Neutral Citation Number: [2022] EWHC 2499 (Ch)

Case No: HC-2012-000165

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10/10/2022

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

(1) BANK ST PETERSBURG OJSC
(2) ALEXANDER SAVELYEV — **Claimants**

- and –

(1) VITALY ARKHANGELSKY
(2) JULIA ARKHANGELSKAYA — **Defendants/ Counterclaimants**

-and-

OSLO MARINE GROUP PORTS LLC — **Additional Party/ Counterclaimant**

Tim Lord KC, Richard Eschwege and Aarushi Sahore (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
Pavel Stroilov appearing as a McKenzie Friend for the **Defendants/Counterclaimants**

Hearing dates 3, 7, 8, 9, 10 and 11 February 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE TROWER

Remote hand-down

This judgment was handed down remotely at 10.30 am on 10 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

Mr Justice Trower:

Introduction

1. On 9 May 2018, after a trial that had lasted for 46 sitting days, Hildyard J entered judgment against the first defendant, Dr Vitaly Arkhangelsky, and ordered him to pay the first claimant, Bank St Petersburg PJSC (the "Bank"), sums totalling RUB 1,798,947,619.33 being the debt held to be due (with interest then accrued) as at 26 March 2018. The liability arose under (a) six agreements (the "Personal Guarantees") pursuant to which Dr Arkhangelsky had guaranteed certain liabilities of Vyborg Sudokhodnaya Kompania ("Vyborg Shipping"), Lesopromyshlennaya Kompaniya Scandanavia LLC ("LPK Scan") and Onega LLC ("Onega") to the Bank and (b) a personal loan agreement dated 28 November 2008. At the exchange rate then prevailing (RUB 1 = c.£0.012), the sterling equivalent of the judgment debt amounted to approximately £21.5 million.

2. By the same order, Hildyard J dismissed the counterclaims made by Dr Arkhangelsky, his wife the second defendant (Mrs Julia Arkhangelskaya) and a company owned and controlled by them, Oslo Marine Group Ports LLC ("OMGP"), which had been joined to the proceedings as an additional party (together the "counterclaimants"). The defendants to the counterclaim were the Bank and its chairman, Mr Alexander Savelyev, who was also the second claimant in the action.

3. The counterclaims had sought relief for unlawful harm pursuant to article 1064 of the Russian Civil Code ("article 1064"). The essence of the harm alleged was a dishonest conspiracy to steal or seize by unlawful means two of the counterclaimants' businesses in Russia: Zapadny Terminal LLC ("Western Terminal LLC") and Strakhovoye Obschestvo Skandinavia LLC, anglicised as Scandanavia Insurance Company LLC ("Scan"). It was said that what occurred was not a legitimate enforcement by the Bank for the purpose of recovering amounts that had been lent to companies controlled by Dr Arkhangelsky; rather it was a classic 'raid', in a form that was said to be well-known in Russia, designed to misappropriate the Arkhangelskys' valuable assets for the benefit of the Bank and its associates.

4. The main assets with which the counterclaims were concerned were a number of pieces of real property in the Big Port of St Petersburg ("BPSP"), most but not all of which were mortgaged to the Bank as security for loans made to various members of the OMG group of companies ("OMG") controlled by Dr Arkhangelsky, the two material members of which were Oslo Marine Group LLC, aka Group Oslo Marine LLC ("GOM"), and OMGP:

    i) An 8.1 hectare site known as the Western Terminal, 6 Litera A, Korabelnaya Street, St Petersburg ("Western Terminal") owned by Western Terminal LLC. This comprised a plot of land of 73,399 sq m and two berths, SV-15 which handled mostly timber exports, and SV-16M (the latter of which was not pledged).

ii) A number of blocks of land and buildings at Onega Terminal, 14 Elevatornaya Ploschadka, Ugolnaya Gavan, St Petersburg ("Onega Terminal") owned by Scan. The Onega Terminal also included two separate plots at 2 Elevatornaya Ploschadka, which were owned by LPK Scan.

5. Western Terminal LLC, Scan and Dr and Mrs Arkhangelskaya also owned a number of other properties outside BPSP which were the subject matter of the counterclaimants' claim. They were located in and around St Petersburg at Sestroretsk, 22 Pravdy Street, 8a Kharkovskaya Street, Seleznyovo and Tsvelodubovo.

6. The claimants had also sought certain negative declarations. These negative declarations were the obverse to the declarations sought by the counterclaimants. They were to the effect that the claimants were not party to a conspiracy or scheme intended to seize ownership and control of Western Terminal LLC and Scan without paying full and proper consideration and that the claimants had not committed the equivalents of the torts of deceit, intimidation and/or conspiracy to commit such torts under article 1064. They also sought declarations that the claimants had not acted in breach of a number of other articles of the Russian Civil Code and that the counterclaimants' allegations that they had were made dishonestly, knowing the same to be false and/or recklessly not caring whether they were true or false.

7. I shall have to consider the events that formed the basis of the allegations made in the counterclaim later in this judgment, but it was at the core of the counterclaimants' case that Western Terminal and Onega Terminal ended up in the hands of companies in the Renord-Invest group, which they alleged to be controlled and owned by Mr Savelyev and/or the Bank and their associates. It was said that the raid by which it was engineered and implemented was carried out by the Bank in conjunction with its associates and with the assistance of corrupt public officials, and to have been achieved through a series of transactions and events including:

i) the entry into of a series of repurchase or 'repo' agreements arranged by the Bank pursuant to which certain entities in the Renord-Invest group (the "Original Purchasers") acquired the shares in Western Terminal LLC and Scan from OMGP and GOM;

ii) a transfer of their Scan shares by the Original Purchasers to a number of other companies associated with the Renord-Invest group (the "Subsequent Purchasers");

iii) a refusal by the Bank to extend the loans followed by the occurrence of events of default for non payment;

iv) the removal of Dr Arkhangelsky as director-general of Scan and Mr Denis Vinarsky as director-general of Western Terminal LLC followed by the physical seizure of Western Terminal with the assistance of organs of the state in the form of the St Petersburg riot police;

v) the pursuit by the Bank of criminal and civil proceedings against Dr Arkhangelsky arising out of the circumstances in which Western Terminal LLC became indebted to another lender, Morskoy Bank; and

vi) the realisation by the Bank of its security by the auction of certain real property, including in particular the Onega Terminal and the Western Terminal on various dates between 2009 and 2012.

8. Hildyard J's reasons for making the order that he did are explained in a lengthy 390 page judgment handed down on 9 May 2018 (*Bank St Petersburg PJSC and another v Vitaly Arkhangelsky and others* [2018] EWHC 1077 (Ch)). Although he entered judgment on the claims and dismissed the counterclaims, Hildyard J refused to grant the negative declarations sought by the claimants and said the following:

> "1633. The fact that I have found that the Counterclaimants have not established the very serious allegations they put forward does not mean that I have rejected the claims as being a fiction dishonestly contrived: only that the claims have not been established having regard to the strength of the evidence that was necessary to discharge the burden of proof.
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> 1634. Indeed, in considering whether to grant the declarations sought, I think it is relevant that I have, throughout the case, before, during and after the hearing, harboured a nagging and discomfiting feeling that the evidence by which alone the case is to be decided may not have revealed the whole truth; and that the very different conditions in Russia may mean that what seems improbable, or at least not probable, looked at through the lens of a different jurisdiction accustomed to different conditions, may yet have occurred …
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> 1635. … I have misgivings such that I would not wish to elevate my findings into declarations which might be perceived to go beyond findings and conclusions on the balance of probabilities, on the basis of the available evidence, having regard to the burden of proof. Still less would I be inclined to make some declaration that the Counterclaimants were dishonest in pursuing their counterclaims."

9. There was no appeal against that part of Hildyard J's order which dealt with the Bank's claim in debt against Dr Arkhangelsky, nor was there any appeal against his refusal to grant the negative declarations sought by the claimants. There was, however, an appeal by the counterclaimants against the dismissal of the counterclaims.

10. On 18 March 2020, the Court of Appeal (Sir Geoffrey Vos C, Patten LJ and Males LJ) allowed the counterclaimants' appeal (*Bank of St Petersburg PJSC and another v Arkhangelsky and others* [2020] EWCA Civ 408, [2020] 4 WLR 55). It ordered that the counterclaim be remitted to the Chancery Division for the purpose of a re-trial to determine the issue of whether or not the claimants are liable under article 1064 for the dishonest conspiracy alleged by the counterclaimants and any harm or losses recoverable thereunder. At the conclusion of his judgment, with which the other members of the panel agreed, the Chancellor summarised his reasons for doing so as follows (at [106]):

> "For the reasons I have given, I would allow the appeal on the grounds that the judge applied too high a standard of proof, created inconsistencies within his decision, and failed adequately to stand back from his sequence of factual findings so as to consider them as a whole. Those conclusions, in my judgment, render the judge's ultimate conclusion that there was no actionable dishonest conspiracy by the respondents to cause the appellants harm under article 1064, unsafe."

11. However, the Court of Appeal also made clear that many of the conclusions reached by Hildyard J in what the Chancellor recognised as a "hugely difficult case" were safe, and recorded that none of the parties had suggested that many of his findings of primary fact should be revisited. It therefore directed that the re-trial be conducted in the light of its findings as to the standard of proof, the unchallenged findings of primary fact made by Hildyard J in his judgment and the matters identified in the Chancellor's judgment, and in particular those identified in [69] and [76] which identified the evaluations, inferences and findings that were upheld and those that required reconsideration.

12. The reference to [69] and [76] of the Chancellor's judgment was a reference to his description of the 16 findings of primary fact made by Hildyard J, as summarised by the Chancellor in [16] of his judgment. Those were Hildyard J's factual conclusions on what he had called (see [901] of his judgment) "the Counterclaimants' contentions as to the factual elements of their claim". In [69] the Chancellor identified, by reference to what he called the 16 silos, whether Hildyard J's conclusions were safe or whether they required reconsideration, whether in their entirety or only as to the inferences which he drew from the findings of primary fact which were to remain undisturbed.

13. The Court of Appeal's order also reflected those parts of [99] to [105] of the Chancellor's judgment, in which he summarised (a) the matters in respect of which Hildyard J's findings could stand in their entirety, (b) those matters in respect of which his findings of primary fact could stand although their evaluation and the inferences to be drawn from them required reconsideration and (c) those matters in respect of which both findings of primary fact and inferences had been thrown into doubt. These latter findings all related to the auction sales of the pledged assets, the valuation of those assets and the claimants' motives for acquiring the pledged assets. There was also a discreet but linked question on the issue of whether or not Hildyard J was correct to conclude that Baltic Fuel Company ("Baltic Fuel"), a purchaser of some of the assets at the auctions, was owned or controlled either by the Bank or Mr Savelyev. They also extended to the resulting question of whether the counterclaimants sustained any harm as a result of the Bank's conduct.

14. The Court of Appeal explicitly stated that it should avoid requiring the parties to go through another massive trial if at all possible, and to that end held that, subject to two qualifications, it should not be open for them to call any further evidence on any of the matters which required to be reconsidered. The first exception was that fresh evidence may be required on the issues arising from the auction sales, the value of the pledged assets and the Bank's motives. The second was that it would be open to the re-trial court to admit further evidence on any issue if it considered it necessary to do so in order to determine the remaining issues between the parties fairly.

15. In the event, at the directions hearings before the commencement of the re-trial, the parties reached agreement that the further evidence to be called on the remission would be restricted to expert evidence on valuation. The counterclaimants served reports prepared by Mr Paul Thomas, the President of IRE USA Inc and a partner of IRE Ukraine LLC, a full service appraisal firm located in Kyiv, Ukraine. The Bank served reports prepared by Ms Svetlana Shalaeva, the head of the valuation department of Knight Frank St Petersburg AO. Neither of these two experts had given evidence at the original trial, although Mr Thomas had assisted his partner, Ms Ludmila Simonova, in the preparation of a valuation report on the instruction of the counterclaimants and she

also assisted him in the preparation of his report for the re-trial and attended the hearing while he was being cross-examined.

The issues for the re-trial

16. At the directions hearing, the parties also agreed the following List of Issues for the re-trial. I shall explain the significance of each of them later in this judgment but it is appropriate to summarise them at this stage:

Article 1064

1. In the light of: (i) the undisturbed findings of primary fact in the Judgment of Hildyard J; (ii) the Court of Appeal's findings as to standard of proof; (iii) the matters identified in paragraphs 69 and 76 of the Court of Appeal judgment; and (iv) upon consequent re-determination of the issues below; are the claimants liable under article 1064 of the Russian Civil Code for the dishonest conspiracy alleged by the Defendants?

Asset valuation

2. In respect of the pledged assets, what was the actual value of the assets set out in the Appendix as at the date of sale at auction?

Auctions

3. As a matter of Russian law, did the Bank properly dispose of the relevant assets at each relevant auction and/or were those auction sales valid?

4. Insofar as any pledged assets were acquired by (allegedly) the claimants and/or the Renord-Invest Group, what were the motives for any such acquisition and/or are such motives relevant to any liability under article 1064?

Baltic Fuel

5. Who ultimately owned and/or controlled Baltic Fuel Company?

Inferences to be reassessed

6. What inferences (if any) should be drawn from Hildyard J's findings in relation to the:

   (1) nature of the repo (including the fact that the Original Purchasers were the counterparties used to purchase the [counterclaimants'] assets);

   (2) rationale and true objectives of the transfers of shares in Scan from the Original Purchasers to the Subsequent Purchasers in late March/early April 2009;

   (3) removal of Dr Arkhangelsky and Mr Vinarsky as directors-general of Scan and Western Terminal LLC;

(4) conduct of the 'wars' conducted by the parties in the Russian courts;

(5) transactions relating to the assets of Western Terminal LLC and Scan, such as the Gunard Lease;

(6) alleged unlawful seizure of control of Scan and Western Terminal LLC;

(7) alleged relentless campaign by the Bank against Dr Arkhangelsky;

(8) Bank's conduct of the Morskoy Bank loan proceedings; and

(9) alleged "tell-tale signs of a classic raid"?

17. In broad terms, Issues 3, 4 and 5 relate to the conduct of the auctions and the circumstances in which they were held. The nine matters listed under Issue 6 relate to the 16 findings of primary fact in respect of which the Court of Appeal concluded that the inferences drawn by Hildyard J were unsafe and required reassessment.

18. As was stressed by Mr Pavel Stroilov (who appeared as he did at the original trial before Hildyard J as a McKenzie Friend for the counterclaimants, a role which he fulfilled with very considerable ability), the ultimate purpose of the re-trial is to give full consideration to Issue 1. While he accepted that the List of Issues seeks to introduce a structure to the exercise of determining the counterclaim based on the approach explained by the Chancellor in [99] to [105] of his judgment, he submitted that it was important that the court should not repeat what he called Hildyard J's piecemeal analysis. As he put it, an issue-by-issue analysis is useful as far as it goes, but ultimately Issue 1 alone is determinative of the outcome of the counterclaim.

19. At the highest level of generality, Mr Tim Lord KC who appeared for the claimants did not disagree with this submission. He too stressed the importance of the court standing back from the individual matters with which the List of Issues is concerned and the need to consider the findings as a whole. He said that there is a danger that, in focusing on those parts of the story in respect of which the Court of Appeal has directed that Hildyard J's evaluations, inferences and findings require reconsideration, the court might lose sight of the overall picture.

20. I agree that it is important to guard against the danger of a piecemeal analysis and losing sight of the overall picture. This was one of the reasons identified by the Chancellor for holding that Hildyard J's ultimate conclusion that there was no actionable dishonest conspiracy by the Bank to cause the counterclaimants harm under article 1064 was unsafe. This danger applies not just to the ultimate conclusion, but also to an evaluation of the findings of primary fact and the inferences to be drawn from them. The significance and relevance of any single finding of primary fact cannot be assessed without regard to the place which it has in the overall story.

21. Mr Lord gave a number of examples of the danger of assessing and evaluating the evidence in respect of which the Court of Appeal considered that the inferences drawn by Hildyard J were unsafe without sufficient regard to the broader context. I refer to a number of those during the course of this judgment, but Mr Lord stressed two specific headline points in his opening submissions. First, he pointed out that the counterclaim was originally premised on the Bank forging and fabricating documents on a grand

scale in order to generate liabilities and to engineer a default. It is now beyond argument that those allegations were misconceived, but in his submission the fact that they have been shown to be untrue, undermines a central pillar of the conspiracy case, not least because the engineering of a default was treated by Hildyard J as a classic sign of the possibility that a state sponsored 'raid' had occurred.

22. Secondly, he pointed to the fact that the premise of the original conspiracy claim was that OMG were conducting very valuable businesses, but Hildyard J had concluded, in a finding that was not reversed on appeal, that these businesses were built on sand. This was a significant conclusion for the conspiracy claim, because (anyway once that became a possibility in the mind of the Bank) any motive for a conspiracy of the type alleged by the counterclaimants rapidly dissipated. This was said to be the case, even if the Bank might have thought at the time the repos were agreed that the businesses were worth more than they turned out to be, because there is no doubt that the Bank knew that it was likely to be heavily under-secured some considerable period of time prior to the auction sales which the counterclaimants contend to have been the consummation of the conspiracy.

23. This consideration has also meant that there is an important difference between the nature of the counterclaimants' case advanced before Hildyard J and the nature of the case with which the re-trial is concerned. At the original trial, the counterclaimants had alleged that the amount of the harm they sustained was US$467 million, a figure that was based on what they alleged to be the true value of the businesses of which the counterclaimants were deprived by the Bank's unlawful conduct. Because the counterclaimants could not prove that their businesses would have been refinanced and made profits going forward (see the summary explanations given by the Chancellor at [13] and Males LJ at [110] of their judgments on the appeal), this way of approaching their case is no longer sustainable.

24. The harm now alleged by the counterclaimants is more limited, anyway in concept. It was described by Males LJ, when explaining the surviving more modest version of the conspiracy at [112] of his judgment as follows:

> "The essence of this version of the conspiracy is that, as a result of the Bank's dishonesty, the assets pledged to the Bank were sold fraudulently to connected parties for less than their proper market value. Consequently, in order to establish "harm" within the meaning of article 1064, it was necessary for the appellants to prove both dishonesty on the part of the Bank and also that the sums realised at auction were less than the market value of the assets."

25. It follows that the counterclaimants now accept that they cannot claim for the loss of business value of Western Terminal LLC, Scan and Onega. They now say that the harm that they have sustained is the undervalue for which the auctioned assets were realised. As Mr Stroilov put it in his written opening, the counterclaim is for the excess market value of OMG's pledged and unpledged assets over and above its indebtedness to the Bank, i.e. the surplus value of the assets of Scan and Western Terminal LLC.

26. It is of some note that, in his formulation of this version of the conspiracy, Mr Stroilov submitted that this alternative way of presenting the counterclaim was "on the assumption that the Group's default was inevitable and the Bank was in principle entitled to realise its security". Mr Eschwege, who argued this part of the case for the

claimants, drew attention to the fact that this was not the assumption on which the alternative version of the counterclaim was put at the original trial, because the counterclaimants had alleged throughout that the Bank was not entitled to call the defaults and enforce when it did. The reason this is important is that an allegation by the counterclaimants that the Bank engineered the default was said to be the centrepiece of the dishonest 'raid' and no case that there would be a surplus on the basis of an inevitable default by OMG was put to the Bank's witnesses.

27. At the original trial, the counterclaimants' expert said that the combined value of the Onega Terminal and the Western Terminal was US$244 million, while the Bank's expert said they were worth only US$25 million. At the re-trial the counterclaimants' expert gave a combined value of US$378 million while the Bank's expert gave a range that was in the region of US$40 million. It follows from these figures that, if the Bank's expert is correct, the realisations that were in fact achieved at the auctions (as to which I will explain the position a little later) means that the counterclaimants will have real difficulty in showing that they sustained any harm, without which an essential element of the cause of action under article 1064 is missing.

28. It remains the case, however, that the valuation evidence fulfils two separate functions, only the first of which is to enable the counterclaimants to establish that they have suffered harm, without which their cause of action under Russian law is incomplete. The second is to substantiate their allegation that the undervalue was so significant that it justifies or supports an inference that the Bank was guilty of fraud. As Hildyard J said in [23] of his judgment, what the counterclaimants alleged to be the huge discrepancy between the realisations achieved and the true value of the business and assets realised by the Bank was presented by them as "the crux of [their] case from which fraud may be inferred". Hildyard J's approach to the drawing of this inference is one of the matters which the Court of Appeal has directed the court to reconsider.

Legal Principles: article 1064

29. As appears from Issue 1, the claim made by the counterclaim is brought under article 1064, which is in the following terms:

> "1. Harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject of compensation in full by the person who has caused the harm. A statute may place a duty for compensation for harm on a person who is not the person that caused the harm. A statute or contract may establish a duty for the person who has caused the harm to pay the victim compensation in addition to compensation for the harm.
>
> 2. The person who has caused the harm is freed from compensation for the harm if he proves that the harm was caused not by his fault. A statute may provide for compensation for the harm even in the absence of fault of the person who caused the harm.
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> 3. Harm caused by lawful actions shall be subject to compensation in the cases provided by statute."

30. The Court of Appeal explained that it was common ground that Hildyard J's citation (at [787] of his judgment) from *Fiona Trust v Privalov* [2010] EWHC 3199 ("Fiona Trust") at [94]-[95] accurately stated the elements of a claim under article 1064:

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

31. In the light of this common ground, the applicable principles, to be derived from [857] to [865] of Hildyard J's judgment and [34] to [38] of the Chancellor's judgment in the Court of Appeal, can be summarised as follows:

i) The intentional causing of harm satisfies the requirement of fault. This includes both a situation in which the defendant knows that his actions will inevitably cause harm, whether or not he specifically desires the harm that results, and a situation in which the defendant should have known it would cause harm and went ahead nevertheless.

ii) The defendant's action must be a direct or immediate cause of the harm. Thus if there are a number of causes leading to harm, the court's task is to identify which is the predominant one (see also per Andrew Smith J in *Fiona Trust* at [101] cited by Hildyard J at [859] of his judgment).

iii) Once harm is established, it is presumed to have been caused unlawfully unless specifically justified in law by the person who caused the harm.

iv) There will be a lawful justification for causing the harm if the defendants or any third party acted in accordance with contractual arrangements entered into so long as they do not act dishonestly or in bad faith (see Hildyard J at [861] of his judgment), a point that was accepted by Mr Stroilov. The same point was also recorded at [862]:

> > "It is, in these circumstances, common ground between the Russian law experts that if the Counterclaimants succeed in proving their factual case as to the dishonest conspiracy to steal their assets, liability under article 1064 is established."

> As the Chancellor put it in [37] of his judgment: "Only the good faith enforcement of rights is sufficient to negate fault for the purposes of article 1064."

32. The consequence of applying these principles to the factual case alleged by the counterclaimants was recorded in [112] of Males LJ's judgment in the Court of Appeal as follows:

> "This version of the conspiracy involves allegations of dishonesty by the Bank in what was otherwise the lawful enforcement of its contractual rights. It is accepted that, if established, these allegations would found a valid claim for damages under article 1064 of the Russian Civil Code. The essence of this version of the conspiracy is that, as a result of the Bank's dishonesty, the assets pledged to the Bank were sold fraudulently to connected parties for less than their proper market value."

33. One of the arguments advanced by the counterclaimants on the appeal against Hildyard J's judgment was that he had misapplied article 1064 because he placed the burden of proving dishonesty on the counterclaimants. This argument was based on the wording of article 1064(2) which imposes the burden of proving absence of fault on the person who has caused the harm. This argument was rejected by the Court of Appeal (see the Chancellor's judgment at [85]):

> "The appellants had to prove harm caused by the conduct of the respondents under article 1064. They could not do so by showing that the respondents had enforced their lawful rights. They could only do so by proving the dishonest conspiracy they alleged, as was assumed by all parties and the judge at trial. The reversal of the burden of proof in article 1064(2) is not relevant to this stage of the analysis."

34. This issue was also addressed by Males LJ in [112] of his judgment, where he explained the practical consequences for the present case of the way in which the burden of proof under article 1064 operates in the following terms:

> "Consequently, in order to establish "harm" within the meaning of article 1064, it was necessary for the appellants to prove both dishonesty on the part of the Bank and also that the sums realised at auction were less than the market value of the assets."

35. This reference to the need for the counterclaimants to prove that the sums realised at auction were less than the market value of the assets was also dealt with by the Chancellor in [61] of his judgment, where he said the following:

> "It was common ground that the appellants had to prove they had sustained harm in order to succeed under article 1064. That required there to be some financial loss. I do not accept that the appellants had to be able to quantify that loss precisely, but they did have to show that they had sustained some financial harm as a result of the respondents' alleged dishonest conspiracy."

36. During the course of his submissions, Mr Stroilov took me to some of the underlying evidence of Russian law. He did so in circumstances in which I had understood from the judgment of the Court of Appeal that Hildyard J's findings were not challenged and the Chancellor had said (at [103]) that there should be no need for further evidence of Russian law. At the end of the day, however, I did not understand him to disagree with any of the material findings made by Hildyard J. He submitted that, if the Bank acted in a manner which was dishonest and the relevant dishonest acts caused loss, the combination of those matters meant that liability under article 1064 is established. As will appear, this becomes particularly relevant when considering whether the Bank complied with the rules of Russian law in relation to the conduct of auctions and, if they did so, whether or not the Bank is liable.

Legal principles: pledges and auctions

37. As to the rules of Russian law in relation to the conduct of auctions, Hildyard J concluded, in a part of his judgment with which neither party took issue, that steps taken intentionally to subject a pledged asset to some form of encumbrance to make it less attractive to potential buyers and/or to reduce the pool of potential buyers and thus its realisable value, would, if proven to be causative of harm, be wrongful, and actionable accordingly. This led to the following conclusion, expressed in [864] and [865] of his judgment:

> "864. In my view, and although this was not expressly put, the same analysis may apply where the value of pledged assets under the same pledge is reduced by the way in which they are presented for sale: for example, if two assets in the same ownership, pledged under the same agreement in respect of the same debt and having together a marriage value in excess of their individual value are sold in separate sales for no good or sufficient reason. However, by the same token, assets which are subject to separate pledges in respect of different indebtedness may lawfully be sold separately, even if combining the assets in the separate pledges might yield a higher aggregate amount.
>
> 865. Similarly, there was no suggestion, and I would not consider it to be the case, that a pledgee is obliged to sell pledged assets together with other non-pledged assets in its possession or control under some different arrangement, even if the combined package might yield a higher aggregate amount."

38. Hildyard J also said ([1268] of his judgment) that it was common ground between the experts that under Russian law a pledgee must realise its security in the manner specified in the pledge agreement and may do so in one of two ways:

    i) enforcement through the court, in which case the court bailiff will arrange for the auction of the pledged asset, which is what happened in relation to Western Terminal; or

    ii) enforcement out of court pursuant to an agreement between pledgee and pledger, in which case a licensed independent auction house conducts the auction, which is what happened in relation to the Scan land at Sestroretsk and Onega Terminal.

39. It was an important part of the claimants' case that the mechanics of the sale are in the hands of the court bailiff or the auction house as the case may be, and not the pledgee. As Hildyard J explained at [1276], the pledgee can oversee the enforcement, but cannot interfere with the actions of the court bailiffs. There are technical rules about how the auction must be conducted, some of which are of no significance for present purposes. However, two of the rules are of importance. The first is that the starting price at the auction must be appraised by court order in the case of enforcement through the court bailiff and by a licensed appraiser in the case of a non-judicial auction. The practice is for it to be set at 80% of market value assessed by an independent valuer. The second is that the auction will fail unless there are at least two registered bidders and at least one bid at or above the starting price. All of this was uncontentious. There are also

minimum periods for notice, the detail of which were not in issue in the present case ([1280] to [1282]).

40. It was common ground between the experts that non-compliance with the relevant auction rules renders the auction organiser liable but not the pledgee. It was also common ground that there must be at least two registered participants, but there was an issue as to whether the substantive validity of the auction was vitiated if there were only two registered participants and they are not independent of each other. The evidence of the counterclaimants' expert, Dr Gladyshev was that:

> "There has to be more than one genuine bidder at the auction. If there is only one bidder, the auction is considered as not having taken place – article 447(5).
>
> If compliance with the rules is a mere pretence of form, and a competing bidder is a mere puppet, with no genuine interest of its own in bidding for the asset, it would be an abuse of right."

41. The claimants' expert took a different view. He said that there is no requirement that individuals or legal entities bidding in an auction are independent of one another or of a third party, but instead that "auction bidders are free to act in their own best interests and are not required to be independent". Hildyard J expressed his conclusion in terms which seem to me to be an accurate reflection of Russian law. In a passage of his judgment with which I agree ([1286] and [1287]), he held:

> "1286 … whilst the affiliation of two parties may not itself provide grounds to invalidate an auction, it could do so if the relationship is such as in fact to prevent, limit or eliminate competition.
>
> 1287 … the question is whether, on the one hand, the bid process is real and competitive (which the participation of an associated person would not prevent, especially where there are other bidders) or, on the other hand, fictional and collusive (as where all bidders are associated and there is no genuine competition). An idle or rehearsed chorus is not, in reality, an auction."

42. It therefore follows that the affiliation of two connected parties does not in itself invalidate the auction, provided that the relationship does not in fact prevent, limit or eliminate competition. As the claimants put it in their closing submission at the original trial "the key issue is not the relationship between the bidders, but whether the auction process is somehow limited, or restricts genuine attempts to bid."

43. Even where the auction is inquorate or collusive, it is not invalid until declared so by the court further to a claim brought against the auction organisers under article 449 of the Russian Civil Code within one year and after the expiry of that year it is no longer possible for the auction to be set aside. As was confirmed by the counterclaimants' expert, after the expiry of one year from the date of the relevant auctions, it was no longer possible to set aside either the auction itself or the resultant sales. In effect these provisions operate as a statutory limitation period after the expiry of which the auction is valid as a matter of Russian law.

44. Hildyard J went on to explain at [1290] and [1292] as follows:

> "1290. Neither expert specifically addressed the question of whether the auction organisers' certificate as to the validity of the auction would be vitiated and invalidated if the only bidders were in collusion in fact, but the auction organisers were not aware or on notice of that, or what the other consequences might be in such circumstances. But if, as I take it (see below), the auction would cease to be capable of being invalidated by action if brought more than one year after the auction (see paragraph [1293] below), the matter may in any event be academic in this case."

> "1292. The experts agreed also that only if the relevant auction rules have been broken is there a potential remedy for the pledgor, and in those circumstances, if there has been a violation of the auction rules, liability would fall upon the court bailiffs or auction house which conducted the auction rather than upon the pledgee."

45. That does not mean, however, that all remedies available to the pledgor are extinguished, because both experts accepted that, if actual dishonesty was established, a claim could be sustained under article 1064 which was not knocked out by the restrictive provisions of article 449. The counterclaimants' expert accepted that any such claim would require bad faith in the valuation or bidding process; it would not suffice to show only that the price achieved at the auction was an undervalue. The evidence was (see Hildyard J's judgment at [1300]) that:

> "…undervalue itself is not a factor. Undervalue in conjunction with intent to harm me and enrich you, this is the actionable offence."

> (and by "enrich you" he meant "enrich the Bank or those who dishonestly contrived the undervaluation".)

46. On the basis of this evidence Hildyard J was satisfied that the applicable rules dictated that the deployment of article 1064 may be limited to cases of demonstrated dishonesty or participation in dishonesty on the part of those who have undermined the auction process. The way he expressed his conclusion (in a manner which was not challenged by either party) was as follows:

> "1302. In summary, therefore, I take the position under the Russian law to be that in the absence of proof of such dishonesty there can be no claim, except for breach of the auction rules, the latter of which is a claim that could lie only against the bailiff or auction organiser, and must be brought within one year. But, if dishonesty which causes loss is established, a claim may lie at the suit of the victim under article 1064 for recovery of demonstrable loss. Causation may however not be easy to prove.

> 1303. Further, it seems to follow from the fact that the starting price is fixed by the court, or (in the case of out of court enforcement) by appraisal, that it would be necessary to show that the court or the appraiser were either dishonestly misled in some way which caused them to undervalue the asset (presumably as to some feature or quality of the auctioned asset, or some contrived flaw in the assets to make it appear less valuable than in truth it is) or themselves directly implicated in the dishonest attempt to harm the Counterclaimants and enrich the pledgee or its associated parties.

> 1304. Linked to that, it would also have to be shown that steps had been taken or deliberately omitted, presumably by or on behalf of those sought thereby to be enriched, calculated to have, and (in a causative sense) having, the result that the (unacceptably) low valuation should not be (as it were) "rescued" by active bidders raising the price by virtue of their competition."

Legal principles: inferences and standard of proof

47. As will be apparent from my outline of the grounds on which the Court of Appeal directed a re-trial, this is a case in which the counterclaimants seek to prove their counterclaim by persuading the court to infer the existence of a dishonest conspiracy. The inferences to be drawn from Hildyard J's findings of primary fact are at the root of the exercise the Court of Appeal has directed to be reconsidered.

48. In drawing inferences in a case such as the present, the approach to be adopted is explained by the Chancellor in [45] of his judgment:

> "Both parties cited Bryan J's recent decision in *Bank of Moscow v. Kekhman* [2018] EWHC 791 (Comm), in which he cited at [41] a passage from Flaux J's judgment at an earlier hearing in the same case where he had said: "[t]he claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". I entirely agree with that passage.""

49. The Chancellor then went on in [44] to [47] of his judgment to explain his findings on the standard of proof. He referred to the well-known passage in the judgment of Lady Hale in *Re B (Children)* [2009] AC 11 at [70ff], and held that, in civil proceedings generally, as much as in care proceedings, the question for determination is whether the case has been proved on the balance of probabilities. It also follows that what Lady Hale said at [70] of her judgment in *Re B* is of general application:

> "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

50. The Chancellor also referred to *Fiona Trust* in this context and in particular to discussion of the principle, encapsulated by what Lord Nicholls said in *In re H* [1996] AC 563 at p.586H, that cogent evidence is required to justify a finding of fraud or discreditable conduct on the grounds that the court perceives that it is not normally likely that people engage in such conduct, and that "the more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it". As Andrew Smith J made clear in *Fiona Trust*, this principle does not alter the fact that the balance of probabilities remains the standard of proof.

51. The Chancellor also explained (at [47] of his judgment) that, applying this principle to commercial cases such as the present one, there is a wide spectrum of probabilities as

to the occurrence of reprehensible conduct. He said that the present case is a very unusual one, because both parties had behaved dishonestly and lied to the court. This meant that "it would be faintly absurd to elevate the principle that it is inherently improbable that a party would do something dishonest into a relevant benchmark for the determination of the issues." While this means that treating the inherent improbability of dishonesty as a benchmark in the present case is the wrong approach, it does not mean that the court should assume that, merely because one or other of the parties has been dishonest or lied on one or more issues, it can assume that the dishonesty of that party is all-pervasive.

52. The need for the court to assess the inherent probabilities is at the root of the exercise it must undertake and as the Chancellor said at [53] the court must ask itself whether a particular fact (whether event or state of mind) "was more likely than not, having regard to the nature and gravity of the allegation." At this re-trial, I must therefore assess the inherent probabilities to determine whether the inferences of fact (and the limited primary facts), which the counterclaimants invite me to find and in respect of which the Court of Appeal has determined that Hildyard J's findings were unsafe, were more likely than not to have occurred.

Background

53. Because only a limited number of Hildyard J's findings of primary fact were challenged by the counterclaimants on their appeal, the re-trial has been conducted on the basis that many of Hildyard J's conclusions must remain undisturbed. For this reason, and because the re-trial is only concerned with the counterclaim and not the claim, it is unnecessary for me to repeat many of the background findings which Hildyard J made. To do so would not only be unhelpfully repetitive of what has already been conclusively determined by Hildyard J, it would also tend to distract from the issues which bear upon the central question of whether or not the claimants are liable under article 1064 for the harm caused by the dishonest conspiracy which is still alleged by the counterclaimants.

54. Nonetheless, much of my explanation of the background is drawn directly from the findings made by Hildyard J, albeit abbreviated where the detail into which he went for the purposes of the task which he had to carry out is not necessary for an understanding of this judgment. In giving that explanation, I have sought to identify the material findings of primary fact made by Hildyard J on which the inferences I must reassess are based, but even where they are not specifically identified, I have taken into account his undisturbed findings of primary fact as a whole, which should therefore be treated as incorporated in this judgment.

55. The Bank is the largest privately-owned bank in the St Petersburg region. It was incorporated in 1990 when the system of specialised state banks was introduced in what by then had become the Russian Federation. Mr Savelyev acquired shares in the Bank and became chairman of its Management Board in 2001, having been approached by the then management of the Bank in the wake of the financial crisis in Russia in that year, sometimes referred to as "the rouble crisis".

56. Mr Savelyev has, since about 2001, been a substantial shareholder (direct and indirect) in the Bank. He said in his evidence that he has never denied that he controlled the

Bank and that he did so at management level as the Bank's chairman. His personal direct shareholding in 2009 was just under 30% of the voting shares. He also held an indirect conditional interest (partially through an option arrangement with his sister-in-law, Ms Lyudmila Stepanova) in a further c.40% of the Bank's voting shares, and yet further indirect interests in other shares. Hildyard J recorded that it is a mark of the Bank's standing overseas that the European Bank for Reconstruction and Development ("EBRD") has held a c.6% stake in the Bank's shares and that shares in the Bank were also held by well known and respected financial institutions including JP Morgan, Credit Suisse and UBS.

57. Mr Savelyev was said by the counterclaimants to have been the principal architect of the conspiracy against them. He was said to have acted with the assistance of Mrs Valentina Matvienko, the then governor of St Petersburg, Gen. Vladislav Piotrovsky, then head of the St Petersburg police and Lt. Col. Levitskaya, then St Petersburg chief prosecutor. In their pleadings, the counterclaimants identified a large number of other alleged conspirators, most of whom will feature later in this judgment. The claimants submitted that the need for such a large and disparate group to participate together in a dishonest scheme in order to give the counterclaimants' alleged conspiracy any form of traction, was itself a strong pointer towards its inherent improbability.

58. Both OMGP and GOM were ultimately owned or controlled by Dr and Mrs Arkhangelsky. Their subsidiaries included:

i) Scan, which was notionally at least an insurance company and was a subsidiary of GOM. Dr Arkhangelsky was its director-general. It owned some of the land at Onega Terminal and the other real property I have already described.

ii) LPK Scan, a timber company of which Dr Arkhangelsky's mother-in-law, Ms Tarasova, was director-general and the legal owner of 100% of the shares. Hildyard J said they were presumably held for GOM. It exported timber through Western Terminal. It also owned real property at Onega Terminal.

iii) PetroLes LLC ("PetroLes"), a subsidiary of GOM, was also involved in the timber business as a wholesaler.

iv) Leasing Company Scandinavia LLC ("Scandinavia Leasing"), a subsidiary of GOM, specialised in business leasing technical and industrial equipment, cargo ships and specialised vessels, and real estate.

v) Vyborg Port LLC was a subsidiary of OMGP. It acquired the port of Vyborg in around 2007 with finance from Vozrozhdenie Bank ("V-Bank"). The port of Vyborg is located about 120 kilometres north-west of St Petersburg. It covers some 16 hectares and had 13 berths, including 8 cargo berths, 4 covered warehouses with a total area of 2,170 square metres and open hard standing areas of some 67,000 square metres. Its director-general was Ms Olga Lukina.

vi) Vyborg Shipping, which was established in 2007 to transport containers and cargo with an ultimate objective of launching a regular line service from Vyborg to western ports, was a subsidiary of GOM.

vii) Western Terminal LLC was a subsidiary of OMGP and owned Western Terminal as described above. Mr Vinarsky was its director-general.

viii) Onega was also a subsidiary of OMGP and carried on a port handling business. On acquisition of the land at Onega Terminal, it started the construction of a new 'Roll-on, Roll-off' ("Ro-Ro") facility, intended to attract car imports previously handled for the Russian market via Finnish ports. Dr Arkhangelsky was its director-general.

59. Other OMG subsidiaries owned substantial real estate assets elsewhere in the St Petersburg region, the details of which were outlined by Hildyard J, but which do not matter for present purposes.

