immediately. Jyske Bank, I infer, were worried about money-laundering issues. There was a face-to-face meeting on 19th September 2012 between four officers of Jyske Bank and Mr Balk. Jyske Bank's note of this meeting is surprisingly short, but Jyske Bank do seem to have satisfied themselves that Mr Balk's instructions were legitimate.

106. Instead of US$30,000, on 2nd October 2012 Jyske Bank transferred US$90,000 to the Urumovs' Coutts account.

107. The following day the Swiss prosecutor executed the search warrant against Dunant's safe deposit box. That revealed the existence of Vandry and, as the VTL material showed, its use for money-laundering by Ms Balk. The documents were passed to Otkritie's English solicitors at the end of October.

108. At this time Otkritie had an outstanding application in this Court dated 6th June 2012 for a further *Norwich Pharmacal* order. This sought from Jyske Bank, *inter alia*, details of all accounts over which Iosif Balk had signing rights. If this Court made that order, then the existence of Vandry would be revealed. However, at that stage, Otkritie argue, the Urumovs would have been able to say that Vandry was Mr Balk's company and would not have been unduly worried about Vandry's existence coming to Otkritie's notice. It was the VTL documentation which would for the first time show that Vandry had been used for money-laundering by Ms Balk.

109. The original hearing date for the *Norwich Pharmacal* application had been adjourned, but it was listed in front of Dudley CJ for 8th November 2012. Otkritie's English solicitors, then

Hogan Lovells, kept the Urumovs' English solicitors, Farrer & Co, informed of the hearing. So far as appears from the email chains the former did not inform the latter either about Vandry's existence now being known to the former or of the disclosure of the Dunant documents. However, it is likely that the Urumovs would have learnt of the execution of the warrant to search the Dunant safe deposit box around this time. The sealed Order of Dudley CJ, which provided for Jyske Bank to give disclosure in relation to Vandry was only sent to Farrer & Co on 27th November 2012. Farrer & Co had, however, on 14th November 2012 asked Hogan Lovells whether this Court had made a further *Norwich Pharmacal* order and were told that it had.

110. In the meantime, on 12th November 2012, Mr Kotton sent an email to Ms Duran asking her to prepare a loan agreement between himself and Vandry for the US$5 million transferred on 30th May 2012. The loan agreement as drafted recited the making of the loan on 30th May 2012 and provided for repayment (without interest) on one month's notice. Mr Kotton sent a copy of the agreement (purportedly dated 15th November 2012) signed by him to Ms Duran on 21st November 2012. It was then signed by Mr Lundin on Vandry's behalf on 6th December 2012. That is also the likely date of a meeting of the board of directors of Vandry, which supposedly occurred on 15th November 2012, because that is the only day on which Mr Lundin, the only director, was in Gibraltar. The minutes of the board meeting say that Vandry "had requested Mr Alexander Kotton on the 30th May 2012 for a loan for the sum of US$5,000,000 for the purposes of investing into a Portfolio."

111. On 10th December 2012, Mr Kotton asked Ms Duran to give a copy of the loan agreement to Jyske Bank. The same day he made a formal request for repayment of the US$5 million. On 18th January 2013 he asked Ms Duran to have the money paid to Ivory Key, but she replied that James Ramagge suggested "that it might

be more appropriate if the funds were transfer[red] from Vandry to your personal account and then to Ivory Key as this would clarify the transaction."

112. On 21st January 2013, Ms Duran and another TTMS signatory on the account instructed Ms Wright at Jyske Bank to transfer US$4,9 million to Mr Kotton's personal account with the bank. The same day there was a purported meeting of the board of Vandry at which Mr Lundin resolved that the US$4.9 million be repaid to Mr Kotton and that "the balance of US$100,000 be repaid as soon as possible."

113. In fact, on 28th January 2013 Jyske Bank transferred the GDPM portfolio valued at US$4,998,547.62 and made a balancing payment (mathematically slightly incorrect) of US$12,962.80 to Ivory Key's account at the same bank. There was no transfer through Mr Kotton's personal account.

Witnesses not called

114. Mr Pillow criticised Ivory Key's case for only calling one witness, Mr Kotton. He identified five potential witnesses who could have been called on Ivory Key's behalf: Yulia Balk, Iosif Balk, Rosanna Duran, Alexander Lundin and Mr Lundberg.