The Bank's loans to OMG

60. OMG became a customer of the Bank in 2006. The relationship expanded considerably over the course of that year and throughout 2007 and the first part of 2008. The account was handled through one of the Bank's subsidiary branches called "Investrbank".

61. During the period 2006 to 2008, OMG companies opened a number of accounts with the Bank, which advanced a number of different loans. Valuation reports in respect of the security pledged were provided by a Russian valuer called Lair LLC ("Lair"):

i) On 30 June 2006, the Bank provided a loan of RUB 110 million to Onega (the "First Onega Loan") to finance the construction of the Ro-Ro facility at Onega Terminal. The security consisted of a mortgage over two pieces of real property in Sestroretsk owned by Scan, various corporate guarantees from OMG (including a Scan guarantee), and a personal guarantee from Dr Arkhangelsky. There was also a spousal consent signed by Mrs Arkhangelskaya in respect of this personal guarantee.

ii) On 9 March 2007, the Bank provided a loan of RUB 354 million to PetroLes (the "First PetroLes Loan"), which was secured by pledges over real property at Onega Terminal owned by Scan, and a personal guarantee from Dr Arkhangelsky.

iii) On 30 November 2007, the Bank provided a loan of RUB 450 million to LPK Scan (the "2007 LPK Scan Loan"). The security consisted of a mortgage over separate parcels of real property at Onega Terminal (owned by Scan and LPK Scan), a Scan guarantee and a personal guarantee from Dr Arkhangelsky.

iv) On 26 December 2007, the Bank provided a loan of RUB 400 million to Onega (the "Second Onega Loan"). The security consisted of a mortgage over real property at Onega Terminal (owned by Scan and LPK Scan), a Scan guarantee and a personal guarantee from Dr Arkhangelsky.

v) On 28 March 2008, the Bank provided a further loan of RUB 80 million to PetroLes (the "Second PetroLes Loan"), secured by pledges over real property at Onega Terminal owned by Scan, and a Scan guarantee.

62. The Onega Terminal property used as security for these loans consisted of 4,506.5 sq m of warehouse and supporting space, and 55,208 sq m of land. The four warehouses

and administrative buildings and the three land lots were owned by Scan and LPK Scan. The site did not include a berth or other direct outlet to the sea. The operation of the Onega Terminal as a port facility therefore relied on a berth provided by an unrelated third party, The Sea Fish Port of St Petersburg ("SFP"), through a related company, ROK No 1 Prichaly CJSC ("ROK No 1 Prichaly"). A business plan prepared in October 2008 estimated that the cost of Dr Arkhangelsky's plan for a larger and more sophisticated Ro-Ro and container transhipment facility at Onega would be c.RUB 36 billion (then just over US$1 billion).

63. In early 2008, Dr Arkhangelsky sought the Bank's assistance for a new project to purchase vessels and operate them from Vyborg Port. He wanted to expand Vyborg Shipping's business to create a fleet of 30 cargo ships. Dr Arkhangelsky's objective in relation to the creation of this cargo fleet was first to acquire 10 vessels, and then build 20 more. A Cypriot company, Land Breeze Holdings Ltd ("Land Breeze"), would own companies registered in the Marshall Islands, each one of which would own one of the vessels. They would charter each vessel to Land Breeze, which would sub-charter them to Vyborg Shipping. The vessels would be mortgaged to the Bank, and Scan and Dr Arkhangelsky were each to give guarantees.

64. The proposal therefore involved the Bank taking pledges over the vessels. In March 2008, the Bank agreed to assist in the financing of this project and Investrbank drew up a credit report for a number of loans to Vyborg Shipping of up to RUB 2.1 billion. The first three Vyborg loans were dated March and April 2008. Each was for a sum in excess of RUB 300 million and was secured by a mortgage over a vessel ('*Gatchina'*, '*Tosno'* and '*Kolpino'* respectively) and guarantees from Scan and Dr Arkhangelsky personally.

65. On 21 July 2008, the Bank agreed to provide the Fourth Vyborg Loan to Vyborg Shipping (the "Fourth Vyborg Loan") in the sum of RUB 1.088 billion. The purpose of the Fourth Vyborg Loan was to make payments under time charters for two vessels, named '*Tikhvin*' and '*Luga*'. It was secured by a mortgage over some of the land at Western Terminal (namely SV Berth 15 and the Western Terminal land plot of c.73,000 sq m), a Scan guarantee and a personal guarantee from Dr Arkhangelsky. The value of the real property for the purposes of the pledge was recorded in the mortgage agreement as being RUB 1.286 billion.

66. Western Terminal had in Soviet times formed part of a larger, state-owned military terminal, which in the past had handled and stored special refrigerated containers and nuclear waste. However, it was not disputed that, when Dr Arkhangelsky acquired it in 2007, the Western Terminal site was in a poor state. It was little more than a timber yard, and, as Hildyard J recited ([150] of his judgment) was in Dr Arkhangelsky's own words "like a swamp and not all the territory is used".

67. The remaining real estate assets at Western Terminal (berth "SV-16M", and "two railway tracks") were not pledged to the Bank. Under the Russian cadastral rules, those assets were registered separately from the land they were located in, which was registered as a single plot and pledged to the Bank. There was a dispute as to the value of those unpledged assets. According to the Bank, these additional 'assets' were in a very dilapidated state and added nothing to its value. Berth SV-16M was only 35.5 m long and was only accessible from the plot pledged to the Bank. The two railway tracks were outside the Western Terminal site and on land owned by a third party, the

Severnaya Verf Northern Shipyards ("North Shipbuilding Company"), which was a state-owned military shipbuilder. The counterclaimants, however, maintained that both had material value. It was said that berth SV-16M and the railway tracks would significantly increase the capacity of any business operating the terminal, if owned by the same business as berth SV-15 and the remaining land.

68. Hildyard J concluded that, although Dr Arkhangelsky described Western Terminal as having its own railway spur and major road junctions, it became clear that at least the railway was on a separate plot which had been in state ownership but was never in OMG's. Design work for development carried out by a German firm, Schuppertbau, suggested an initial costs estimate for the proposed work of US$200 million. There was also a two-storey temporary structure, which Hildyard J described as in effect a portacabin, and a single story guardhouse, neither of which was or could be registered on Rosreestr, the Russian registry of real property rights. For that reason these assets could not be pledged at all.

69. There was a dispute at the original trial as to what happened to the proceeds of the Fourth Vyborg Loan (and I think the Third Vyborg Loan as well). Hildyard J was plainly very suspicious as to what had occurred but, although he said that he was not satisfied that it had been established that Dr Arkhangelsky had pocketed the money himself (as the Bank had alleged), he did find that "the moneys have never been accounted for".

70. All the Vyborg Loan Agreements (as well as the PetroLes Loans) required the borrower to maintain a stipulated percentage of turnover (100% in the case of the First to Third Vyborg Loans, 70% in the case of the Fourth Vyborg Loan and the First PetroLes Loan and a specific sum of RUB 250 million per quarter in the case of the Second PetroLes Loan) on settlement and currency accounts of the relevant borrower at the Bank. The purpose of this was to enable the Bank to monitor trading performance.

71. During the first half of 2008, there were various changes to OMG's existing loans from the Bank. Thus, the First PetroLes Loan was extended by a year until 5 March 2009, and there were also various changes in security and the maturity date for the First Onega Loan which was extended by a year until 27 June 2009. On 25 June 2008, the Bank also granted LPK Scan an overdraft facility up to the sum of RUB 145 million (the "2008 LPK Scan Loan"). The only security required was a personal guarantee from Dr Arkhangelsky, to which Mrs Arkhangelsky gave her consent.

Dr Arkhangelsky's plans to develop OMG's business in 2008

72. By 2008, Dr Arkhangelsky had extensive plans for the development of his businesses. I have already mentioned his plan to expand Vyborg Shipping's fleet of vessels. This was reflected in a business plan, which Dr Arkhangelsky described as having been prepared by Lair and which is dated April 2008. It envisaged the creation of a fleet of 30 cargo ships as part of what the report described as OMG's strategic goal, being to create a vertically integrated holding in the field of sea cargo shipping (from order placement to cargo delivery), where all the links of the chain were OMG companies. He also had plans to modernise Vyborg Port by the development of a multi-functional

container and Ro-Ro terminal, for which he was seeking funding of at least €115 million.

73. Dr Arkhangelsky also had extensive plans for the development of Western Terminal in three stages, which Hildyard J described as by no means straightforward. In a passage from his evidence cited by Hildyard J at [157] and [158] of his judgment, Dr Arkhangelsky explained the proposed development in the following terms:

> "The first stage would involve building an open storage area at berth 15, reconstructing a railway track to connect the port to the main railway system, dredging the channel in front of the terminal, and finishing the construction of berth 15. The second stage would include the reconstruction of berth 16, the building of open storage for containers, the construction of a railway link to berth 16, purchasing port handling equipment and installing a container crane. Finally, at the third stage, we planned to reclaim the bay northwest of berth 16, construct a pile-supported berth, build further storage space, install a second container crane and extend the railway track along the pier."
>
> "The development plans entailed the removal of a man-made island near the entrance to the port. From a practical perspective, I understood this to be relatively straightforward. Once this had been done and the bay north of berth 16 dredged, access to Western Terminal by sea from the Gulf of Finland would have been easier than to competing terminals. The island would need to be removed by the state authorities because the land and water were the property of the state. No investments or payments were needed from Western Terminal itself. All I needed to do was try to speed up the process as much as possible. I was seeking to do that by lobbying my contacts and colleagues in the Ministry of Transport and local government."

74. To assist him in raising the necessary funding (c.US$220 million), Dr Arkhangelsky approached a project finance company called Oxus Border Finance LLP ("Oxus"). From around May 2008, Oxus started work on a draft Information Memorandum (the "IM") containing a Business Plan for this proposed development. The nature and content of the IM were subject to significant dispute between the claimants and the counterclaimants in the original proceedings. It suffices for the present to summarise its contents as follows:

i) The Western Terminal was described as having been acquired in 2007, in a "very run-down condition" at a cost of US$220 million: this was said to have been paid in cash by OMG.

ii) An up-to-date value for the site was stated to be US$188 million, "in its present state" and it was said that OMG had "already put in US$140 million of equity into the facility".

iii) The business plan was said to include an upgrade of the two existing berths, reclamation of the adjacent area and the creation of a new berth.

iv) The stated funding requirement was for US$300 million in long term debt to fund the upgrade of the terminal and to repay $90 million of short term debt used to

acquire the terminal in 2007. There was stated to be "considerable asset backing for the debt, given the size and location of the facility".

v) The IM assumed that US$220 million would be invested in the years 2008 to 2011, over three phases, and predicted that Western Terminal's turnover by 2011 would be 500,000 TEU per annum (TEUs being a standard unit of cargo capacity based on the volume of a 20-foot long intermodal metal box container known as a 'Twenty Foot Equivalent Unit').

75. Hildyard J concluded that there were two inaccuracies in the IM on matters which were fundamental to any investment or lending decision. The first was the statements as to the acquisition costs and subsequent investment in the facilities. Hildyard J was satisfied both that the US$220 million acquisition cost was entirely false and that its inclusion in the IM amounted to a fundamental misrepresentation. It transpired that the difference between the acquisition cost of RUB 1.069 billion (c.US$40 million), disclosed in the original purchase contract as the price for which OMGP had originally purchased the shares in Western Terminal LLC from Premina Limited ("Premina"), and the US$220 million stated in the IM, was the amount of a vast bribe (US$160 million) that Dr Arkhangelsky said he was required to pay officials as the price of doing business and expanding the Western Terminal.

76. The second inaccuracy was the projection as to the capacity of the Western Terminal as measured by annual TEUs. I shall come back to this in the context of the expert evidence advanced at the re-trial, but the final figure varied significantly in the various drafts and Hildyard J was satisfied that the final figure of 500,000 TEU contained in the draft IM was impossible to justify. He explained in some detail why, on the evidence before him, it was an unrealistic assumption that could never have been fulfilled, and "even on the most generous assumptions, the total capacity figure would need to be halved" (see [193] and [194] of his judgment). A figure of no more than 240,000 was the highest that could have been justified.

77. In Hildyard J's view, there were many reasons for this, including the finite land space at Western Terminal and the physical constraints of the site, the unrealistic assumptions as to the impact of modern container stacking methods and OMG's own April 2009 presentation to equity investors which suggested 100,000 TEU per annum. Perhaps most strikingly of all, the capacity contended for by the counterclaimants, if achieved, implied that by 2011 Western Terminal would have become the second largest container handling terminal in Russia.

78. Dr Arkhangelsky said that he and Oxus met various international banks during the summer of 2008. The only meeting described by Hildyard J was one held in September 2008, when they went to Paris to meet BNP Paribas. On 12 September 2008, BNP Paribas provided a letter of interest with its thoughts on the development of Western Terminal. BNP Paribas noted that Dr Arkhangelsky's objective was to raise US$300 million of which US$220 million was stated to be required for the redevelopment of Western Terminal, and US$80 million was required to restructure OMG's debts. BNP Paribas said it would need to go through a due diligence and financing process with Western Terminal LLC. It set out its various requirements and suggested that, if an advanced business plan was ready, due diligence could take 3 to 4 months.

79. In the event, Dr Arkhangelsky did not proceed with the BNP Paribas proposal, apparently on the basis that OMG could not afford their proposed monthly fee of €25,000, and no other bank ever made an offer to provide funding for the proposed Western Terminal development. Hildyard J left open the possibility that the real reason for not pursuing matters with BNP Paribas was a concern by Dr Arkhangelsky that any due diligence by BNP Paribas might expose unpalatable features about OMG's business practices and the payment of huge bribes.

80. In addition to his plans for Western Terminal, Dr Arkhangelsky gave evidence of attempts to acquire additional land and cargo handling and other facilities at Onega Terminal in accordance with another business plan which Dr Arkhangelsky said was prepared by Lair in October 2008. These plans envisaged the expenditure of RUB 2.3 billion to acquire additional land at the terminal (which was needed to give it its own berth), RUB 5.9 billion to purchase cargo handling and other equipment and RUB 9 billion to develop the land and construct the necessary port facilities. Most significantly for the prospect of development, Dr Arkhangelsky said that throughout 2008 there were negotiations through Onega for the acquisition of 100% of the shares in either ROK No 1 Prichaly, whose land did have direct access to the sea, or its holding company, SFP.

81. The Bank said that the plans for Onega Terminal were fanciful and wholly unrealistic. They never progressed beyond requests by funders for more detailed information "for preliminary due diligence" and no contracts were ever signed. It is plain that Hildyard J agreed that they were devoid of substance and Dr Arkhangelsky's belief that he could raise the funding to finance them was deluded. There was no suggestion at the re-trial that these findings were or could be open to challenge.

82. Dr Arkhangelsky also had similar plans for the development of Vyborg Port. He maintained that EBRD was willing to provide that funding, and also that OMG had had productive discussions with a Russian bank called KIT Finance about a US$150 million bond issue. Neither eventuated, and both were dismissed as pipe-dreams at best by the claimants. In the event, neither EBRD nor KIT Finance ever committed to raising any funds for OMG.

83. More broadly, it is clear from Hildyard J's unchallenged findings (judgment at [222] to [225]) that OMG never obtained financing for its development plans from any of the more than 25 banks and other lenders whom Dr Arkhangelsky said he approached in 2008 and 2009. It is also clear that Dr Arkhangelsky's assertions as to the interest which other banks had in his development plans were, as Hildyard J found them to be, a delusion. This had a direct effect on Dr Arkhangelsky's ability to refinance when the crunch came at the beginning of 2009. Hildyard J concluded, "the OMG business was built on sand". It could not survive on its operational turnover, but could only survive by borrowing money to buy more assets to support further borrowing.

84. Further, as Hildyard J demonstrated in the same part of his judgment, OMG's net profit in the relevant accounting year was only achieved by a substantial revaluation of Western Terminal, thus giving rise to a figure for negative goodwill which did not in anyway demonstrate a profitable trading performance. Indeed, on a trading basis, OMG was making substantial net losses, which was why it was having to borrow to survive. This is an important background factor against which the Bank's conduct towards him thereafter is to be assessed. Hildyard J's findings also explain why the nature of the alleged conspiracy is now very much more limited than the case advanced at the original

trial, as described in the passages from the judgments of the Chancellor at [13] and Males LJ at [110] to [112] referred to above.

OMG's Financial Difficulties

85. In September 2008, OMG was in breach of the turnover covenants in the Vyborg Loan agreements and by October rumours had come to the Bank's attention that OMG was in serious financial difficulties. By then, and in addition to loans from other banks, OMG had 15 loans (including overdrafts) from the Bank, amounting to RUB 3.7 billion. Dr Arkhangelsky accepted in his evidence to Hildyard J that by late November 2008 he anticipated that OMG would be unlikely to be in a position to resume servicing its loans, which by then exceeded some RUB 3.7 billion to the Bank, and some RUB 2 billion to V-Bank, which had a mortgage over the land at Vyborg Port, "until the spring of 2009 at the earliest." By then the Bank's director who had been OMG's initial contact (Mr Andrei Belykh) was hearing of growing concerns regarding OMG's financial position from a number of sources. Hildyard J was satisfied that by autumn 2008 OMG was already in deep trouble, and that in truth Dr Arkhangelsky was well aware of this. This was a major issue for the Bank as OMG was then Investrbank's largest borrower. The need for both temporary facilities to avoid default, and for a longer term rescheduling of OMG's obligations, was by this time, therefore, unavoidable and acute.

86. The immediate risk to the Bank concerned OMG's repayments falling due then or shortly thereafter. Those obligations were summarised by Hildyard J as follows:

i) The LPK Scan overdraft facility of RUB 145 million, which had been extended to 10 December 2008, was due for payment but seemed unlikely to be repaid on the due date.

ii) Scan promissory notes falling due for repayment had not been repaid, exposing the Bank to the requirement to form reserves of 21% of the total value of the notes, being no less than RUB 25.2 million.

iii) Interest on all OMG loans from the Bank for the month of November (amounting to RUB 45 million), would not be paid and there seemed to be equally little prospect of the interest payments for December (in the sum of RUB 55 million) being met either.

87. In the light of these pressures, the Bank had calculated that OMG needed RUB 130 million by 28 November 2008 to avoid a default. Having concluded on 26 November 2008 that OMG would not be making repayments before 1 December, the options were either to defer the next interest payments or to grant an emergency loan before 28 November to cover the payments. Hildyard J concluded that this led to Dr Arkhangelsky signing a personal loan agreement for the provision by the Bank of a loan of RUB 130 million ("the Personal Loan") on or about 28 November. The counterclaimants were keen to stress that the Personal Loan was held by Hildyard J to be in the Bank's own interests, in the sense that it enabled it to avoid having to make provision for the outstanding OMG debt.

88. Initially, it was part of Dr Arkhangelsky's case that he was never a party to, or even aware of, the Personal Loan and he described the documentation as 'bogus' suggesting it had been fabricated by the Bank as part of the scheme to defraud him. However, when it came to it, Hildyard J described this case as unsustainable and found as a fact (not challenged on appeal) that there was no real doubt that Dr Arkhangelsky signed the Personal Loan agreement and received the sums expressed to be borrowed by him pursuant to it. He agreed the Personal Loan (and another c.RUB 30 million loan made to him from a client of the Bank called Tekno SPb) to avoid imminent default. Hildyard J reached the same conclusion in relation to the counterclaimants' case that the Personal Guarantees were forgeries. After a meticulous review of the evidence, he concluded not just that Dr Arkhangelsky had failed to discharge the burden of demonstrating that the signatures were forgeries, but that it was plainly more likely than not that the signatures were his own.

89. The Court of Appeal was satisfied that these findings were reliable and unaffected by the issues on standard of proof and inconsistency which underpinned the order it made. I shall revert to the point a little later, because the ramifications and consequences for the counterclaim of Hildyard J's rejection of Dr Arkhangelsky's case that the Personal Guarantees and the Personal Loan agreement were forgeries is the first of the 16 factual elements of the counterclaimants' claim (as described in [16] and [69] of the Chancellor's judgment in the Court of Appeal). Hildyard J's conclusions on this issue are described in [903] to [908] of his judgment.

90. Although the detail of the forgery allegations in relation to the Personal Guarantees and the Personal Loan were primarily concerned with the Arkhangelskys' defence to the claim, it is appropriate to record the following conclusions reached by Hildyard J as to Dr Arkhangelsky's case, because they bear on two aspects of the counterclaim.

91. The first relates to the credibility of the conspiracy forming the subject matter of the counterclaim in circumstances in which the counterclaimants alleged that the claimants fabricated the guarantees as part of that conspiracy. It had always been the counterclaimants' case that what they claimed to be the Bank's engineering of a default through forged documents (the fabrication of which were said to be overt acts demonstrative of the alleged conspiracy) was what Mr Lord called "a very important part of the conspiracy story".

92. The second is that Hildyard J's findings reflect his views as to Dr Arkhangelsky's character, which were pithily summarised at [82] of his judgment, and with which the evidence I have considered is wholly consistent:

> "Dr Arkhangelsky also struck me as having a propensity to see things as he wished them to be in his ego-centric view of the world; and he tends to regard any detractors or criticism as either lamentably misinformed or inferentially dishonest."

93. As these views are or may be relevant to the approach the claimants took to protect the Bank's security, and therefore go some way to explain some of the oddities in the Bank's own conduct, it is worth citing a few further passages from Hildyard J's judgment:

i) At [749] of his judgment:

> "This conclusion accords with my general impression of Dr Arkhangelsky as a buccaneer, "the "ultimate chancer" as the Claimants put it, whose confidence in his own abilities and determination to succeed caused him to take on risks that he did not contemplate would eventuate and which were the necessary price of raising the enormous sums that he borrowed from the Bank (and others also). Further, he is not a man for painstaking detail or care: it would be quite in character for him to have either signed the relevant documents without regard to their effect if the worst transpired, since he would have regarded that as remote, or even without regard to their content, so long as the immediate objective of bank lending was secured."

ii) At [758], having described the way in which Dr Arkhangelsky's case as to the forgery allegation changed and developed during the course of the trial:

> "Not until the accumulation of evidence against him, and after extensive prevarication in the choice or acceptance of comparators, did he accept (though not unequivocally) that he might have signed the disputed documents, or some of them, mistakenly; and his efforts to resuscitate his case of forgery under cross-examination confirmed me in my feeling that by then it was an expedient adopted in the knowledge that it was without feet in fact, and dishonest accordingly."

iii) At [760] to [762]:

> "760. At trial, Dr Arkhangelsky's oral evidence in relation to the Personal Guarantees and the Personal Loan persuaded me only that Dr Arkhangelsky at one and the same time appreciated the danger, in terms of its potential impact on the court's assessment of his credibility, of abandoning his case on forgery, but also the weakness of his case in seeking to maintain it. He veered from absolute denial of signature to grudging acceptance that perhaps he might have signed accidentally, and back again. He was consistent in nothing but inconsistency.
>
> 761. His resort to unpleaded allegations, such as that the guarantees were contrivances to help the Bank manipulate its reserves, smacked of desperation and not conviction or substance; and his suggestion that the documentation was never intended to be given any legal effect and was signed for show did not impress me as even potentially plausible.
>
> 762. Similarly, his efforts to deny that the OMG debt schedules were reliable by depicting his own employee (Mr Dubitskiy, OMG's business development manager) as a "low level, low quality employee", confirmed the impression of someone prepared to throw in any accusation or excuse to deflect a straight question and avoid a straightforward admission, relying (in effect) on the proposition that, such is the scale and extent of corruption in Russia, and the participation or connivance of enforcement officers and others in it, anything is possible."

94. Hildyard J also concluded that, throughout December 2008, OMG's position continued to deteriorate substantially: indeed, receipts had all but dried up. One illustration of this deterioration, which features later in the story, was the fact that *'Tosno'*, which had

been pledged as security for the Second Vyborg Loan was arrested in Tallin for non-payment of bunkering charges. Another illustration was the fact that, despite telling the Bank that a large payment from Finnish customers relating to timber deliveries was imminent, the money never appeared. During this period, Dr Arkhangelsky continued to present the problem to his creditors as a short-term cash-flow difficulty caused by customers delaying payment due to their own economic difficulties. He sought to reassure the Bank, and especially the credit department at Investrbank, that this was a temporary problem.

Repos and the allegation of a general moratorium

95. In a letter dated 28 November 2008, (i.e., at about the time the Personal Loan was given) Dr Arkhangelsky suggested a transfer of shares in Vyborg Shipping as collateral for a refinancing. It seems that the Bank had by then begun to focus on some form of "repo" transaction under which it would acquire (for a nominal consideration) the shares in the relevant companies, subject to a provision for the shares to be repurchased (likewise for a nominal consideration) upon timely repayment of the debt. In a context in which it was commonplace for there to be a hard-fought war between lender and borrower on default, the advantage from the Bank's perspective was that it would secure control over the relevant companies so that it could more easily enforce its security without obstruction from the defaulting borrower or its shareholders. It also gave the Bank potential access to the business value of OMG. Whether that was the Bank's objective from the outset was a central issue between the parties.

96. The Bank, in the form of Ms Kristina Mironova then the deputy director of Investrbank, identified two companies which were potentially suitable for a repo arrangement: Western Terminal LLC and Scan. The reason they were chosen was that they had no loans from any other banks and nearly all their assets had already been pledged to the Bank. Its evidence at the original trial, and which despite Dr Arkhangelsky's evidence to the contrary Hildyard J accepted, was that this proposal was then discussed at a meeting between representatives of the Bank and Dr Arkhangelsky on 24 December 2008.

97. This meeting was then followed by a meeting between Dr Arkhangelsky and Mr Savelyev on 25 December 2008, also attended by a number of other individuals on behalf of the Bank and OMG, to discuss a restructuring of OMG's debts. Dr Arkhangelsky described it as a "really terrible meeting" at which Mr Savelyev was very aggressive and informed him that the Bank would only allow OMG a moratorium on its payments if the shares in Western Terminal LLC and Scan were transferred to the Bank, a demand that was said to be non-negotiable. He said that what Mr Savelyev had to say amounted to threats to his life and family, and that it was his appreciation of the forces that could be brought to bear against them which had convinced him he had to agree to arrangements that he considered to be one-sided in the interests of the Bank. The Bank's evidence was quite different. Ms Mironova said that the meeting took place in a friendly atmosphere and that no threats were made.

98. In any event, it was agreed at the December meeting that the paperwork to record the arrangements under which OMG was given time to meet its payment obligations should be drawn up and signed before the end of December. It was accepted that the formal

documentation might take longer to finalise, but if the interest instalment dates were not extended by then, OMG would go into default. The resultant memorandum dated 30 December 2008 (the "Memorandum"), was prepared by Mrs Irina Malysheva, the Bank's deputy chairperson, with the assistance of another member of the Bank's corporate finance department. The Memorandum was then signed in Mrs Malysheva's office by Dr Arkhangelsky on behalf of OMG and by Mr Savelyev on behalf of the Bank on 30 December 2008.

99. The terms of the Memorandum referred to the repo arrangements and stipulated that, after the complete fulfilment of OMG's obligations to the Bank, the shares in Western Terminal LLC and Scan would be transferred back pursuant to repurchase contracts. It also provided that the purchasers of the shares under the repo agreements would not interfere in the affairs of Western Terminal LLC and Scan and that the Bank would not make demand for early repayment "on condition that the Group fulfils its obligations to the Bank under the said contracts on time and entirely". It also made provision for the sellers and management of the companies not to sell or transmit their assets to anyone and not to worsen in any other way their material and financial situation.

100. Dr Arkhangelsky claimed at the original trial that it was expressly agreed at the 25 December meeting that all payments due from the OMG companies to the Bank, including interest payments and capital repayments, would be subject to a general six-month moratorium until the end of June 2009. He said that Mr Savelyev's promise of the moratorium was the reason why he agreed to transfer the shares under the repo arrangements, and that without it OMG was exposed to the 'raid' to which the counterclaimants contend that it was eventually subjected. He was adamant that, even though the Memorandum as drafted did not expressly record that there would be a moratorium on interest payments and a prolongation of the loans, nevertheless he and Mr Savelyev had a clear agreement to this effect.

101. Hildyard J concluded that no general moratorium in the form asserted by Dr Arkhangelsky was agreed by the Bank. He held that Dr Arkhangelsky agreed to the repo not because of any general moratorium but because he was desperate. He therefore rejected the counterclaimants' case that Dr Arkhangelsky was in effect tricked into the repo transactions by the promise of a moratorium. He was satisfied from the evidence that Dr Arkhangelsky was not coerced by threats or intimidation, nor induced by a false promise of a general moratorium, into agreeing the Memorandum and the repo arrangements. The way that Hildyard J explained his conclusion was expressed in [821] and [822] of his judgment as follows:

> "821. In reaching that conclusion I have had much in mind Dr Arkhangelsky's main point that, without the alleged 'Moratorium', the repo arrangements exposed OMG to a 'raid' without any sufficient *quid pro quo*, and that it stands to reason that he would never have agreed such terms. But in my judgment, the truth is that Dr Arkhangelsky, by December 2008, was desperate. Unlike the Bank, he knew how serious the position had become (illustrated by the arrest of the *'Tosno'*, the deficits across the companies' accounts, and his inability to fund the retainer proposed by BNP); and the repo was all he had left to offer to keep the Bank at bay.
>
> 822. My assessment is that Dr Arkhangelsky is a chancer with a belief that something will turn up in the end, so long as he can keep kicking the can down the

> road; and that he is capable of convincing himself in retrospect of things which have not in fact happened, and of denying any possibility that he personally may have made a mistake."

102. The events of December 2008 and the allegation of a general moratorium is the second of the 16 factual elements referred to in [901] of Hildyard J's judgment and the effect of his findings as they relate to the counterclaim is explained in greater detail in [909] to [923]. The Court of Appeal held that Hildyard J's finding as to the absence of a moratorium was reliable and should remain undisturbed. In that sense, this issue did not feature at the re-trial in the same way that it did at the original trial. It does however bear on the question of consent in relation to the repo, and I shall therefore revert to it in that context.

103. It was also at the 25 December 2008 meeting that Dr Arkhangelsky met Mrs Malysheva for the first time. It was Dr Arkhangelsky's case that the introduction of Mrs Malysheva marked the commencement of the 'raid' on OMG's assets which he alleges that she together with Mr Savelyev orchestrated, and which is the substance of the counterclaim.

104. Hildyard J found that the formulation and coordination of the Bank's response to OMG's financial difficulties, including questions relating to enforcement, was entrusted, probably by Mr Savelyev, to Mrs Malysheva. In effect, she took over from Mr Vladislav Guz (then a member and deputy chairman of the Bank's Management Board and later its chairman) and his subordinates, as the manager with responsibility and oversight of day-to-day relations with OMG. In fulfilling that role, Mrs Malysheva turned for advice and assistance to Mr Vladimir Sklyarevsky ("Mr Sklyarevsky"), the owner of Strategiya Korporativnskyh Investitsiy I Finansov ("SKIF"), an organisation which focused on corporate restructuring and refinancing of distressed banking assets and a long-standing client of the Bank. Mrs Malysheva and Mr Sklyarevsky had been colleagues when working at the AVK group ("AVK"), once one of the Russian Federation's largest financial consultants and brokerage firms.

105. When describing the detail of what occurred, Hildyard J found that there were strong antecedent connections between all the main actors brought in to act for the Bank in relation to OMG's default. Many of them had worked together at AVK. However, he made clear that, contrary to the case advanced by Dr Arkhangelsky, the evidence did not come close to justifying the description of AVK as a vehicle for fraud or those who had worked for it as a "mafia", still less did the evidence justify a finding that there was something akin to guilt by association or a predisposition or tendency to corruption amongst the individuals concerned. Hildyard J did, however, conclude at ([459] of his judgment) that events as they developed demonstrated what he called "a community of interest" between the old friends from their days at AVK separate from, and in the end inconsistent with, the interests of the Bank in its role as lender obliged to seek to recover as much as possible from pledged assets in order to apply as much as possible in diminution of loans it had made.

106. The introduction of Mrs Malysheva to control and direct implementation of the Bank's strategy in all matters concerning OMG was held by Hildyard J to be expected in circumstances in which the Bank had reached the conclusion that default by OMG was all but inevitable and she had considerable experience of handling events of default. It is the fourth of the 16 factual elements of the counterclaimants' claim and is analysed by Hildyard J in greater detail in [961] to [969] of his judgment. The Court of Appeal

held that Hildyard J's findings as to the introduction of Mrs Malysheva were not called into doubt by any other aspects of his judgment. However, Mr Stroilov continued to rely on the fact that Mrs Malysheva did not give evidence at the original trial with the consequence that there was no opportunity for her to be cross-examined on behalf of the counterclaimants. This was a point that was dealt with by Hildyard J in his judgment in passages in which he explained that his concerns about her later conduct in orchestrating the replacement of the directors of Scan and Western Terminal LLC and the subsequent auction sales could not be dispelled by any evidence she may have been able to give. I shall revert to the circumstances in which Mrs Malysheva did not give evidence later in this judgment.

107. Mrs Malysheva was in charge of the drafting and implementation of the repo arrangements. Three sets of documents were prepared: (a) a share purchase agreement to transfer the shares; (b) a preliminary or provisional agreement for the future repurchase agreements to be concluded no later than 1 January 2011 at the same price and on the same terms; and (c) the repurchase agreements themselves. There was also a master repurchase agreement for the transfer back. OMG was kept involved in the process, although Dr Arkhangelsky said that he himself was not personally involved and Hildyard J accepted that this was probably true. It is also important that Hildyard J accepted (at [364] and [365] of his judgment) the Bank's uncontradicted evidence that OMG's lawyers, Mr Vasiliev and his assistant Ms Vasilenko, were kept fully involved in the process, and expressed no concerns to the Bank about the forms of repo documentation proposed.

108. A curiosity which Hildyard J understandably regarded as important was that the repo agreements provided not for the Bank, but for the Original Purchasers to be the counterparties and transferees of the shares which were the subject of the arrangements. I shall come back a little later to the controversy surrounding this aspect of the repos and the explanation given by the Bank for why it was done the way that it was, but it is appropriate to note at this stage that the authenticity and validity of those aspects of the share purchase and repo agreements were not challenged and the identities of the Original Purchasers were not hidden from OMG.

109. The identities of the Original Purchasers were described on the face of the agreements as follows:

i) In respect of the shares in Western Terminal LLC, OMGP entered into a share purchase agreement to transfer 99% of the shares to Sevzapalians LLC ("Sevzapalians"); the remaining 1% was retained by Mrs Arkhangelskaya.

ii) In respect of the shares in Scan, GOM entered into six share purchase agreements to transfer the shares in Scan to the Original Purchasers as follows: 18% to each of Agenstvo Po Upravleniyu Aktivami LLC ("Agentsvo"), CJSC Akva-Ladoga ("Akva-Ladoga"), Graham-Bell LLC ("Graham-Bell"), Medinvest LLC ("Medinvest") and Severo-Zapadnaya Agrarnaya Kompaniya LLC ("Severo-Zapadnaya") and 10% to Gelios LLC ("Gelios").

110. The Original Purchasers, including Sevzapalians, were supposedly owned or controlled either by Mr Mikhail Smirnov, CEO of the Renord-Invest group, a group of companies which features at the heart of the counterclaim, or in the case of Agentsvo and Gelios by Mr Leonid Zelyenov. Both of these businessmen had been known by Mrs

Malysheva for many years and were well established clients of the Bank. Another individual who features in this part of the story is Mrs Elena Yatvetsky, a Russian qualified lawyer and legal adviser to Renord-Invest, who gave evidence from its perspective when it was said that Mr Smirnov was too ill to attend to give evidence.

111. The counterclaimants asserted that the Renord-Invest group was itself owned or controlled by the Bank, Mr Savelyev or their associates, an allegation which was denied by the claimants. In the event, Hildyard J considered that it was not necessary for him to decide the point in that way, but he did decide (at [1196]) that the Bank was able to and did, commandeer companies from the Renord-Invest group for its own use and in that sense they were at the Bank's disposal. During the period of that use, it owned or controlled their businesses, usually through nominees including amongst others Mr Zelyenov. Hildyard J also concluded (at [1198] of his judgment) that the ties between the Renord-Invest group and the Bank, or more accurately those with conduct of the Bank's affairs at the relevant time "were close, personal and pervasive and extended well beyond the confines described by the claimants, and operated to render substantially unimportant the appearance of individual corporate forms or structures."

112. This was exemplified by the fact that there was no written record of the relationship between the Bank and the Original Purchasers, nor of the basis or terms on which they held the relevant shares. It was also illustrated by some of the connections between the participants in the relevant events, a number of whom (including Mrs Malysheva, Mr Smirnov, Mr Sklyarevsky and Mrs Yatvetsky) had worked together at a AVK. One of the more striking connections was that Mrs Malysheva's husband was a shareholder of record in Renord-Invest until March 2008, a shareholding which Mr Stroilov suggested he held as nominee for his wife. Hildyard J made no finding on that latter submission but, in March 2008 Mr Malysheva transferred his interest to Trak LLC and Barrister LLC, which were said by Mr Smirnov to be entities owned by him. Another Malysheva connection was that Mrs Malysheva's son, Mr Igor Malysheva was a shareholder in Baltic Fuel, which ultimately became the owner of Western Terminal, through Kontur LLC ("Kontur") and Nefte-Oil CJSC ("Nefte-Oil").

113. Apart from the interpolation of the Original Purchasers in place of the Bank, there were a number of curiosities in the drafting of the repo arrangements which I shall come back to a little later in this judgment, including in particular those relating to what occurred to the pledged assets in the event of default. It was the counterclaimants' case that they were devised by Mrs Malysheva, and always intended by her and Mr Savelyev, to be the means of wresting control of OMG from Dr Arkhangelsky and obtaining access to the value of the underlying businesses as well as the pledged assets. In the event, stock transfer forms to implement the repo arrangements were registered by the Bank with the federal tax authorities in January 2009. Under Russian law the transfer of the shares to the Original Purchasers had legal effect from that time.

114. Hildyard J's conclusions that the unusual features of the repo agreements did not justify a finding of dishonest collusion or "raiding" by the claimants are explained in [924] to [960] of his judgment as the third of the factual elements of the counterclaimants claim listed in [901]. The inferences to be drawn from the nature of the repos (including in particular the fact that the Original Purchasers were the counterparties used to purchase the assets) are amongst the findings in respect of which the Court of Appeal was not persuaded that Hildyard J's conclusion was safe. The inferences which the

counterclaimants say that Hildyard J should have drawn from the nature of the repos therefore feature as Issue 6(1) for the re-trial.

Loan extensions: early 2009

115. Although there was no general moratorium, on 29 and 30 December 2008 those of the OMG companies which were debtors of the Bank, i.e., LPK Scan, Vyborg Shipping, Onega and PetroLes entered into a series of agreements with the Bank extending the dates for payment of capital and/or interest under the 2007 and 2008 LPK Scan Loans, the First, Second, Third and Fourth Vyborg Loans, the First and Second Onega Loans and the First and Second PetroLes Loans. The details of those agreements are set out in [381] of Hildyard J's judgment from which it can be seen that the extensions as requested and agreed were not uniform, but were all to dates in 2009. They ranged from an extension in respect of interest for the First PetroLes Loan to 5 March 2009 (which was also the date for repayment of the loan's capital) to an extension of the date for repayment of capital under the Second Onega Loan to 23 December 2009. At about the same time, a Scan promissory note, due to expire on 15 January 2009, was also extended by a year.

116. Dr Arkhangelsky also entered into an agreement with the Bank extending the date for repayment of the Personal Loan until 31 December 2009 and the dates for the monthly payments of interest until 28 June 2009. There was also an additional agreement providing for further security in respect of the Personal Loan in the form of a pledge over certain of the Western Terminal assets, although the pledge was never executed. It was Dr Arkhangelsky's case at the trial before Hildyard J that he was not a party to these additional agreements. This was not a very surprising position for him to adopt, as he had said that the Personal Loan itself was a fabrication by the Bank. However, in the same way that Hildyard J accepted that Dr Arkhangelsky had been a party to the original guarantees and the Personal Loan, he also accepted that Dr Arkhangelsky was a party to these additional agreements as well. Those findings of primary fact remained undisturbed by the decision of the Court of Appeal.

117. The agreed extensions provided what Hildyard J called at [384] of his judgment "a lifeline to OMG and Dr Arkhangelsky: default was otherwise inevitable". He also pointed out that they suited the Bank as well, because it wanted to avoid an OMG default to be reserved for at the year-end (2008). The agreements were therefore backdated to the end of 2008 in order to avoid the need for any such reserve.

118. OMG's financial position continued to deteriorate during the early part of 2009 and no payments of any substance were being made into OMG's accounts with the Bank. The only one of the OMG companies which was able to pay interest under its loan was Scandinavia Leasing. OMG's timber business (carried on through LPK Scan and PetroLes) seemed to have come to a complete stop and no funds had been received into the Vyborg Shipping's accounts with the Bank (such limited income as it was receiving was being paid directly into its accounts with V-Bank, in breach of its covenants with the Bank). Although it was Dr Arkhangelsky's evidence that during this time he continued to look for additional funding to make repayment of its loans to the Bank, no such funding was obtained. He contended that, even if long-term finance was not available, he would have arranged replacement short-term funding with V-Bank.

However, it is plain from Hildyard J's findings that he was sceptical that Dr Arkhangelsky really believed that he would have succeeded in arranging short term finance from V-Bank, but concluded at [392] that, even if he did, the belief was a triumph of hope over reality.

The OMG defaults

119. In late February 2009, PetroLes sought further to extend both the First and Second PetroLes Loans for a year from the expiry dates on 5 March 2009 and 26 March 2009 respectively and to defer interest payments until 28 June 2009. Interest under each loan had been deferred until maturity under the agreements made pursuant to the meeting of 25 December 2008. On 19 March 2009, Vyborg Shipping, sought to extend the four Vyborg Shipping Loans by one year and to defer interest payments until the end of June 2009.

120. Initially, Investrbank's Minor Credit Committee approved both PetroLes extension requests, but on referral to the Major Credit Committee the wider extension was refused and it approved only an extension of the First PetroLes Loan for a short period of days until it was coterminous with the Second PetroLes Loan on 26 March 2009. This extension was then referred on to the Management Board of the Bank for a final decision. The Management Board presided over by Mr Savelyev met on 4 March 2009. Its decision, recorded as unanimous, was to deny any further extension of the two PetroLes Loans. As a result, in the absence of the more general moratorium for which Dr Arkhangelsky had contended at the original trial, the First PetroLes Loan fell due for repayment on 5 March 2009.

121. The Bank gave a number of reasons to Hildyard J for the Management Board's decision, all of which were said to justify its view as to the unreliability of their customer. The first was that Dr Arkhangelsky had previously given assurances that OMG was to receive a RUB 300 million timber payment in January or February 2009, but no such payments materialised. The second was that it had discovered tax and criminal investigations into Dr Arkhangelsky, alleging tax evasion and sham transactions, although it transpired during the oral evidence that this was not a significant factor for the Bank. The third was that Ms Volodina (the Bank's deputy chairman and a member of its Management Board responsible for monitoring the Bank's reserves and credit risk) had heard from her contacts at Rosselkhozbank and VTB Bank that they and other banks were experiencing problems and losing patience with Dr Arkhangelsky and his companies, and that OMG was in default with V-Bank. The fourth was that the Bank had found out (which it did sometime during the course of February 2009) that Dr Arkhangelsky had failed to disclose that *'Tosno'* had been arrested for non-payment of bunkering charges. In the light of these factors, Hildyard J was satisfied that the true basis for the Management Board's decision in principle to call in all of its OMG loans across the board was its doubt as to OMG's credit-worthiness.

122. Although Hildyard J was unimpressed by the way in which the Bank's witnesses sought to embroider the reasons for its decisions by reference to collateral factors which were not particularly significant at the time the decisions were made, I think that the fourth reason gives some genuine flavour to one of the factors which caused the Management Board's doubts. Hildyard J was satisfied that the first communication from Dr

Arkhangelsky about the arrest is a letter of 3 April 2009 to Mr Savelyev. He was also satisfied that Dr Arkhangelsky was not aware at the time that the Bank already knew of this arrest. The letter refers to the seizure as having taken place in Tallinn on 11 December 2008. It also referred to the seizure of *'Gatchina'* in La Pallice, France in "early March" 2009 and to the seizure of '*Kolpino'* under the very same maritime claim for non-payment of bills and crew wages and salaries that had previously been used to seize the *'Tosno'*. In effect the doubts as to OMG's credit-worthiness were exacerbated by grounds for a loss of trust, which Ms Mironova explained flowed from the arrests which he had not disclosed ([446] of Hildyard J's judgment). Hildyard J was satisfied that this collapse of trust in Dr Arkhangelsky was readily understandable ([993]), a conclusion with which I agree.

123. It was the Bank's case that it had by then concluded that default across OMG was all but inevitable. It also contended that, despite Dr Arkhangelsky's efforts to disguise the scale of OMG's difficulties, it was this conclusion which prompted a review of its security arrangements. This included, and indeed focused especially on, urgent consideration as to how the Bank's position might be strengthened (by insulating and then perfecting control over its security) to cover against a situation in which, after default, Dr Arkhangelsky sought to avoid enforcement, as the Bank anticipated he would.

124. PetroLes failed to make payment on 5 March. The Bank sent a notice of default on 6 March 2009. From that point onwards, OMG defaulted on each of its loans from the Bank as they fell due. On 25 March 2009, the Bank wrote to Dr Arkhangelsky in relation to the default under the First PetroLes Loan, seeking to resolve any questions concerning enforcement against the pledged assets so as to avoid any court action. There was no response.

125. It was an important part of the counterclaimants' case that the refusal of extensions to the PetroLes Loans (and the Vyborg Shipping Loans as to which see below) justified an allegation that the claimants wilfully contrived to ensure an event of default before Dr Arkhangelsky and OMG had had the time to arrange repayment that they had been promised. This is the fifth of the 16 factual elements described in [901] and Hildyard J's findings in relation to it are explained in [970] to [1018] of his judgment. Hildyard J concluded that the Bank was entitled to refuse loan extensions in March 2009, that it did not engineer a default, that its decision not to extend the loans was, like the loss of trust, readily understandable and that it was under no duty to assist the borrower, but was entitled to act exclusively in its own interest subject to realising its security in a manner consistent with law. The Court of Appeal held that there was nothing unsafe about Hildyard J's findings on this aspect of the case and that they should remain undisturbed.

The Bank's demands

126. Shortly after the Management Board's decision to refuse the extensions sought by Dr Arkhangelsky, Investrbank set up a working group to consider how best to effect recovery. This led to the development of a plan as to when and how demands for repayment of each of the loans to OMG companies would be made. The Bank then continued both to refuse extensions to its loans and to take steps to demand repayment.

127. Thus, having refused an extension to the First PetroLes Loan and in light of OMG's resulting default, the Bank also refused a request for an extension to the First, Second and Third Vyborg Loans until 28 June 2009. The Bank then proceeded to make the following demands for repayment none of which was satisfied:

i) The First Vyborg Loan fell due for repayment on 26 March 2009. On 27 March 2009, the Bank made demand for repayment on Vyborg Shipping. On 1 April 2009, the Bank sent notice of demand to Dr Arkhangelsky under his personal guarantee.

ii) The Second Vyborg Loan fell due for repayment on 15 April 2009. On 16 April 2009, the Bank made demand for repayment on Vyborg Shipping. It also sent notice of demand in respect of Dr Arkhangelsky's personal guarantee.

iii) The Third Vyborg Loan did not initially fall due for repayment until 28 April 2009, but on 14 April 2009 the Bank made demand for repayment by Vyborg Shipping on the grounds that it was in default of its other lending obligations to the Bank. On 22 April 2009, the Bank sent notice of demand in respect of Dr Arkhangelsky's personal guarantee, which it followed up with a further notice on 29 April 2009.

iv) The Fourth Vyborg Loan was due for repayment on 17 July 2009. However, in view of the notice of default under the First and Second Vyborg Loans, on 20 April 2009 the Bank made demand for repayment on Vyborg Shipping. On 29 April 2009, the Bank sent notice of demand in respect of Dr Arkhangelsky's personal guarantee.

128. The First Onega Loan was due for repayment on 27 June 2009. Under the agreement, the Bank was entitled to demand repayment if the financial position of Onega deteriorated and the sums entering the settlement account at the Bank fell below certain minimum levels. This entitlement crystalised when Onega's revenue fell below those minimum levels and, on 22 May 2009, the Bank made demand on Onega (and did the same in respect of the Second Onega Loan). No repayment was made in response to those demands. On 2 June 2009, the Bank made demand on Dr Arkhangelsky under the terms of his personal guarantee.

129. By 3 June 2009, LPK Scan was in default of its obligations under the 2008 LPK Scan Loan because it had failed to register a mortgage agreement dated 26 February 2009 over the real property it had pledged as security. On 3 June 2009, the Bank drew up notices of demand both under the 2008 LPK Scan Loan and Dr Arkhangelsky's personal guarantee. This was followed on 30 June 2009 by demand made on the Personal Loan followed by a notice of demand on Scan as guarantor of the Personal Loan.

130. At the original trial, Dr Arkhangelsky challenged the demands made on him for repayment of the sums due under the Personal Loan and the personal guarantees. Hildyard J rejected Dr Arkhangelsky's case on this issue and was satisfied that the demands were sent to and received by him. There was no appeal to the Court of Appeal against that finding.

Transfers of Scan shares to the Subsequent Purchasers

131. Meanwhile, at some time between 20 March 2009 and 6 April 2009, the Original Purchasers transferred the Scan shares which were the subject of the repo arrangements to the Subsequent Purchasers for a nominal consideration. CJSC Aneks-Finance, Dom Na Maloy Moyke LLC, Khortitsa LLC ("Khortitsa"), Sevzapalians and SKIF each acquired an 18% shareholding from Akva-Ladoga, Graham-Bell, Medinvest, Severo-Zapadnaya and Agentstvo respectively, while CJSC Nazia acquired a 10% shareholding from Gelios. Sevzapalians retained the shares in Western Terminal LLC. Save for a dispute as to the true ultimate ownership of SKIF, it is common ground that all the Subsequent Purchasers were members of the Renord-Invest group. The transfers were directed by Mrs Malysheva.

132. Although the transfer agreements appear to have been made on various dates between 20 March and 6 April 2009, it appeared that the transfers were not registered until some time later, probably in May 2009, until which time the Original Purchasers were still the registered shareholders of Scan. Hildyard J recorded Mrs Yatvetsky's evidence that this meant that the Original Purchasers were still the registered shareholders of Scan at the time that Dr Arkhangelsky was removed as director-general (as to which see further below). There were no formal contractual arrangements between any of the Subsequent Purchasers and the Bank as to the terms on which they held their Scan shares.

133. The rationale and true objectives of the transfer of shares in Scan from the Original Purchasers to the Subsequent Purchasers in late March and early April 2009 is the sixth of the 16 factual elements described in [901] of Hildyard J's judgment and his findings in relation to those questions are explained in [1019] to [1025]. The Court of Appeal said that the inferences that Hildyard J was prepared to make on this issue were thrown into doubt by a number of his later comments. The inferences which the counterclaimants say that Hildyard J should have drawn as to the rationale and true objectives of the transfer of shares in Scan from the Original Purchasers to the Subsequent Purchasers in later March and early April 2009 therefore feature as Issue 6(2) for the re-trial.

Morskoy Bank Loan and change in management at Scan and Western Terminal LLC

134. At the end of March 2009, Dr Arkhangelsky procured Western Terminal LLC to take out a loan of RUB 56.5 million from Morskoy Bank ("the Morskoy Bank Loan"). The loan agreement was dated 30 March 2009 and was signed on behalf of Western Terminal LLC by its then director-general, Mr Vinarsky, on the basis of an OMGP shareholder resolution which was signed by Dr Arkhangelsky. Although the loan was advanced for Western Terminal LLC's working capital purposes, it was in fact used for the benefit of another OMG company, LPK Scan, to whom it was on-lent. It was not however approved by Sevzapalians, one of the Original Purchasers which had become a 99% shareholder of Western Terminal LLC in early February 2009 pursuant to the repo arrangements I have already described.

135. The circumstances surrounding the Morskoy Bank Loan would subsequently lead to criminal proceedings being commenced against Dr Arkhangelsky and an Interpol notice, which in turn became the basis of a request for Dr Arkhangelsky's extradition

from France. The complaints were based on the proposition that Dr Arkhangelsky had no authority to borrow on behalf of Western Terminal LLC since Sevzapalians, as 99% shareholder, had not authorised the loan. I will revert to those proceedings a little later.

136. The Morskoy Bank Loan agreement was entered into during the period in which the agreements to transfer the Scan shares to the Original Purchasers were being entered into. Shortly after the Morskoy Bank Loan agreement was signed, Dr Arkhangelsky and Mr Vinarsky were removed from their offices as directors-general of Scan and Western Terminal LLC. Under Russian law, this was only possible by resolutions passed at shareholders' meetings duly convened and held. Although it was not in dispute that such meetings were held on or around 7 April 2009, it is of some importance to one part of the counterclaimants' case that Hildyard J concluded ([514] and [516] of his judgment) that Sevzapalians set in motion the process for the removal of Dr Arkhangelsky and Mr Vinarsky on 10 March 2009, which was before the Morskoy Bank Loan was agreed. It follows that the entering into of the loan cannot have prompted or justified those removals.

137. The Bank's evidence did not identify the replacement directors-general, an omission which caused Hildyard J to describe its evidence as notably and intriguingly reticent. In fact, Mr Vinarsky's replacement as director-general of Western Terminal LLC was a Renord-Invest employee, Mr Andrey Maslennikov with Mr Igor Chernobrovkin as his deputy. Mr Chernobrovkin was at the time also director-general of Kontur, part of the Baltic Fuel group said by the counterclaimants to be in reality part of the Renord-Invest group and/or ultimately controlled by Mr Savelyev. Three years later, Kontur successfully bid for the assets of Western Terminal LLC, but the counterclaimants alleged that as early as March 2009, Mr Smirnov, the CEO of the Renord-Invest group was "already interested in using Western Terminal assets for his own projects".

138. In his witness statement, Dr Arkhangelsky identified (without elaboration) his replacement at Scan as being a Mr VV Kuvshinov. On Hildyard J's findings, Mr Kuvshinov was a somewhat shadowy figure, but he assumed for reasons that were not explored in any detail in his judgment but were not challenged at the re-trial, that Mr Kuvshinov was also was an employee of Renord-Invest.

139. The real reason for the removals were hotly contested at the original trial. As Hildyard J said at [1035] of his judgment:

> "… the parties are in effect agreed that the purpose of changing the management was for the Bank and/or Renord-Invest to secure control of the assets and prevent Dr Arkhangelsky having any access to them: the real point between the parties is as to whether the Bank had the far-sighted objective of exercising its control to pass the assets out to Renord-Invest or SKIF (as subsequently did, in fact, occur)."

140. Hildyard J described the removal of Dr Arkhangelsky and Mr Vinarsky as an obviously hostile act which signified a settled intent on the part of the Bank to deploy the control over OMG that it had obtained via the repo arrangements. He said that it was unsurprising that Dr Arkhangelsky should have perceived his and Mr Vinarsky's removals after the transfers to the Subsequent Purchasers and the introduction of Mr Sklyarevsky as being the first manifest step in a 'raid'. Nonetheless, he did not accept that he could infer anything more than a determination by the Bank to wrest control

from Dr Arkhangelsky as a means of securing the assets. He reached that conclusion having analysed the applicable primary facts in [1026] to [1038] of his judgment.

141. The circumstances in which Dr Arkhangelsky and Mr Vinarsky were removed as directors-general of Scan and Western Terminal LLC was the seventh of the 16 primary facts relied on by the counterclaimants in support of their claims that the claimants were guilty of conspiracy or collusion to 'raid'. The Court of Appeal concluded that, while the primary facts found by Hildyard J were not in doubt, the inferences to be drawn from them were called into question. The inferences which the counterclaimants say that Hildyard J should have drawn from the removal of Dr Arkhangelsky and Mr Vinarsky as directors-general of Scan and Western Terminal LLC respectively on a trumped up basis therefore feature as Issue 6(3) for the re-trial.

Proceedings by the Bank in respect of the various OMG Loans

142. On non-compliance with the various demands, the Bank commenced a series of proceedings in Russia (and in the case of the pledged vessels elsewhere) to obtain judgment against the relevant OMG companies. As will become apparent from the summary which follows, this process took some time. In general terms, the counterclaimants' initial approach to the defaults was not to dispute their indebtedness, nor even initially to challenge guarantees or the Personal Loan. Instead they disputed valid service of the proceedings brought by the Bank to enforce their indebtedness and issued their own proceedings in the Russian courts to seek to regain or retain control of the OMG companies and their assets. I shall describe the counterclaimants' proceedings after summarising the proceedings taken by the Bank

143. On 8 May 2009, the Bank issued proceedings in the Petrogradsky District Court against Vyborg Shipping, Scan, and Dr Arkhangelsky in respect of the First, Second and Third Vyborg Loans, the security for which was the various vessels I have described above and guarantees from Scan and Dr Arkhangelsky. Details of the proceedings are given in [605] to [607] of Hildyard J's judgment. On 24 August 2009, the Bank obtained judgments in the amounts of RUB 335 million, RUB 368.9 million and RUB 387.6 million respectively. Dr Arkhangelsky challenged the judgments through a number of different procedural routes, alleging amongst other things forgery of his signatures, but each of these challenges was unsuccessful.

144. On 12 May 2009, the Bank brought proceedings in the Kirovsky District Court against Vyborg Shipping, Western Terminal LLC, Scan, and Dr Arkhangelsky in respect of the Fourth Vyborg Loan, the security for which was a mortgage over Western Terminal and guarantees from Scan and Dr Arkhangelsky. Dr Arkhangelsky defended the proceedings on the grounds that his signature had been forged, but was unsuccessful. On 24 May 2010, the Bank obtained judgment against all defendants in the amount of RUB 1.17 billion.

145. On 24 August 2009, the Bank commenced proceedings in the Petrogradsky District Court against LPK Scan and Dr Arkhangelsky in respect of the 2008 LPK Scan Loan, for which the only security was a personal guarantee. Dr Arkhangelsky defended the claim on the basis that the signature on an additional agreement dated 30 December 2008 was not his. This defence was unsuccessful and on 1 February 2010, the Bank

obtained judgment in the sum of RUB 157.4 million. The Bank has not made any recoveries under the 2008 LPK Scan Loan, and the full amount remains outstanding.

146. On 24 August 2009, the Bank commenced further proceedings in the Petrogradsky Court against Scan, Scandinavia Leasing and Dr Arkhangelsky in respect of the Personal Loan, which had since the end of 2008 been secured by security over Western Terminal. Dr Arkhangelsky's defences were unsuccessful and on 1 February 2010, the Bank obtained judgment against all defendants in the sum of RUB 152.9 million. The court ordered foreclosure on the vessel *'Pechora'* which was also pledged in support of the loan. However, this enforcement was unsuccessful because the vessel was the subject of a finance lease between Scandinavia Leasing and Baltdraga CJSC ("Baltdraga"), which took priority over the Bank's enforcement claim.

147. On 15 October 2009, the Bank commenced proceedings in the Petrogradsky District Court against Onega, Scan, Scandinavia Leasing and Dr Arkhangelsky in respect of the First Onega Loan, the security for which included a mortgage over Scan's property in Sestroretsk, and guarantees from Scan and Dr Arkhangelsky. Dr Arkhangelsky defended the claim on the grounds that he had been discharged from liability by alterations in the terms of the principal debt to which he had not consented. This defence was rejected and on 22 January 2010, the Bank obtained judgment against all defendants in the sum of RUB 34.9 million.

148. Meanwhile Western Terminal LLC had commenced proceedings against LPK Scan to recover the proceeds of the Morskoy Bank Loan (RUB 56.5 million) which it had on-lent to LPK Scan. On 30 December 2009 the Arbitrazh court for St Petersburg ordered LPK Scan to make repayment. It was unable to pay and, as appears below, in due course its land at Onega Terminal was put up for sale at public auction subject to the pledges to the Bank.

149. Although Hildyard J's judgment does not deal with proceedings by the Bank in relation to the other OMG loans which I referred to earlier in this judgment, some of them were secured by pledges over OMG assets, the realisation of which are the subject matter of the counterclaim. By the time of the re-trial, there was no dispute that all of these loans had fallen due and that (subject to the counterclaims) they were repayable out of the proceeds of the security and the other assets of OMG. Thus:

i) the First and Second PetroLes Loans were secured over Scan's property at Onega Terminal, as well as by guarantees from Scan and Dr Arkhangelsky; and

ii) the 2007 LPK Scan Loan and the Second Onega Loan were both secured by pledges over the Sestroretsk property owned by Scan and those parts of the Onega Terminal that were owned by LPK Scan, as well as by guarantees from Scan and Dr Arkhangelsky.

The Russian proceedings by the counterclaimants

150. From early April 2009, a series of proceedings were commenced in the name of Mrs Arkhangelskaya and OMG with the objective of reversing the repo arrangements and contesting the removal of Dr Arkhangelsky and Mr Vinarsky. They also initiated the

bringing of criminal charges: in May 2009, orders were issued initiating criminal proceedings against individuals in Renord-Invest and SKIF and confirming the "victim status" of the complainants. Mr Sklyarevsky said that these criminal proceedings came as a surprise and said that at least part of the rationale was to put pressure on him and Mr Smirnov personally. I accept that they demonstrate the lengths to which the counterclaimants were prepared to go in their efforts to set aside the repo arrangements. They also provide some explanation for the Bank's reaction to the full-scale 'war' which ensued.

151. At the trial before Hildyard J, the counterclaimants portrayed these proceedings as necessary, and forced upon them as the only means of vindicating their rights. The Bank portrayed them as part of a 'war' commenced by Dr Arkhangelsky in a classic attempt to frustrate the Bank's enforcement of its security rights, such as to justify the Bank's further efforts thereafter to insulate OMG's assets from what the Bank considered to be obvious stratagems.

152. For present purposes it suffices to summarise the proceedings as follows. Mrs Arkhangelskaya and Bissonia Holdings Limited (a Cypriot company owned by Dr Arkhangelsky and Mrs Arkhangelskaya), brought claims in their capacity as shareholders of OMGP against Sevzapalians and OMGP in respect of the transfer of 99% of the shares in Western Terminal LLC. Mrs Arkhangelskaya also brought six actions against the Original Purchasers of the Scan shares in her capacity as a shareholder of GOM, while GOM itself brought six actions against the Subsequent Purchasers of the Scan shares.

153. The proceedings involved Mrs Arkhangelskaya, as a shareholder in OMGP, seeking to declare void the Western Terminal LLC share purchase agreement and to restore to OMGP its 99% stake. She argued that the sale price of RUB 9,900 was "knowingly" lower than the original purchase price of the shares (i.e. the RUB 1.069 billion in the Premina contract) in order to conceal what was said to be a "gift". On 25 June 2009, the St Petersburg court of first instance upheld Mrs Arkhangelskaya's complaint. It did so in part because of the discrepancy between the sale and acquisition prices, but the court was only able to reach that conclusion because it ruled that the repurchase side of the transaction at the same price of RUB 9,900 was legally irrelevant. (In [554(2)] of his judgment Hildyard J said that the Russian court was not even told about the repurchase agreement, but this was not the conclusion that he ultimately seems to have reached – see [1044(2)]). Sevzapalians' appeals were initially unsuccessful but it eventually succeeded before the Federal Arbitrazh Court of the North West Region in December 2009.

154. Hildyard J identified a number of aspects of the claims brought in the name of Mrs Arkhangelskaya which are worthy of note in the context of the current proceedings.

i) The first was that the proceedings were to the effect that the purchasing companies ought to have been aware that the repo transactions, being at nominal value, were so obviously contrary to the selling companies' interests that they should not have proceeded with them. Yet the presentation to the court of the purchase price as nominal was incomplete, because there was no explanation that the repurchase price was also nominal, a conclusion which Hildyard J concluded the Russian courts did not take into account. However, in circumstances I shall explain a little later, the incomplete presentation to the court was not corrected by the claimants.

ii) The second was that, despite what is now alleged by the counterclaimants in these proceedings, at no point did they or OMG ever allege fraud or conspiracy. Although Dr Arkhangelsky sought to explain this omission to Hildyard J on the basis that in Russia such allegations are ordinarily made in criminal rather than civil proceedings, Hildyard J concluded that his explanation carried no conviction, a conclusion with which I agree.

iii) The third is that the eventual reversal of the judgments once the proceedings went to the third level of appeal was unsurprising in light of the way the case was put. But the fact of victory at two levels, followed by the unsurprising nature of the reversal on final appeal, tended to tell against suggestions made by the counterclaimants subsequently that the final decisions in favour of the Bank "resulted from political interference". This is a point to which I shall return but is an expression of view by Hildyard J with which I also agree.

155. The way in which what were called the 'wars' in the Russian courts were conducted, the curious stances in them of the protagonists and their ultimate resolution in favour of the claimants was the eighth of the primary facts on which the counterclaimants relied to support what Hildyard J called:

> "the inference that the Bank was seeking to 'raid' the assets and parcel them out to its associated companies without accounting for their true value and intending to snaffle the surplus for its or their benefit free of any claims by OMG".

156. Hildyard J explained why he did not accept that conclusion in [1039] to [1044] of his judgment. The Court of Appeal concluded that, while the primary facts found by Hildyard J were not challenged, the inferences to be drawn from them were questionable. The inferences which the counterclaimants say that Hildyard J should have drawn from 'wars' in the Russian courts feature as Issue 6(4) for the re-trial.

Other steps taken by the counterclaimants and claimants

157. At about the same time, Dr Arkhangelsky and Mrs Arkhangelskaya entered into a marriage contract dated 5 May 2009, under which he transferred some of his assets to her. Later on in January 2010, he executed a deed of donation by which he made a further transfer to her of the shares in a Bulgarian entity called EOOD Petrograd, which owned an apartment complex in Bulgaria. Although it was not suggested that the Bank was aware of this arrangement until later, the timing of the agreements excited the Bank's suspicion because Dr Arkhangelsky and Mrs Arkhangelskaya had married in 2002. Hildyard J regarded this reaction as understandable. Mrs Arkhangelskaya said that their purpose was to "safeguard my position and that of our children for the future". The Bank contends that this supports the claimants' concern that Dr Arkhangelsky was prepared to take whatever steps were necessary to evade his creditors.

158. However, Hildyard J refused to make a finding that the purpose of the marriage contract was to put Dr Arkhangelsky's assets beyond the reach of his creditors. He accepted that the claimants had failed to disprove the counterclaimants' case that the purpose was to safeguard Mrs Arkhangelskaya's pre-existing interest in certain assets acquired in her

or joint names (including a flat she said she had owned since before their marriage), and, for the future, to insulate and safeguard any assets she might herself acquire.

159. It is also right to note that the challenge to the marriage contract and claim to set it aside was one of the main bases for the claimants' joinder of Mrs Arkhangelskaya as a defendant to the proceedings. Hildyard J said the following about this in [853] of his judgment:

> "I have been left with the impression, reinforced by the somewhat incidental way in which the claim was advanced and the overlap with other pre-existing proceedings it involved, that the plea was introduced as the means of bringing Mrs Arkhangelskaya into the fray. This may be relevant to the question of costs, but also may provide an insight into the relentless nature of the Bank's pursuit of the Arkhangelsky family."

160. This relentlessness was also manifest in Hildyard J's conclusion that, quite apart from the legal proceedings to recover the debts owed by the various OMG companies and Dr Arkhangelsky, from the summer of 2009 onwards, Mrs Malysheva and the Bank, with Mr Sklyarevsky and Sevzapalians, were determined to take any steps available to them, deploying such state connections as they could call on, to make quite sure that Dr Arkhangelsky's exclusion from OMG could not be undone. Hildyard J did not reject the Bank's protestations that it acted only within the law, but he concluded that some of these steps "included actions of an intimidating kind, especially when Dr Arkhangelsky and Mr Vinarsky dared question the legal propriety and effectiveness of their removals".

161. Although the precise chronology is not entirely clear, the Bank (through Mrs Malysheva) and Mr Sklyarevsky were engaged with a number of proposals designed to protect Scan assets from the threats which they apparently considered were posed by the possibility of judgments against the Bank in the proceedings brought by the counterclaimants in respect of the Scan shares acquired by the Original Purchasers (and then the Subsequent Purchasers), which were being heard by the Russian courts in mid-June 2009. In short, the Bank wished to make sure that its position could not be undone or circumvented whatever might be the result of Mrs Arkhangelskaya's proceedings. The premise of those steps was that the repo arrangements with Sevzapalians (in the case of Western Terminal LLC) and the Original and Subsequent Purchasers (in the case of Scan), were legal and effective. They depended on the effectiveness of the Bank's control over Sevzapalians and the other Subsequent Purchasers.

162. The first proposal (referred to in [563] and [1046] of Hildyard J's judgment) was consideration by the Bank as to whether it should consent to Scan transferring its assets to one of the Subsequent Purchasers (CJSC Nazia), subject to the Bank's pledges over those assets. Although, in the event, no such transfer was effected, the counterclaimants portrayed the fact that this was under consideration as part of a blatant, concerted and reprehensible attempt to evade the decisions of the Russian courts (which at the time were invariably going against the Bank in the proceedings brought by the counterclaimants) by insulating or putting OMG's pledged and other assets beyond its reach.

163. The next proposal is referred to in [576] and [1046] of Hildyard J's judgment. It was to consent to Western Terminal LLC transferring its assets to SKIF, subject to the

Bank's pledge over those assets, or to have some form of lease agreement with SKIF in respect of those assets. It was not in dispute that no such transfer or entry into any lease agreement happened.

164. A third option, which in the event was partially implemented although it never came into legal effect, was described in [577] to [581] and [1050] to [1066] of Hildyard J's judgment. It provided for the Bank (as pledgee) to consent to a lease of the Western Terminal assets between Western Terminal LLC and Gunard Enterprises Ltd ("Gunard"), another company in the Renord-Invest group. The Bank said that it had two particular concerns which caused it to consider and start to initiate this course of action. The first was that Dr Arkhangelsky was by now seeking to disrupt any enforcement over the Western Terminal assets, as shown by the proceedings commenced by OMG to recover control of the shares in Western Terminal LLC. The second was that the Bank now had to take account of any potential claim by Morskoy Bank against Western Terminal LLC. If Western Terminal LLC could not repay the Morskoy Bank Loan then Morskoy Bank would have been entitled to proceed against its assets, which might cause further risk to the Bank's security.

165. Hildyard J was satisfied that the terms of the Gunard Lease were plainly uncommercial. It provided for rent to accrue at the rate of US$20,000 per month, but that the entire rent would only be payable at the end of the term (initially 49 years, later reduced to 30 years). The time would begin to run after the registration of the lease, which apparently never took place. Gunard was entitled to take control of the assets from three days after the lease agreement was signed, i.e. on 23 August 2009, although in the event that never happened.

166. Hildyard J explained that the Bank's evidence was that the conditions of the Gunard Lease were unimportant. What mattered, so its witnesses said, was control in circumstances in which it had already lost in the Russian courts of first instance in the proceedings commenced by Mrs Arkhangelskaya and in which Dr Arkhangelsky was known to have other creditors (such as Morskoy Bank) who might have claims against the Western Terminal assets. It wanted to put in place additional leverage to improve its position in the event that Western Terminal LLC reverted to the control of Dr Arkhangelsky if the success he was having before the courts were to continue.

167. The manner in which the control would be achieved was said to be that the Gunard long lease would operate so as to permit Gunard to sub-let on short notice, but then consent to a sale if any purchaser were to be found for the assets. The effect of the lease was therefore highly uncommercial so far as Western Terminal LLC itself was concerned, because it would operate to encumber and restrict the free realisation of the pledged Western Terminal assets without Gunard's consent.

168. Although the Gunard Lease was signed on 20 August 2009, it was never registered and so never became legally effective. Apparently the reason for this was that Renord-Invest was unable to find any tenants and so the lease agreement went no further and Gunard never went into possession. Nonetheless, Hildyard J said (at [1061]) that the terms were quite extraordinary and uncommercial, and that he agreed with the counterclaimants that they were:

> "so extreme as to be likely entirely to destroy the value of the pledged asset to third parties for so long as they were in place and enforceable. Only to those with the

ability to discharge or dissolve the terms of the lease or the lease itself would the pledged asset realistically have any value".

169. Hildyard J also found that it was clear that the Gunard Lease and the other aborted transactions demonstrated a pattern of setting up transactions that could be implemented, cancelled or wound down at will. This pattern also reflected the use of Renord-Invest group companies to achieve that end. So far as Mrs Malysheva and Mr Savelyev, in combination with Mr Smirnov (and Renord-Invest) and Mr Sklyarevsky (and SKIF) were concerned, this was part of a plan to take all necessary steps to ensure that the assets of Western Terminal LLC and Scan, whether pledged or not, should be insulated or put beyond the reach of Dr Arkhangelsky, OMGP and OMG's other creditors such as Morskoy Bank.

170. Hildyard J's findings in relation to the transactions considered by Mrs Malysheva in relation to the assets of Western Terminal LLC and Scan, including the Gunard lease, comprised the ninth of the 16 factual elements described in [901] of Hildyard J's judgment. His findings in relation to those questions are summarised above, but are explained in more detail in [1045] to [1066] of his judgment. The Court of Appeal said that there were no challenges to the findings of primary fact made by Hildyard J but held that the inferences he was prepared to draw from what occurred were questionable. The inferences which the counterclaimants says that Hildyard J should have drawn from Mrs Malysheva's efforts to put transactions in relation to Western Terminal and Scan assets (such as the Gunard lease) in place therefore feature as Issue 6(5) for the re-trial.

The June seizure of Western Terminal and the July raid

171. During the course of the Bank's consideration of the proposals to give effect to the transfers and leases I have just described, steps of a wholly different character were taken. At about 8.00am on Saturday 20 June 2009, employees of Sevzapalians arrived at Western Terminal LLC's premises, accompanied by a contingent of St Petersburg riot police together with representatives of two security companies instructed by the Bank. By this stage Dr Arkhangelsky had left Russia and was in France, a circumstance to which I shall revert shortly.

172. I agree that the video footage (taken on the mobile phone of a Western Terminal employee and which I have watched) demonstrated that the police and security people took control in a manner that brooked no opposition. The Bank, through Sevzapalians, was thus enabled to take full control of the premises and operations of Western Terminal LLC, excluding both Mr Vinarsky and Dr Arkhangelsky from any further direct involvement.

173. Hildyard J was unconvinced by the claimants' assertion that the operation was necessary to enable access to corporate information and accounts to which Renord-Invest and SKIF were entitled. He also found unconvincing their characterisation of the operation itself (and the presence of the riot police) as "melodramatic". He concluded that there was something unsettling both about the ability of the Bank to call for police deployment and the actual use of such methods, more particularly since the Russian courts were seized of proceedings brought by Mrs Arkhangelskaya which might have led to the restoration of control to OMGP and might therefore have called

into question the validity of the removal process deployed. He also expressed concern about the ease with which the Bank (and Sevzapalians) were able to commandeer this intervention in the manner they did, at the weekend and apparently without a warrant. For Hildyard J this all encouraged a less sceptical review of the counterclaimants' contentions that the Bank, principally through Mr Savelyev, had official contacts in the police, and with Mrs Matvienko (who, as mayor of St Petersburg, controlled them).

174. The perception that something unsettling was going on was reinforced for Hildyard J by two further matters. First, the criminal complaints filed by Dr Arkhangelsky and Mr Vinarsky, alleging that their removals as directors-general of Scan and Western Terminal LLC were illegal, were suddenly closed days before the seizure, by order of the Chief Investigator for St Petersburg. Secondly, Dr Arkhangelsky gave hearsay evidence that he was told by the person with line responsibility for the proceedings that Gen. Piotrovsky had personally intervened with an order to "kick the case into the long grass."

175. At almost exactly the same time (on 19 June 2009), Lt. Col. Levitskaya caused the opening of a criminal case against LPK Scan in relation to alleged non-payment of VAT (which Hildyard J called at [590] a well-known tactic in cases such as this). One month later, on 15 July 2009, the Bank wrote to Gen. Piotrovsky encouraging investigation of Dr Arkhangelsky for alleged fraud in connection with the Personal Loan. The very next day, there was a police raid at OMG's headquarters, which (according to the hearsay evidence of Ms Lukina) was personally attended by Lt. Col. Levitskaya with special forces reported in a newspaper article as claiming to be acting on the directions of Mrs Matvienko, a claim that was also confirmed by Ms Lukina. The evidence was that nearly all the documents, computers and servers were removed and the offices of OMG's in-house lawyer, Mr Vasiliev, were also raided.

176. The July 2009 raids were challenged in the courts and on 30 September 2009 were held by the Kirovsky court of St Petersburg to have been illegal, having been conducted without regard to due process. This decision was upheld on appeal. It was Dr Arkhangelsky's evidence that these decisions were ignored by the authorities and the majority of the documents, servers, computers and hard drives that were seized were never returned. As I understand Hildyard J's judgment, he accepted that this was the case.

177. The circumstances of the seizure of the Western Terminal with the assistance of riot police was the tenth of the 16 factual elements described in [901] of Hildyard J's judgment and his findings in relation to those questions are explained in [1067] to [1074] in a section of his judgment in which he also discusses the raid on the OMG headquarters in July 2009.

178. The Court of Appeal said that there is no doubt as to the findings of primary fact made by Hildyard J but held that the inferences he was prepared to draw from what occurred were unsafe. It is to be noted, however, that the Court of Appeal's description (in [69(x)] and [99] of the Chancellor's judgment) of the seizure and control of Scan and Western Terminal as being unlawful is convenient shorthand in this sense: the description refers to what Hildyard J described as the counterclaimants' *allegation* of unlawful seizure and, while unlawfulness was established by the Kirovsky court in relation to the July raid arising out of the Personal Loan fraud allegation, there was no finding that the June raid pursuant to which physical possession was taken of Western

Terminal was itself unlawful. Be that as it may, the inferences which the counterclaimants say that Hildyard J should have drawn from the seizure of control of Scan and Western Terminal, and the use of political and police connections and the deployment of the police in support therefore feature as Issue 6(6) for the re-trial.

Dr Arkhangelsky's departure from Russia

179. While this was all going on, a further relevant event occurred. In early June 2009, Dr Arkhangelsky left Russia. He said that he did so in order to protect himself and his family. He said that he was prompted to leave by warnings from a friend of a friend, the tenor of which was that Gen. Piotrovsky was reported to have given an order to arrest him and put him in prison.

180. Initially Dr Arkhangelsky went to Bulgaria where he stayed until September 2009 when he and Mrs Arkhangelskaya moved to Nice. They chose Nice because they already owned an apartment there, which they had bought in June 2008. Apart from a one-day trip to Moscow, which he made on 20 July 2009 in order to discuss re-financing for OMG when he said that he met the chairman of Sberbank, he has not returned. Dr Arkhangelsky said that he had been told by one of the lawyers representing him in Russia, that Lt. Col. Levitskaya (the St Petersburg chief prosecutor) had told the lawyer that if Dr Arkhangelsky dropped his complaints against the Bank and returned to Russia he would only serve a limited prison sentence but that if he did not do so the Bank would arrange for him to be killed in France.

181. This version of what occurred was then modified by Dr Arkhangelsky, apparently in the light of certain difficulties with the chronology identified by the claimants. He said that, after leaving St Petersburg, and having hoped for some months to persuade the Russian state that he was being victimised by 'raiders', he eventually, and reluctantly, concluded that the St Petersburg authorities and the Russian state were in it together, and by the latter part of 2009 had concluded that he and his family were in real danger and that there would be no realistic hope of safe return. Hildyard J's finding was that what became the Arkhangelskys' exile was not predetermined in the way that Dr Arkhangelsky initially sought to portray but became a fact of life when (as Hildyard J put it at [1089] of his judgment) "his return became both dangerous and (once his early victories in court were reversed and the Claimants secured their control) practically futile".