115. Dealing with these in turn, it cannot in my judgment sensibly be suggested that Ivory Key should call Ms Balk. Ivory Key would need to present her as a witness of truth. In the light of her involvement in fraud and money-laundering, that would be preposterous. If I reached the same conclusions as Eder J as to her credibility (which must be quite probable), this would inevitably damage Ivory Key's case overall.

116. Whilst Mr Balk could certainly give useful information, it is unlikely in my view that he would cooperate in giving evidence. Effectively he would inevitably be asked to give evidence damning of his own daughter. Moreover his own involvement in her money-laundering would equally inevitably come under the spot-light in a manner likely to be highly discomforting to him. He might have had to be reminded of his privilege against self-incrimination. As Mr Kotton said, the freezing of the US$5 million inevitably poisoned their relationship.

117. As to Ms Duran, in my judgment of 15th September 2015, I concluded that she had been "deliberately attempting to mislead the Court." It is hardly surprising that Ivory Key did not want to call her as a witness of truth. Further, if Ms Duran did give evidence, she would inevitably be asked about Mr Balk, to whom she owed duties of confidentiality. Likewise questions as to other trusts and other clients (such as Mr Rubiner) might well be posed. If she voluntarily gave evidence about other clients, that would potentially effect the business of TTMS, which is built on confidentiality. It is likely that, even if she is still employed at TTMS, Ms Duran would be an unwilling witness.

118. As to Mr Lundin, this issue of conflict of interest arises too. Mr Lundin was not a director of Ivory Key, but he was of others of Mr Kotton's companies, including Knightsbridge, Perth, Solaria and Henbury. Mr Kotton explained Mr Lundin's rôle in his companies as follows (transcript, day 2, page 86 line 27ff):

> "He is not a front man, he is a director. Let me explain why: I use directors in Cyprus, I use directors in BVI, I use directors in Gibraltar, I use directors in Spain. The reason why I use Mr Lundin in some cases is very simple: Since I have an active business in Russia where I construct many thousands of apartments and objects, I need sometimes a director who can travel, sign and represent. I cannot ask Rosanna Duran with no knowledge of Russian, with no transportation ability to be that. Therefore, I have Mr Lundin. He performs an excellent

> service and has done so for many, many years. He has never done anything that compromises me.

119. Importantly, however, he also performed the same services for other Russian clients, not just Mr Balk and Vandry. Mr Kotton understood the need for Mr Lundin to compartmentalise his work for different clients. At day 3, page 79, line 26ff he said:

> "Mr Lundin works for me, he works for Mr Balk, he works for a couple of other people, okay, and he is very, very professional in that case not to discuss what he does in other people's companies and I am professional enough not to ask him."

That evidence in my judgment is believable. If Mr Lundin gave evidence for Mr Kotton, he could expect to have to answer questions about about Mr Balk and quite possibly other clients. That would be likely to result in his becoming unemployable, because his discretion in the preserving of his different clients' secrets is his core duty and his unique selling point.

120. This point also applies to Mr Lundberg.

121. Further in relation to Mr Lundin, he was a director whilst Ms Balk was laundering money through Vandry. He is likely to have had at least some knowledge of that. I would probably have had to give him a warning against self-incrimination. For these reasons too, Mr Lundin is likely to have been a reluctant witness.

122. Accordingly, I do not consider that any inferences should be drawn against Ivory Key under proposition (4) of the *Wiszniewski* guidance set out above. For completeness, I shall examine proposition (3) of *Wiszniewski* but on individual points as they arise.

Mr Kotton's swearing affidavits but affirming at trial

123. Mr Pillow in cross-examination (see transcript, day 4, page 93, line 10) and in closing submitted that Mr Kotton did not take the oath seriously. He pointed out that Mr Kotton had earlier in the proceedings sworn affidavits.

124. Now it is quite true that Mr Kotton when giving evidence to me affirmed before giving his evidence rather than taking the oath. However, that was entirely his right. He gave an explanation (transcript, day 3, page 59, line 4ff):

> Q You see, Mr Kotton, I am suggesting you are a man who does not take an oath seriously, aren't you?
> A I take an oath very seriously, much more seriously than you think because I... well, it doesn't matter.
> MR JUSTICE JACK: What holy book did you take your oath on?
> A Well, by origin I am Jewish. However, I am not, what do you call it, religious, therefore I don't take usually oaths on the Jewish Bible. My former wife was not Jewish, my children are half-half, they are Christian. So, I actually believe that religion is up to every person for himself.
> MR JUSTICE JACK: Yes, but what holy book do you swear on? The Christian Bible or the Jewish Bible?
> A I actually swear on whatever is available. I don't discriminate on any of those.