182. The allegation by the counterclaimants that the Bank waged a relentless campaign against Dr Arkhangelsky which caused him to flee to France with his family and thereafter to seek asylum and abandon any prospect of a safe return is the eleventh of the 16 factual elements described in [901] of Hildyard J's judgment. His findings in relation to those questions are explained in [1075] to [1090] of his judgment. The Court of Appeal concluded that Hildyard J's findings of primary fact in relation to these matters were not in doubt but held that the inferences he drew from them were unsafe. The inferences which the counterclaimants say that Hildyard J should have drawn from what the counterclaimants alleged to have been the Bank's relentless campaign against Dr Arkhangelsky and his flight to France therefore feature as Issue 6(7) for this re-trial.

The Morskoy Bank Loan proceedings and the extradition proceedings

183. Hildyard J also concluded that it seemed likely that another factor informing Dr Arkhangelsky's decision to move his home and family away from Russia occurred when the criminal complaint I have already mentioned was made against him for alleged fraud in connection with the Morskoy Bank Loan. This was initiated by Western Terminal LLC and the investigation commenced at the end of September 2009.

184. The taking of the Morskoy Bank Loan by Western Terminal LLC had already provided the alleged justification for the Bank's active intervention in the affairs of Western Terminal LLC, and (in part) the Gunard Lease. The basis of the fraud was said to be that when, at the end of March 2009, Dr Arkhangelsky had procured the Morskoy Bank Loan on the basis that he owned Western Terminal through OMGP, this was not the case. Sevzapalians, as Original Purchaser and supposedly as 99% shareholder, had not authorised the loan. Although consent was obtained from OMGP, it was not obtained from Sevzapalians. It was alleged that Dr Arkhangelsky had sought to borrow on a knowingly false basis.

185. Dr Arkhangelsky's case was that Sevzapalians' consent was not required, as it was not a genuine shareholder but merely a 'special company' holding the shares by way of security only and on trust, subject to the undertakings recorded in the Memorandum. Those undertakings included one by the Original Purchasers not to interfere with the day-to-day commercial activities of the companies and one by OMGP and Western Terminal LLC not to stop their commercial activities or otherwise worsen their economic position. He said that his understanding was that the OMG companies were entitled to continue trading in the ordinary course of business and that there was, therefore, nothing wrong or suspicious in Western Terminal LLC borrowing further funds and then using those funds for an inter-group loan. He considered the charge to be trumped up by the Bank to put further pressure upon him and to distract his attention from seeking to challenge the fraud which had been practised on him.

186. Hildyard J concluded that there were very curious features about the Morskoy Bank proceedings, and even more so as regards the extraordinary nature of the evidence compiled with the assistance of the Bank or its employees in its support. As I shall explain a little later this evidence was found to have been a pack of lies ([1104] of Hildyard J's judgment), but Hildyard J also regarded the following as of particular relevance to the Bank's position that it had nothing to do with the extradition request which was the ultimate result of the proceedings (see [596]):

i) The criminal complaint was instigated originally, not by Morskoy Bank, but by Western Terminal LLC, once it had come under the control of the Bank, Sevzapalians and/or Renord-Invest through its new director-general, Mr Maslennikov.

ii) Western Terminal LLC's criminal complaint was launched before any enforcement proceedings were brought by Morskoy Bank itself in respect of the Morskoy Bank Loan. It was only in December 2009 that Morskoy Bank brought civil proceedings against Western Terminal LLC to enforce repayment of that loan. The total debt then amounted to RUB 68,109,102.

iii) It was not until 31 March 2010 that Morskoy Bank itself applied to initiate criminal proceedings in respect of its loan to Western Terminal LLC. Thereafter, the complaint proceeded in the name of Morskoy Bank, with Western Terminal LLC's proceedings being subsumed into that complaint, the essence of which was that Dr Arkhangelsky had used false documentation which wrongly purported to be the consent of Western Terminal LLC's shareholder. It was also alleged that Dr Arkhangelsky then stole the proceeds by transferring them to LPK Scan without any intention of paying the money back to Morskoy Bank or to Western Terminal LLC.

iv) In May 2010 Dr Arkhangelsky was convicted by a St Petersburg Court in his absence. He maintained that he was never notified of the proceedings and only became aware of them after the Russian authorities submitted a request for his extradition in November 2010.

187. The consequence of Dr Arkhangelsky's conviction was that on 14 May 2010 an International Arrest Warrant or Interpol 'Red Notice' was issued, and Russia applied for Dr Arkhangelsky's extradition from France. On 4 June 2010, which was before he said that he knew of the Russian criminal proceedings, Dr Arkhangelsky instructed French lawyers to make a request for political asylum. On 18 November 2010, Dr Arkhangelsky was initially arrested and imprisoned for two weeks until released on bail. The extradition request was ultimately refused by the Investigation Chamber of the Court of Appeal in Aix-en-Provence on 10 November 2011. In its judgment, that court rejected Dr Arkhangelsky's claim that the indictment was brought for inadmissible political purposes, but it upheld the other objections to it. The court concluded that: (1) there were serious doubts with regard to the fairness of the criminal proceedings in Russia, (2) the indictment documents lacked proper particularisation and credibility, (3) extradition would disproportionately infringe his right to a private and family life, and (4) there was a risk that Dr Arkhangelsky would be subject to inhuman or degrading treatment if he were to be extradited. A second request for extradition made by Russia in November 2011 was also rejected for substantially the same reasons.

188. It is Dr Arkhangelsky's case that: (1) the Bank used its close connections to the political elite in Russia (especially through Mrs Matvienko) to manipulate the enforcement authorities to bring a fabricated case, (2) it was the Bank that thereby was the true instigator of the complaint, its adjudication and the extradition request which followed, and (3) it was and is the Bank that sought his extradition as part of the conspiracy he alleges. The Bank entirely denies this.

189. The allegation that the criminal charges against Dr Arkhangelsky and Mr Vinarsky in respect of the Morskoy Bank Loan were concocted and coordinated by the Bank with the assistance of the state and subsequently deployed in the extradition proceedings is the twelfth of the 16 factual elements described in [901] of Hildyard J's judgment. His findings in relation to those questions are explained in [1091] to [1115] of his judgment. The Court of Appeal concluded that Hildyard J's findings of primary fact in relation to these matters were not in doubt, but held that the inferences he drew from the Bank's conduct of them were thrown into doubt by the inconsistency in his judgment. The inferences which the counterclaimants say that Hildyard J should have drawn from the circumstances of the criminal charges against Dr Arkhangelsky in relation to the Morskoy Bank Loan (including their deployment in extradition proceedings) therefore feature as Issue 6(8) for the re-trial.

Tell-tale signs of a classic "raid"?

190. The thirteenth of the 16 factual elements described in [901] of Hillyard J's judgment draws together a number of the matters to which I have already referred, in support of an allegation that the events in the round displayed tell-tale signs of a classic 'raid'. Hildyard J accepted that the facts revealed what he described as a thoroughly disturbing tendency on the part of the claimants and their associates to put forward sworn evidence regardless of its truth, and also that there were clear signs that the claimants enjoyed an unusual ability to call on state resources and assistance at the local level to reinforce the exercise of their legal rights.

191. In dealing with this issue, Hildyard J referred to a report ("the NACC Report"), the status of which he also characterised as debatable. It was produced in 2011 by the National Anti-Corruption Committee, a body which investigates suspect practices in the Russian Federation as to which he said (at [1131] and [1132] of his judgment):

> "1131 … the report offers some confirmation of the prevalence of 'raiding' in the Russian Federation, and its adumbration of the usual characteristics of the practice is useful in that it elucidates the means whereby typically a raid may be effected. However, each case must be assessed on its own facts, and the departures from the usual 'check list' may be as instructive as the similarities. In particular, it is the element of premeditation, and the ability unilaterally to bring about the premeditated result, which is the overall characteristic.
>
> 1132. I suspect that the most telling indication of a 'raid' is evidence of a premeditated decision on the part of the Bank and/or a power reserved to it, to deliberately engineer a default, thus enabling the Bank to be sure it can implement the raid, and at a time of its own choosing."

192. Nonetheless, he said that it did not irresistibly follow that all this was done to advance a preconceived plan to "raid" Dr Arkhangelsky's businesses without regard to legal right. The Court of Appeal held that the inferences to be drawn from the evidence on this issue were thrown into doubt by the inconsistencies in Hildyard J's judgment. The inferences which the counterclaimants say that Hildyard J should have drawn from what they say were the tell-tale signs of a classic raid therefore feature as Issue 6(9) for the re-trial.

Enforcement and the auctions

193. I now turn to the steps taken by the Bank to enforce its debts. The first of these are not the subject matter of complaint by the counterclaimants in these proceedings. They relate to auctions of the vessels pledged as security for the First, Second and Third Vyborg Loans.

194. All three vessels pledged as security were sold at auctions for very substantially less than their valuation by Lair at the time of the relevant Vyborg Loan. *'Kolpino'* was sold at public auction in England in July 2009 for the then US$ equivalent of RUB 105

million. The sale price was 21% of the value given in the Lair valuation. *'Gatchina'* was sold at public auction in France in April 2010 for what was then the Euro equivalent of RUB 47 million. The sale price was 11% of the value given in the Lair valuation. *'Tosno'* was sold at public auction in Estonia in April 2010 for what was then the Euro equivalent of RUB 66 million of which, after payment of prior ranking creditors, the Bank recovered RUB 54.3 million. The sale price was 14% of the value given in the Lair valuation.

195. These realisations, the first of which occurred in 2009, were symptomatic of a more general issue as to the extent to which the Lair valuations were reliable and when it was that the Bank first realised that it was or may be under-secured. Although there was evidence, which Hildyard J accepted, to the effect that sometime no later than the early spring of 2009 the Bank was starting to be concerned about the absence of any development of the Western Terminal site, the Bank only started to focus on the Lair valuation after the defaults occurred. The realisation that the Bank was under-secured only crystallised on 6 July 2009 when the report of another valuer, Agentsvo Delovyh Konsultantsky LLC ("ADK"), was circulated containing the conclusion that the Lair valuation reports had significantly over valued the relevant properties not just by reference to eroded values following the 2008 financial crisis but also at the time. It was not, however, until the latter half of 2009 (the evidence as to timing was very imprecise) that the general director and head of immovable property valuation at Lair were summoned to the Bank. From this meeting it transpired that Lair had valued the OMG assets as security on a future discounted cash flow basis in respect of which the projected income was regarded by the Bank as completely unrealistic.

196. The next category of enforcement relates to those assets which are in direct issue in these proceedings, the first group of which are the Sestroretsk assets and the Onega Terminal assets owned by Scan, all of which were pledged as security for the First and Second PetroLes Loans, the 2007 LPK Scan Loan and the Second Onega Loan. They were sold at public auction held by the Russian Auction House on 26 October 2009 in accordance with an extrajudicial foreclosure agreement between Scan and the Bank dated 22 July 2009.

197. Russian Auction House was established in 2009 by Sberbank, a large Russian state owned and controlled savings bank. It conducted the auction pursuant to a formal agreement with Scan. It was the counterclaimants' case at the original trial that the auction was orchestrated by Mr Andrei Stepanenko, an official in Mrs Matvienko's administration, on her direct orders. Her involvement was said to be part of the conspiracy. Hildyard J concluded (at [1365] of his judgment) that "Dr Arkhangelsky's assumption of such a connection and influence over the Russian Auction House through Mr Stepanenko is a wholly inadequate foundation for such a serious claim." I agree. In my view this particular part of the counterclaimants' case is based on no more than a speculative assumption unsupported by any evidence of material weight. It did not feature in Mr Stroilov's written or oral submissions at the re-trial and, on the evidence I have been shown, I am satisfied that it is improbable that it is true.

198. The two entities admitted to participate as registered bidders at the October 2009 auctions were Solo LLC ("Solo") and Kiperort LLC ("Kiperort"), both of which were part of the Renord-Invest Group. The outcome of the auction was as follows:

i) As to the Sestroretsk assets, the starting price for the bidding was RUB 105.6 million. Solo was the successful bidder and paid RUB 106.656 million. The Bank applied this to the sums owed under the 2007 LPK Scan Loan.

ii) The Onega Terminal assets owned by Scan were divided into five lots, two of which were sold together with a starting price for the bidding of RUB 162.948 million and the other three of which were sold together with a starting price for the bidding of RUB 31.282 million. Solo again was the successful bidder and paid RUB 164.578 million and RUB 31.595 million respectively. The Bank applied these realisations to the sums owed under the First and Second PetroLes Loans.

199. Before the auction, the Scan land at Onega Terminal was valued by an independent valuer, Alliance Otsenka LLC, at RUB 242.789 million. Neither this evidence nor the valuation itself (to which my attention was drawn by the claimants but which was not directly referred to by Hildyard J) was challenged by the counterclaimants. The evidence accepted by Hildyard J ([1335(5)]) was that it is standard Russian practice for a foreclosure agreement to provide that the auction starting price is to be 80% of an independent valuation, which is the aggregate figure at which the starting prices were set in the present case.

200. It appears from [1156(10)] of Hildyard J's judgment that, although Kiperort was registered to participate as a bidder, which had the effect of achieving a quorum for the purposes of ensuring that the essential qualities of a valid auction under Russian law were achieved ([1283]), it did not in fact bid. This is a point on which the counterclaimants rely as evidence that the auctions were infected by dishonest bid-rigging, a point to which I shall return.

201. In January 2011, the LPK Scan land at Onega Terminal was sold at auction, but subject to the pledges in favour of the Bank for as yet undischarged debts (which then exceeded RUB 700 million). The sale was to Mercury LLC ("Mercury") for RUB 99,000 again acting at the behest and on behalf of Renord-Invest and with the consent of its then owner Mr Sklyarevsky. Mercury was an entity owned by Mr Sklyarevsky until April 2011 when it was sold by him to Renord-Invest.

202. In June 2011, the Bank assigned to Mercury the remainder of its claim under the LPK Scan Loan for RUB 12.69 million and its claim under the Second Onega Loan for RUB 14.3 million. These assignments included the associated security agreement in respect of which the LPK Scan land at Onega Terminal had been pledged. The Bank then applied the RUB 27 million to the amounts outstanding under the 2007 LPK Scan Loan and Second Onega Loan and otherwise wrote off the monies owed to it by LPK Scan and Onega under those loan agreements (c.RUB 810 million). The amount so applied was only a little less than the price of the LPK Scan land at Onega Terminal as recorded in the OMG accounts, which was just over RUB 29 million, and according to Hildyard J ([1407]) represented fair value according to valuations in the depressed conditions of the time. He also held that the land had only been acquired two years earlier for RUB 2 million ([1415(4)], with a relatively small amount of additional expenditure.

203. Once Mercury had acquired the LPK Scan land at Onega Terminal free from the Bank's pledges, Renord-Invest sold the combined Onega Terminal land to ROK No 1 Prichaly, which as I have explained owned property adjacent to Onega Terminal with access to the sea (unlike Onega Terminal itself). The price was c.RUB 500 million, although

surprisingly there was no documentation to confirm this figure. It purchased with loan funding from the Bank. This was achieved by two sales to ROK No 1 Prichaly: Solo's sale of the land previously owned by Scan and Renord-Invest's sale of Mercury. Hildyard J was satisfied that ROK No 1 Prichaly was probably the only realistic buyer of the land at Onega Terminal. It was part of the SFP group, which owned not only the land adjacent to the Onega Terminal but also the berths on which the Onega Terminal depended. The Onega Terminal assets therefore had special synergy value for it.

204. At the original trial, the counterclaimants submitted that there was an irresistible inference that ROK No 1 Prichaly was in the claimants' ownership or control and that this explained what they called the cosy deals by which it acquired ownership of the whole of the Onega Terminal. The claimants submitted that ROK No 1 Prichaly was an independent third party, and that there is no evidential basis for the counterclaimants' contention that the sale to it of the Onega Terminal assets was in some way part of a conspiracy to which it was party. For understandable reasons, Hildyard J described the counterclaimants' inference argument as entirely circular and concluded at [1246] and [1249] that:

> "1246. The actual evidence as to the ownership and control of ROK No 1 Prichaly is (leaving aside any inference from the allegedly 'cosy' deal) is very slim: indeed, I do not think there is any of any substance. Further, (again leaving the 'inference' case aside) the evidence of any substantial connection between the Claimants and ROK No 1 Prichaly, let alone such a connection as might of itself suggest conspiracy, was also vanishingly weak."
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> "1249. Apart from the 'inference' case as described above, I see no basis for the claim that ROK No 1 Prichaly was owned or controlled by Renord-Invest, SKIF, the Bank or Mr Smirnov. There is no evidence that it was part of either the Renord Group or the SKIF stable."

205. I agree with this conclusion, and I also agree that the counterclaimants' original case that ROK No 1 Prichaly was a party to a dishonest conspiracy and acquired the Onega Terminal land at a gross and fraudulent undervalue, is not substantiated by the available evidence. Hildyard J was satisfied ([1413]) that the counterclaimants' case to this effect was no more than speculation and at the re-trial the counterclaimants did not persist in presenting their case in this way. They did, however, suggest that ROK No 1 Prichaly was likely to have paid more than RUB 500 million (a possibility which Hildyard J did not rule out: see [1337(5)] of his judgment) and that I should draw adverse inferences from the fact that the terms of the deal between Renord-Invest and ROK No 1 Prichaly were not disclosed. In essence, the way in which the counterclaimants put their case was that I should infer that market price is likely to have been paid.

206. The sequence of enforcement steps which ultimately led to ROK No 1 Prichaly acquiring the combined Onega Terminal land mirrored a plan set out in a document called the "Stage Plan". There is a dispute between the parties as to the purpose of the Stage Plan. The counterclaimants contend that, taken together with inexplicable features of the auction sales, the Stage Plan supports the conspiracy they allege. Their allegation that at an early stage (probably even before December 2008), the Bank and/or Renord-Invest were interested in Western and Onega Terminals as complex income-generating assets with synergistic value which could be enhanced by acquiring control of all their assets, including unpledged assets was the fifteenth of the 16 factual

elements described in [901] of Hildyard J's judgment. His findings in relation to those questions are explained in [1332] to [1338] of his judgment. The Court of Appeal said that his conclusions required reconsideration.

207. The Western Terminal assets pledged to the Bank were realised by what Hildyard J called processes "which were on any view convoluted". These assets were those parts of the Western Terminal comprising berth SV-15 and the c.73,000 sq m land plot which were pledged to the Bank as security for the Fourth Vyborg Loan. They had an agreed value of RUB 1.286 billion for the purposes of the pledge. I can summarise what occurred as follows.

208. On 3 December 2010, Morskoy Bank obtained judgment against Western Terminal LLC for RUB 68,109,102 on its civil claim in respect of the Morskoy Bank Loan. An appeal by Western Terminal LLC was dismissed on 30 March 2011. Not having recovered on its own claim over against LPK Scan, Western Terminal LLC had no funds to repay Morskoy Bank. Meanwhile, in February 2011 Morskoy Bank had assigned its unsatisfied claim to Sevzapalians in return for which it acquired the right to recover c.RUB 68 million in the enforcement proceedings. At or about the same time, Sevzapalians transferred its shareholding in Western Terminal LLC to Ultriva Limited ("Ultriva"), an offshore entity incorporated in Cyprus, which was also a Renord-Invest company.

209. In August 2011, as part of the enforcement proceedings against Western Terminal LLC, which were now being conducted for the benefit of Sevzapalians, the court bailiff sought and obtained the Bank's consent to enforce against the entirety of the Westem Terminal assets, i.e., both the real property pledged to the Bank and the residual assets which had not been pledged (berth SV-16M and the railway tracks). Hildyard J said that, according to the Bank's witnesses, any auction of the entirety of the Westem Terminal assets to realise sums in respect of the Morskoy Bank claim would have left unaffected the Bank's security rights in respect of the Western Terminal assets.

210. Two public auctions were then held in December 2011 in order to enforce the writ of execution against Western Terminal. At the first auction held on 23 December 2011, Nefte-Oil purchased the two railway tracks located on adjacent land outside the Western Terminal for RUB 5,646,740. At the second auction held three days later, Nefte-Oil purchased the Western Terminal land plot, SV-15, SV-16M, and the railway tracks on the site for RUB 161,497, still encumbered by the pledge to the Bank. There is a puzzle as to whether any other party was in fact registered to bid, a point that is relevant to the question of whether the auction was in fact valid (as to which see further below). Although there was no clear evidence that any such bidder was registered, Hildyard J was satisfied that one probably was for the reasons he gave in [1361] and [1362] of his judgment. I agree with his conclusions on this point.

211. On 6 June 2012, Nefte-Oil sold the pledged assets of Western Terminal to Vektor-Invest LLC ("Vektor-Invest"), another Renord-Invest company, for RUB 2,300,000. Only the pledged assets were sold, whereas the unpledged berth SV-16M and the railway tracks were kept by Nefte-Oil. As Hildyard J explained in [633(9)] of his judgment "The unpledged assets were useless in themselves, but added synergistic value to the pledged assets." The pledged assets were sold subject to the pledge.

212. Two months later, and after proceedings had been commenced, the Bank and Vektor-Invest made a settlement agreement by which the Bank agreed to sell its right to enforce the pledge to Vektor-Invest for RUB 1,209,952.86. This was the value stipulated in the security agreement to be "the initial selling price" in any sale at open public auction and was itself based on the Lair valuations, which as I have explained had by then been discredited. Under this settlement agreement, which was dated 20 August 2012, Vektor-Invest was to pay the Bank before 28 August 2012, failing which the Western Terminal assets pledged to the Bank would be auctioned, with an initial sale price of RUB 670 million.

213. The claimants insisted that, although barely half the agreed "initial selling price", RUB 670 million was by then, in difficult circumstances, the market value; indeed Hildyard J found that it was fixed in accordance with valuation advice ([1375]). This settlement agreement has the case name and the name of a judge in the top left corner and Hildyard J noted that the default price of RUB 670 million there recorded therefore appears to have been approved by the Russian court. He also found that the settlement agreement valuation of RUB 670 million was not vastly at variance with the value reached in a valuation report from GVA Sawyer dated 12 April 2012, which valued the Western Terminal assets at RUB 709.8 million and a July 2012 report from ADK which valued the assets at RUB 837.4 million, neither of which were challenged by the counterclaimants. He also thought that the reduction might be justified as a means of attracting interest in a very difficult market, a conclusion which seems to me to be likely to have been the case.

214. Hildyard J accepted the expert evidence (including that of the counterclaimants' expert, Professor Sergei Guriev) that the commencement of enforcement proceedings and their compromise by court-approved settlement as the means of realising pledged property was consistent with standard practice. It was required "in order to ensure ultimate sale clear of adverse claims if (as was the case) Dr Arkhangelsky was determined to oppose realisation and otherwise make trouble in any way he could" ([1335(3)]).

215. Vektor-Invest did not pay the agreed price by the agreed date (28 August 2012) and the Bank then terminated the agreement. On 29 September 2012, the pledged assets were then sold at a public auction by way of realisation of the Bank's pledge. According to the documents initially disclosed by the Bank, the only bidder appeared to have been Kontur, but other documents subsequently disclosed by the claimants suggest that there was another bidder, Globus-Invest LLC ("Globus-Invest"). At the auction, Kontur bought SV-15 and the other pledged assets at Western Terminal for RUB 675 million. Kontur also acquired SV-16M and the track for a nominal consideration, thereby reuniting the Western Terminal assets into a coherent whole.

216. As to the Pravdy Street property, Scan was one of the Bank's debtors in respect of the First, Second and Third Vyborg Loans. It eventually filed for bankruptcy, and a receiver was appointed by the court in 2011. He arranged for Scan's real estate assets at Pravdy Street to be sold by public electronic auction on 30 August 2012. The auction was advertised in Kommersant and there were six separate lots. BarD LLC was the successful bidder for Pravdy Street assets 1-4 and Stimul LLC was the successful bidder for Pravdy Street assets 5-6. This auction realised RUB 19.15 million, which was distributed to the Bank and Scan's other creditors. The Bank received RUB 3.745 million, which it applied to the sums owed under the Second Vyborg Loan. Although Hildyard J concluded on the balance of probabilities that both BarD LLC and Stimul

LLC were within the Renord-Invest group, there was no allegation by the counterclaimants that the receiver who organised this auction was complicit in the conspiracy.

217. In due course, the Petrogradsky District Court appointed the Federal Service of Bailiffs to enforce its 24 August 2009 judgment in respect of the First, Second and Third Vyborg Loans against Dr Arkhangelsky's personal assets. They were sold by the court bailiff by public auction held on various dates at the end of 2011:

i) The apartment at Kharkovskaya Street was sold in October 2011 for RUB 11.59 million, of which the Bank recovered RUB 10.66 million. The apartment was bought by a private individual.

ii) The parking spaces at Kharkovskaya Street were sold in late 2011 for RUB 1.826 million, of which the Bank recovered RUB 455,994.

iii) Personal chattels were sold on 21 December 2011 for RUB 51,950, of which the Bank recovered RUB 21,973 (which Hildyard J said appeared extraordinarily little for the entire contents of a multi-millionaire's main residence).

218. The other two assets which were the subject matter of the claim were a 14.76 hectare plot of agricultural land at Seleznyovo which was owned by Western Terminal LLC and an 18.5 hectare plot of land at Tsvelodubovo originally owned by Scan. Neither plot of land was at any stage sold at auction and at the date of the original trial, the evidence was consistent with both plots being retained by or on behalf of the Renord-Invest group.

219. The Seleznyovo land was not itself pledged to the Bank but came under the control of Renord-Invest when it acquired Western Terminal LLC through Sevzapalians under the terms of the repo arrangements. On 29 November 2009, Mercury was registered as owner for Renord-Invest. Hildyard J appears to have accepted the Bank's assurance that the proceeds of sale of the land would be applied against the OMG debt, although it appears that, by the time of the original trial, it had been on the market for sale by Renord-Invest at an asking price of RUB 12 million (US$ 172,000) since 2014.

220. The Tsvelodubovo land was transferred to Meridian LLC (another Renord-Invest company) in December 2009 and then on to Mr Evgeny Kalinin, Renord-Invest's finance director, to hold on behalf of Renord-Invest. The transfer price was RUB 500,000.

221. The circumstances in which Kontur became the purchaser of Western Terminal LLC and Solo became the purchaser of Onega Terminal, and the questions which have arisen as to the ownership of the entities involved in the enforcement and realisation processes (including Baltic Fuel) continue to be in dispute in the context of the counterclaim. This aspect of what occurred relates to the fourteenth of the 16 factual elements described in [901] of Hildyard J's judgment, which itself extends more widely to the counterclaimants' allegations as to the true nature and purposes of the long series of transactions by which all of the OMG assets were realised. The essence of this part of the counterclaimants' claim is that the sellers and purchasers at each of the auction sales at which the pledged assets were sold were connected parties owned or controlled by the Bank and/or Mr Savelyev.

222. The Court of Appeal held that Hildyard J's findings in relation to the propriety and validity of the auctions were equivocal. This was the issue on which the Chancellor said in [101] of his judgment that Hildyard J's judgment gives rise to inconsistency and difficulty, more particularly on the resulting question of whether the counterclaimants sustained harm as a result of the claimants' conduct.

223. The propriety and validity of the disposals and the motives for the acquisitions by the purchasers (insofar as they were acquired by the claimants and/or the Renord-Invest group) are Issues 3 and 4 in the List Issues, while the ownership of Baltic Fuel is Issue 5. Although the Court of Appeal concluded that, subject to the need to determine the issues between the parties fairly, no further evidence should be called on the Baltic Fuel issue, different considerations were thought to arise in the remaining questions relating to Issues 3 and 4 in respect of which the Court of Appeal considered that the calling of further evidence may be necessary. In the event, as I have already mentioned, the parties agreed that the further evidence would be restricted to expert evidence on valuation. It follows that, on the remaining aspects of the auction sales and the identity and role of the purchasers, the evidence at the re-trial was limited to the evidence adduced at the original trial before Hildyard J.

Issue 1

224. As Mr Stroilov submitted, the counterclaimants' case ultimately turns on the answer to Issue 1. This is whether, in the light of the undisturbed finding of primary fact, the Court of Appeal's findings as to the standard of proof, the matters identified in [69] and [76] of its judgment and the redetermination of the remaining issues on the List of Issues, the claimants are liable under article 1064 for the dishonest conspiracy alleged by the counterclaimants. Although it is listed first, as is apparent from its formulation the answer to Issue 1 depends on the court's assessment of the Issues listed as 2 to 6(9), together with those of Hildyard J's findings which were not disturbed by the Court of Appeal. It is therefore necessary to reach a conclusion on these other issues, before addressing the inherent probabilities as to whether the claimants are liable for the dishonest conspiracy alleged.

225. As to the order in which to deal with the other issues, I think it is more helpful to adopt a chronological approach. This means that I will deal with the inferences to be reassessed first (Issues 6(1) to 6(9)). They all relate to events prior to the auctions. I will then give my findings on Issues 3, 4 and 5 which are concerned with the conduct of the auctions and the motives of the acquirers of the assets and the ultimate ownership of Baltic Fuel. I will then consider the question of value of the pledged assets at the time of the sale or auctions (Issue 2). Finally, I will explain my conclusions on Issue 1.

226. In my view, any other approach runs the risks which flow from compartmentalisation, which the Court of Appeal held to be an entirely logical and comprehensive approach by Hildyard J, but was flawed because he did not then stand back and consider the effects and implications of the facts he had found taken in the round (see [59] of the Chancellor's judgment). It seems (see [68] of the Chancellor's judgment) that one of the principal reasons for this concern was Hildyard J's explanation in [1619] to [1637] (and in particular in [1635]) of why he declined to make the declarations of non-liability

sought by the claimants. The Court of Appeal has said that much of what Hildyard J said in [1635] rendered the judgment equivocal on the findings he had made earlier and considered that these inconsistencies were caused by an application of a piecemeal approach which rendered his conclusions on the counterclaim unsafe.

227. Accordingly, while I will express views as to the inferences I consider it is appropriate to draw issue by issue, I shall endeavour to look at each issue in its proper context, having regard in particular to what may have gone before. This is particularly important in a context in which many of the circumstances giving rise to the inferences which the counterclaimants invite me to draw are consistent with the conspiracy they allege. However, they are equally consistent with the conduct of a hard-nosed bank concerned to avoid obstruction and delay from a customer which is no longer able to discharge its liabilities and whom they no longer trust.

228. Before doing so, it is right to address the significance of the fact that a number of the core allegations made by the counterclaimants were rejected by Hildyard J in findings which the Court of Appeal was satisfied were safe.

229. The first of these was the allegation that the Bank had forged the personal guarantees given by Dr Arkhangelsky and other loan documentation, including that relating to the Personal Loan. This part of the counterclaimant's case was rejected by Hildyard J in the clearest terms (at [748] "I consider it is plainly more likely than not that the signatures are his own") and in circumstances in which Hildyard J was satisfied that Dr Arkhangelsky's deployment of the argument in these proceedings was dishonest (see in particular the conclusions at [756] to [758]). The Court of Appeal determined that these findings were reliable (the Chancellor's judgment at [69(i)]) and, in the light of Hildyard J's compelling analysis of the evidence over 35 pages of his judgment, I can see why it took the view that it did.

230. The relevance for present purposes is that this allegation went to the heart of the conspiracy, because as Hildyard J recorded at [867(5)] it was said by the counterclaimants that "… in order to further the conspiracy and to put irresistible pressure on Dr Arkhangelsky, the Bank fabricated the Personal Guarantees and Personal Loan (and the additional documents relating to them) and procured the forgery of Dr Arkhangelsky's signature on them." I agree with the claimants' submission that the failure of these contrived allegations is significant because they were advanced as the genesis of the counterclaimants' core case that the Bank wanted to harm Dr Arkhangelsky and was responsible for his systematic harassment and the campaign of persecution against him.

231. However, like Hildyard J, I do not accept that either the failure of this part of the counterclaimants' case or the consequential damage done to Dr Arkhangelsky's credibility by Hildyard J's rejection of his evidence in the terms in which he did, is fatal to the whole counterclaim. The fact that the allegations which have so comprehensively failed were used to justify the claim that a conspiracy had occurred is a material factor in the court's assessment of the probabilities that the conspiracy did indeed take place, but their failure is not conclusive.

232. I have reached a similar conclusion in relation to the second of the factual elements of the counterclaimants' claim in respect of which Hildyard J rejected their case and the Court of Appeal held (the Chancellor's judgment at [69(ii)]) that his findings were

reliable. This was his finding that no general moratorium was agreed and an agreement to that effect was not therefore the reason that Dr Arkhangelsky agreed to enter into the repos.

233. This issue is closely related to the third factual element originally relied on by the counterclaimants as demonstrating conspiracy and collusion, but in respect of which it was said by the Court of Appeal (the Chancellor's judgment at [69(v)]) that there was nothing unsafe about Hildyard J's rejection of their case. The findings made by Hildyard J which were safe (and which are therefore not for reassessment at the re-trial) are not just that there was no general moratorium, but also (a) that the Bank was entitled to refuse loan extensions and its decision to do so was readily understandable, (b) that the Bank did not engineer a default, (c) that it was under no duty to assist its borrower and (d) that it was entitled to act exclusively in its own interest subject to realising its security in a manner consistent with law.

234. These conclusions are important, when combined with the finding that the repos were consensual, because they demonstrate that, at the time the repos were agreed, there was nothing underhand about the way in which the Bank took the steps it did to enhance its security. On the face of it, the Bank appeared to be protecting its own position in a manner, the substance and legal consequences of which were in no way hidden from OMG or Dr Arkhangelsky and in circumstances in which they had the benefit of legal advice. However, the next issue to which I will now turn is whether the actual terms of the repos support an inference that the Bank and/or Mr Savelyev were in fact embarking on the process of conspiring with others to steal the OMG's valuable assets for their own benefit.

Issue 6(1): the inferences to be drawn from the nature of the repos

235. The Court of Appeal held ([69(iii)] of the Chancellor's judgment) that the inferences drawn by Hildyard J from the nature of the repos (including the fact that the Original Purchasers were the counterparties used to purchase the counterclaimants' assets) were unsafe.

236. Having identified a number of peculiarities and curiosities in the form of the repos, the question that Hildyard J had asked himself was as follows ([936] of his judgment):

> "The question is whether these curiosities demonstrate a hard bargain which the Bank was in a position to and did drive in order to enhance its security and the prospect of full recovery; or whether, even at this early stage, the Claimants had their eyes not on repayment of the loans but on seizing the businesses. For the purpose of analysis, I turn to assess each curiosity in turn and then at the end seek to assess the arrangements in the round."

237. The form of the repos was one of the features of the case which Hildyard J said in [1635(1)] of his judgment had encouraged and fomented the misgivings he had about the counterclaim, such that he considered that the declarations sought by the claimants should not be made. Nonetheless, the conclusion he reached ([959] of his judgment) was that, even bearing in mind the use ultimately made of the curiosities, none of them

"justify a finding that the repo arrangements were contrived *ab initio* to implement a 'raid'". He went on to say:

> "In my judgment, none of that is enough, of itself or in combination, to warrant an inference that when the Bank initially agreed the repo arrangements with Dr Arkhangelsky and put them in place it did so with the intention of later stealing the Group's assets."

238. This is an important part of the case, because the repos were the means by which OMG and Dr Arkhangelsky lost control of the shares in Western Terminal and Scan. Their nature and the circumstances in which they came to be agreed were said by the counterclaimants to be part of the dishonest conspiracy. The root of their case was that, while the repos were consistent with the legitimate banking purpose of protecting and streamlining the process of realising security, they were also capable of being used for a dishonest raid on the assets, and they invite the court to find that dishonest purpose in the present case. In support of their argument the counterclaimants rely on three separate aspects of what occurred.

239. The first is what they said were the unusual circumstances in which the repo arrangements were said to be necessary at all, together with the unusual features of some of the terms of the relevant documents. As to the former, the counterclaimants said that the repos were unnecessary because the Bank already had pledges over most of the real property owned by Western Terminal and Scan. It was therefore said to be implicit that the arrangements were not intended for security but to establish a mechanism for snatching control.

240. The Bank's expert, Mr Mikhail Turetsky, disagreed that the repo arrangements were unnecessary on the basis that, while a mortgage or pledge is what he called very good negative protection in that it prevents the borrower from selling without the Bank's consent, it provided limited positive protection. What he meant by that was that in his view the enforcement of security by way of sale (without the additional benefit of the repo) in many instances required cooperation from the borrower such that in his opinion:

> "it wouldn't be an unrealistic estimate that the bank may spend 2 or 3 years trying to enforce. Probably they would enforce at the end, but they would lose so much time, and value may have been reduced over time."

241. This conclusory opinion was based on Mr Turetsky's considered view of the way in which the system in Russia enables a number of hurdles to be erected as obstructions to efficient secured creditor enforcement. Based on his evidence Hildyard J concluded in a passage of his judgment (at [937]) with which I agree as follows:

> "The evidence that enforcement, even of such pledges, may be a long-protracted business if the pledger is minded to 'play the system' was not contradicted; and Dr Arkhangelsky made no secret of his intention to use the full armoury of tactics available to borrowers in Russia to delay or even defeat a lender. Control of the borrower achieved though implementation of repo arrangements would circumvent all this, and, as Mr Turetsky pointed out, would be of particular interest and potential utility in the context of fast-deteriorating asset values where, in his phrase, "the land was burning under their feet".

242. It follows that, merely because the Bank already had pledges over the underlying assets does not mean that the repos were unnecessary. Hildyard J saw that there was good sense in a mechanism for securing control of the entities which provided the security and I agree with his view. Although Professor Guriev considered that "a further registered pledge of real estate would be a more reliable form of additional security", even he did not contradict that logic, nor did he contend that combining a repo arrangement with an existing mortgage of real property was inherently wrongful or necessarily sinister, although he maintained his position that it was unusual. In my view, Hildyard J was right to conclude that control was a core aspect of the Bank's reason for wanting the repo arrangements and (as he explained in [959] of his judgment) that was a perfectly legitimate response to avoid facing the delaying tactics of a recalcitrant borrower:

> "The Counterclaimants' expert, Professor Guriev, acknowledged that the value of collateral is in substantial part a function of the ability to control its disposition, and that upon default a creditor bank's main job is to "assure the control over the collateral" (as he put it in his report). Indeed, although he avoided giving a direct answer, when it was put to him that it was plainly a legitimate aim and advantage for a creditor bank to seek ways of vesting control of collateral in the event of default in friendly hands, Professor Guriev offered no cogent basis for denying it."

243. In any event, I think that Hildyard J was correct to note that, because there were assets of the underlying companies which remained unpledged, the effect of the repos was to enhance the security granted by the pledges over the identified assets because they enabled the unpledged assets to be made available for discharge of the indebtedness to the Bank through the exercise of the control conferred by the holding of shares under the repos ([939] of his judgment). In reaching that conclusion, Hildyard J accepted the evidence from Ms Mironova that the purpose of the repo deal was to have an opportunity "to get the asset in its entirety", by which she meant that the repos would enable unpledged assets to be made available with pledged assets if that would provide synergy value.

244. The counterclaimants also said that it was peculiar and unusual that, even though the repos were said to be justified as enhancing the Bank's security, the repos provided for the Original Purchasers, who were parties connected to the Bank rather than the Bank itself, to be the counterparties used to purchase the counterclaimants' assets. This was an aspect of the nature of the repos to which the Court of Appeal drew specific attention (see [16(iii)] and [69(iii)] of the Chancellor's judgment). This peculiarity was said to be all the more striking as, although the role of the Original Purchasers was apparent from the face of the repo documentation itself and could not therefore be characterised as covert, the arrangements between the Original Purchasers and the Bank were made orally and not recorded in writing.

245. It was the Bank's case that it was expedient for it to arrange for the Original Purchasers to act as transferees of the shares for a number of accounting and commercial reasons, not least the fact that, if the Bank held the shares itself then it would have needed to consolidate Western Terminal LLC and Scan in the Bank's own financial statements. In other words, the Bank contended that the interposition of the Original Purchasers into the structure enabled it to use a repo structure in a manner which ensured that the impact of the transaction on the Bank's capital was minimised. As Mr Sklyarevsky explained in a passage of his evidence referred to in [488] of Hildyard J's judgment:

> "I also understood why the Bank used third parties to hold the shares on its behalf in the "repo" arrangements. Due to Russian banking controls that were in place at the time, if the Bank had purchased the shares in the relevant OMG companies and put them on its own books, then their value would have been deducted from the Bank's overall capital."