125. That is probably a view which a significant number of witnesses take, when they take the oath. I do not consider that an investigation of Mr Kotton's theological standpoint on oaths is in any way relevant to my assessment of him as a witness. I am satisfied that he considered that his conscience was bound both by the oaths he took when swearing his affidavits and in his evidence to me given on affirmation.

126. Of much greater importance is my assessment of the substantive points made by Mr Pillow and it is to these I shall turn.

Mr Pillow and Mr Dudnikov produced a forty-five page document with transcript references. It is obviously unmanageable to refer to all the references but I shall refer to the most important ones, whilst of course bearing the other references in mind.

The Profsoyuznaya land

127. Mr Kotton's evidence was that the Profsoyuznaya land was to be developed by a Russian joint stock company called OOO Mechta ("Mechta"). Mr Balk was offering Mr Kotton a 20 per cent interest in the project in return for a US$5 million investment. Mr Balk said he needed the money urgently so as to get the project going. However, by 30th May 2012, when Mr Kotton transferred the money to Vandry, Mr Balk and Mr Kotton had not agreed the terms on which he would invest in the Profsoyuznaya land project: that would only occur later. His interest in the project might be by taking shares in Mechta, or by taking physical possession of 20 per cent of the flats. It was agreed that Mr Kotton would have an option to treat the US$5 million as a loan, if they did not agree terms for the investment.

128. Mr Kotton explained what occurred leading up to the making of the loan agreement in November/December 2013 as follows (transcript, day 3, page 92, line 9ff):

> "The chronological effect of this is very -- I make a lot of money in May, okay. June, July and August is for me vacation months that I spend with my children. I spend them in Spain, in Norway, in Sardinia, in Sweden. For me, it is holy months. I am extremely happy after making a lot of money and I actually during these months didn't care anything about. I have worked with Mr Balk, I know that he does his job; okay. It was not until September that I talked to him and started to hear claims about garages that was not broken and it was tough but it would soon be ready and all these things. As soon as I heard that, I started to be very, very, very suspicious about this thing because I know what litigation in Russia means, okay."

129. That there was a genuine problem with the garages is shown by a letter of 28th April 2015 from a Moscow lawyer called Stepanenko (admitted without objection: see transcript, day 3, page 115, line 8ff). Some of the judgments of the Moscow court dealing with the individual possession actions against the squatters in the garages were also adduced in evidence. The litigation commenced in August 2012 and was only resolved the following year. As a result of the problem with squatters, Mr Kotton says he decided to have nothing further to do with the Profsoyuznaya project and wanted to convert the US$5 million advanced to Vandry into a formalised loan.

130. Mr Calver submits that what Mr Kotton says is a consistent story. In the light of his relationship with Mr Balk, he was prepared to advance monies in an informal manner on the basis that the precise terms of any agreement would be negotiated later.

131. Mr Pillow attacked various aspects of Mr Kotton's evidence on the Profsoyuznaya land. Firstly, he submits that it is "[i]ncredible that Mr Balk would require loans from Mr Kotton." Now it is common ground that Mr Balk was indeed a very wealthy man. However, that does not mean that Mr Balk would not want to have partners in his real estate projects. The very wealthy, just like the more modestly prosperous, seek to reduce their risks by sharing the risks with others.

132. Secondly, he submitted that it was incredible that Mr Kotton would advance monies to Mr Balk without knowing who the other partners in the Profsoyuznaya project would be. Yet, Mr Calver submitted, if the terms on any investment in the project were only to be agreed later and Mr Kotton's money was in the meantime safe, there is no inconsistency.

133. Thirdly, he queried Mr Kotton's belief that the site was empty, when in fact there were illegally-constructed garages. There is, however, nothing to contradict Mr Kotton's statement that he checked the site on Google and believed it was ready for development.