246. The counterclaimants did not accept that was the real reason and it was Dr Arkhangelsky's case at the original trial that he was misled as to the reasons for the introduction of the Original Purchasers, which he now believes was in reality part of the alleged 'raid' and indeed the first step in the appropriation by Renord-Invest of the assets of OMG. Furthermore, Professor Guriev gave evidence to the effect that the use of repos for the purposes of reducing the impact of the transaction on the Bank's capital was a deliberate attempt to mislead the market. He was not, however, able to say how unusual the structure was. Indeed he accepted that it might be quite commonplace, but insisted that if it was, he would characterise it as "common malpractice".

247. Mr Turetsky took a different view. He said that he did not consider there was anything covert or improper about the repos making provision for relevant rights to be vested in the Original Purchasers, in circumstances in which OMG was well aware of their identity. He also did not consider that the form of arrangement involving the interposition of the Original Purchasers was particularly unusual, not least because, unlike larger banks such as Sberbank or VTB, the Bank did not have its own subsidiaries incorporated for the purposes of acquiring 'toxic' assets onto its own balance sheet. As he explained in a passage from his evidence cited by Hildyard J at [933(2)] of his judgment:

> "…assuming that the OMG companies (of which Scandinavia Insurance and Western Terminal were a part) [were] in a dire financial position, like many companies in Russia during the global financial crisis, then I am not surprised that the Bank structured the repo transaction with the assistance of third parties. I am familiar with the practice of Russian banks of not consolidating any distressed companies acquired in enforcement scenarios due to negative consequences for the bank's financial results and pressure on regulatory capital requirements."

248. Another unusual feature was that the sale of the relevant shares by OMG to the Original Purchasers did not make any specific provision for the right to repurchase. On their face the sale appeared to be absolute. It was also the case that there was no provision dealing with (a) the entitlement of the purchaser under the repo to income generated from the underlying assets (and whether or not it should be applied in reduction of the debt) or (b) any restrictions on the exercise by the purchaser of the rights which attach to the shares or (c) any requirement on the purchaser to account for any surplus received on the sale of assets in excess of the amount repayable under the loans. The submission that the repos were unusual in these respects was supported by Professor Guriev, and his conclusion that the absence of provisions dealing with these matters was exceptional and of far-reaching effect was accepted by Hildyard J as correct.

249. By way of response, Mr Turetsky pointed out that some of the omissions identified by Professor Guriev had less significance in light of the fact that the Original Purchasers agreed not to interfere with the business or assets of Western Terminal LLC and Scan unless and until default occurred and entered into separate written agreements obliging

them to return the shares upon repayment of the loans and assumed an express obligation towards OMGP and GOM to act in good faith.

250. I think it is clear that Hildyard J's characterisation of these features of the repos as being at least peculiar or amounting to curiosities (see [935] and [936] of his judgment) involved his assessment of the expert evidence and the way in which the witnesses had expressed themselves. For the purposes of this re-trial it is appropriate for me to proceed on the basis that they were indeed peculiar and curious. But what matters is whether they provide positive support for a conclusion that the repos were indicative of the raiding conspiracy alleged, or whether, they were peculiarities for which a more benign explanation is justified and, even though they "presented the Bank with the keys to Dr Arkhangelsky's empire" (as Hildyard J put it at [935]), they simply provided an opportunity in the sense of being the mechanism by which any surplus value in the companies might be extracted in due course.

251. As to the use of the Original Purchasers and the lack of documentation to establish the true relationship between them and the Bank, Hildyard J made two findings of significance. The first was one which was criticised by the counterclaimants on the appeal, and held by the Chancellor (at [50] of his judgment) to be based on the wrong approach:

> "It is not easy for an English judge to determine on the basis of this opposing and somewhat general evidence whether the arrangements were in compliance with Central Bank requirements and accounting fairness; and I am relieved that it is not necessary for me to attempt to do so, since that is not properly an issue in the case. What is necessary for me to decide is whether the justification offered is a plausible one. In my view, the rationale that the Bank simply could not take the shares into its own books, and that there would be regulatory difficulties if it tried, seems to me plausible, even if it may not provide the whole story; and the explanation that the Original Purchasers provided a solution similarly so."

252. In [50] of his judgment, the Chancellor held that this finding reflected an erroneous approach to the question of whether the justification for the form of repos generally (as opposed to simply the use of the Ordinary Purchasers) was explained by concerns about Central Bank requirements and accounting fairness, or whether their form was driven by the alleged conspiracy. It does not seem to me that this requires the court to determine whether the form of repos adopted did *in fact* ensure that the Bank then acted in compliance with those Central Bank requirements (the point with which Hildyard J was concerned in the first sentence of the passage cited). What it does, however, require is for the court to be satisfied that what the Bank *asserted* to be this justification was a more likely reason for the form the repos took than the alleged conspiracy, even if that assertion did not in fact reflect the true nature and extent of the Central Bank's regulatory requirements.

253. Like Hildyard J, I am not in a position to make a finding on whether the arrangements were in fact in compliance with Central Bank requirements and accounting fairness. That case remains wholly unproven one way or the other. In my view, however, the evidence all points to the fact that the Bank believed and intended that the use of a structure involving the Original Purchasers would enable it to reduce the impact of the transactions on its capital. To that extent, I consider that the evidence justifies a conclusion not just that the rationale was plausible, but that it reflects what the Bank

considered the position to be. Whether the effect of the transaction also meant that the prudential regulators were deceived and the market was misled, which was the evidence given by Professor Guriev, but with which Mr Turetsky disagreed, is a quite different question on which Hildyard J did not reach a conclusion.

254. The second significant finding on this issue was what Hildyard J characterised as the claimants' reticence in explaining their true relationship with the Original Purchasers. This is linked to the complete absence of any formal record of the repo arrangements and the obligations as between the Bank and the Original Purchasers. However, I agree with Hildyard J's conclusion that it is difficult to infer any malign or dishonest intent from the claimant's reticence to explain its relationship with those playing a central role in this part of the structure in circumstances in which there was no attempt to hide the fact that the Original Purchasers were the counterparties to the repos, and that this was obvious to Dr Arkhangelsky, OMG and their lawyers (Mr Vasiliev and his assistant Ms Vasilenko) who were involved throughout the relevant events.

255. So far as the other peculiarities and curiosities relating to the repos are concerned, Hildyard J considered that the separation of the two sides of the repo arrangement into two documents with no cross-referencing between them, resulting in the transactions appearing to be absolute sales, was odd, confusing and substantively unexplained. In effect he accepted the counterclaimants' submission that it is to be expected that the purchase and repurchase sides of the transaction would be recorded in an agreement between bank and borrower in a formal contract contained in a single document.

256. However he did not accept, and I think he was right not to do so, that the informality was contrived and intentional or that it was indicative of fraud on the basis that the Bank did not wish to leave unnecessary records of the precise nature of the agreement. Likewise there is nothing inherently suspicious arising out of the fact that repo agreements are typically used by Russian banks as a form of additional security where a loan is only secured by a pledge of shares and a repo of the underlying assets is used in addition to the security over those shares, but the present case was the other way round. He concluded ([949] of his judgment) that error or unfamiliarity with the form of the arrangements, rather than any malign intent, was a more likely explanation. He pointed out that the arrangements were novel so far as the Bank was concerned and that "their drafting was entrusted to people who were largely 'flying blind' and without the benefit of precedent or (as far as I can tell) established practice."

257. Having reconsidered the circumstances in which the documentation came to be drafted I have reached the same conclusion as Hildyard J. I agree with his finding (at [950] of his judgment) that on this particular peculiarity:

> "I accept that the failure to match up the two sides of the repo arrangements by express cross-references was not intended to prevent or impede Dr Arkhangelsky in exercising his right to repurchase if the conditions under which the right arose were satisfied in time."

258. I also agree that the obvious omissions from the repo arrangements of any provision for defining the rights of OMGP and GOM post-sale and, in particular, for specifying what was to happen to any right to repurchase the shares in the event of default is more surprising. The same can be said about the linked question relating to whether the right to repurchase the repo shares would ever be exercisable after default in the event of

there being a surplus after repayment of the Bank's loans, or whether any such surplus would enure to the sole benefit of the Original Purchasers. The significance of these factors needs to be assessed with particular reference to the counterclaimants' focus on the second aspect of what occurred, viz the Bank's state of mind at the relevant time.

259. The counterclaimants submitted that the Bank believed at the time the repos were agreed that the assets, control of which would pass to the purchasers under them, were worth very much more than OMG's total indebtedness. It also believed that OMG's default was all but inevitable. They said that it follows from this that the Bank thought that the assets were much more valuable than the liabilities and they therefore intended to appropriate the assets in some form. Hildyard J's finding on this point (see [926] of his judgment) was that, at the relevant time, the Bank "supposed (on the basis of the Lair valuations) that the value of the assets considerably exceeded the amounts outstanding". This finding caused him to treat the omission of any provision in the repos requiring the holder of the shares to account for any surplus in excess of the amount repayable under the loans to be especially notable.

260. I agree that the omission of any provision in the repos requiring the holder of the shares to account for any surplus is especially notable, but in my view the finding made by Hildyard J only goes so far and rightly so. This is because he also recognised (in [955] of his judgment) that the supposition of an asset value considerably in excess of the amounts outstanding is not the same thing as an expectation of a surplus. I agree with this, essentially for the type of pragmatic reason with which it would not be surprising to find that any bank would be concerned. Difficulties in realisation or obstruction by the debtor are obvious reasons why an excess of asset value over debt outstanding may mean that a surplus is not in the event achieved and so is the intrinsic uncertainty as to what the assets might realise in the context of an enforcement sale. On that issue, the only finding Hildyard J made (at [955]) was that, even if the Bank "had little or no expectation of a surplus", he had difficulty in accepting that the Bank gave no thought as to where any surplus should go.

261. The counterclaimants also relied on the following finding made by Hildyard J ([957] of his judgment) as reflective of the claimants' state of mind that the expected process of realisation (which was all but inevitable) would produce surplus value and in that context they specifically intended not to return it to OMG:

> "On that basis, it was an egregious feature of the repo arrangements that upon default and the exclusion of the repurchase right, the value of the businesses would enure to the purchasers, subject only to an obligation to apply sums realised for pledged assets in repayment or reduction of indebtedness. A further consequence is that any income generated by Western Terminal and Scan, so far as not applied in reduction of the interest and capital outstanding on the relevant loans, would also accrue to the purchasers as holder of the shares free, in effect, of anything like an equity of redemption."

262. I do not agree, however, that this is a conclusion which Hildyard J reached as to what the Bank anticipated would occur. In my view this is a jump in the logic too far. The more likely explanation for the structure is that it reflected a desire to have "the 'whip-hand' on a recalcitrant borrower" as Hildyard J put it at [958] of his judgment, not a desire to expropriate that to which it knew or suspected it might not lawfully be entitled. Consistent with this conclusion, the mere fact that the bargain struck left any realisation

surplus in the hands of the Bank (thereby extinguishing what might be regarded as an equivalent to a mortgagor's equity of redemption) does not demonstrate a specific intention that this is what the Bank expected would happen or necessarily wished to achieve.

263. Indeed, I have concluded that the contrary is likely to have been the case. In my view the right inference to draw from the evidence is that the Bank did not know one way or the other whether or not there would be a surplus. That does not mean that it did not appreciate that the effect of the repos was that, if there was a surplus, it would be entitled to retain that surplus for itself. I think that it did, although I am not satisfied that it gave very much thought to the likelihood of that possibility eventuating. Control of what was there, not the destination of any surplus which might arise, was the focus of its attention. It follows that, although, like Hildyard J, I do not agree that it is right to say (as Mr Birt QC arguing this aspect of the case for the claimants at the original trial submitted) that nobody thought about surplus at all, the evidence does not justify a conclusion that it was at the forefront of the Bank's mind. In short, while it was part of the hard bargain driven by the Bank (and on that I agree with Hildyard J's conclusion at [957] of his judgment), the probabilities are that it was not treated by the Bank as the main or even a significant factor in causing it to structure the transaction in the way that it did.

264. The counterclaimants also relied on a passage in Hildyard J's judgment in which he found that in the autumn of 2008, OMG was "substantially if not completely reliant on the Bank for financial support; and the Bank was aware of that, regarding it both as its exposure and its opportunity". To the extent that this is said by the counterclaimants to be a finding that the Bank was aware that OMG had serious structural problems such that it was unlikely to survive the financial crisis (see [118] of Mr Stroilov's written opening), I do not agree that that is quite the right way of expressing the position. However, I do accept that the counterclaimants are correct to submit that Hildyard J made a finding that, by the time Mrs Malysheva came on the scene and, amongst other things, was dealing with the form of the repos, the Bank had reached the conclusion that OMG's default on its indebtedness to the Bank was all but inevitable.

265. On this aspect of the case, I think that the fact that Dr Arkhangelsky consented to the form of repo and had lawyers involved in the process of preparing the relevant documentation is important. This is partly because it gives the lie to Dr Arkhangelsky's protestations that he did not understand that the Bank would be able to acquire full ownership of the OMG companies if there was a default, but for present purposes its real importance is that it makes it less probable that the Bank had the nefarious intent alleged. It is clear that the Bank did not seek to hide anything from its borrower about the form of repo arrangement proposed, an approach which sits unhappily with an allegation that at the same time it was planning an illegal 'raid' founded it is said by the counterclaimants on the very status it made no attempt to hide. Accordingly, I agree with Hildyard J's assessment (at [916] of his judgment) that this conclusion is destructive of one important element of the counterclaimants' case.

266. The third aspect of the counterclaimants' case on the significance of the repos related to Dr Arkhangelsky's state of mind. Mr Stroilov submitted that, while Hildyard J found that no general moratorium had in fact been agreed, that did not exclude the possibility that he had been strung along by vague but unenforceable assurances. He said that Hildyard J held that it was possible that Dr Arkhangelsky had gradually persuaded

himself that a general moratorium must have been finalised and that he might have chosen to believe that this was the effect of conversations that he had had with the Bank and Mr Savelyev, even if that was not in fact the case. In other words, even if the moratorium had not in fact been agreed as a *quid pro quo* for the repos, Dr Arkhangelsky thought that it had been. They also argued that Hildyard J had made clear that it remained open to Dr Arkhangelsky to argue that he misunderstood the true effect and intended use of the repo contracts or that they were put to improper use, with a consequence that the Bank cannot rely on its argument that the repo arrangements were consensual.

267. I do not consider that this is the right conclusion to draw from the findings of primary fact made by Hildyard J. In my view it is clear from [917] to [923] of his judgment that Hildyard J's primary finding was that the repo arrangements were consensual and were not induced by, or premised on, or subject to the alleged general moratorium which he had concluded was never agreed. While Hildyard J left open the possibility that Dr Arkhangelsky misunderstood the true effect and intended use of the repos, he made no finding that that was in fact the case. Rather, he concluded (see [919] of his judgment) that Dr Arkhangelsky was not coerced by threats or intimidation nor by a false promise of a general moratorium into agreeing the repo arrangements.

268. But what matters for present purposes is the consequence of Dr Arkhangelsky's appearance of consent on the inferences I must draw as to the Bank's intentions and motives in entering into the repos in the form they did. In my judgment, even if Dr Arkhangelsky has subsequently convinced himself that he had consented only because he thought that he was being promised a moratorium (see the possibility alluded to by Hildyard J in [914] of his judgment), it remains more probable than not that the Bank thought that it was dealing with a counterparty who was well-aware of the nature of the deal he was entering into, and was content to do so because he was desperate (a state of mind I have already described). Although he asserted in his own evidence that he "understood clearly that by relinquishing the ownership of the shares I was exposing myself to the risk of a raid" (see the evidence cited at [375] of Hildyard J's judgment) that does no more than demonstrate that he himself fully understood the form of the agreement to which he was subscribing. This all points against a conclusion that the Bank itself intended to abuse its contractual rights. In my view, it is consistent with a belief by the Bank that the rights it had acquired had been freely given, a state of mind which although not incompatible with it, sits uneasily with any idea that it was conspiring to cause harm to the counterclaimants in the manner alleged.

269. Drawing these threads together, I am satisfied that, at the time the repos were agreed, it is improbable that the Bank had any intention to utilise the repo structure to effect the 'raid' that was at the core of the conspiracy alleged by the counterclaimants. In my judgment the right inference to be drawn from what occurred is that the rationale for the repo arrangements was both to enhance the Bank's security and to strengthen its hand in the event that it needed to enforce its security, which by the time the repos were agreed was an outcome the Bank anticipated would occur. The fact that it anticipated that this was a likely eventuality does not detract from this being its real motive. Indeed quite the contrary. In my judgment the fact that the Bank believed that enforcement would be necessary in circumstances in which the repos operated to enhance its security itself underpinned their rationale. In particular, I agree with the Bank's submission that there is nothing inherently wrongful or sinister about the combination of a repo

arrangement with existing security and there is, to the contrary, logic in using a repo to ensure control. As the counterclaimants' own banking expert, Professor Guriev, accepted:

> "…the value of collateral is in substantial part a function of the ability to control its disposition, and that upon default a creditor bank's main job is to "assure the control over the collateral"."

270. So far as the peculiarities and curiosities in the terms of the repo are concerned, I think that in large part they reflected the haste with which the repo arrangements were agreed and documented and the relative lack of experience of those responsible for the drafting (acting as Hildyard J found they were without precedent or the benefit of established practice) as to the form which such arrangements should take.

271. The only aspect of this part of the case that has given me real pause for thought is whether the treatment of the surplus post-default gives rise to any form of inference that the Bank's intention was to 'raid' the assets by misappropriating them rather than to enhance its security and facilitate its ability to enforce in due course. I do not think that it does. There is a difference between a deal as to the application of any realisation surplus once default had occurred, and a deal which contemplated the Bank taking control of the asset once the realisation was complete because it saw the surplus as an opportunity from which it intended to benefit. I agree with Hildyard J's conclusion that the former was the Bank's state of mind and simply reflected its entitlement to drive a hard bargain.

272. In reaching that conclusion, it is important to stress that there is no suggestion that it was unlawful under Russian law to enter into an arrangement which entitled the Original Purchasers post-default to receive the income or capital from the assets sold under the repos free from what in English law might be regarded as something akin to an equity of redemption. It was a term of the deal, which in my judgment it was open to the Bank to agree with Dr Arkhangelsky and to which he agreed with his eyes open in circumstances in which legal advice was available to him. He did so in order to avoid an immediate default.

273. In my judgment it is not a proper inference to conclude from what had occurred at this stage in the story that the Bank was thereby participating in a dishonest conspiracy to 'raid' the assets should an enforcement realisation eventuate, however likely that may have been. I am satisfied on the balance of probabilities that the proper inference to draw is (as it was put in the Banks' closing submission at the end of the original trial – cited at [960] of Hildyard J's judgment) that:

> "the Bank wanted to avoid having to face an unscrupulous borrower and minimise problems of enforcement in the event that became necessary because the ability of the borrower to engage in spoiling tactics would have been curtailed. In any enforcement process, it wanted to face a friendly counterparty rather than a borrower who had declared war on the bank."

274. Having reached that conclusion, I would not myself have expressed the misgivings expressed by Hildyard J in [1635(1)] of his judgment. Whether, having considered what occurred thereafter, this remains the proper inference, or indeed whether the

Bank's intentions and state of mind changed as time went on, is a matter to which I shall return.

Issues 6(2) and 6(3): Events of March and April 2009

275. Issues 6(2) and 6(3) relate to the transfer of the Scan shares from the Original Purchasers to the Subsequent Purchasers at some stage between 20 March 2009 and 6 April 2009 and the removal of Dr Arkhangelsky and Mr Vinarsky as directors-general of Scan and Western Terminal at shareholders' meetings held on or around 7 April 2009. The Court of Appeal held ([69(vi)] and [69(vii)] of the Chancellor's judgment) that the inferences drawn by Hildyard J from the rationale and true objectives for the transfer of the Scan shares and the removal of the directors-general were thrown into doubt or called into question by a number of the later comments he made.

276. Before focussing on the inferences themselves it is necessary to put the counterclaimants' case as to these two events (the transfer and the removal) in their proper context. As Hildyard J explained at [473] of his judgment, they were said by the counterclaimants to be part of a pattern of conduct adopted by the Bank, which "was enabled by calling a cross-default across the Group in breach of the alleged moratorium and was directed towards the appropriation of the assets and business of Scan and Western Terminal." Another event which was said to demonstrate the same pattern was a refusal by Mr Savelyev to meet with Dr Arkhangelsky to discuss any refinancing options.

277. At the original trial the counterclaimants therefore relied on the alleged moratorium in support of an argument that the Bank engineered OMG's default to trigger the repo arrangements when they were not entitled to do so. They also relied heavily on the fact that the Bank appeared at that stage to have collateral available that was materially in excess of the amounts outstanding from OMG in support of an argument that the Bank's refusal to extend was driven by an intent to 'raid' rather than merely to effect recovery under its loans. They also sought to persuade the court to draw inferences adverse to the Bank from the way in which the Bank treated Dr Arkhangelsky's attempts to refinance and the fact that an earlier recommendation to extend the relevant loans was reversed when the matter was referred up to Mr Savelyev, Mrs Malysheva and the Bank's Management Board.

278. The counterclaimants' allegations in relation to the significance of the Bank's decision to call a default were examined in detail by Hildyard J in [970ff] of his judgment, but were rejected. In a passage with which I agree he held (at [994]) that:

> "It is no answer for Dr Arkhangelsky to complain that the Bank was acting in its own self-interest; that is what commercial enterprises, including banks, sometimes have, and are entitled, to do. Only if some breach of previous commitment, or some overriding or paramount illegitimate reason for the decision, is demonstrated is that pursuit of self-interest improper."

279. Hildyard J concluded, in a passage at [1016] and [1017] of his judgment (which was upheld by the Court of Appeal (see [16(v)] and [69(v)] of the Chancellor's judgment) as follows:

> "1016 In my judgment, there is every sign that by March 2009 the Claimants had determined to act in their own interests, without any real consideration as to the possibility of being able to assist the OMG companies to trade through and overcome their difficulties, and safe in the knowledge (as it then seemed) of well-adequate security. Indeed, I suspect that all the Bank had by then set its sights on was realization of its security in an auction process beyond challenge by Dr Arkhangelsky, abiding by the letter of the process required by law, but not taking any steps to seek to further the interests of OMG and the Arkhangelskys. However that may be, it does not seem to me that there is any sufficient basis for inferring from that commercially self-centred and ruthless approach an intention to 'raid'."
>
> "1017 To my mind, Mr Stroilov's submissions that the inference from the fact that the Bank set its face so precipitately against refinancing despite having (so it appeared) more than adequate cover is that "by that time the Bank was already determined…to seize the assets" in a 'raid' is based upon a false premise that, even if there was no moratorium, the Bank was obliged to refinance unless it had good reason not to do so. In my judgment, the Bank had no such obligation. Upon default, which it had no duty to assist the borrower to avoid, it was entitled to act exclusively in its own interests subject to realising the security in a manner consistent with the law and its duties under relevant law to the borrower."

280. It therefore follows that the allegation that the Bank was not entitled to implement the repo transactions in reliance on contrived defaults has failed. As Mr Stroilov accepted in his oral submissions, Hildyard J made a finding, which the Court of Appeal accepted was safe and should not be disturbed, that the Bank was entitled to call the defaults when it did, and that its decision to do so was based on proper commercial reasons. In my view this is an important conclusion because like Hildyard J (see [1132] of his judgment), I think that any evidence of a premeditated decision on the part of the Bank deliberately to engineer a default, thereby enabling the Bank to be sure it could implement a 'raid' at a time of its own choosing would be a most telling indication that a 'raid' was in fact intended. I do not go so far as to accept (as the claimants submit that I should) that this conclusion removes the heart of the alleged conspiracy, but I do agree that its absence removes one of the building blocks, and an important one, for the counterclaimants' case which, had it been present, might well have given materially greater substance to the allegations they have made.

281. So far as the transfers were concerned, the inferences in respect of which the Court of Appeal has directed a reassessment were that, while the transfers to the Subsequent Purchasers confirmed the influence of Mrs Malysheva and Mr Sklyarevsky and their determination to bring the Bank's planning under their direct control (and that the Bank controlled the Renord-Invest companies concerned - a point to which I shall return), the circumstances of the transfers did not necessarily indicate any appreciation or even private suspicion by Mr Zelyenov (the owner of two of the transferring Original Purchasers) that he wanted out because of fraud by the Bank ([1024] and [1025] of Hildyard J's judgment).

282. So far as the removal of the directors-general are concerned, the inferences in respect of which the Court of Appeal has directed a reassessment were summarised in [1038] of Hildyard J's judgment in the following terms:

> "But the question is whether that [a reference to Mr Savelyev's avoidance of a meeting with Dr Arkhangelsky], combined with the precipitate decisions to remove the Directors-General, is evidence of a 'raid', as distinct from a determination to wrest control from Dr Arkhangelsky as a means of securing the assets. Put shortly, I do not think the inference sought by Mr Stroilov can fairly be drawn from those facts, especially given the nature of the inference sought to be drawn. If an inference is to be drawn it must be by reference to other facts which combine to show unequivocal intention to 'raid'."

283. In the event, Hildyard J was not satisfied that any of these circumstances or events demonstrated a pattern of conduct by the Bank directed towards the unlawful appropriation of the assets and businesses of Scan and Western Terminal LLC. Against that background, the claimants contended that the transfers to the Subsequent Purchasers were simply an attempt to make it more difficult for Dr Arkhangelsky to unwind the repo transfers. At the root of their case was a submission that this was entirely understandable, because by then OMG companies were in default in circumstances in which no criticism could be made of the Bank for refusing to take any further steps to ensure that the defaults did not occur. They contended that the Bank was driven by a desire to control and therefore preserve its security. The decision to replace Dr Arkhangelsky and Mr Vinarsky was also driven by similar considerations.

284. The claimants also said that it was necessary to consider the significance of both the decision to effect the transfers to the Subsequent Purchasers and to remove and replace Dr Arkhangelsky and Mr Vinarsky against the background of the circumstances in which OMG had come to be in default. In particular, although companies in the OMG group had sought an extension of their loans, the Bank had refused those extension requests, because, so far as the Bank was concerned, there was what Hildyard J described and accepted to be "a collapse of trust" in Dr Arkhangelsky. In those circumstances, Hildyard J described the decisions not to extend the loans as readily understandable.

285. I agree that it is highly likely that the factors listed by Hildyard J in [993] of his judgment caused the Bank to doubt its borrower. Those factors included Dr Arkhangelsky's decision to keep quiet about the arrest of '*Tosno*', the fact that RUB 300 million from timber sales had not materialised and showed no signs of doing so, failures by Dr Arkhangelsky to provide financial information, rumours in banking circles that OMG was in real trouble and that turnover had been fabricated from sham transactions and the absence of remittances into Vyborg Shipping's accounts. The Bank's explanation for the transfer from the Original Purchasers to the Subsequent Purchasers and for the removal of Dr Arkhangelsky and Mr Vinarsky, and the inference to be drawn, have to be assessed against that background.

286. There were two explanations for the transfer decision. The first is one to which I have already alluded, namely that the Bank was attempting to ensure that Dr Arkhangelsky could not unwind the repo arrangements now that OMG was in default. The second was that, in the light of the likely conflict between OMG and the Bank as to the enforcement of its security, Mr Zelyenov (the owner and controller of two of the Original Purchasers: Agentsvo and Gelios) was no longer willing to be involved in the repo arrangements. This was the reason why SKIF, a company owned and controlled by Mr Sklyarevsky, and five Renord-Invest companies became the Subsequent Purchasers.

287. From around this time, Mr Sklyarevsky and SKIF were directly and routinely involved in what he described as the "business restructuring" of OMG. Mr Sklyarevsky said that the steps taken with his involvement were essentially defensive, with the aim of protecting the Bank's existing security. His evidence was that all that was done was made necessary by his and the Bank's perception that Dr Arkhangelsky had evinced, and occasionally expressed, his intention to resort to any available means of delaying, and if possible defeating, the Bank's recovery efforts. He said that he agreed to his and SKIF's participation in order to assist the Bank. He had no formal agreement to that effect, either as regards the share transfers to SKIF or his own remuneration, relying only on what he described as his good relationship with the Bank. He said that he understood "the key motivation" behind the transfers of Scan shares to the Subsequent Purchasers to have been to enable "the Bank's security to be further protected by making it more difficult for Dr Arkhangelsky to unwind the transfers."

288. The claimants therefore accepted that the transfer of the shares to the Subsequent Purchasers was indeed an attempt to make it more difficult for Dr Arkhangelsky to unwind the transfers effected under the repos. Mr Stroilov submitted that this was an admission that the transfers to the Subsequent Purchasers were effected in order to increase the prospects of defeating any potential adverse judgment of the Russian courts and that this demonstrated dishonesty. As to this, I asked Mr Stroilov why it was that the court should be suspicious of a transfer on from one purchaser to the other and whether the counterclaimants simply say that it was an odd thing to have done. He responded as follows:

> "No, what we say is well, it is -- what we say is essentially if you have someone who is transferring assets from one set of companies which he secretly controls to another set of companies that he secretly controls via nominees, with the intention of defeating an adverse judgment of the court, we say, well, (a) this is dishonest in itself ... and (b) this indicates that they are up to something, if I may put it that way.
> …
>
> "We say this is dishonest in itself to try and defeat judgments of courts; and then secondly, well, we invite you to consider, well, why would they expect an adverse judgment from a court if all they were doing was enforcing their lawful contractual rights. Because on their theory, there was no reason to expect court proceedings, let alone successful court proceedings."

289. I do not agree that it is possible to say that the Bank was not expecting proceedings, let alone successful court proceedings. This submission presupposed that, merely because the Bank considered that all it was doing was enforcing its lawful contractual rights it cannot have expected that proceedings would be commenced by its counterparty or that such proceedings might succeed. I think that is an unrealistic submission. It is clear from the evidence I have outlined earlier in this judgment that the reasons justifying the Bank's refusal to extend the loans thereby allowing OMG to default on its obligations were sufficient to make any bank suspicious of the motives and conduct of its borrower. It is a small step from that to conclude that a borrower is likely to be very obstructive to any attempt made by the Bank to enforce its rights.

290. Mr Stroilov submitted that the court should draw inferences adverse to the Bank from the fact that, although the transfers to the Subsequent Purchasers took place at the direction of Mrs Malysheva, she did not give evidence at the original trial. Hildyard J

did not seem to have considered that it was appropriate for him to draw any such inference (although her absence was one of the factors which persuaded him not to grant declaratory relief in relation to the counterclaim: see [1635(4)] of his judgment). I assume that the reason for this, as he recorded in [74] of his judgment, was that Mrs Malysheva had ceased to work for the Bank by the time of the original trial, was not prepared to assist and there was no basis under the terms of her severance agreement to require her to do so. In my view, although there can be little doubt that the picture would have been clearer on this amongst a number of other contentious issues in the case if she had been called and cross-examined, there is no evidence to justify a conclusion that the court should draw inferences adverse to the Bank from her refusal to do so.

291. It follows that I do not think that the evidence justifies the concern expressed by Hildyard J in [1635(4)] of his judgment, when considering the question of whether or not the counterclaimants had established that they had suffered actionable harm under article 1064 for the purposes of the counterclaim. In my view it is either the case that the circumstances justify the drawing of an inference adverse to the Bank arising out of Mrs Malysheva's non-appearance or they do not. In my view they do not.

292. The counterclaimants also suggested that the position of Mr Zelyenov was not as presented by the Bank. They submitted that Mr Zelyenov wanted to withdraw his companies from the arrangements as part of the arrangements for the transfer from the Original Purchasers to the Subsequent Purchaser because he was suspicious that the Bank was engaged in fraud. The way that Mr Stroilov put it was that I should infer that Mr Zelyenov thought that what was happening was dubious, and did not want anything to do with it, which is why he withdrew from further involvement. He also said that Mr Zelyenov was only associated with two out of the six Original Purchasers and Mr Sklyarevsky was only associated with one out of the six Subsequent Purchasers. It therefore followed he submitted that neither Mr Zelyenov's influence nor Mr Sklyarevsky's influence fully explained all of the transfers. The claimants said that the position was more straightforward and suggested that it was simply that Mr Zelyenov did not want to get into a fight with OMG.

293. Hildyard J did not accept that Mr Zelyenov's withdrawal of his companies from the repo arrangements indicated any appreciation or even private suspicion by him of fraud on the part of the Bank. It simply showed (as Hildyard J put it at [1024] of his judgment) that he "anticipated becoming enmeshed in battles between the Bank and Dr Arkhangelsky unless he got out: and he wanted out". While I agree that it is improbable that Mr Zelyenov withdrew simply because OMG was in default (that being the very event against the consequences of which the repo was agreed in the first place), I think that his realisation of the likely extent of the battle ahead, which was by then becoming increasingly apparent, is a much more probable explanation for his withdrawal than any concern that the Bank was about to engage in conduct that was dishonest or in bad faith.

294. Nor do I consider that there is any real significance in the fact that Mr Zelyenov was only associated with two out of the six Original Purchasers - the substance of the position is that there is little doubt that the purpose of the transfers was to make Dr Arkhangelsky's anticipated efforts to resist enforcement more difficult. Mr Stroilov was unable to point to any specific evidence which indicated any concern by Mr Zelyenov along the lines suggested. On this point, I think that the counterclaimants' case is wholly unsupported and can properly be characterised as mere speculation. I

think that Hildyard J's conclusion is materially more likely: Mr Zelyenov wanted out for the reason he gave.

295. As to the removal of Dr Arkhangelsky and Mr Vinarsky, Hildyard J said that the parties were in effect agreed that the purpose of changing the management of Scan and Western Terminal LLC was for the Bank and Renord-Invest to secure control of the assets and prevent Dr Arkhangelsky having any access to them. This reflected his earlier acceptance of Mr Sklyarevsky's evidence that a change in the management "would protect the Bank's security and would force Dr Arkhangelsky to the negotiating table". In [521] of his judgment, Hildyard J expresses a conclusion to this effect and he then went on later in his judgment (at [1038]) to make a similar finding when he said that the decision to remove the directors-general was simply a determination to wrest control from Dr Arkhangelsky as a means of securing the assets before their realisation. The question is whether the management change was also evidence from which an intent to 'raid' can be inferred.

296. At the original trial the counterclaimants relied on two other aspects of what occurred in support of their case "that the removals of the Directors-General constituted the first step in a pre-planned and fraudulent 'raid'" (per Hildyard J at [1036] of his judgment). Neither of these matters were developed in any detail, but I should refer to them in any event.

297. The first related to Hildyard J's finding (at [512ff] of his judgment) that Sevzapalians put in motion the removals before the Morskoy Bank Loan became apparent, and therefore could not have prompted or justified the removals. The potential significance of this point flows from Mr Sklyarevsky's evidence at the original trial. He said that he discovered that Dr Arkhangelsky had managed to obtain the Morskoy Bank Loan during a visit to Morskoy Bank. He said that the fact he had done so caused him serious concerns about the way in which Dr Arkhangelsky was acting. He said that it was his report on this matter which prompted the decision at a meeting with Mrs Malysheva and Mr Smirnov that Dr Arkhangelsky could no longer be trusted and that, in order to protect the assets of Scan and Western Terminal LLC, the management of both should be changed to "protect the bank's security and … force Mr Arkhangelsky to the negotiating table" (see the passage from Mr Sklyarevsky's evidence cited in [483], [520] and [1032] of Hildyard J's judgment)

298. The Morskoy Bank Loan was therefore invoked by the Bank not just as support for its decision to call a default, and rely on its security. It was also advanced as a justification for the steps taken in early April 2009 to remove Dr Arkhangelsky and Mr Vinarsky as directors-general and to effect transfers of the shares in Scan from the Original Purchasers to other companies in the Renord-Invest Group in order in both cases (so Mr Sklyarevsky said in his evidence to Hildyard J) "to protect the repo transaction". The counterclaimants contended that this was a contrived and *ex post facto* excuse. They said that Dr Arkhangelsky and Mr Vinarsky were removed as directors-general on a trumped-up basis and in furtherance of the alleged conspiracy.

299. As I have said, Hildyard J did not accept the Bank's case that the decisions to transfer the Scan shares to the Subsequent Purchasers and to change the management of Scan and Western Terminal LLC were made in response to Mr Sklyarevsky's discovery and revelation to the Bank of the Morskoy Bank Loan. He accepted the counterclaimants' case that the date on which Sevzapalians first determined to set in motion the process

for the removal of Mr Vinarsky from his post at Western Terminal LLC was 10 March 2009, therefore pre-dating the Morskoy Bank Loan. The way that Hildyard J described his conclusion was as follows (see [521] of his judgment):

> "It seems to me clear, and I find, that the decision to remove and replace Dr Arkhangelsky and Mr Vinarsky was made by Mrs Malysheva, as part of the overall strategy she, with those she had brought in and especially Mr Sklyarevsky and Mr Smirnov, had been developing to take control of all the OMG assets. As will already be apparent, I do not consider that it was the Morskoy Bank Loan issue which promoted the decision: that issue was in reality more in the nature of an opportunistic basis of justification than a catalyst."

300. The second matter related to Hildyard J's findings in relation to Dr Arkhangelsky's repeated efforts to seek a meeting with Mr Savelyev to explain the situation and clear the air. Hildyard J was very surprised by Mr Savelyev's apparent refusal to meet Dr Arkhangelsky personally. He was particularly unimpressed with Mr Savelyev's initial denials that Dr Arkhangelsky had repeatedly sought to contact him and that he had conspicuously evaded such contact and his later evidence that he had not seen Dr Arkhangelsky's letters seeking a meeting. He concluded at [1037]:

> "In my judgment, the evidence is, as I see it, that Mr Savelyev and his managers did avoid having a meeting; and it is clear that the Bank (through Mrs Malysheva, her team and Mr Savelyev) had no wish to negotiate with Dr Arkhangelsky."

301. In [165] to [167] of his written opening for the re-trial, Mr Stroilov made the following submission which conveyed in graphic terms why he said that the refusal of Mr Savelyev to agree to a meeting was important, and more significantly why he said that Hildyard J's preference for the counterclaimants' case is revealing:

> "165. This dispute is forensically important, since each party's case on it supports their respective wider narratives. The Bank and Mr Savelyev portray Dr Arkhangelsky as a fraudster who systematically borrowed large sums on grossly overvalued security, then siphoned off the funds, defaulted, and ran away with the money, leaving the Bank to enforce worthless mortgages. Dr Arkhangelsky, in turn, contends that he was lured into the Repo agreement under the pretence of fortifying the Bank's securities; but almost as soon as he signed on the dotted line, the Bank stopped working with him, and ran away with his valuable assets. Almost inevitably, the element of 'running away' is an inherent feature of an alleged fraud.
>
> 166. It is natural enough that a working relationship gives way to a 'war' after the innocent party has discovered the fraud against him. It may then be difficult to unravel what exactly happened prior to that. However, between the period of 'cooperation' and the period of 'war', there is often an illuminating interlude of one party chasing the other in some bewilderment, with exclamations such as "wait, wait, what about my money?", while the fraudster vanishes out of sight.
>
> 167. This is why this point of detail was robustly contested at the 2016 trial; and the facts as found by Hildyard J are forensically consistent with the Counterclaimants' case and inconsistent with the Bank's case."

302. I share Hildyard J's surprise that Mr Savelyev behaved in the way that he did. Furthermore, it is clear to me that the evidence in relation to this behaviour and to the Morskoy Bank Loan as a reason for the removals are examples of the Bank's witnesses seeking to improve the claimants' case by distorting the true chronology and by misrepresenting the reasons for their refusal to engage with their borrower once default had occurred. However I do not consider that they detract from the core aspect of the Bank's case that the decisions to effect the transfers to the Subsequent Purchasers and to remove the directors-general was taken for the simple reason that the Bank wanted to maintain and enhance its control over its security. Thus, if it had been true, the evidence in relation to the Morskoy Bank Loan would have given the Bank an additional reason not to trust its borrower, but there were already other reasons for it to have lost confidence in Dr Arkhangelsky, a point recognised by Hildyard J at [1031] of his judgment.

303. I do not consider that the inadequacies and inaccuracies in the Bank's evidence on this point, mean that the claimants, whether through Mr Sklyarevsky or Mr Savelyev, were acting in the manner suggested by the counterclaimants. Like Hildyard J, I decline to draw the inference of more general dishonesty sought by Mr Stroilov. In my judgment, this is not a case in which the way in which Mr Sklyarevsky or Mr Savelyev gilded the lily in their evidence points to an attempt to hide what is alleged by the counterclaimants to be the true 'raiding' intention behind both the transfer to the Original Purchasers and the removal of the directors-general. It is plain that they were defensive about the Bank's position, and sought to do what they could to strengthen it by advancing additional reasons for the removals which were unjustified as an explanation. This is plainly reprehensible conduct, even though it would not be right to characterise what was said by them as anything other than a further and additional reason to be added to the existing and unchallenged justifications for the removal of the directors-general which did in any event exist.

304. It does not follow from any of this that Mr Sklyarevsky, Mr Savelyev or anybody else on behalf of the Bank can therefore be seen to have been planning a dishonest 'raid'. In the same way, I do not consider that what was alleged by the counterclaimants to be the nefarious explanation for Mr Savelyev's refusal to meet Dr Arkhangelsky is made out on the evidence. Much the more probable explanation for this refusal is the straightforward one that the Bank, including Mrs Malysheva and Mr Savelyev, had no real wish to negotiate with him. They did not consider it to be in the Bank's commercial interest at that stage to do so and, although I find that decision to be surprising, I do not think it was any more than that.

305. In these circumstances, I agree with Hildyard J's conclusion that it would be wrong to draw the inference that the removals were a further step in a pre-planned and fraudulent raid. In my view, the simple determination to wrest control of its security from its borrower, rather than anything more, is materially the more probable explanation for the conduct of the Bank at this stage in the enforcement process and that remains the only inference that I consider it would be appropriate to draw. Whether that remains the case throughout 2009 and thereafter, and whether a conspiracy to 'raid' later developed as one of the reasons for the Bank's later conduct is a matter to which I will revert later in this judgment.

Issue 6(4): the conduct of the wars in the Russian courts

306. The fourth issue relates to what were called the 'wars' in the Russian courts, the curious stances in them of the protagonists and their ultimate resolution in favour of the claimants. The Court of Appeal held ([69(viii)] of the Chancellor's judgment) that the inferences drawn by Hildyard J from the conduct of those 'wars' were questionable.

307. The inferences identified by the Court of Appeal (see [16(viii)] of the Chancellor's judgment) continued with a similar theme to the inferences relating to the Bank's conduct in relation to the form of the repos, the transfers to the Subsequent Purchasers and the removal of the directors-general. They were set out in [1044(4)-(6)] of Hildyard J's judgment:

> "(4) The general picture which emerges once again is that the Bank, by the end of March 2009, was intent on removing from the Counterclaimants any control over the assets of the OMG companies by any means available to it, without regard to the interests of the borrower or even the constraints of the legal arrangements that had given it legal power over the shares which enabled such control.
>
> (5) But though consistent with, that does not, in my view, necessarily mandate, the inference that the Bank was seeking to 'raid' the assets and parcel them out to its associated companies without accounting for their true value and intending to snaffle the surplus for its or their benefit free of any claims by OMG.
>
> (6) It is, as it seems to me, consistent with a shorter term and less complex objective of protecting and ensuring efficient realization of its security by making sure that Dr Arkhangelsky had no legal right or means of practical access to the assets or control of the companies by which they were held."

308. One of the questions which arises is whether this conclusion is consistent with the way in which Hildyard J described the 'war' as a feature of the dispute which contributed to the misgivings he had about the conclusions he had reached on the counterclaim. The way he described that feature at [1635(7)] of his judgment was as follows:

> "My perception that, in the war between the parties, all sense of commercial reasonableness was lost on both sides, and in the case of the Claimants, they determined to, and did, opportunistically and in some respects ruthlessly, pursue their own commercial objectives without any regard to anything more than formal compliance with their obligations under Russian law, and have personally profited in the result."

309. I have already described the form which the various sets of proceedings in Russia took. The claimants submitted that the inferences drawn by Hildyard J were supported by his further findings that Dr Arkhangelsky made no secret of his intention to use the "full armoury of tactics available to borrowers in Russia to delay or even defeat a lender" ([937]). They also contended that the counterclaimants' success before some Russian courts told against their case that the final decisions showed political interference ([555(4)]), and they relied on the fact that their initial success before the Russian courts meant that the Bank needed to find ways to protect its security ([1045]). These findings amongst the other findings of primary fact were set out in [549] to [556] of Hildyard

J's judgment and are undisturbed by the decision of the Court of Appeal (although a single sentence in [554(2)] is incorrect as I shall explain).

310. Several of Mr Stroilov's submissions concentrated on the fact that the counterclaimants did not accept that they were the aggressors in what has come to be called the 'wars' in the Russian courts, but I do not agree. In my view it was very much the case, and perceived by the Bank to be the case, that the counterclaimants were prepared to go to great lengths in order to negate the effects of the repo arrangements. This was clear from the fact that the challenge to the repo arrangements, entered into as they were by Dr Arkhangelsky with his eyes wide open, was mounted by the counterclaimants (or their side of the dispute) with a flurry of litigation in circumstances in which, on Dr Arkhangelsky's own evidence, it was standard market practice not to consent to or cooperate in bank security realisation. Furthermore, the extent of the potential litigation 'war' was apparent not just from the nature of the claims that were made in the civil proceedings brought by Bissonia and Mrs Arkhangelskaya against Sevzapalians and by GOM and Mrs Arkhangelskaya against the other Original Purchasers, but also from the fact that Dr Arkhangelsky and Mr Vinarsky had filed criminal complaints against Renord-Invest and SKIF, which as I have explained above led in May 2009 to orders confirming their "victim status".

311. In general terms, therefore, I accept the claimants' submission that it is appropriate to characterise the counterclaimants' position in those proceedings as amounting to a series of challenges to the exercise by the Bank of what have now been established as its lawful rights, and to that extent the litigation amounted to a 'war' initiated by the counterclaimants. In particular, Dr Arkhangelsky advanced defences to straightforward claims in debt which have been conclusively established as misconceived and in some respects dishonest, with particular reference to the arguments advanced as to the alleged forgery of the Personal Loan and guarantee documentation and the existence of a general moratorium. However, the proceedings with which this issue are primarily concerned were those initiated by Mrs Arkhangelskaya (together with Bissonia and GOM). These were the civil proceedings and criminal complaints against the Bank and others involved in the repo transactions, all of which failed.

312. Mr Stroilov made much in his submissions of the fact that Hildyard J accepted that Dr Arkhangelsky genuinely perceived the replacement of the management of Scan and Western Terminal to be a 'raid' against OMG and that this justified the commencement of the proceedings he and Mrs Arkhangelskaya commenced. As he put it at [519] of his judgment:

> "Dr Arkhangelsky painted a picture of the Bank as an aggressive and unscrupulous 'raider', stopping at nothing to secure its objectives. I accept that it was his perception that the steps taken to remove both him and Mr Vinarsky were all part, and lurid examples, of the same 'raiding' tactics."

313. But in my view, what matters rather more than the fact that the counterclaimants commenced these proceedings is the course which they took. In particular, there were a number of strange aspects to the way the litigation was argued by both sides which the counterclaimants relied on as indicative of an inference that the Bank was seeking to raid the assets and pass them out to its associated companies without accounting for their true value.

314. The first oddity was the response of Sevzapalians, acting I think it is right to conclude at the direction of the Bank, to Mrs Arkhangelskaya's case. She had relied on an argument that Dr Arkhangelsky had acted without her knowledge and in bad faith, against her interests and those of OMGP, in executing one side of the repo arrangement (the sale and purchase agreement by GOM) at a price of RUB 9,900, which she said was knowingly lower than the purchase price of the shares (alleged in those proceedings to be RUB 1.069 million). This was done, so she alleged in those proceedings, in order to conceal a gift. She did not draw attention to the repurchase side of the transaction which would have provided an explanation for the nominal RUB 9,900 figure, nor did she contend that the repo transactions should be set aside in their entirety for fraud by the Bank (or Sevzapalians), which is an allegation which would have chimed with the case in conspiracy now advanced by the counterclaimants.

315. The response of Sevzapalians / the Bank was equally surprising in light of the arguments now advanced in the current proceedings. Instead of relying on the opposite side of the repo arrangements (i.e. the repurchase), which might have been thought to explain why the arrangements were fair when viewed as a whole, it contended that the transaction was one of absolute sale and the price of just under RUB 10,000 was itself fair. Mr Stroilov submitted that the Bank therefore behaved in a misleading and improper way in its general presentation of the position to the Russian court, which showed that it had something to hide.

316. Mr Stroilov said that any criticism of Mrs Arkhangelskaya for the way in which she formulated her proceedings was misplaced. I understood it to be said that this was in large part because she was not fully apprised of what was going on. Nonetheless, even if that is the case, there is no obvious reason why, in circumstances in which it is said that OMG's lawyers formulated her claims, the true nature of the repo was not advanced by her from the outset. Mr Stroilov said that a claim in fraud akin to that which is advanced in the current proceedings was then unattractive and she was not to be stigmatised for not advancing any such case at that stage.

317. I do not think that the counterclaimants' explanation that this is unsurprising because it would have made the proceedings against the Bank much more complex and difficult to prove is very compelling. Apart from anything else, it presupposes that this was the thought process adopted by her (or at least her legal team) and I have been pointed to no evidence that that was in fact the case. But more importantly it is inconsistent with the way in which the Arkhangelskys have conducted their litigation against the Bank throughout this dispute; at no stage has there been any holding back in the nature and seriousness of the allegations which the counterclaimants are prepared to make.

318. On this issue, there was some explanation for the way the litigation was conducted on both sides thereafter in the evidence accepted by Hildyard J that the Russian judge was referred to the repurchase side of the repo arrangement but concluded that they "are not legal documents under Russian law, and they were not accepted by the court" (see the evidence cited in [1043(2)] of Hildyard J's judgment). Although this is a strange response looked at through the eyes of an English lawyer or judge, the fact that it happened means that the obvious argument available to Sevzapalians / the Bank as to why Mrs Arkhangelskaya's proceedings were misconceived could not be deployed. It seems that the Bank would not have been able to prove its case because it would not have been able to rely on the documents necessary to enable it to do so.

319. However, this is only part of the answer because, as I have already explained, the Bank itself did not initially appear to have taken any steps to put the repurchase side of the arrangements into issue before the Russian court. The evidence of Mr Sklyarevsky (being as he was on the Bank's side of the dispute) was that it was Mrs Arkhangelskaya's lawyers who sought to draw the documents to the Russian judge's attention. It was also noteworthy that the Bank's ultimate success on appeal had nothing to do with the consequences of the repurchase side of the repo on the overall fairness of the arrangements. Rather, the appeal was allowed because there was nothing in the repo arrangements which conveyed the obvious intention to give property as a gift, thereby negating Mrs Arkhangelskaya's arguments based on gift concealment, and the courts below were wrong in their approach to "abuse of rights".

320. Hildyard J identified two contrasting explanations for what he described as the determination of the Bank to demonstrate that "the nominal purchase that had been ascribed to the shares on the basis of the repurchase side was in fact the full market price in an absolute sale" ([1044(3)] of his judgment). The first was that the apparent ruling of the Russian court that the repurchase side of the agreements was to be excluded from consideration left the Bank with no alternative but to uphold the sale side. The second was that the Bank was uneasy about the repo arrangements as a whole and had other objectives in seeking to establish the nominal price as the real price and the sale as an absolute one. In my view the first of these explanations is plainly established on the evidence. The question is whether the second is also.

321. Mr Stroilov submitted that I should draw adverse inferences against the Bank, because the whole story demonstrated that the Bank was prepared to lie to the Russian court in relation to the true nature of the transaction and that the inferences to be drawn should reflect that fact. I do not accept this submission, anyway in the terms in which it was put. The conclusion which I draw is that neither side was full and frank with the Russian court in relation to the true nature of the repo arrangements, but in circumstances in which Sevzapalians was responding to the case advanced by Mrs Arkhangelskaya in its own terms (i.e. on the basis of the concealed gift argument), it is difficult to draw any broad inference from what occurred, apart from the conclusion that the Bank was responding in kind to the all out 'war' which it perceived to have been initiated by the counterclaimants and was prepared to use all available tactics to do so.

322. This conduct was far from straightforward and I am satisfied that it is right to infer that the Bank was indeed very uneasy about the repo arrangements. The circumstances in which it displayed that unease included both the need to enforce repos which took a form with which it was unfamiliar and the advance by the counterclaimants of what have been found to be vigorously asserted but misconceived defences to the Bank's outstanding claims. But I do not think that the case made by the Bank in the Russian proceedings was made because it thought that the repos were unlawful, nor do I think that the evidence demonstrates that the Bank had what Hildyard J called ([1044(3)]) "other objectives" in the course that it took. Much the more likely reason for its unease was the position it found itself in trying to resist the challenges to its security advanced by the counterclaimants, which included that taking of what it perceived to be all available steps to restrict Dr Arkhangelsky's access to the charged assets whether through control of the companies by which they were held or otherwise.

323. It follows that, while nothing that occurred in the Russian courts or the arguments advanced by the claimants was wholly inconsistent with the counterclaimants' case that

the litigation was another step in a dishonest conspiracy to raid the OMG's assets, the more probable explanation is that the ruling of the Russian courts that the repurchase side of the arrangements was excluded from consideration left the Bank with no choice but to uphold the sale side. I also think that Hildyard J was correct to infer that the Bank's intent by the end of March 2009 was to remove control over the assets of the OMG companies from the counterclaimants by any means available to it.

324. Looked at without regard to what happened thereafter, in my view the balance of probabilities does not also point to an intent by the Bank to raid the assets without accounting for their true value, intending to take the surplus for its own benefit free of any claims by OMG. In my judgment a more prosaic inference is the right one to draw. Both parties lost all sense of commercial reasonableness in the battles they fought in the Russian courts. They both took points opportunistically and the claimants were ruthless in pursuit of their own commercial objectives: formal compliance with their obligations under Russian law was the only thing with which the claimants were concerned. But while some of the conduct on both sides was both deeply unattractive and dishonest, none of it points without more to the conspiracy to raid OMG's valuable assets for which the counterclaimants contend. I consider that at this stage the Bank's sole objective was the uncomplicated one of seeking to protect and ensure the efficient realisation of its security by making sure that Dr Arkhangelsky had no legal right or means of practical access to the assets. I do not consider that the way in which the 'war' in the Russian courts was conducted at the direction of the Bank points to the drawing of any further inferences that might support the counterclaimants' case.

Issue 6(5): transactions relating to the assets of Western Terminal and Scan

325. Issue 6(5) relates to a series of proposals, already described above, that were never fully implemented, but which the counterclaimants contend provide a very significant insight into the claimants' intentions at a time when OMG's claims to set aside the share transfers to the Original Purchasers had been successful in the Russian courts (i.e. before the successful outcome of the appeal by Sevzapalians). The Gunard Lease was said to be particularly significant because, as Hildyard J put it in [1061] of his judgment, it was:

> "likely entirely to destroy the value of the pledged asset to third parties for so long as [its terms] were in place and enforceable. Only to those with the ability to discharge or dissolve the terms of the lease or the lease itself would the pledged asset realistically have any value"

326. As I have already mentioned, Hildyard J also concluded that it was clear that the Gunard Lease and the other aborted transactions demonstrated a pattern of setting up transactions that could be implemented, cancelled or wound down at will, according to the Bank's developing requirements, using Renord-Invest Group companies to that end. He said that it and the other transactions reflected a concern by the Bank (through Mrs Malysheva and Mr Savelyev), Mr Smirnov and Mr Sklyarevsky to take all necessary steps to ensure that the assets of Western Terminal LLC and Scan, whether pledged or not, should be put beyond the reach not only of Dr Arkhangelsky and OMGP but also of any creditors (of which Morskoy Bank was one) which might seek to enforce against them.

327. The claimants do not dissent from the broad thrust of these conclusions, but they stress that there was no evidence that the Gunard Lease was ever known to the market or that it had any impact on the auction process or that it otherwise resulted in any form of deterrence. They explain the proposals as nothing more than further illustrations of the Bank's determination to protect its security, and to do so in response to Dr Arkhangelsky's success in the Russian courts, a success which they submitted itself contradicted any alleged conspiracy involving the Bank and the Russian authorities. This submission flows from the finding made by Hildyard J in [1324] of his judgment, which amounted to a primary finding of fact based on his assessment of the evidence given by Ms Mironova that was not subject to challenge on appeal that:

> "I have concluded that when the Gunard Lease was put in place its object was protection of the assets of Western Terminal, rather than their extraction for the benefit of the Bank and its associates, and that Ms Mironova's evidence to that effect, and to that extent, is correct. According to her (as appears from my summary of her evidence above), and though it is now confusingly denied by the Claimants, the purpose was indeed to subject the Western Terminal assets to an encumbrance calculated to prevent Dr Arkhangelsky re-establishing control if he should succeed in the Russian courts in setting aside the repo arrangements, and to impede and deter third party creditors from looking to Western Terminal assets for enforcement in competition with the Bank and/or Renord-Invest."

328. The counterclaimants continue to submit, as they did before Hildyard J, that, while the proposals for Scan to transfer assets to CJSC Nazia and for Western Terminal LLC to transfer assets to SKIF did not in fact go ahead in June 2009, it was to be inferred that the Bank had the intention to facilitate these transfers for the fraudulent purpose of defeating the potential judgments in favour of OMG. In broad terms the same submission was made in relation to the proposed Gunard lease which was after the stage at which the Bank realised that the valuations on the basis of which it had originally lent were inflated. These submissions are difficult to square with the citation from Hildyard J's judgment I have cited, but in any event I do not accept that they are justified.

329. In support of this submission the counterclaimants relied on what Mr Stroilov called in his written opening "the extraordinary evidence of the Claimants' industrious efforts to conceal any record of the proposed transfer of Western Terminal to SKIF." It is difficult in the context of the re-trial to get a complete sense of what occurred, but the way this issue was described by Hildyard J in [1048] was as follows:

> "[The counterclaimants] also sought to rely on the fact that the relevant Management Board resolutions were not disclosed until an order for specific disclosure was made in September 2015; and that the record of the decision relating to the transfer of Western Terminal assets to SKIF was sought to be deleted by the substitution by Ms Blinova of many dozens of documents – the entire sequence of Investrbank's weekly 'bad debt reports' – solely to delete the one entry referring to that transfer."

330. The reference to Ms Blinova was to Ms Elena Blinova, who shared responsibility for the OMG file in the Investrbank credit department. She gave evidence at the original trial. She had also been responsible for preparing some of the facility documentation

(e.g. in relation to the First, Second and Third Vyborg Loans), the documents agreed for the loan extensions in early 2009 and some at least of the demands made on default.

331. The counterclaimants rely on the substitution as an attempt to erase any record of what it knew to be a dubious transaction. They submitted that a simple correction of an error to avoid confusion would have required no more than deleting the entry from further reports produced after the error was discovered, because nobody would need to consider historic reports. They suggested that the only purpose of re-writing the historic reports was to misrepresent a sanitised version of history as a contemporaneous record. The claimants submit that this is nonsense and that the only reason for the change was because the transaction never happened.

332. I do not think that it is appropriate to draw the inference suggested by the counterclaimants, largely for the reasons advanced by the claimants. The counterclaimants did not at the original trial or the re-trial suggest that Ms Blinova was dishonest. In transcripts of her oral evidence to which I was referred by the claimants, she explained that it was usual practice for errors in the reports to be corrected, evidence which was corroborated by other examples, and that any changes would have been made by her in accordance with that practice. It also makes little sense for concealment to have been attempted by the Bank in the way suggested by the counterclaimants, because the documents concerned were internal Bank files and it is difficult to discern from whom the concealment was meant to be achieved.

333. In any event, in circumstances in which both versions of the reports were eventually disclosed, I think it is far-fetched to suggest that what Ms Blinova said was a simple correction of an error was in fact a dishonest attempt to fabricate the record for the nefarious purpose suggested by the counterclaimants. It is, however, a good example of how the just resolution of the difficult issues which arise in this case has not been assisted by the constant refrain from the counterclaimants that even the correction of simple errors, which is what occurred in this instance, is an example of conduct that was somehow suspect or fraudulent.

334. Having said all that, I agree with Hildyard J's conclusion (at [1061] of his judgment) that the proposal for the Gunard lease invites a dark interpretation in the sense that, if it had been implemented, it would have been an extraordinary and wholly uncommercial transaction. If effective, it would have had the consequence that the leased asset had no value to third parties for enforcement purposes. In that sense it would have amounted to the putting of assets beyond the reach of other creditors of Western Terminal LLC with the effect, so far as the Bank was concerned, of facilitating its ability to obtain a return, even if the repos were held by the Russian court to have been invalid. This was of particular significance in relation to those assets which were not otherwise pledged, a point that was recognised (in my view correctly) by Hildyard J in [1065] of his judgment.

335. At one stage, the counterclaimants appeared to be submitting that a creditor who seeks to insulate assets, which it believes to be pledged to it (whether directly by charge or indirectly through operation of the repo), from seizure by other creditors or from the control of the debtor is acting dishonestly. In the event that was not the way that Mr Stroilov explained the significance of the Gunard Lease, submitting that if a creditor uses dishonest means, or as he put it "a sham lease agreement" to achieve that end, he will be acting dishonestly. I agree that that may well be the case, although in the present

instance the highest it could be put is that the Bank flirted with a wholly uncommercial agreement but which in the event it did not use. In circumstances in which the lease never became effective and was never used in a marketing context, anything that can be said on how it might have been deployed is ultimately speculative. I do however accept that the lack of commerciality and other oddities are another reason why the court needs to look with particular care at what happened when the assets that would have been encumbered by these transactions if they had ever become effective were ultimately realised.

336. In short, it is my view that there is no basis to draw any inference that the Bank was doing anything other than giving consideration to a number of options as to how to further protect the assets of Western Terminal for its own benefit. It seems to me that the counterclaimants' conspiracy case would only gain any support from the fact that these transactions were under active consideration by the Bank if there were to be evidence that they were conceived as a means of extracting them at a reduced price for its own benefit or that of its associates. Anyway at this stage of the story I do not think that such evidence exists and the inherent probabilities are that the Bank's focus was on control of the relevant property (as against its debtor and the other creditors with whom it might otherwise be in competition) in the event of losing the control provided by the repo arrangements.

Issue 6(6): seizure of control of Scan and Western Terminal

337. One of the aspects of the case which caused Hildyard J particular concern was the circumstances in which, and the method by which, Western Terminal was seized by Sevzapalians on 20 June 2009. I have already described in outline what happened and how Hildyard J was not convinced by the claimants' explanation that the operation was justified by any need to access corporate information and accounts and the fact that he did not consider that the counterclaimants were being melodramatic when they complained about the form that the operation took.

338. Hildyard J said that there was something unsettling about the ease with which it seems that the Bank and Sevzapalians were able to obtain the assistance of the police for the purposes of enforcing their civil rights but, as Hildyard J explained in [1068] of his judgment, the circumstances in which that occurred are "still unclear and *sub judice*". In [1635(3)] of his judgment he doubted that persons without considerable influence would have been able to call upon the police and regional authorities to assist them in this way and this was another feature of the case which he said had encouraged and fomented the misgivings he had about the conclusion he had reached on the merits of the counterclaim.

339. I too consider that it is probable that the Bank had influence, anyway in the sense that it had the contacts sufficient to persuade the police that attendance was necessary, even though others without those contacts may have had greater difficulty in procuring any such service. Of course, the use of the police gives rise to concern, but the video I was asked to look at does not evidence the type of raid that I had originally imagined based on the description given by Mr Stroilov. It shows some rather disorganised-looking police and enforcement officers milling around outside the premises, with some dramatic music superimposed on the film. I have no doubt that the police and

enforcement officers would have brooked no opposition, but there is nothing intrinsically surprising in a bank making plans to ensure that its security enforcement process is carried out in an effective manner, which can in some circumstances require firm or even forceful (albeit lawful) steps to be taken where opposition is anticipated or actually occurs.

340. In large part the concern as to the role of the police could really only have been relevant to the allegations as to the wider state-sponsored conspiracy; i.e., the case which the Court of Appeal held (see in particular the judgment of Males LJ at [110] and [111]) had been demolished at the original trial. It also relates in some respects to the narrower allegation still pursued to the effect that three named public officials were participants in the conspiracy, a way of putting the case to which I shall come shortly. But in any event it seems to me that the concerns expressed by Hildyard J fall someway short of demonstrating it is probable that the assistance of the police was all part of some grand conspiracy in which the state or the St Petersburg public authorities as a body were involved, to deprive Dr Arkhangelsky of his companies in a dishonest manner. In my view, the reality of the position is far more mundane and is accurately reflected in the submissions made by Mr Eschwege at the re-trial.

341. The way he expressed it was that the reason Sevzapalians needed to take control of the Western Terminal premises was that, although Mr Vinarsky had been removed as director-general in early April 2009, he refused to accept that he had been dismissed. Evidence sworn by Dr Arkhangelsky in proceedings in the BVI supports this theory. The reason the police were requested to attend was to secure the site and deal with any trouble that may arise in circumstances in which Mr Vinarsky was still in de facto control with a number of OMG employees present. As Mr Eschwege put it:

> "… at this stage, in June, we've got a situation where we've had the Morskoy loan, we've now got proceedings against Sevzapalians and others to unwind the repo and then, at this point, Mr Vinarsky is still in place. What one needs to appreciate is that there may well have been trouble if in fact the police had not turned up."

342. The conclusion I have reached is that Sevzapalians, as the 99% shareholder in Western Terminal LLC was prepared to take forceful steps to gain control of the assets to which it regarded itself as entitled and the Bank was prepared to do what it could to enforce its security over the shares in Western Terminal LLC and the pledges of its assets. Like Hildyard J, I think it is probable that both entities deployed their connections with the authorities to assist in making sure that Dr Arkhangelsky was excluded from the relevant OMG entities. But the purpose for the exclusion is ultimately what matters, even though the way it was done may throw some light on that question.

343. While I agree that there is something unsettling about the use of the police to assist in the resolution of a civil dispute, this only establishes that the Bank had access to organs of the state and not just commercial enforcement officers. As I explained when running through the chronology earlier in this judgment, Hildyard J made no finding that the police's participation in this seizure (as opposed to the later July raid which I shall deal with in the next section of this judgment) was or has been found by the Russian courts to be unlawful, whether on procedural or other grounds. I do not think that it is possible to infer that it was, not least because the explanation for the presence of the police given by Mr Eschwege strikes me as being significantly more probable than the counterclaimants' suggestion that the police only participated in what occurred because

they (or more particularly Gen. Piotrovsky) were part of a grand conspiracy to strip Dr Arkhangelsky of the OMG assets. In my judgment, the reality is that, while the police might have been more receptive to claims that disorder might ensue if they were not present than would have been the case if the Bank had had no contacts, the evidence goes no further than that.

344. In reaching that conclusion I have had particular regard to the timing of the Western Terminal seizure and its relationship to the other events which were going on at the same time. These included in particular the facts that the civil courts were seised of the proceedings brought by Mrs Arkhangelskaya and that the criminal complaints made by Dr Arkhangelsky and Mr Vinarsky arising out of their removal as directors-general of Scan and Western Terminal were closed a few days before the seizure on the order of the Chief Investigator for St Petersburg. This timing is consistent with the Bank being concerned to make a pre-emptive strike in the event that Mrs Arkhangelskaya's proceedings were to be successful, but this too does not point to anything more than a desire by the Bank to do everything it could to protect its security. In other words I am satisfied that the probabilities are that the seizure – heavy-handed though it was - was for security enforcement purposes. It had nothing to do with a process to achieve a fraudulent sale of the seized assets to connected parties for less than their proper value.

345. In short, these events demonstrate that there was contact between the Bank and Lt. Col. Levitskaya, which may have been abused in a public law sense. But I am not satisfied that the probabilities point to it being part of an asset-grabbing 'raid' directed at depriving Mr Arkhangelsky of valuable assets of OMG which were not required for realisation in order to enable the discharge of its indebtedness to the Bank.

Issues 6(7) and 6(8): the Bank's relentless campaign against Dr Arkhangelsky, his flight to France the criminal charges in relation to the Morskoy Bank Loan

346. In their oral and written submissions, Issues 6(7) and 6(8) were dealt with together by the counterclaimants, and they are said to be part of the same pattern of deployment by the claimants of what the counterclaimants have called their corrupt "state connections". Hildyard J explained how this part of their case was put in [1122] of his judgment:

> "(3) The 'conspiracy' case contends that Mrs Matvienko, Gen. Piotrovsky, and other "corrupt officials" joined the conspiracy before June 2009 and/or before October 2009 "by agreeing with Mr Savelyev and/or the Bank acting by Mr Savelyev" to carry out such roles as to "further the Scheme".
>
> (4) The Counterclaimants allege also that one of the objects of what they depict as a state-assisted campaign of harassment and the bringing of (allegedly) false criminal charges was to force the Arkhangelskys to flee Russia, which they allege is "a well-known procedural tactic to secure the raided property."

347. This part of the case is obviously closely linked to the way the counterclaimants' case was put in relation to the seizure of Western Terminal on 20 June 2009. Mr Stroilov started this part of his submissions by drawing attention to some evidence from Dr Arkhangelsky which described a meeting he had at the beginning of June 2009 with an

unnamed friend of the owner of Baltdraga (Mr Alexander Bliznyukov) who said that he had been present at a meeting at which Gen. Piotrovsky was reported to have given an order to arrest him and put him in prison. This was a warning which Dr Arkhangelsky took very seriously for the reasons he gave. It was Dr Arkhangelsky's case that this caused him immediately to leave Russia for his own safety.

348. The Bank invited the court to reject that evidence as an invention, but Mr Stroilov says that Hildyard J did not do so. In particular Mr Stroilov relied on [590] of Hildyard J's judgment in which he plainly refers to warnings that Dr Arkhangelsky had received in terms which made clear that he accepted they had been given. However, although it is clear that Hildyard J made a finding to that effect, I do not think that he concluded that this warning had the impact on Dr Arkhangelsky that he sought to convey. In a passage in his judgment between [1075] and [1090], Hildyard J makes a number of detailed findings of fact as to what occurred. As he explained, these findings demonstrated that Dr Arkhangelsky's allegation that he was forced to leave Russia in fear for his own and his family's safety faced some difficulty.

349. As the difficulties were described at length by Hildyard J in a passage in his judgment in respect of which the findings of primary fact are to stand ([99] of the Chancellor's judgment), it is not necessary for me to do more than summarise them here. They were that (a) Dr Arkhangelsky had already planned to go on holiday when he departed Russia in June 2009 and simply moved to his property in France when his holiday came to an end, (b) he returned to Russia openly and voluntarily in July 2009, (c) he maintained contacts with the Russian state even participating in state sponsored trade exhibitions and delegations in Chicago and Singapore in October and November 2009 and (d) he continued to seek to exploit his relationship with his St Petersburg government contacts through into 2010. Hildyard J was also very unimpressed by the way in which Dr Arkhangelsky changed his evidence as to the time that the state became involved in the conspiracy when confronted with parts of his story which did not fit with the established chronology. It was also consistent with the findings made by Hildyard J on this part of the case that Dr Arkhangelsky seems to have been able to continue with some OMG business projects in Russia from his home in Nice into 2010 (details are given in [1084] of Hildyard J's judgment), and he was still trying to 'sell' Vyborg Port as late as 2013.

350. In the light of those findings of primary fact, the conclusions which Hildyard J reached (at [1089] of his judgment) were as follows (and nothing that I have been shown causes me to consider that they are not an accurate reflection of what occurred):

> "In my view, the likelihood is that when Dr Arkhangelsky first left Russia he did so in the expectation that, one way or another, something would turn up and he would find some sufficient solution to return and carry on his businesses, even if in altered scale and form. But things did not work out that way; and his return became both dangerous and (once his early victories in court were reversed and the Claimants secured their control) practically futile. I do not find that he was forced to flee; but I would accept that it became both senseless and dangerous to return to Russia."

351. The claimants submitted that the counterclaimants' failure to substantiate their case that Dr Arkhangelsky was forced to flee Russia because of a campaign against him, let alone a campaign orchestrated by the Bank, is important. I agree. I also agree with the claimants' submission that the more probable explanation of what occurred is that he

left Russia of his own accord, because of the problems with his businesses. I also think that he was wary of the legal consequences of the way that his relationship with the Bank had collapsed, in part because he knew that the Bank no longer trusted him.

352. However, the real importance for present purposes is that Dr Arkhangelsky's failure to demonstrate that he was forced abroad because of a state-sponsored campaign against him undermines one of the core aspects of the allegation that he was the victim of a state-sponsored conspiracy, an allegation that was always central to the idea that the Bank conspired with others to 'raid' his businesses. The claimants submit that the most that can now be said is that the counterclaimants were the victims of a conspiracy to raid in which three corrupt public officials (Mrs Matvienko, Gen. Piotrovsky and Lt. Col. Levitskaya) participated.

353. Adopting that more limited way of putting their case, the counterclaimants relied on a number of what they said were significant events in support of this part of their case. The meeting with Mr Bliznyukov and Dr Arkhangelsky's departure from Russia both took place shortly before the seizure of Western Terminal by Sevzapalians, which was itself one of the events on which the counterclaimants relied. On 19 June 2009 (i.e., immediately before the seizure), Lt. Col. Levitskaya caused a criminal case to be opened in relation to LPK Scan alleging non-payment of VAT.

354. A little later, on 15 July 2009, the Bank wrote to Gen. Piotrovsky encouraging investigation of Dr Arkhangelsky for alleged fraud in connection with the Personal Loan. The very next day (16 July 2009), there was the police raid at OMG's headquarters which I have already described. This was said to have been personally attended by Lt. Col. Levitskaya with special forces. It was said by the counterclaimants (and supported by evidence) that they claimed to be acting on the directions of Mrs Matvienko. The offices of the Group's lawyer, Mr Vasiliev, were also raided. Mr Stroilov submitted that it was significant that the fraud investigation in respect of which the raid occurred was opened the day before the forcible seizure of Western Terminal and were likely to have been coordinated.

355. In a judgment given on 30 September 2009, the July raids by the St Petersburg police were held by the Kirovsky court to have been undertaken without regard to due process and were therefore unlawful. The court recorded that they had been directed by Lt. Col. Levitskaya on the basis of investigations said by her to have been required in connection with an alleged VAT fraud. The illegality was a breach of article 182 of the Code of Penal Procedure in refusing to permit OMG's advocate to attend the search. However, it is of some significance to the issue with which I am concerned that the court also concluded that Lt. Col. Levitskaya "had sufficient grounds to perform a search … in order to find and seize the documents, seals and electronic devices concerning financial and commercial relationships" between LPK Scan and a number of other entities. Its decision was upheld on appeal.

356. The evidence that Mrs Matvienko was involved in some way came from Dr Arkhangelsky who said that he had been told by Mrs Lukina (who did not herself give evidence) that Lt. Col. Levitskaya had personally attended the July raid and claimed to be acting on the direct instructions of Mrs Matvienko. This was said by Mr Stroilov to have been independently corroborated by a newspaper article citing Lt. Col. Levitskaya as saying that the operation was implementing the will of Mrs Matvienko, although the source of the newspaper's information seems to have been Dr Arkhangelsky's own

lawyer. This article was referred to by Hildyard J in [1071] of his judgment. I was not shown the article, but what Hildyard J called a rudimentary translation was in evidence at the original trial. It established that Mrs Matvienko's involvement in the search was reported in the press at the time, but it is impossible to gain any accurate sense of why it was that she was said to be interested, what the nature of her involvement was, what instructions or directions she might have given to Lt. Col. Levitskaya and why.

357. Although I approach Hildyard J's conclusion on the role of Mrs Matvienko with caution in light of the Court of Appeal's criticism of the approach he took to the standard of proof on this issue (see the Chancellor's judgment at [52] and that of Males LJ at [114]), it is my view that the evidence that such interest as she had in what was going on was directed towards an unlawful conspiracy is weak. It falls well short of establishing on the balance of probabilities that it was. Likewise, I am not satisfied that the evidence comes anywhere close to establishing that the Bank's conduct reflected the following way in which the counterclaimants' put their case (as explained by Hildyard J at [602]):

> "the Bank used its close connections to the political elite in Russia (especially through Mrs Matvienko) to manipulate the enforcement authorities to bring a fabricated case."

358. More specifically, it seems to me that the attitude of the Russian court is very revealing and counts against what occurred as being part either of a state sponsored conspiracy or a conspiracy to which a few corrupt public officials were party. While the court did not baulk at declaring the search illegal (thereby going some way to undermine any suggestion that this particular Russian court was not prepared to operate in an independent manner), it determined that the search itself was justified. There were therefore grounds for believing that offences warranting a search had been committed. Furthermore, apart from the original encouragement by the Bank to investigate the Personal Loan, there was no evidence which linked the Bank to the police reaction in the form of the search.

359. These circumstances caused Hildyard J to conclude that Mrs Malysheva, the Bank and Mr Sklyarevsky were making as much use as they could of their state connections to achieve their ends. I do not doubt that is the case, but the more important question is not whether those connections were exploited, but rather the purpose for which they were exploited and deployed and the use that was made of that exploitation and deployment. Mr Stroilov submitted that the deployment was "for their own financial ends". If by that he meant obtaining state assistance in securing the assets charged to the Bank by taking steps to facilitate enforcement, the allegation of a fraudulent conspiracy to cause harm by an illegal 'raid' is not much substantiated. As Hildyard J explained in a passage with which I agree (at [567] and [568] of his judgment):

> "567 There seems to me to be no real doubt that, from the summer of 2009 onwards, Mrs Malysheva and the Bank, with Mr Sklyarevsky and Sevzapalians, were determined to take any steps available to them, deploying such state connections as they could call on, to make quite sure that Dr Arkhangelsky's exclusion from OMG and the Bank's means of appropriating its assets could not be undone.
>
> 568 Despite the Bank's protests that it acted only within the law, I am in equally little doubt that some of these steps included actions of an intimidating kind,

> especially when Dr Arkhangelsky and Mr Vinarsky dared question the legal propriety and effectiveness of their removals."

360. The counterclaimants submitted that there was good evidence as to connections between the claimants and Gen. Piotrovsky and that it was revealing that he did not attend the original trial to give evidence if that was not the case. I agree that the role of the police in the 19 June 2009 operation at the Western Terminal and the 16 July 2009 raid to seize documents from OMG's headquarters, together with the hearsay evidence about Gen. Piotrovsky's role in seeking to kick the police investigation relating to the removal of Dr Arkhangelsky and Mr Vinarsky into the grass, all support Hildyard J's conclusion (at [1239]) that he was "plainly an ally of Mr Savelyev". In my view, however, the evidence falls well short of justifying a conclusion that Gen. Piotrovsky "energetically implemented" any form of strategy which amounted to participation in a raiding conspiracy, which is what appears to have been suggested in [238] of Mr Stroilov's written submissions.

361. While the role that Gen. Piotrovsky seems to have played is not inconsistent with any such participation, it is much more naturally explicable as a response to what Hildyard J called the Bank's "unsettling" ability to call on state resources to assist in the pursuit by the Bank of its desire to secure the enforcement of its rights and judgments against its OMG debtors than it is as evidence of participation in fraudulent conspiracy to 'raid'. I shall revert to this when considering the evidence in the round.

362. In short, while it is striking that state assistance was given at all, I think it is unlikely that such help as the Bank received was directed towards any conspiracy to 'raid'. I have therefore reached the conclusion that Hildyard was correct in the essence of what he said at [1138] of his judgment (viz that the evidence is insufficient, to implicate Mrs Matvienko, Gen. Piotrovsky, and other "corrupt officials" in a conspiracy to raid or assist the raid of Western Terminal and Onega Terminal), but I have done so on the basis that, taken in the round, it is more likely than not that none of these of three individuals participated in a conspiracy of the form alleged.