134. Fourthly, he pointed to a discrepancy. In answer to a request for further information served by Otkritie, Mr Kotton on Ivory Key's behalf said in reply to request 12.1 that the project was for "office block and commercial units of 10,000 square metres." In cross-examination, there was this exchange (transcript, day 3, page 88, line 18ff):

> Q Did he give you the approximate square meterage, square footage of the finished job?
> A The discussion of the project was in two ways: He said that it will be, he said a very exact number. I don't know why he said that, I didn't reflect over that. He said 18,050 square metres, but he told me out of those square metres, whatever they will become, I will get 20 per cent but minimum 2,500 leasable.
> Q Your evidence is that you, sitting there today, remember Mr Balk telling you that this development would be an 18,050 square metre development, do you?
> A I remember because it was such a funny number.
> Q A funny number?
> A He didn't say 18,000 or approximately 15,000, he said it will up to 18,050 square metres, I don't know why he said that. But that is quite uninteresting for I made my calculations on other numbers, I made it on the 2,500 minimum square metres that he said would be available to me if it was ready, but I made also the calculation on another view.

135. Mr Pillow submitted that this detail of "18,050 square metres" was an invention, intended by Mr Kotton to add verisimilitude to his otherwise bald narrative. Whether Mr Pillow is right on this will depend on my overall assessment of Mr Kotton's evidence, however, from what Mr Kotton is saying in this passage, it is more likely (assuming he is giving truthful evidence) to be the 10,000 square metre figure in the Further Information which is wrong. If

the 20 per cent he was going to get is 2,500 square metres minimum, then the total net area would be a minimum of 12,500 square metres. That is more consistent with an 18,050 square metre gross area.

Misleading the Court

136. The next matter on which Mr Pillow relied was the way that the Court had, as I found in my judgment of 15th September 2015, been misled by Ms Duran's assertion that Mr Kotton was not a beneficiary of the Ivory Key Trust. Mr Kotton had repeated that assertion in his second affidavit of 12th December 2013. At trial he was asked about that (transcript, day 3, page 58, line 32ff):

> Q At this stage is it your evidence to the court that you simply forgot that at the beginning of 2009 you had become a free man?
> A No. At this stage it was made by automatic. I am sorry but I looked at it, I didn't even reflect on it.
> Q Did you read any other parts of the statement before you signed it?
> A Yes, yes.
> Q Which bits did you read and which bits didn't you read?
> A I did read all the bits but the question of who the beneficiaries are, I admit that I looked at it, I didn't reflect because I was assuming this was the correct thing.

137. He had earlier made the same assertion in his first affidavit of 3rd June 2013. This affidavit was sworn four days after TTT had given a formal confirmation to the Cypriot trusts and company management company Mr Kotton used. The confirmation said that Mr Kotton was indeed a beneficiary in common with his children. The confirmation was, however, signed by Mr Joseph Triay and Mr Robert Vasquez QC, neither of whom appear to have had conduct of the litigation with Otkritie. Mr Kotton said that the confirmation may have been given without knowledge of it on his part. There is no evidence to gainsay that.

138. I will in due course consider whether Mr Kotton was deliberately lying about whether he was a beneficiary of the Ivory Key Trust, or whether he simply signed affidavits drafted by his lawyers, trusting them to have checked the position.

Other inconsistencies

139. There are a number of other inconsistencies relied on by Mr Pillow. For example, in evidence to me, Mr Kotton said that the payment of US$100,100 to Vandry on 29th May 2012 was in return for Mr Balk paying roubles to Mr Kotton's office in Moscow, whereas in the Reply to Otkritie's Request for Further Information, the rouble exchange is said to be in respect of the US$100,000 payment on 29th June 2012.

140. In my judgment, these inconsistences are minor. Indeed, there are comparatively few identified by Mr Pillow. Given that Mr Kotton was in the witness box for two and a half days, it would be suspicious if there were not the odd inconsistency on subsidiary matters which occurred years before. Mr Pillow's points about Mr Kotton's recollection of what occurred back in 2002 when the Birch Key Trust was set up for Mr Balk are an example. It would require super-human feats of memory for Mr Kotton to recall every detail of what occurred back then.

Assessment of Mr Kotton's evidence

141. I turn then to my assessment of Mr Kotton's evidence. I had the advantage of seeing him in the witness box for two and a half days. The transcript of his evidence is of high quality, but there has been a little smoothing of some of the grammatical infelicities committed by Mr Kotton. For example, Mr Kotton thought the

adjective of "Cyprus" was "Cypriotic", whereas the transcript corrects his English to "Cypriot".

142. Whilst Mr Kotton's English was of a high standard, it was not perfect and the ability to see his manner of giving evidence was very useful. One example is a passage relied on by Mr Pillow in his closing list of transcript references (transcript, day 2, page 99, line 18ff):

> Q. …What the order required you to do as a matter of substance, you will see you say in paragraph 2 that you were required 'to state with precision all the locations where you keep your private records and when they were searched.' Do you see that?
> A. Yes.
> Q. Did you comply with that order?
> A. I did.
> Q. You didn't, did you?
> A. I did.
> Q. Where do you mention your memory stick with your private records on in this affidavit or this witness statement?
> A. I don't.
> Q. You did not comply with the order, did you?
> A. I checked the memory stick.
> Q. No, Mr Kotton, I am not asking you whether you checked it, I am asking you where in this document you stated with precision that you kept your private records on a memory stick?
> A. I didn't state it.
> Q. Do you accept that you disobeyed the court order in that respect?
> A. If you say so.
> Q. In that respect this affidavit, this witness statement, is misleading, isn't it?
> A. If you say so.
> Q. You are then asked not just to state the location where your private records were kept but when they were searched. Do you in this witness statement say whether you served the memory stick and when you did so?
> A. No, I don't.
> Q. So, you disobeyed the court order in that respect too, didn't you?
> A. Obviously.

143. On its face, these exchanges might be interpreted as a slippery witness giving slippery answers. However, that was not the impression I got. His demeanour suggested that he was learning that he had made a mistake in not revealing the memory stick and failing to state what searches he had made on it. His final answer "obviously" in my judgment was really an expression of contrition.

144. Mr Kotton in my judgment gave his evidence in an honest and credible manner. That is not conclusive as to whether he was a truthful witness and it to that question that I next turn.

Discussion and determination of the facts

145. Mr Calver's central criticism of Otkritie's case was that it all depended on suspicion. The actual hard facts on which Otkritie could rely as against his client were, he submitted, very few.

146. There are in my judgment indeed many suspicious features in this case. Vandry was used in the period 2006 to 2009 for money-laundering activities by Ms Balk. Mr Kotton's transfer of US$5 million to Vandry was made at a time when the Urumovs were subject to draconian freezing orders. Iosif Balk seems to have assisted his daughter by laundering the proceeds of the frauds against Otkritie (albeit not through Vandry). The absence of proper documentation as of May 2012 for such a large advance could potentially also be treated as suspicious.

147. The hard facts on which Otkritie can rely to prove its case against Mr Kotton are much more limited. Firstly, there is the fact that the loan agreement dated 15th November 2012 came into existence at the precise moment the Urumovs realised the English Court was going to learn of Vandry and of its use by Ms Balk to launder money. Secondly, there is then the making of formal

demands for repayment of the US$5 million, which seems scarcely necessary. Thirdly, there is the absence of documentation passing between Mr Balk and Mr Kotton showing any of the initial discussions about the Profsoyuznaya land project or Mr Kotton's subsequent withdrawal from it. Fourthly, there is the destruction of the wilsonsweden.com server and the other deficiencies in the disclosure.

148. Against this, there is no evidence that Mr Kotton ever met Mr Urumov, or that he had had any contact with Ms Balk since 2008. Nor is there any evidence that Mr Kotton received any monies from any earlier frauds committed by the Urumovs (assuming there were some). That is a pretty unpromising starting point for Otkritie to show that Mr Kotton was laundering money for the Urumovs.

149. By contrast, Mr Kotton gives a coherent narrative as to how he came to advance monies to Vandry. There is nothing inherently unbelievable about two extremely wealthy men, Mr Balk and Mr Kotton, who had been friends for many years, dealing with their affairs in an informal manner, as occurred (on Mr Kotton's case) in May 2012. Nor is there anything inherently unbelievable about Mr Balk and Mr Kotton intending to sort out later the precise details of the mechanics of any investment (for example, whether the investment would be taken in shares or physical flats, and who the other investors would be).