363. The counterclaimants also placed heavy reliance on the conduct of the Morskoy Bank criminal proceedings which had been initiated by Western Terminal (at the instigation of Sevzapalians, itself a Renord-Invest company) on 25 September 2009. A number of Bank officers and employees gave statements in support of the criminal complaint (in particular Mr Savelyev and Mrs Malysheva). The gist of Mrs Malysheva's evidence, which was supported by a number of other Bank and Renord-Invest witnesses, was that, in December 2008, Dr Arkhangelsky decided to sell Western Terminal and approached the Bank asking for help in finding a buyer. Mrs Malysheva put him in touch with the director-general of Sevzapalians (Mr Gavrilov) and there then followed a genuine and absolute sale from OMGP to Sevzapalians at the fair market price of RUB 9,900. Other than that, the Bank had no involvement in the deal. It had no interest in the sale other than helping its borrower.

364. Hildyard J said that this story was crafted and dictated by Mrs Malysheva but was a pack of lies (see [1103] and [1104] of his judgment). He expressed himself in trenchant terms in [1094] of his judgment, and I have no doubt that he was right to do so:

> "They sang in unison the same song: but the song was untrue. Their evidence was both orchestrated and fundamentally false."

365. It was also Hildyard J's finding that, because it was almost impossible to conclude that Lt. Col. Levitskaya was not aware from the outset of the repurchase side of the repo arrangements, she must also have been aware of sufficient facts to reach a conclusion that "fundamentally undermined the song sung in unison". Hildyard J went on to find (at [1108]) that much the most likely explanation for this conduct is that once the repurchase contract side of the repo transaction had been held by the Russian court to be inadmissible, she was content to go along with the fiction of an absolute sale at fair market price "in accordance with Dr Arkhangelsky's wishes and in which the Bank had no involvement other than to assist the sale and never had any interest".

366. On any view, this conduct was wholly reprehensible, and was consistent with what Hildyard J described as the use by Lt. Col. Levitskaya of an intrusive and oppressive approach to the way in which she collected evidence for use in the Morskoy Bank Loan criminal proceedings. His findings as to what actually occurred underpinned an important part of the counterclaimants' submissions at the original trial as to the inferences the court should draw from this conduct. Hildyard J recorded those submissions in the following form (at [1110] of his judgment), in a passage which Mr Stroilov submitted at the re-trial should now be adopted as a series of findings by me:

> "In this uncertain but troubling state of things, the Counterclaimants invited me to draw the following inferences:
>
> (1) A perjury by six witnesses telling substantively the same lie can only result from a collusion.
>
> (2) The only purpose of that perjury was to conceal the so-called 'repo' arrangement.
>
> (3) The reason for concealing it was because it was fraudulent.
>
> (4) Three different employees of the Bank gave the same false evidence because the Bank was responsible for that fraud.
>
> (5) Three different employees of Renord-Invest gave the same false evidence because Renord-Invest was also responsible for that fraud.
>
> (6) A conspiracy involving, at least, the Bank, Renord-Invest, and the six individuals is, by far, the most probable explanation."

367. Like Hildyard J, I agree that there was serious collusion between those whose evidence was obtained for the purposes of the criminal proceedings. I also think it is clear that there was dishonesty involved, because a number of the witnesses gave perjured evidence. What occurred was another feature of the case which encouraged and fomented Hildyard J's misgivings as to the findings he had made in relation to the counterclaim ([1635(5)] of his judgment).

368. However, I do not agree that the purposes of the collusion or the perjury was to conceal the repo arrangements because they were fraudulent, nor do I agree that it demonstrates that employees of the Bank and Renord-Invest were responsible for that fraud. As the Court of Appeal explained (at [51] of the Chancellor's judgment), there must be sufficient cogent evidence for the "malign rationale alleged", i.e., a desire to conceal

the repos because they were fraudulent, to have been established as the more likely explanation for the dishonest conduct which Hildyard J held to have been instigated and carried out by Mrs Malysheva. What is important is the reason for the dishonesty. In my view, the evidence falls well short of establishing that the dishonest conduct was driven or even influenced by Mrs Malysheva's desire to conceal the repo arrangements because she knew or thought they may be fraudulent. The more likely explanation is that Mrs Malysheva had determined that the presentation of the arrangements as an absolute sale put in place by Dr Arkhangelsky himself was a straightforward response to the story (as Hildyard J put it at [1112]) "first spun by Mrs Arkhangelskaya and the Arkhangelsky's lawyer". Her conduct was reprehensible and dishonest, but I think it was much more likely to have been driven by opportunism than pre-planning. She, with the assistance of Lt. Col. Levitskaya, procured not only Bank employees, but employees of Renord-Invest, also to support the story, but the reason for this was not because the claimants believed or were concerned that the repo arrangements were fraudulent. It was simply that the concocted chorus "suited her objective at the time of promoting and supporting the Morskoy Bank criminal proceedings" ([1113]), which had become a central part of the 'war'.

369. On this particular point, therefore, I cannot improve on the way that Hildyard J expressed it in the findings he made at [1115] of his judgment, making clear as I do that his conclusion is a more probable one than the explanation advanced by Mr Stroilov, which in my judgment the evidence does not substantiate:

> "… the purpose of the concocted chorus was to support and substantiate the criminal proceedings, as part of the continuing 'war' against Dr Arkhangelsky; and I do not infer from any of this any recognition or concern that the repo arrangements were fraudulent; the evidence was concocted and coordinated to assist the Morskoy Bank criminal complaint. That is reprehensible: but, in my judgment, it does not demonstrate a conspiracy to conceal the repo arrangements because the participants recognised them to be fraudulent."

Issue 6(9): the tell-tale signs of a classic raid

370. In the way it was addressed by the counterclaimants, this issue turned out to be narrower than might at first have appeared. It flows from [69(xiii)] and [99] of the Chancellor's judgment in the Court of Appeal in which he held that the inferences to be drawn from the evidence about the tell-tale signs of a classic raid are thrown into doubt by the inconsistencies in Hildyard J's judgment. By this he meant the findings as to whether the events in the round displayed the signs of a classic raid see [16(xiii)] of his judgment and most particularly Hildyard J's conclusion (at [1131] of his judgment) that an element of premeditation and the ability unilaterally to bring about the premeditated result was the overall characteristic of a 'raid' as extrapolated from a series of case studies analysed in the NACC Report I referred to earlier in this judgment. In particular, the question which arises was whether there was (per Hildyard J at [1132]):

> "evidence of a premeditated decision on the part of the bank… To deliberately engineer a default thus enabling the bank to be sure it can implement the raid and at a time of its own choosing."

371. The counterclaimants therefore concentrated on the simple issue of whether the elements of what occurred were recognisably similar to the elements of one of the NACC Report's "schemes of raiding" as described by Hildyard J at [1127] of his judgment. They said that this was the evidence referred to by the Chancellor and on which they relied as giving rise to an inference of an unlawful 'raid'. In essence, it was submitted by Mr Stroilov that, because many of the characteristics of a raid as described in the NACC Report were present in this case, this pointed, along with other factors on which the counterclaimants relied, to there being a conspiracy to raid OMG's valuable assets. The NACC Report was the source of Hildyard J's description of how another feature of the case which caused him misgivings about the conclusions he had reached was the existence of what he called "numerous examples of state-orchestrated or assisted 'raids' in the Russian Federation, of which there are at least disconcerting echoes in this case" ([1635(8)].

372. Hildyard J summarised the characteristics of the fourth of the schemes described in the NACC Report at [1127] of his judgment. I agree with his conclusion that the parallels between that description and some of the events in this case are clear. In particular the use of repos, pledges, personal guarantees and some of the enforcement steps taken by the Bank were similar to those described in the NACC Report. There are, however, a number of significant differences, including in particular two important facts. First, in the present case, the business conducted by OMG was not successful and was in very significant difficulty by the time the repos were entered into. Whatever the position may have been thought by the Bank to be at the time the loans were originally advanced, it cannot therefore be said that, at the time the repos were entered into, OMG was "a successfully operating big or medium-size business". Hildyard J demonstrated in the clearest terms why that was no longer the case. Secondly, the counterclaimants' case that the Bank "deliberately created the conditions for an overdue indebtedness to emerge" has been shown to be wholly misconceived. I have explained why that is the case when considering Issues 6(2) and 6(3) (the events of March and April 2009) earlier in this judgment.

373. I also think that the evidence as to the nature of the NACC Report, and its authority, not only justified Hildyard J's conclusion that its status was debatable, but also his conclusion that (see [1131] of his judgment) that:

> "… each case must be assessed on its own facts, and the departures from the usual 'check list' may be as instructive as the similarities. In particular, it is the element of premeditation, and the ability unilaterally to bring about the premeditated result, which is the overall characteristic."

In short, it is my view that the NACC Report, as a document published at or about the time of the events with which these proceedings are concerned, provides some evidence that a particular form of lending and security structure had been used (along with other types of scheme) as a mechanism for stealing borrowers' valuable assets. However, I agree with Hildyard J's conclusion that the departures from the usual checklist may be as instructive as the similarities.

374. Those departures include the two I have already mentioned, which seem to me to undermine in a material and significant manner the counterclaimants' case that the NACC Report does any more than show that the security structure in the present case is capable of being manipulated for the nefarious purpose alleged by the

counterclaimants. I shall revert to this when dealing with my final conclusions, but in my view the NACC Report does not assist the counterclaimants on the question of whether there was a premeditated unlawful conspiracy to 'raid' in the present case. The circumstances were materially different from those contemplated by the authors of the NACC Report. While I agree that the structure in the present case gave an opportunity for a 'raid' if the Bank had wanted to take that course, nothing in the Report suggested that the structure adopted by the Bank was not capable of being used in a legitimate manner. In my judgment, there is nothing flowing from the NACC Report which justifies any inference that it is more likely than not that a raid was contemplated.

Issues 3 and 4: the auctions

375. Both parties took issues 3 and 4 together. They relate to the conduct of the auctions by which the pledged assets were ultimately realised. As the Court of Appeal said, the conclusions in relation to the auctions were all-important for the purposes of the counterclaim. It concluded that Hildyard J's findings as to the propriety and the validity of the auctions were equivocal ([69(xiv]) and that his findings as to the claimants' motives for acquiring the pledged assets required reconsideration ([69(xv)]).

376. The Chancellor also held ([101] of his judgment) that the court at the re-trial was to be free to accept further evidence on these issues. He explained the position as follows:

> "It is only the issues arising from the auction sales of the pledged assets, the valuation of those assets, and the respondents' motives for acquiring them that stand in a different position. Unfortunately, the judgment gives rise to the inconsistencies and difficulties that I have identified above that concern these matters and the resulting question of whether the appellants sustained harm as a result of the respondents' conduct. Those questions **may** necessitate the calling of further evidence on these points. I say "may", because I do not believe that this court is in the best position to decide that question. It will be for the judge hearing the re-trial to decide the extent of any new evidence which either party should be permitted to call and how the evidence heard by Hildyard J should be presented and considered."

377. In the event, no party sought to adduce any further evidence apart from that relating to valuation. The evidence heard by Hildyard J was analysed in the parties' skeleton arguments and I was referred to some of it during the course of oral submissions. There were very few points of detail in which their respective positions did not reflect the way each party had approached the case at the original trial.

378. The counterclaimants' case at the original trial was that the Bank took steps to control the auction process and in particular the bidding constituency to enable the auction sales to proceed free of competition on the understanding that they could acquire the assets from the successful bidder at a later stage. At the re-trial, the way this case was put can be summarised as follows, taking the core elements from [31] of Mr Stroilov's written opening:

i) At each auction, the claimants secretly controlled and directed the seller, the successful bidder and the only unsuccessful bidder and went to great lengths to

conceal the connections behind those participants and their own control of them. Those lengths included arranging sham transactions and dishonestly misleading courts in Russia, the BVI and the UK as to what occurred.

ii) Each lot was sold at the minimum increment above the starting price and the manner of sale amounted to dishonest bid-rigging.

iii) In the case of Western Terminal, the contractual starting price was artificially reduced by a series of prior sham transactions and collusive court proceedings orchestrated by the claimants.

iv) There was formal compliance with Russian law requirements in relation to marketing, but although the claimants were in a position to take further marketing steps, they chose not to do so.

v) The claimants knew that the main value in the assets was their synergistic value as income generators, but the assets were put up for public sale in unattractive parcels which made it impossible for independent purchasers to unlock that income generating potential. This demonstrated that the claimants had no interest in achieving the maximum price, but were only concerned with selling to themselves.

vi) The sales were at a gross undervalue. I shall revert to this last point when I deal with the expert evidence on value.

379. At the original trial, an additional argument was advanced by the counterclaimants relating to the Gunard lease proposal, and the proposals to transfer to CJSC Nazia and SKIF. It was said that they were capable of being what Hildyard J called "an obvious technique for artificially reducing the value of an asset in the perception of third parties … to reduce any interest in it".

380. However, none of these transactions were in fact implemented. The consequence of this is that, even if they were to have been illustrative of an intention by the Bank to discourage third party interest in the eventual realisations, nothing in the event was done to consummate that intention. Indeed, the fact that no such steps were taken is itself inconsistent with what the counterclaimants alleged to be the conspiratorial plan. In my judgment, the conclusions reached by Hildyard J (in [1320] to [1326] of his judgment) are both justified by the evidence to which he referred, and in so far as they contain inferences which I am required by the Court of Appeal to reassess are inferences with which I agree.

381. Like Hildyard J, I cannot exclude the possibility that the Gunard lease was put in place and held in abeyance in case it was needed to depress demand and reduce the market value of the assets, and simply never was so. However, I do not think the evidence is sufficient to warrant such a finding. In my view, the more likely explanation is that its object, like the proposed transfer or lease to SKIF, was asset protection and to inhibit Dr Arkhangelsky from re-establishing control if he were to be successful in the Russian courts

Auctions: allegation of secret control of participants by the claimants

382. In support of the counterclaimants' first core element, viz. their argument that the claimants secretly controlled and directed each of the participants in the auctions, the counterclaimants relied not just on their case that each was a Renord-Invest company, beneficially owned and controlled by the Bank, but also that the claimants took elaborate and persistent steps to maintain that this was not the true position. It is of significance to understand the relationship between the claimants and all of the many entities which participated in the realisation process. It is of particular significance to understand the relationship between the claimants and the entities in whose hands Onega Terminal and Western Terminal ultimately ended up – in the case of the former, ROK No 1 Prichaly and in the case of the latter, Baltic Fuel.

383. In [1151ff] of his judgment, Hildyard J undertook a detailed analysis of the nature and extent of the control and ownership of Renord-Invest and SKIF. Based on the evidence of Renord-Invest's lawyer, Mrs Yatvetsky, Hildyard J was satisfied that each of the following entities was a member of the Renord-Invest Group.

i) So far as the 26 October 2009 auction Onega Terminal assets is concerned, (a) the Subsequent Purchasers which by then controlled the seller, Scan, (b) the successful bidder, Solo and (c) the unsuccessful bidder, Kiperort.

ii) So far as the 29 September 2012 auction of the Western Terminal assets is concerned, (a) the seller, Vektor-Invest (b) the successful bidder, Kontur and (c) the unsuccessful bidder (if there was one), Globus-Invest.

384. This meant (also according to Mrs Yatvetsky) that their shareholdings were typically held by Renord-Invest employees as nominees on behalf of Renord-Invest under arrangements which were usually oral and relied "on trust between the parties" ([1155](2)). Hildyard J then went on to make the following findings (at [1157] and [1159] of his judgment) on the relationship between these members of the Renord-Invest group and the Bank in relation to the auctions:

> "1157. It seems to me to be clear that the Bank used the Renord companies, and in the context those specifically identified above, as and when it required them for such undertakings, business operations or investments as appeared to it expedient at the time. It does not seem to me to be possible to characterise the business of the Renord Group more exactly: its diversity is itself confirmatory of the Bank's needs, and the facility with which the companies were made available to it to service them."
>
> "1159. The fact that the Renord entities deployed by the Bank were not *de jure* subsidiaries no doubt was of utility: it enabled their operations to be kept off the Bank's balance sheet. But *de facto*, as it appears to me, certainly those expressly identified above were used, or made available for use, by the Bank in the context of these proceedings. In my judgment, their involvement in the auctions and transactions referred to above was not as independent third parties."

385. The reference to keeping the participants off balance sheet reflected the Bank's earlier explanation for the transfers of the Scan shares to the Subsequent Purchasers, and in my view is likely to be one of the reasons the Bank was defensive about the enforcement structures it adopted. A little later in this section of his judgment, Hildyard J explained that in his view, it was not necessary to decide whether Renord-Invest itself was owned

or controlled by the Bank, Mr Savelyev or their associates, but he accepted the counterclaimants' description of the Renord-Invest Group as "a store of SPVs at the Bank's disposal" (at [1195]). He then went on to make the following findings:

> "It is clear to me, and I hold, that the Bank was able to and did, commandeer companies from the Renord Group for its own use, and in the case of those companies, during the period of its use of them, the Bank did own and control their businesses, usually through nominees as above described, and in particular, Mr Lokai, Mr Maleev, Mr Romashov and Mr Zelyenov." ([1196])
>
> and
>
> " … [they served] as nominees for the Bank and/or Mr Savelyev and his close associates and were accustomed to act subject to the instructions of the management of the Bank, and ultimately of Mr Savelyev, when their interests were concerned and they or he thought it appropriate to give them. That is not irrelevant, as the Claimants would have it. On the contrary, it is of interest and relevance because it seems to me to chime with the conclusion that the true relationships of importance in the context of the Bank, Renord Group and SKIF were personal rather than structural." ([1197])

386. Mr Stroilov identified a number of respects in which, during the course of his evidence, Mr Savelyev was at pains to stress that the Renord-Invest Group was not ultimately owned or controlled by the Bank and that the Subsequent Purchasers and other Renord-Invest participants in the auction were not directed and controlled by the Bank or him personally. He also relied on those parts of Hildyard J's judgment in which he recited parts of Mr Smirnov's and Mr Savelyev's evidence which were adamant in their denials that the Renord-Invest was anything other than a group independent of the Bank but with which the Bank had a friendly relationship.

387. It is also clear that the claimants persisted in their denial of the closeness of the connection between the Renord-Invest companies and the Bank throughout the course of the trial, a course of action which the counterclaimants relied on as reflecting their continuing concealment of that which Hildyard J was satisfied was the case. In particular, as Hildyard J explained in [1170] and [1171] of his judgment, he was satisfied that the Bank made efforts to seek to distance itself from Renord-Invest which were heavy-footed and ultimately false and that the ties between the Renord-Invest group and the Bank, or more accurately those with conduct of the Bank's affairs at the relevant time were close, personal and pervasive, and extended well beyond the confines described by the claimants in their evidence. He found that this suggested not just unreliability in what they had to say, but also a consciousness of vulnerability on the issue of the nature and extent of these relationships and that "it is the inconsistency and unreliability of the Bank's various iterations of the factual position which are of the greater interest".

388. All of this goes some way to support the counterclaimants' allegation that the claimants secretly controlled and directed the participants at the auctions and went to great lengths to conceal the connections behind those participants and their own control of them. To that extent the Bank certainly gave the impression that it had something to hide and that it did so in the context of the realisation process at the heart of the counterclaimants' conspiracy claim. In those circumstances, it is not wholly surprising, given the

approach that Hildyard J took to the declarations sought by the claimants at the original trial, that these denials were another of the features of the case which he said in [1635(2)] of his judgment had encouraged and fomented the misgivings he had about the counterclaim.

389. In my view, the claimants' continuing denials of their ownership or control of the Renord-Invest companies is a further illustration that they have behaved in a far from straightforward manner. It demonstrates a defensiveness about the approach they took to the structures used for enforcing their security and a reluctance to accept the closeness of the control which they had over many of the Renord-Invest companies. But I am not persuaded it is likely that this was because the claimants wanted to hide a reality that they controlled or owned either of the ultimate purchasers, because I do not think that they did. Suspicions were obviously excited, but in my judgment on this particular issue the probabilities are that they were misplaced.

390. I also take the view that the way in which Mr Stroilov expressed the position in his submissions was overblown. While it is plain that, to treat any of these entities as in any sense independent of the Bank would be wrong (and I have little doubt that they were made available to be used by the Bank in the manner described by Hildyard J), that does not mean that the Renord-Invest group in all of its elements was owned or controlled by the Bank. Having reassessed the evidence, I cannot improve on Hildyard J's description at [1195] of his judgment of Renord-Invest as "a store of SPVs at the Bank's disposal" and that in the case of those SPVs, "during the period of its use of them, the Bank did own and control their businesses, usually through nominees". That is not the same thing. The control and ownership found by Hildyard J to have existed is time-limited ("during the period of its use of them") and relates to the specific business activity with which the court is then concerned, not the legal entity itself and every aspect of its activities and governance.

391. In particular, I do not understand Hildyard J to have found that this kind of participation on behalf of the Bank was the only activity of companies within the Renord-Invest group and I do not think that the evidence points to such a conclusion. As he said in a passage of his judgment at [1204] which I think expresses the likely position:

> "… it may be that even the SPVs or other vehicles they provided were also engaged (or from time to time became so) in independent projects and businesses with which the Bank and/or Mr Savelyev were not directly concerned."

392. The reason I doubt that this was Hildyard J's view is that, even in the part of his judgment in which he expressed the misgivings which caused him to refuse to grant the declarations sought by the claimants he simply said (at [1635(2)]) that "at least most of the Renord-Invest group companies were in reality almost certainly owned or controlled by the Claimants". That falls some way short of a finding that even all of the Renord-Invest group entities which featured in this case were owned or controlled by the claimants, even less that the group did not carry out other activities through the other companies (Mrs Yatvetsky said that there were 50 or 60 in all) which made up that group.

393. It follows from this that I do not think that Hildyard J made a finding that, merely because an entity featuring in the matters with which these proceedings are concerned is a member of the Renord-Invest group, it was to be treated as if it was owned by the

claimants and I do not think that the evidence would have warranted any such finding. This is particularly relevant to the Baltic Fuel Issue which relates to the precise nature of the interest which the claimants, and more particularly the Bank as pledgee, had in the two entities which were involved in the acquisition of Western Terminal: Kontur and Baltic Fuel. As I have already explained, there was no evidence that ROK No 1 Prichaly had anything to do with Renord-Invest or the claimants and so the same issue does not arise in relation to Onega Terminal.

The Baltic Fuel Issue (Issue 5)

394. There is no dispute that both Kontur and Baltic Fuel Company are companies in the Baltic Fuel group. However, there continues to be a dispute as to whether, at the material times Baltic Fuel was owned and/or controlled by Mr Smirnov (which is the claimants' position) or by the Bank or Mr Savelyev (which is the counterclaimants' case). Hildyard J's conclusion that the counterclaimants had adduced insufficient evidence to warrant a finding that it was owned and/or controlled by the Bank and/or Mr Savelyev was the only finding of primary fact against which the counterclaimants mounted a direct appeal.

395. The conclusion reached by Hildyard J was expressed at [1241] and [1242] of his judgment in the following terms:

> "1241. However, in my view, the hard evidence to demonstrate ultimate control and ownership of Baltic Fuel (if not Renord-Invest) remains meagre. It is not such, in my judgment, as to displace the possibility that, consistently with my view that Renord-Invest and SKIF were corporate vehicles available for use for the control and fulfilment of various potentially independent projects, Renord-Invest and/or Kontur were used by Mr Smirnov (rather than the Bank and/or Mr Savelyev) as vehicles for the purposes of an oil business which included Baltic Fuel, in much the same way as I have found the Bank and/or Mr Savelyev used Renord-Invest in connection with the pledge realisations and transactions. …"

> "1242. In the end, therefore, though not without equivocation, I have concluded that such circumstantial evidence as was provided by the Counterclaimants is insufficient to warrant a finding, contrary to the evidence of Mr Savelyev (which, as I have previously noted, was not challenged), of Mr Smirnov and of Mrs Yatvetsky, and notwithstanding the equivocation of FTI, that the Bank and/or Mr Savelyev owned and/or controlled Baltic Fuel."

396. The Chancellor explained ([40(x)] of his judgment) that Hildyard J's conclusion that the hard evidence was not such as to displace the possibility that Mr Smirnov controlled and owned Baltic Fuel through Renord-Invest was one of the parts of his judgment in respect of which the counterclaimants contended that he had misdirected himself as to the standard of proof. The consequence was (see [76] and [100] of the Chancellor's judgment) that this conclusion was one which should be reconsidered at the re-trial, although the reconsideration is to be carried out on the basis of the existing material with no further evidence to be called.

397. The starting point for the counterclaimants' case on this issue was that Hildyard J had concluded that (like Kontur ([1230])) Baltic Fuel was a Renord-Invest company. The way that he expressed the point was that ([1235]):

> "I do not accept Mrs Yatvetsky's evidence if and insofar as it might be taken to suggest that Baltic Fuel was not and is not a Renord-Invest company: I find that it was and is. But, as previously indicated, that does not conclude the necessary enquiry."

398. They then submitted that Hildyard J concluded that "each and every Renord company involved in handling OMG assets was, at all relevant times owned and controlled by the Claimants via nominees, and acted on the Claimants' instructions". For this submission, made in [98] of Mr Stroilov's written opening, reliance was placed on passages in Hildyard J's judgment (at [1195] to [1198]). In particular, the counterclaimants pointed out that both Baltic Fuel and Kontur had the same ownership structures and the same director-general, Mr Stanislav Korneev. It therefore followed, so the counterclaimants submitted, that, because both Kontur and Baltic Fuel were Renord-Invest companies, they, like "each and every Renord company involved in handling OMG assets", were owned and controlled by the claimants via nominees.

399. In summary, the counterclaimants submitted that it is overwhelmingly likely that the claimants owned and controlled Baltic Fuel at all material times. The series of steps said to make such a conclusion inevitable are that (a) the claimants owned and controlled all Renord-Invest companies involved in dealing with OMG assets, (b) the function of the Renord-Invest group was as a store of companies at the Bank's disposal, (c) Baltic Fuel was part of Renord-Invest, (d) Kontur was part of Baltic Fuel and of Renord-Invest, (e) Kontur was owned and controlled by the claimants and (f) there is no good reason to treat Baltic Fuel differently from Kontur and other Renord-Invest companies.

400. The counterclaimants said that the fact that it was not put to Mr Savelyev in cross-examination that he owned and controlled Baltic Fuel should not inhibit the court in making a finding that it was. I do not agree with this submission, anyway in the terms in which it was put. While it is correct that he was cross-examined on his interest in Renord-Invest and I do not think that there could have been any doubt that the counterclaimants challenged his evidence or that he denied and would continue to do so that he owned any part of Baltic Fuel, it was obvious that this was an important issue for the counterclaimants' case. I accept that the failure to put the point to Mr Savelyev does not in the circumstances mean that the counterclaimants cannot even argue that he was the ultimate beneficial owner of Baltic Fuel, but I have regard to the fact that no specific challenge was made when assessing the weight to be given to his evidence on this point.

401. They also submitted that Hildyard J was wrong to be influenced by the fact that the Baltic Fuel group of companies was, as he put it, a substantial business in its own right. They said that it had only been incorporated in 2008 and it was not suggested that it ever owned any other port terminals, and indeed its seaport operating business only developed as a result of its acquisition of Western Terminal. The appearance of commercial substance was therefore illusory.

402. There is no doubt that Hildyard J held that Kontur and Baltic Fuel were part of the Baltic Fuel group ([527]) and indeed there was no dispute at the original trial that this was the case ([1226]); it was supported by Mr Smirnov's evidence. There is also no doubt that a material percentage of Kontur's shares (23.5%) were held by Mr Stanislav Korneev, who was also its director-general and the director-general of Baltic Fuel and that the remaining shares were registered in the names of Nefte-Oil (23.5%) and Timus LLC (51%). It is also the case that Hildyard J's conclusion (at [1230] of his judgment) that all of these registered shareholdings were held on behalf of Renord-Invest and that Kontur was a Renord-Invest company accordingly was not challenged at the re-trial. Likewise, it is clear that Baltic Fuel came to be treated as the owner of the assets at Western Terminal, although the counterclaimants pointed to the absence of any detail as to how that occurred. All of this demonstrates the intimate interconnection of Kontur and Baltic Fuel.

403. However, Hildyard J's conclusions were carefully expressed and do not support the submission made by the counterclaimants. He quite explicitly did not conclude that Baltic Fuel was owned or controlled by the claimants and he was careful to distinguish between different contexts in which control of different legal entities was exercised. In my judgment, it is not right to say that, merely because a company was to be described as part of the Renord-Invest group, it was also to be treated as owned or controlled by the claimants. This was not the conclusion reached by Hildyard J, more particularly in [1195] to [1198], being those parts of his judgment in which the counterclaimants wrongly submitted that he did.

404. In my judgment, the evidence does not justify a conclusion that Baltic Fuel was owned or controlled by the claimants in its capacity as the ultimate purchaser of Western Terminal. I have reached that conclusion having regard to the debate as to whether, at the relevant time, Baltic Fuel could properly have been characterised as a substantial business involved in the transport of oil products and bunkers in its own right. While I do not think that there is any evidence from which I can conclude that Hildyard J was wrong to describe it as a substantial business or that its appearance of commercial substance was illusory I think it is probable that the business had expanded since the time of the Western Terminal acquisition (by the time of the original trial in 2016 it was said to employ over 800 people with an annual turnover of €130 million).

405. In any event, and whether substantial or not at the relevant time, I think it is most improbable that in the period between 2009 and 2012, the only business conducted by Renord-Invest was providing companies to be used by the Bank in the manner described. This is consistent with the claimants' case that there is no hard evidence to contradict the evidence of three witnesses, two of whom were cross-examined at the original trial (Mrs Yatvetsky and Mr Savelyev) while the witness statement of the third (Mr Smirnov) was admitted in evidence under a Civil Evidence Act notice. Although Mr Smirnov was not cross-examined at the original trial, I think that there is part of his witness statement, which accurately reflects the true position, that it was he who owned Baltic Fuel through Renord-Invest, not the claimants:

> "It is correct that I own Baltic Fuel through its major shareholder, Renord-Invest and Renord-Invest has a good relationship with the Bank, but Baltic Fuel is not owned or controlled by the Claimants and is an independent business in its own right."

406. Hildyard J noted that this evidence had to be treated with care because it was not subject to cross-examination. He also noted that Gen. Piotrovsky was appointed Baltic Fuel's security adviser and that a Baltic Fuel manager, Mr Chernobrovkin, had been appointed as deputy director-general of Western Terminal when the Bank obtained control pursuant to the repo arrangements. These are all indications of a close connection between the Bank and Baltic Fuel.

407. However, I agree with Hildyard J's ultimate conclusion that the evidence of the claimants' ultimate control and ownership of Baltic Fuel is meagre. It seems to me that there is a significant difference between the Bank's utilisation of Renord-Invest companies as a store of SPVs as part of the process of achieving an ultimate realisation of its security and the fact that Baltic Fuel, as one of the ultimate purchasers, was also a Renord-Invest company in the sense that Mr Smirnov co-owned Baltic Fuel through its major shareholder, Renord-Invest (see [1235] of Hildyard J's judgment). Put another way, the evidence and purpose for which Baltic Fuel is to be treated as being a Renord-Invest company are very different from that of other Renord-Invest companies.

408. In making those findings, I am very conscious that the way in which Hildyard J expressed himself in [1241] of his judgment appeared to indicate that he thought there was no more than a possibility that Renord-Invest was used by Mr Smirnov (rather than the claimants) as a vehicle for the purposes of an oil business which included Baltic Fuel, in much the same way as the claimants used Renord-Invest in connection with the pledge realisations and transactions. Having analysed the evidence, I am not sure that that is the right way of reading his conclusion but, if it is, I think that he could have expressed himself with a greater degree of certainty. In my judgment the probabilities are that Renord-Invest was indeed used by Mr Smirnov for the purposes of an oil business including Baltic Fuel. While it is clear that there was a close relationship between the Bank and Baltic Fuel, in my view it is more likely than not that the ultimate beneficial owner and controller was always Mr Smirnov, not Mr Savelyev or the Bank.

409. It is convenient to note at this stage that a relevant consequence of the relationship between the Bank, Renord-Invest and SKIF is that the counterclaimants maintained at the re-trial their complaint as to the inadequacies in the claimants' disclosure. The argument was that documentation relevant to the issues in these proceedings held by Renord-Invest and SKIF was in truth within the claimants' control. This dispute had originally been argued out at a CMC held in September 2015 at which stage the Bank's position as to its relationship with the Original and Subsequent Purchasers was described by Hildyard J in [28] and [31] of his CMC judgment as follows:

> "28. The Claimants deny any such agency, nominee or "puppet" arrangements between the Bank and the Original or Subsequent Purchasers, any Renord Group entity, or any of the three individuals. They contend that they have no right to possession of such documents and that such documents are not within their "control" for the purposes of CPR 31.8. They point out and object also to the extreme width of the search sought."
>
> "31. The Claimants also stress that the question of the relationship between the Bank and the Renord Group and other transferees of OMG assets is of great significance to the Counterclaim, as indeed the Defendants themselves accept and assert: the Claimants urged me energetically against its summary determination."

410. Hildyard J seems to have been satisfied that the Original and Subsequent Purchasers would hold some relevant documents that should be treated as within the control of the claimants, but he went no further than that. He considered that the appropriate relief was to order the claimants to write to Mr Smirnov, Mr Sklyarevsky, Mr Zelyenov and each of the Original and Subsequent Purchasers seeking any documents in their possession in relation to the transfer, retention or sale of the shares in Scan or Western Terminal LLC or to the exercise of any voting rights or receipt of any distributions in respect of those shares. This correspondence yielded only a very limited return. It is the counterclaimants' position that, in the light of Hildyard J's finding (at [1198] of his judgment) that "the ties between the Renord-Invest Group, SKIF and the Bank … operated to render substantially unimportant the appearance of individual corporate forms or structures", it can now be seen the claimants were under an obligation to provide very much more extensive disclosure than they did in fact give. Mr Stroilov did not contend that further disclosure orders should therefore be made for the purposes of the re-trial. He did however submit that I should not hesitate to draw inferences adverse to the claimants "where a particular factual issue is clouded by the inadequacy of the documentary record".

411. I do not agree that this is an appropriate course for me to take, largely for the reasons advanced by Mr Eschwege in his oral closing submissions. No further application for disclosure was made to Hildyard J in the light of developments during the course of the trial, or to me at or before the re-trial in the light of the findings that had been made by him. As Mr Eschwege submitted it was incumbent on the counterclaimants to be specific about the issues on which they contended that further steps ought to have been taken by the claimants to give disclosure, more particularly in circumstances in which it is not said that documents which it can now be seen to be (or to have been) within their control are (or were) within the actual physical possession of another legal entity albeit it one acting in the manner described in [1197] of Hildyard J's judgment.

412. The counterclaimants only identified two specific issues on which they contended that documents should have been disclosed by the Bank. The first related to the alternative proposal to transfer the Western Terminal assets to SKIF referred to in [576] and [1046] of Hildyard J's judgment. Those undisclosed documents were said to have been in the actual possession of Renord-Invest and SKIF. The second related to the consideration by the Bank of whether it should consent to Scan transferring its assets to CJSC Nazia (as referred to in [563] and [1046] of Hildyard J's judgment). It is said that those undisclosed documents are in the actual possession of CJSC Nazia. In my view it is most improbable that disclosure of that material would have been ordered even if it had been applied for, largely on proportionality and necessity grounds in circumstances in which the proposed transactions did not proceed.

413. In any event, Mr Sklyarevsky (SKIF's owner) and Mrs Yatvetsky (Renord-Invest's legal advisor) both gave evidence at the original trial and it was not put to either of them that non-disclosures by Renord-Invest or SKIF of any document amounted to a breach of the claimants' disclosure obligation, nor that they were in breach of disclosure orders in any particular respect. For all of these reasons I think it is inappropriate to draw any inferences adverse to the claimants either from the fact that the Bank did not disclose further documents in the actual possession of any of the Renord-Invest companies or SKIF, or that the lack of such information at the original trial was otherwise its fault. While in some respects the absence of such material is surprising, I do not think it is

appropriate for me to conclude that the lack of information in relation to these two issues resulted from a failure by the Bank to give disclosure of documents in the physical possession of Renord-Invest, SKIF or CJSC Nazia. I was told that at the original trial, Hildyard J was invited to draw the adverse inferences now sought by Mr Stroilov, but that was not a course he was prepared to take. I agree that it would be wrong for me to take a different course at this re-trial and I decline to do so.

Bid-rigging

414. The next element of this part of the counterclaimants' case relates to Hildyard J's findings about bid-rigging. There are two aspects to this. The first was that there were only two bidders at each of the auctions. The second was that each lot was sold at no more than a single minimum increment above the starting price.

415. There is no doubt that, if what occurred amounted to bid-rigging and harm was caused by it, liability would arise. As Hildyard J recorded at [1301] of his judgment, the claimants' own expert:

> "… accepted during his cross-examination that 'bid-rigging' (which he defined as "a conspiracy among bidders not to outbid each other") would give rise to liability as well under the combined effect of article 10 and article 1064, demonstrating that article 449 is not invariably exclusive in its application. However, as discussed later (see paragraphs [1380] to [1386] below), where the real cause of any loss is the non-attendance of anyone except associated parties, it may be very difficult (if possible at all) to establish causation."

416. Mr Stroilov initially submitted during the course of his oral submissions that an agreement between bidders not to compete was inherently dishonest, but rapidly accepted that, put in those terms, this was an unsustainable submission because there may be what he called a benign reason for the agreement. The way he then explained the counterclaimants' case was that "if the reason is to fabricate an auction which in reality hasn't taken place and to deprive someone of their assets and/or to enrich the conspirators, that would be dishonest. So, it may be a theoretical distinction, but that is what I'm saying." He then accepted during the course of his submissions that the essence of the counterclaimants' case was that if there were to be an agreement between the pledgee and third parties whom the pledgee knew were likely to bid, in order to facilitate the ability of the pledgee to pick up the assets at an undervalue, that would be dishonest.

417. Mr Stroilov then submitted that it was to be inferred from [1384] of his judgment that Hildyard J accepted that bid-rigging had taken place. He drew significance from the fact that, although Hildyard J held against the counterclaimants on the grounds that they had not established causation or loss because they could not show that anyone else was interested in taking on the assets (having regard to their poor condition, the unattractive packages, the economic circumstances, and the huge debts to which they were subject), he also used the phrase that "the mere fact of bid-rigging does not suffice for liability". It was submitted that it was implicit in the way Hildyard J expressed himself that he was satisfied that bid-rigging, in the sense of a dishonest anti-competitive agreement

between bidders ([1353]), had taken place, but it was only the absence of causation and loss which meant that liability did not arise.

418. I do not agree, nor do I agree with the counterclaimants' further submission in relation to Western Terminal that the facts that (a) both bidders were controlled by the claimants and (b) Kiperort, although registered to bid at the October 2009 auctions, only did so to make up a quorum and did not in the event bid, means that an inference of bid-rigging, anyway as defined by Hildyard J and the claimants' expert, is inevitable. (The position in relation to the September 2012 auction is unclear because of the uncertainty as to the role that Globus-Invest played). In my view, there is an essential piece of the puzzle missing without which the probabilities are that there was no dishonest conspiracy on this aspect of the case as alleged. And I should add that it is clear that dishonesty is required before questions of causation and loss come into the mix ([1302] and [1382] of Hildyard J's judgment).

419. The missing piece in the puzzle is that there is no evidence at all that there were any other bidders out there who were interested in bidding, let alone who might have been prepared to pay more. In particular, there was no evidence that there was any interference with the operations of those responsible for the conduct of the auctions (i.e., the auctions houses) which might have disincentivised those who might otherwise have bid from doing so. I think that this means not only that the counterclaimants cannot show causation or loss from what might otherwise be characterised as bid-rigging, it also means that they cannot show that there was any dishonest conspiracy among bidders not to outbid each other in the first place. To pick up on Mr Stroilov's submissions noted above, there was no independent third party whom the pledgee knew was likely to bid, and with whom the pledgee reached some form of agreement or understanding in order to facilitate the ability of the pledgee to pick up the assets at an undervalue.

420. Against this background, Hildyard J reached a conclusion as to the claimants' state of mind as at the time of the 2009 and 2012 auctions which he summarised in [1347] of his judgment:

> "1347. I also think it possible, and indeed more likely than not, that by this time the Claimants and/or their associates had determined to retain the assets within their circle, with a view (by 2012) to realising their potential by substantial investment of which they had been starved: they were not interested so much in maximising recoveries in diminution of the loans, but in maximising benefit for themselves and their associates, subject only to formal compliance with the Russian law and practice. On that basis, the lack of third party interest undoubtedly suited the Claimants and may well have been vital for the accomplishment of what had become their preferred outcome."