150. Mr Pillow suggested that the Profsoyuznaya land story was concocted later, when Mr Kotton and Mr Balk needed a cover to explain the US$5 million. However, that project did exist. There was a genuine problem of squatters. Mr Kotton's explanation for wanting to withdraw from the project is a rational one.

151. Admittedly the deficiencies in Ivory Key's disclosure mean that I need to consider whether an inference can be drawn about what transpired in May 2012. However, there is no basis in my judgment for drawing an inference that there would be an email showing Mr Balk expressly asking Mr Kotton to launder money for his daughter and her husband. Still less could an inference be drawn that there was correspondence between Yulia Balk and Mr Kotton which has been suppressed.

152. It is a valid point that Mr Balk put most of the US$5 million into the GDMP rather than transfer it to Moscow for use in the Profsoyuznaya land project. However, if Mr Balk was bringing Mr Kotton into the project so that he (Mr Balk) was not excessively exposed to one single project, then the strength of the point is much reduced. Moreover there is no evidence that Mr Kotton knew that Mr Balk was going to make that investment. Indeed he says in his witness statement that he was "quite annoyed" when he learnt this in December 2012.

153. Another point in favour of Otkritie is that Mr Balk was said to want the money urgently in May 2012. Again there is in my judgment some validity to this point, but property developers often like to say that they are in a great hurry, even if they are not, and claim that they need to be able to act quickly to take advantage of unmissable opportunities.

154. Mr Pillow's strongest point by a long way is the astonishing coincidence (if it be coincidence) in the date of the 15th November 2012 loan agreement. However, coincidences do happen.

155. Balancing these considerations, in my judgment Otkritie have not proved their case on balance of probabilities. The absence of evidence to show Mr Kotton ever receiving proceeds of earlier frauds or other financial misconduct is important. His good

character makes him less likely to involve himself in money-laundering. He gives a coherent explanation for what occurred. These points and the others which I have set out above in my judgment outweigh the points made on Otkritie's behalf, outweighing even the 15th November 2012 point.

156. My conclusion is reinforced by the oral evidence of Mr Kotton himself. In relation to the two misleading affidavits, I cannot exclude Mr Kotton simply swearing the drafts his lawyers gave him. The appointment of Mr Kotton as a beneficiary of the Ivory Key Trust was some years prior to his making the affidavits, so he may have forgotten the details. He was entitled to rely on his lawyers (who were after all running the trust) to get the beneficiaries right. In relation to the destruction of the server and the inadequacies of the disclosure, these also tell against him, but not sufficiently for me to reject his evidence. In my judgment Mr Kotton was a witness of truth.

Lucas *direction*

157. Even if I were wrong in my assessment of Mr Kotton's evidence and found that Mr Kotton had been lying, both leading counsel agreed that I would need to give myself a *Lucas* direction (see *R v Lucas* [1981] QB 720). These are of course usually given in criminal trials in the instructions to jurors, but (subject to the different burden of proof) apply equally to civil trials. I therefore direct myself as follows.

158. Before I can use a lie to prove the contrary, I must be satisfied on balance of probability of the following. Firstly, the lie must be proved or admitted. Secondly, the lie must be deliberate and must not have arisen through confusion or mistake. Thirdly, it must not be told for a reason unconnected with the witness's liability (for example, through fear the truth would not be believed, to protect

another, or for some reason advanced on behalf of the witness). If I am satisfied all three elements are made out, then I *may* use the lie as some support for the other side's case. A warning often given to juries is that witnesses sometimes seek to bolster a truthful case by telling stupid lies. I give myself the same warning.

159. Of course in the light of my conclusion as to Mr Kotton's veracity, neither the first nor the second element is established, because there were no lies. However, assuming that Mr Kotton was lying deliberately, the third element is still a problem for Otkritie's case. The only definite lie, which Otkritie could in my judgment hope to establish to satisfy the first limb of *Lucas*, would be Mr Kotton's assertion that the making of the 15th November 2012 loan agreement was unconnected with the disclosure of the VLT material and the inevitable extension of the freezing order to cover the US$5 million in Vandry.

160. Assuming that that was a lie, one view of the evidence is this. Ms Balk had (ab)used Vandry for money-laundering purposes in 2006 to 2009, but that had then ceased. Mr Balk and his wife retook possession of Vandry for legitimate purposes. This is shown by Jyske Bank's contemporaneous note of 23rd August 2012 showing their intention to transfer Vandry's assets to Mystical Journey, which, so far as appears, was Natalia Balk's company and had nothing to do with Yulia Balk, beyond her being one of the beneficiaries of the Birch Key Trust. (Her interest in the Birch Key Trust in any event ended on 26th February 2013, when an appointment in favour of Iosif Balk absolutely was made.)

161. Mr Balk sought the US$5 million investment from Mr Kotton for the Profsoyuznaya land project and it was transferred on the basis of the informal arrangement to which Mr Kotton deposed in

evidence. In November 2012, however, Mr Balk had a big problem. Otkritie had discovered the VTL materials. They were inevitably going to try and seize the US$5 million in Vandry's account. Mr Balk was going to be in a difficult position defending a case brought by Otkritie against Vandry, because he had indeed facilitated his daughter's money-laundering, both earlier, when she used Vandry for that purpose, and later, when she sought to launder the proceedings of the Otkritie frauds by round-tripping monies through his personal account. A court might be unwilling to accept his evidence that the US$5 million was completely unrelated to money-laundering.

162. Since he would still owe Mr Kotton the money (either by way of direct repayment or by way of investment in the Profsoyuznaya land), he was potentially out of pocket for US$5 million. He therefore needed to get the US$5 million out of Vandry as soon as possible. That is why he prevailed on his old friend, Mr Kotton, to execute the 15th November 2012 loan agreement. The lie, on this basis, would be Mr Kotton's assertion that he knew nothing about the freezing orders against Mr Urumov and Ms Balk at the time and that the execution of the loan agreement was wholly unrelated to the events in London. However, that lie would not be evidence to show that the US$5 million in Ivory Key was held on some resulting or other trust for the Urumovs.

163. In so far as I need to, I find as a fact that Ms Balk did not have control of Vandry in 2012 and 2013. As the passage cited from *Prest* shows, her use of Vandry between 2006 and 2009 would be a case of concealment, designed to hide "the real actors". The laundered money was in truth hers or hers and her husband's. (There is no need to apply the evasion principle, which Lord Sumption indicates is the exception.) An analysis of each separate transaction is therefore necessary. It cannot be assumed that the transactions in 2012 and 2013 are tainted in the way the 2006 to

2009 transactions were. In my judgment the 23rd August 2012 memorandum and the intention to move monies to Mystical Journey show that Mr Balk and his wife were in control of Vandry at that time. There is no evidence Mr Balk was acting as his daughter's cypher in 2012 and 2013.

164. The scenario outlined is in my judgment more plausible than Otkritie's case that Mr Kotton was transferring tainted monies for the benefit of Mr Urumov and Ms Balk. On the version which I find more convincing, it would be Iosif Balk who was trying to save his skin. Accordingly the third limb of *Lucas* would not have been made out. It would have been a stupid lie told by Mr Kotton to bolster his case.

Shams

165. Since by 2012 and 2013 Vandry was no longer a vehicle controlled by Ms Balk, it is not necessary to consider whether during that period the Birch Key Trust was a sham or Vandry a façade, in either of the two senses defined in *Prest*. Whether they were or not, they were not in 2012 or 2013 a sham or a façade for the benefit of Yulia Balk, still less for the benefit of Mr Urumov.

166. The precise extent to which a judgment creditor can execute against assets held on genuine discretionary trusts or genuine company arrangements where the trustees or directors habitually act on the instructions of a particular beneficiary is a difficult and developing area of law: see *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm) at [39] and [45] and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 at [26]. However, since in 2012 and 2013 the Birch Key Trust and Vandry were not under the control of Ms Balk, it is not necessary to consider this further.

167. Moreover, since I have found that the loan by Mr Kotton to Vandry was genuine and that there was no resulting or other trust of the US$5 million in favour of Ms Balk or Ms Balk and her husband, even a determination favourable to Otkritie of the issues canvassed in the previous two paragraphs would be irrelevant to the outcome in this matter.

Conclusion

168. Accordingly, I find that the transfer of assets and cash to the value of US$5 million by Vandry to Ivory Key was the genuine repayment of monies advanced by Mr Kotton to Vandry. There is no resulting or other trust in favour of Mr Urumov or Ms Balk. Otkritie's claim fails.

169. I will hear counsel on the consequential orders which I should make.

Adrian Jack
Puisne Judge

9th June 2016