421. I agree with this conclusion, but I do not accept that, without more, this conduct exposed the Bank to liability under article 1064. There are a number of reasons for this. The first relates to fair value and is ultimately concerned with the question of whether any better result would have been achieved if the assets had not been retained within the Bank's circle. As Hildyard J put it in [1335(1)] of his judgment:

> "Even if, as Mrs Yatvetsky came close to conceding and I tend to think, the Claimants and/or their associates or "loyal friends" by now, or even some time ago,

> had resolved to retain within their circle and exploit Western Terminal for their own advantage, using the resources they (but not the Counterclaimants) could command, I do not think that gives rise to actionable impropriety, as long as fair value was achieved; and there is, as I say, nothing such as to dislodge the value accepted and approved by the Russian court."

422. The second is that while it is undoubtedly the case that the Bank was not entitled to give effect to its rights by acting in a dishonest and unlawful manner, that does not mean to say that the court is concerned with its motives in circumstances in which it otherwise acts lawfully. As the Chancellor put it during the course of argument in the Court of Appeal:

> "So I think what you're saying is it may be the judge found bad motives but it's nothing to do with the 1064 and the Russian law of auctions and article 10 which allowed them to do what they did and that's the end of it because they have the contractual rights to enforce their security."
>
> "Can I put it another way. Your submission is that the unlawfulness at the stage of realisation of the assets has to be shown to be something unconnected with simple motivation?"

423. In this connection, Mr Lord stressed in his oral submissions that Hildyard J was correct to recognise (as he did in the immediately following parts of his judgment at [1348] and [1349]) that, whatever the claimants' motivation might have been, the critical question was whether they conducted themselves in a manner which was compliant with Russian law:

> "1348. That said, however, it was not incumbent on the Claimants to do anything more than what was required by the relevant Russian law and practice. Provided the requirements were fulfilled to the satisfaction of the auction organisers they were, as I see it, entitled to pursue their own interests as they perceived them.
>
> 1349. As to that, the assumption must be, and I find, that a marketing exercise which appeared to the auction organisers to be compliant with their obligations was undertaken, unless there is sufficient evidence to establish that the organisers themselves were complicit and/or actively involved in a scheme or schemes to reduce the attractiveness of and demand for the relevant assets and/or to depress third party interest by inadequate marketing."

424. This reflects the fact that the claimants' starting point on this aspect of the case was to concentrate on the substantive validity of the auctions and their compliance with the requirements of Russian law, i.e., enforcement through the court or out of court in the manner I described towards the beginning of this judgment.

425. There was no real doubt that Dr Arkhangelsky himself would never have consented to the Bank realising its security out of court. The consequences of this was the Bank had to identify a means by which realisation could be effected without his consent. The mechanics adopted were that the auction sales of the Western Terminal assets were conducted by the court bailiff, while the auction sales of the Onega Terminal assets owned by Scan were conducted by the Russian Auction House, in accordance with an agreement between the Bank and Scan, then acting through the Subsequent Purchasers.

Mr Lord submitted that "because there are findings that the pledged assets were realised lawfully in accordance with the Russian law of pledges and auctions, there is no unlawfulness in and about what has gone on, and you can't go from the lawful satisfaction of Russian law of auctions and pledges, you can't characterise that as dishonest". I agree that, even if compliance with the strict requirements of Russian law is only achieved through a convoluted mechanism, there is no reason to conclude that the Bank did not consider that the structure which it put in place was anything other than a mechanism for achieving an auction sale that was valid and effective.

426. Having said that, although in the words of the Chancellor (at [64]) Hildyard J had made "earlier repeated findings that the auctions had been valid: see, for example para 1525(6)", Mr Stroilov was right to stress that in a later part of his judgment (at[1635(6)]), Hildyard J said that the only reason for validity was the expiry of a one year limitation period which meant that a challenge could no longer be made. This was one of the points on which the Court of Appeal concluded (also at [64] of the Chancellor's judgment) that there were inconsistencies in Hildyard J's judgment, although it is important to recognise that what he said about invalidity absent a limitation period in [1635(6)] was only concerned with an invalidity which might flow from the absence of any independent participants in the auction process, a point to which I alluded when explaining earlier in this judgment that Kiperort did not actually bid at the Onega Terminal auction.

427. In this context, the counterclaimants said that the absence of any real competition demonstrated that there must have been some form of bid-rigging. As I have already indicated, I do not accept that submission. I think that there was force in Mr Lord's oral submission in closing that Hildyard J found that "to have relevant bid-rigging … you have to have evidence that that has excluded a bid which would have yielded a higher return for the pledged collateral than was actually achieved through the process that took place." In the present case there was no evidence that there was any other bidder out there whose attempt or desire to participate was excluded by those who did participate. In my view it also follows that Hildyard J was correct in his earlier analysis. Merely because the parties who were involved in the auction were connected and subject to common control in the sense I have already described, does not affect the position: whatever their interconnectivity may have been, it did not in fact prevent, limit or eliminate competition.

428. There are of course a number of possibilities as to why there were no competitive bids. Hildyard J analysed the evidence by reference to three separate categories of circumstance which were said by the counterclaimants to point to the deliberate taking of steps by the claimants to deter potential buyers of the assets. They can be called artificial encumbrances, the introduction of unattractive price-reducing parcels for the lots to be sold and poor marketing of the auction. As will appear, there are answers to each of these points which appear to me likely to be correct. It follows that although, as Hildyard J said in [1635(6)], it was an "extraordinary fact that not a single independent person participated in any of the auctions" and that this was one of the features of the case which caused him misgivings, the evidence points to the reason for the absence being simply that the assets had limited appeal, a conclusion which chimes with the conclusion I have reached on their market value.

Encumbrances, marketing and synergies

429. As to artificial encumbrances, I have already considered this issue in the context of the Gunard Lease. It suffices to say that neither the Gunard Lease nor the other proposed transactions which I have already described had any impact on the auction sale process. As Hildyard J said at [1322] of his judgment:

> "it is difficult to infer an intention to deter third party interest when there is no evidence that it was ever deployed or resulted in deterrence."

430. The position in relation to minimal marketing and unattractive parcelling gives rise to more complex issues. To these I can add the way in which the reserve at the auction was set which also raises some questions marks.

431. As to marketing, the counterclaimants relied on the following conclusions (at [1344] and [1345]) in support of their case that the very low level at which it was carried out reduced the prospect of there being any competition to bid against those Renord-Invest entities which were in the event successful:

> "1344. The overall impression I formed from the oral evidence, consistently with the lack of documentary evidence to the contrary, was that no more was done to advertise and market the relevant assets than the basic minimum required, and the Claimants did not press for more.
>
> 1345. However, it must be remembered that, whereas the packaging of the assets for auction was a matter for the vendors/pledgees and their associates, the advertisement of the auctions was a matter for the auction organisers."

432. I accept Hildyard J's findings that the claimants did no more by way of marketing than the minimum legal requirements, recognising that the marketing itself was a matter for the organisers not the pledgees. The question which then arises is whether the fact that they did not try any harder supports an argument that, taken together with the other factors surrounding the conduct of the auctions, the Bank was guilty of dishonest conduct.

433. The Bank said that it was entitled to enforce against its security in the fashion sanctioned by the Russian court which is what it did. It submitted that the auctions were advertised electronically and in the newspapers, and that, although Hildyard J held that "no more was done to advertise and market the relevant assets than the basic minimum required", it was not required to do any more than that. The Bank said that, in any event the advertisement of the auctions was a matter for the auction organisers, not it as pledgee and it relied on Hildyard J's finding that "a marketing exercise which appeared to the auction organisers to be compliant with their obligations was undertaken …" ([1349]).

434. At the original trial, the counterclaimants contended that, although the auction processes were purportedly under the control of the bailiffs and others in accordance with the Russian law, in truth and in effect they abdicated their responsibilities and surrendered control to the claimants, facilitating a "collusive 'public' auction…to cover up the fraudulent nature of the transaction". However, Hildyard J rejected the counterclaimants' case that the auction organisers were complicit in or part of any

conspiracy. Neither the court bailiff nor the Russian Auction House were found to be conspirators and there is no basis for me to disagree with Hildyard J's findings on that point.

435. The counterclaimants also relied on the way in which the reserve was set for the Western Terminal auction held on 29 September 2012. I have already explained what occurred, but two passages from Hildyard J's judgment (at [1371] and [1372]) identify the consequences and convey what I agree was the contrived nature of the steps that were taken:

> "1371. Thus, the overall effect was that (a) the requirement in the mortgage/pledge agreement between the Bank and the original pledgor for the auction price for the pledged assets on public sale free of the pledge to start at RUB 1,209,784, was side-stepped with the blessing of the Russian court; (b) a new reserve price of barely half that (RUB 670 million) was also blessed by the Russian court; and (c) the entirety of the assets, pledged and unpledged, were brought together and sold to an associated company.
>
> 1372. I think it is difficult to regard this careful sequence of steps as anything other than contrived. The bringing of proceedings; the settlement agreement with its unrealistic deadline for payment; the inevitability of Vektor-Invest failing to pay; and the pre-ordained result: none of it bears scrutiny as other than a preconceived plan, with the object which it achieved of obtaining court blessing for auction sale, at a greatly reduced valuation, but nevertheless clearing off adverse claims."

436. However, as Hildyard J noted, the initial selling prices were "established by or by reference to apparently reputable valuers" ([1356]) or, in the case, of Western Terminal, approved by the court. It was not for the auction organisers to gainsay the values so established, and he held that there was no evidence that the auction organisers were themselves prevented or deterred by the claimants or Renord-Invest from further effort as regards presentation and marketing. It follows that I think that Hildyard J was correct to conclude (as he did at [1357] of his judgment) that unless bidders were excluded (or effectively discouraged and dissuaded from attendance at all) any issue as to the reserve value is something of a non-starter.

437. Likewise the submission by the claimants that all the auctions were open to any bidder is uncontradicted by any evidence. As the auctions were certified by the auction organisers as having been validly and properly constituted, the assumption must be that any person interested could have participated and made a bid. I agree with Hildyard J's conclusion (at [1363]) that the fact that, save for Renord-Invest companies, none chose to do so signifies only that there was no one else interested. There is no evidential support at all for the conclusion urged by the counterclaimants that they were improperly barred. On the available material, I think that Hildyard was plainly correct to conclude, as he did at [1367] of his judgment, that:

> "I do not think that there is any evidence that the auction organisers were themselves prevented or deterred by the Claimants or Renord-Invest from further effort as regards presentation and marketing: and accordingly, I do not consider there to be any sufficient basis for inferring from the way the assets were packaged, presented and marketed that the auction organisers' marketing processes were designedly deficient in terms of the Russian law requirements."

438. The answer to this question is also affected by the question of whether, in circumstances in which the claimants knew that the main value in the assets was their synergistic value as income generators, the assets were put up for public sale in unattractive parcels, which made it impossible for independent purchasers to unlock that income generating potential. The substance of the counterclaimants' complaint is that the combination of poor marketing and unattractive parcelling was evidence of dishonesty because it was designed to supress the price to the advantage of a connected purchaser, even though and as Mr Stroilov accepted in [54] of his skeleton argument, what he called "a mechanical sale of each individual pledge without any efforts to unlock the synergistic value" was in strict compliance with Russian law and may well be consistent with honesty, despite its commercial imprudence.

439. In support of this submission, Mr Stroilov relied on the fact that, when giving evidence in relation to the realisation of the Western Terminal assets, Ms Mironova had stressed the importance of synergistic value as an explanation for the original form of the repos (cited by Hildyard J in [939] of his judgment). I do not think that Mr Stroilov is correct to say (as he appears to imply in [59] of his written opening) that this was held by Hildyard J to be the only purpose of the original repos (see the way he explains the position at [939] "at least part of the purpose"), but I agree that he is able to pray in aid the fact that the Bank appreciated the importance of joining together pledged and unpledged assets in order to maximise value, even if (as was the case) there is no legal obligation under Russian law to sell pledged and unpledged assets together in order to maximise value. If further confirmation be needed, Hildyard J also explained (at [1334] of his judgment) how, as well as protecting the unpledged assets from any enforcement claim by Morskoy Bank, a principal rationale for the separate sales to Nefte-Oil in December 2011 was to bring together the pledged and unpledged asset to enhance their value.

440. Ms Mironova also made a similar point when giving the explanation for what Mr Stroilov called the collusive enforcement proceedings by which the pledged and unpledged Western Terminal assets were unified in the hands of Nefte-Oil as a result of the auctions held on 23 December 2011 and 26 December 2011. Her evidence was

> "… one of the reasons why the Western Terminal appeared as a suitable company for a repo deal to me, was that it had considerable assets, and not all of them were pledged to Bank of St Petersburg. As I said several minutes ago, the greatest market value in selling the site is available only to those who sell an asset in its entirety, and not bit by bit, piecemeal. This was the purpose and the objective which was one of the reasons why the Western Terminal was considered as a repo deal candidate."

441. So far as the Western Terminal assets were concerned both the unpledged and the pledged assets ended up in the hands of the same purchaser, Kontur, who then subsequently sold them on to Baltic Fuel for a price which has never been disclosed. The mechanism by which this occurred was plainly convoluted, involving as it did a stage in which the pledged and unpledged assets were at one stage (December 2011) united in the hands of Nefte Oil, only to be separated again when the pledged assets were sold to Vektor-Invest in June 2012 in preparation for the September 2012 auction.

442. According to the claimants, Vektor-Invest's role in purchasing the pledged assets at Western Terminal from Nefte-Oil was in part driven by tax considerations. Hildyard J

considered that, although Vektor-Invest's role appeared contrived, this explanation was plausible. In my view there is no reason to reject it. It served to make what went on more convoluted than might otherwise have been the case, but did not of itself affect the underlying question which is whether the ultimate realisation was for a proper value to be applied in partial discharge of the debt in accordance with Russian law, or whether it facilitated what was alleged to be the conspiracy to steal OMG's valuable assets by an unlawful 'raid'

443. So far as the Onega Terminal assets were concerned, Mr Stroilov also identified what he called other elaborate efforts to unify the two parts of the Onega Terminal, i.e., the property owned by Scan and the property held by LPK Scan in order to unlock its synergistic value. However, because of the way in which the various steps were taken and the stage at which unification took place, those efforts did not have the effect of maximising the realisation value at the time the sale proceeds were applied in discharge or reduction of OMG's indebtedness to the Bank.

444. The ultimate outcome was that the whole of the Onega Terminal land ended up in the hands of ROK No 1 Prichaly for a purchase price of RUB 500 million. This is to be contrasted with the much lower values to be applied in reduction of the Bank's loans achieved on the separate and highly complex enforcements against the Scan land and the LPK Scan land respectively. The counterclaimants relied on the following passages from Hildyard J's judgment (at [1337]) in support of their argument that the synergy value could and should have been realised earlier in the process, and the fact that it was not was indicative of the conspiracy alleged:

> "(2) Had the Claimants really wanted to maximise the amounts realised on enforcement to be applied in reduction of the loans, it seems strange that they did not make greater efforts to arrange a direct sale to ROK No 1 Prichaly in a single transaction: it is true that although the land at Onega Terminal was partly owned by Scan, and partly by another OMG company, LPK Scandinavia, both parts of Onega Terminal, as well as some (but not all) of the other real estate owned by Scan, were pledged to the Bank, and both those companies were subject to its control.
>
> (3) The complexity of the sales processes was not inherently likely to result in the realisation of the highest amount for application in diminution of indebtedness. On the contrary, Mrs Yatvetsky herself stated that "selling Onega 3 and 4 without Onega 1 and 2 was an exercise in futility…there would be no willing buyer"; the fracturing of interests in effect stripped out synergistic values until the final transaction of sale to ROK No 1 Prichaly (from which no amounts were raised whereby to diminish indebtedness).
>
> (4) A measure of proof of the adverse effect of fragmented sales is offered by the fact that the aggregate amount realised from sale of the pledges and apparently applied in diminution of the indebtedness was many factors less than the ultimate sale price of the pledged assets as eventually unified and sold to ROK No 1 Prichaly."

445. The Bank's position was that it did not sell the assets in unattractive parcels "artificially" to lower their value by making it impossible for independent purchasers to unlock their income-generating potential. Indeed it went a little further and said that

there had been negotiations with the state-owned North Shipbuilding Company on whose land the two railway tracks just outside Western Terminal were located, but they came to nothing. The evidence of this was very vague but Hildyard J thought ([1309]) it was likely that at least some approach was made because of the synergistic value, but it was probably no more than preliminary "designed to test the waters, and never pursued with any sustained effort directed towards a private sale or encouraging a bid".

446. The Bank also relied on the following findings in three separate parts of Hildyard J's judgment:

i) While there may be a principle that if two assets in the same ownership, pledged under the same agreement in respect of the same debt and having together a marriage value in excess of their individual value are sold in separate sales for no good or sufficient reason that would, if proven to be causative of harm, be wrongful, and actionable accordingly, that principle only goes so far. It is limited in the sense that:

> "…assets which are subject to separate pledges in respect of different indebtedness may lawfully be sold separately, even if combining the assets in the separate pledges might yield a higher aggregate amount." ([864])

ii) The position is similar where the assets said to have marriage value are part-pledged and part-unpledged (but subject to the control of the pledgee):

> "…I would not consider it to be the case that a pledgee is obliged to sell pledged assets together with other non-pledged assets in its possession or control under some different arrangement, even if the combined package might yield a higher aggregate amount." ([865])

iii) Hildyard J then reiterated the same point when considering the auction of the Western Terminal assets:

> "It was not suggested to me that the Bank was obliged in law to bring together assets pledged under separate agreements in respect of separate assets owned by separate companies, even if it had the economic ability to do so, and even if it was aware that thereby it could achieve greater reduction of indebtedness for the benefit of the Counterclaimants." ([1338(4)])

447. Dealing first with Western Terminal, I do not consider that the fact the Bank had no legal obligation to sell the unpledged assets together with the pledged assets is a complete answer to this aspect of the counterclaimants' claim. However, it is of some relevance that, quite apart from the legal position on what it was entitled to do, it may not have been able to sell the pledged and unpledged assets together in any event until the two were unified in the hands of Nefte-Oil, largely because of the Morskoy Bank claims, but also because Mrs Arkhangelskaya continued to hold a 1% shareholding in Western Terminal LLC. This and a number of the other factors considered by Hildyard J in [1335] of his judgment in relation to Western Terminal (as with those he considered in [1338] in relation to Onega Terminal) have caused me to conclude that what occurred does not support the counterclaimants' conspiracy case.

448. The first of these other factors is that there is no evidence that when the assets were unified, there was any more interest from third parties than had emerged previously. It is also of some significance, although I place less weight on this because it was undocumented, that there is no evidence to contradict the claimants' oral evidence that a number of efforts were made to attract interest anyway at a high level.

449. The second factor relating to Western Terminal is that the counterclaimants' own expert (Professor Guriev) agreed that the commencement of enforcement proceedings and their compromise by court-approved settlement as the means of realising the property was consistent with standard practice. It was required in order to ensure an ultimate sale clear of adverse claims, which was particularly important if (as I am satisfied was the case) Dr Arkhangelsky was determined to oppose any realisation or enforcement process.

450. The third Western Terminal factor is that the settlement agreement valuation of RUB 670 million was not substantially less than the value put on the Western Terminal by GVA Sawyer (RUB 709.8 million) and ADK (RUB 837.4 million), a few months earlier. Hildyard J thought ([1335(4)]) that the reduction might have been be justified as a means of attracting interest in a very difficult market, an expression of view with which I agree. In any event, as I have already mentioned in relation to the Alliance Otsenka valuation of the Scan land at Onega Terminal, the practice of the Russian court is to set the starting value for auction purposes at 80% of market value as assessed by an independent valuer. The Russian court placed its imprimatur on the settlement agreement and approved the figure, presumably on the basis that it was 80% of the ADK valuation of RUB 837.4 million.

451. The fourth factor relates specifically to what appears at first glance to have been the contrived transfer from Nefte-Oil to Vektor-Invest. I have concluded that there is no reason to reject the asserted rationale given for it. This was the tax planning considerations to which I referred above (combined with Nefte-Oil's wish to focus on its own investment projects, and not to be party to enforcement proceedings). Like Hildyard J I do not consider it to have been wrong of the Bank to seek to engineer an auction sale at a price approved by the court, so long as the starting price was not itself artificially reduced, which based on the valuations I am satisfied did not occur. I think that Mrs Yatvetsky's answers in the following exchange when cross-examined by Mr Stroilov at the original trial are a credible reflection of what in fact happened:

> "Q. So the real purpose of this agreement was simply to reduce the starting price at the auction, was it not?
>
> A. No, that is not correct. The true purpose was to judicially establish by the courts the market value of these assets.
>
> Q. So what you mean is that, rather than simply agreeing the terms, Renord and the Bank wanted the sale to take place at a public auction so that it would be more difficult to challenge it for any third party; is that a fair summary of what you meant to do?
>
> A. Well, public auction definitely eliminates all types of risk for the purchaser."

452. The fifth factor is that even though the assets ended up with Baltic Fuel, having passed by the Bank or Renord-Invest, that is unobjectionable if "there is no evidence to demonstrate an improper explanation why no third-party bidders ever emerged" (as Hildyard J put it), nor impropriety in the sale price of RUB 670 million approved by the court and no technical objections to the auction process itself. I agree that, even if the claimants had by then resolved to retain Western Terminal within their circle of associates and exploit it for their own advantage, using, as Hildyard J explained, resources which they but not the counterclaimants could command, there is no actionable impropriety, as long as fair value was achieved.

453. As to Onega Terminal, the challenge is why, if the claimants had really wanted to maximise the amounts realised on enforcement to be applied in reduction of the loans, they did not make greater efforts to arrange a direct sale to ROK No 1 Prichaly in a single transaction. This was particularly the case in circumstances in which the complexity of the sales processes was not inherently likely to result in the realisation of the highest amount for application in diminution of indebtedness, because as Hildyard J reiterated at [1337(3)] the fracturing of interests in effect stripped out synergistic values until the final sale to ROK No 1 Prichaly.

454. It seems to me that the answer to this point is very similar to some of the answers that arose in relation to Western Terminal. Again the starting point is that it was not the case that "the Bank was obliged in law to bring together assets pledged under separate agreements in respect of separate assets owned by separate companies, even if it had the economic ability to do so, and even if it was aware that thereby it could achieve greater reduction of indebtedness for the benefit of the counterclaimants" (per Hildyard J at [1338(3)]). It is also entirely credible that both the Bank and the ultimate intended recipients felt it necessary to receive the blessing of the court and the cleansing effect and protection of open auction sales on realisation of the constituent elements of the Onega Terminal assets, and I think it is likely that that was their real position.

455. There are two additional factors that appear to me to be of some significance. The first is that ROK No 1 Prichaly seems only to have developed a concrete interest in acquiring all of the Onega Terminal assets in early 2011, i.e. well after the original October 2009 auction of the Scan land, but while the LPK Scan land was still subject to the Bank's pledge (albeit sold to Mercury in January 2011 subject to that pledge). This had to be dealt with in some way because ROK No 1 Prichaly's interest was contingent on the assets being available free of the Bank's pledge and free of adverse claims.

456. The second is that the LPK Scan land only became saleable to ROK No 1 Prichaly once the Bank's pledge was discharged. On the face of it this was only achieved when the Bank assigned its loans to Mercury for RUB 27 million. When added to the amount applied in reduction of the OMG debt on sale of the Scan land this appeared to be less than half the RUB 500 million achieved on the sale of the combined Onega Terminal land to ROK No 1 Prichaly. However, this would be to ignore the fact that the Bank also wrote off the remaining RUB 810 million owed under the 2007 LPK Scan Loan and the Second Onega Loan ([1416] of Hildyard J's judgment), as part of the mechanics by which the Onega Terminal ended up in the hands of ROK No 1 Prichaly freed of the pledge to the Bank. In my view this result is not consistent with an argument that either the ultimate purchaser or the Bank gained the benefit of synergy as between the Scan land and LPK Scan land anyway to the detriment of the borrower.

457. Although Hildyard J remarked at [1635(9)] of his judgment on the curiosity that nothing has been revealed about the present trading position of Western Terminal or Onega Terminal, and the possibility that the claimants may have procured for their associates, and even have some interest in, "assets of far greater value than they have accounted for, even if that value could not have been unlocked by Dr Arkhangelsky and could only be realised with the capital at the claimants' or their associates' command", it is my view that these considerations remain just that. They are no more than curiosities and possibilities – the evidence does not justify a conclusion that it is likely that actionable impropriety occurred out of the way that the auctions were conducted.

Issue 2 and factual element 16: Valuation

458. The only new evidence adduced at the re-trial was the expert evidence in relation to valuation. This is relevant to Issue 2 which is concerned with the actual value of the pledged assets listed in the Appendix to the List of Issues. The Issue 2 pledged assets comprise assets to which the new valuation evidence related (Western Terminal and Onega Terminal) and assets to which it did not: the land at Sestroretsk, the property at 22 Pravdy Street, the apartment at 8a Kharkovskaya Street, the parking spaces at 8a Kharkovskaya Street and the plots of land at Seleznyovo and Tsvelodubovo.

459. As I explained at the beginning of this judgment, the Western Terminal and Onega Terminal valuation evidence relates to two separate matters. The first is that it goes to the counterclaimants' case that they have suffered harm, which is a necessary element of their cause of action under Russian law. The second is that the evidence relates to the counterclaimants' allegation not just that OMG assets were realised at an undervalue as part of the enforcement process, but that the undervalue was so significant that it justifies or supports an inference that the claimants were guilty of fraud.

460. Before delving into the substance of Issue 2, it is necessary to describe the component parts of Western Terminal and Onega Terminal (being the assets with which the issue is principally concerned) in a little more detail:

i) Western Terminal comprises 2 berths, SV-15 with an area of 4,800 square metres (Asset WT1) and SV-16M with an area of 120.1 square metres (Asset WT2) and a plot of land comprising 73,399 sq m at 6 Korabelnaya St, Kirovsky District, St Petersburg (Asset WT3). Each of these three Western Terminal asset had its own separate cadastral number. It was all originally acquired by OMGP when it acquired the shares in Western Terminal LLC in November 2007 for c.US$40 million.

ii) Onega Terminal comprises 3 plots of land and four buildings located at 2 and 14 Elevatornaya Ploschadka, Ugolnaya Gavan, St Petersburg. Although the plots of land could have been used for container transhipment and storage, none of them had direct access to the sea. Access to a berth was provided by an unrelated third party, SFP acting through ROK No 1 Prichaly. Each of these seven assets had its own separate cadastral number or numbers.

a) Asset 1A is a land plot with an area of 20,695 square metres in relation to which there is an associated warehouse building of 2,234 square metres described as asset 1B. These two assets were originally owned by Scan and are located at 14 Elevatornaya Ploshchadka, Ulgonaya Gavan.

b) Assets 2A and 2B are non residential premises also located at 14 Elevatornaya Ploshchadka, Ulgonaya Gavan. The associated plot of land of 2,332 square metres is asset 2C. All three of these assets were originally owned by Scan.

c) Asset 3 is a non residential building, reinforcement shop and block of utility premises located at 2 Elevatornaya Ploschadka, Ulgonaya Gavan with an area of 1,129.9 square metres. It was originally owned by LPK Scan.

d) Asset 4 is a plot of land with an area of 34,513 square metres located at 2 Elevatornaya Ploschadka, Ulgonaya Gavan. It too was originally owned by LPK Scan.

461. At the original trial, different experts (Mr Tim Millard of Jones Lang LaSalle in Moscow for the claimants and Ms Ludmilla Simonova of IRE Ukraine LLC for the counterclaimants) gave evidence. Hildyard J was very unimpressed with the quality of what they had to say. He expressed concern about their lack of independence and the obstinacy with which he said that they both adhered to their chosen valuation approach. He was particularly critical about the way in which both experts (and Ms Simonova who gave evidence for the counterclaimants in particular) tended to descend into advocacy.

462. Hildyard J's concerns about the quality of the expert evidence led him to consider whether he should decline to undertake the task of assessing the competing valuations, not least because, in light of his other conclusions, the question of loss (or actional harm under Russian law) did not arise. There was therefore no reason for him to reach a conclusion as to the market value of the assets for that purpose. However, he decided that he needed to reach a determination on the second of the two matters I have outlined above, both because of the counterclaimants' allegation that fraud could be inferred from the very low figures achieved at the auctions and because the evidence shed some light on what he called the objectives of the claimants and their associates.

463. Having carried out that exercise, Hildyard J concluded that the counterclaimants had failed to show that the values achieved at the auctions demonstrated dishonesty by the claimants. However, he declined to go on and make findings as to the true market value of the relevant assets. As I say, he decided that he did not need to do so, because he had concluded that the auctions themselves were not actionably improper (see [1552] of his judgment). It followed that the extent of any harm that may have been sustained by the counterclaimants did not arise.

464. In light of Hildyard J's approach to the expert evidence and the fact that further reports have been put in by both parties, it was common ground that I could ignore the substance of what was said by the valuers at the original trial in relation to Western Terminal and Onega Terminal. This was contemplated by the Court of Appeal as the right way to proceed when, in [101] to [103] of his judgment, the Chancellor explained why he was proposing that at the re-trial the parties should be permitted to call new

evidence of valuation in substitution for the evidence which he said had been rejected by Hildyard J. This is subject only to the fact that the views of the original experts were referred to from time to time during the course of the cross-examination. To the extent that they were referred to or relied on by the experts at the re-trial I have taken those views into account in my assessment of what they had to say.

465. I have taken a different approach in relation to the assets other than Western Terminal and Onega Terminal. At a directions hearing held on 25 March 2021, I ruled that the new valuation evidence would be limited to evidence as to the value of the Western Terminal and the Onega Terminal. I reached that conclusion in circumstances in which the counterclaimants accepted that it was only Western Terminal and Onega Terminal that were central. The differences in value attributed by the experts to the other assets were not sufficiently significant, and it was possible for me to reach appropriate conclusions on the basis of the evidence called at the original trial. I shall explain my conclusions in relation to them after I have considered Western Terminal and Onega Terminal.

The expert witnesses

466. As will appear the difference between the values attributed by the counterclaimants' expert to Western Terminal and Onega Terminal and the values actually achieved at the auctions continues to be very substantial. However, unlike at the original trial, the evidence with which I was presented has enabled me to reach conclusions as to their market value (anyway to the extent of a range) which both bear on the conspiracy allegations made by the counterclaimants and on the question of whether they did in any event sustain any harm from the claimants' conduct.

467. The counterclaimants put in reports prepared by Mr Paul R Thomas, president and Partner of IRE USA Inc and IRE Ukraine LLC, a full service appraisal firm located in Kyiv. He is the business partner and husband of Ms Simonova who assisted him in the preparation of his reports. He does not have any chartered surveying qualifications and does not hold an appraiser's certificate. It was clear that his real area of expertise was in economics and business development plans, a fact that was apparent from the way in which he expressed views on the value of the assets as development opportunities rather than as real estate assets. He said that his experience working for 25 years as a partner in a highly varied appraisal company is what qualified him to opine on the value of the Western Terminal and Onega Terminal. He does not speak or read Russian and so he relied on Ms Simonova for gathering relevant market data. He also relied on Ms Simonova for the purpose of explaining to him the important parts and meaning of much of the supporting evidence on which he relied (and which was exhibited to his report in Russian without translation).

468. It is clear that Mr Thomas' real focus is on Ukraine, where he is primarily based (he is also based in the USA), and has had a considerable amount of experience working with Ms Simonova and other IRE staff in valuing a number of different port and marine-related assets in Ukraine (Odessa, Kherson, Kerch and Chernomorsk). His experience of valuing Russian assets is limited to what he called (in an uninformative description in his report): "income-generating assets and properties involved in manufacturing and trade, real estate, land and other areas". On cross-examination, this turned out to be a

valuation of a single piece of land with a factory, which was an assignment he carried out for EBRD "sometime in the last 20 years". This evidence as to the paucity of his experience in valuing Russian assets was extracted from him by Mr Lord with some difficulty. I was left with the clear impression that he knew that his personal experience of valuing Russian assets was extremely limited, a lack of experience as to which he was not very forthright in the sense that he was distinctly unwilling to admit until pressed that this was the case.

469. It was also clear that, although signed only by him, Mr Thomas' report for the re-trial was the joint work product of himself and Ms Simonova, which Mr Thomas accepted had also been the case with the report which was prepared for the original trial and signed by Ms Simonova rather than himself. This was consistent with his description of his report as a reassessment and expansion of the valuation work completed during 2015. He accepted in cross-examination that if his report displayed any departure from the analysis adopted by Ms Simonova, it would have reflected a revision of his own opinions as well. In these circumstances it is not very surprising that Mr Thomas said that the methodologies adopted by him for the purposes of his report had not changed from the Simonova report which was adduced in evidence at the original trial.

470. There were a number of aspects of the way in which Mr Thomas gave his evidence which were unsatisfactory. First he betrayed a marked lack of familiarity with the detail of the Simonova report even though it is clear that the essence of his report was based on it. This was well-illustrated by the following exchange which was particularly surprising in the light of what he had said about his report constituting a reassessment of the work carried out in 2015 for the purposes of the Simonova report:

> "Q. Is this unfamiliar to you, Mr Thomas?
>
> A. No, well, it is not unfamiliar ; I have not looked at it since 2016 because it is an old report.
>
> Q. You have not looked at this report since 2016; is that the truth?
>
> A. I have not looked in depth. Okay, when we went back to redo the report, we were more interested in source material, financial models, calculations. So – but I am familiar enough with the report to say I can see it definitely came from our company, and I did read through the report. I did not, you know, memorise numbers and tables . I did read through it to refresh my memory because it had been five years, okay so –"

471. Secondly, while I accept that Mr Thomas had appraisal qualifications and expertise, the expertise that he had was of limited assistance to the court in large part because of his lack of experience of the Russian market and the St Petersburg market in particular.

472. Thirdly, I regret to say that I agree with Mr Lord's description of his evidence as argumentative. Like Ms Simonova at the original trial, the approach that he took to dealing with what appeared to me to be quite obvious points that were put to him betrayed a marked failure to recognise that his role was to assist the court by an independent and dispassionate statement of his views without descending into the arena to argue the counterclaimants' case on their behalf.

473. The claimants' new expert evidence took the form of a report prepared by Ms Svetlana Shalaeva MRICS who has been head of the valuation department of Knight Frank St Petersburg AO since 2014. She is a member of the Russian Society of Appraisers and has experience of undertaking valuations of port assets, land plots and infrastructure including berths within St Petersburg and Viborg sea ports. Although she has periodically undertaken valuations of assets located in other parts of Russia, most of her valuation work was concerned with the valuation of properties in the Saint Petersburg and Leningrad region.

474. At the time of the re-trial, there were difficulties in travel between Russia and the UK, because the Russian Sputnik vaccination programme against Covid-19 was not recognised by the UK for the purposes of admitting travellers from Russia as fully vaccinated. For this reason, Ms Shalaeva gave evidence remotely from St Petersburg. Although her report was written in English she said that her spoken English was not as fluent as her written English and I permitted her to give her evidence in Russian with translation by an interpreter. There were no difficulties in the process of taking her evidence and I found her to be a measured and convincing witness.

Summary of valuation evidence

475. As I have already explained, when Western Terminal was sold at auction on 29 September 2012, it achieved a price of RUB 675 million (US$21.83 million). It was Ms Shalaeva's evidence that the then market value was in the range of RUB 600 to 820 million (US$19.41 to US$26.52 million), with a point estimate of RUB 712 million (US$23.029 million). Mr Thomas only gave a point estimate expressed in US$ which was US$177.44 million. Ms Shalaeva also valued Western Terminal as at 1 June 2009, and concluded that the then market value was in the range of RUB 690 to 950 million (US$22.27 to US$30.66 million), with a point estimate of RUB 818 million (US$26.4 million).

476. The first realisation of Onega Terminal assets was at a public auction held on 26 October 2009. Assets 1A and 1B were realised for RUB 164.578 million (US$5.675 million), while assets 2A, 2B and 2C were realised for RUB 31.595 million (US$1.089 million). Ms Shalaeva said that this was within the range of their then market value: RUB 160 to 218 million (US$5.52 to 7.52 million) for assets 1A and 1B and RUB 29.7 to 40.3 million (US$1.024 to 1.39 million) for assets 2A, 2B and 2C. The figures achieved were less than her point estimate valuations: RUB 189 million (US$6.517 million) for assets 1A and 1B and RUB 35 million (US$1.207 million) for assets 2A, 2B and 2C.

477. Mr Thomas did not give separate valuations but estimated that the market value of all of the Onega Terminal assets sold in the October 2009 auctions was US$50.532 million. He said that the value had increased to US$83.501 million by March 2011.

478. The Onega Terminal assets 3 and 4 were valued by Ms Shalaeva and Mr Thomas at different dates. Ms Shalaeva valued them as at January 2011 when they were sold to Mercury for RUB 99,000, subject to encumbrances to the Bank. She gave a range as at that date of RUB 199 to 271 million (US$6.64 to 9.05 million) and a point estimate of RUB 235 million (US$7.845 million). She also valued them as at 17 June 2011 (the

date of the Bank's assignment of the LPK Scan Loan security to Mercury) and gave them a value range of RUB 193 to 263 million (US$6.85 to 9.33 million) with a point estimate of RUB 228 million (US$8.088 million). Mr Thomas valued assets 3 and 4 on two separate dates: as at 26 October 2009 when he gave them a value of US$45.673m and as at March 2011 when he gave them a value of US$125.152 million. Mr Thomas also valued all of the Onega Terminal assets as at four separate dates: as at December 2008 (US$100.984 million), 26 October 2009 (US$96.205 million), March 2011 (US$208.653 million) and May 2015 (RUB 10.10 billion / US$201.801 million).

Significance of the valuation evidence

479. Mr Lord submitted that, if Ms Shalaeva was correct in her evidence as to the value of Western Terminal and Onega Terminal, it was common ground that that would be the end of the counterclaim. The reason for this is not just that no harm would have been suffered, but that without gross or even significant undervalue of the prices fetched at auction for the pledged assets, the motive for what he called the grand conspiracy disappears. He said that this was why Mr Stroilov urged Hildyard J at the original trial to test the credibility of the counterclaimants' case through the lens of gross undervalue.

480. I am not sure that that follows as night follows day, because, as Mr Lord himself accepted, it is quite possible that the Bank thought that the assets were worth more than they in fact turned out to be. If that were to be the case it is still theoretically possible that there was a conspiracy to "raid", which did not in fact achieve for the conspirators the benefits they hoped to acquire.

481. However, despite this theoretical possibility, the counterclaimants have always approached their whole case on the basis that the motive for the conspiracy they alleged was that the enforcement sales by the Bank were at a gross undervalue. This was always and has continued to be at the heart of their case. As Mr Lord put it in his closing submissions "the telescope of gross undervalue at public sales … was always the magnifying glass or the lens through which forensically this story was to be tested at every point".

482. Furthermore, the fact that the assets might have been thought by the Bank to be worth more than now turns out to be the case was largely dispelled as a possibility when it discovered in July 2009 (before enforcement by auction sale occurred) that its security had been significantly and materially overvalued by Lair. Once that information came to its attention, the motive for the conspiracy alleged became at least suspect.

483. Before dealing with the detail of the valuations, I agree that it is appropriate for the court to stand back and consider the value of the Western Terminal and the Onega Terminal having regard to the price for which they were originally acquired by OMG:

i) Western Terminal was acquired in November 2007 when OMGP purchased the shares in Western Terminal LLC for RUB 1.069 billion (c.US$40 million) from Premina.

ii) Those parts of the Onega Terminal at 14 Elevatornaya Ploschadka that were acquired by Scan were purchased in November 2005 for RUB 102.556 million (just over US$3.5 million).

iii) Those parts that were acquired by LPK Scan were originally purchased by another OMG company (Svir LLC) in December 2006 for c.RUB 2,325,000.

484. Hildyard J pointed out that these amounts were paid before the 2008 financial crisis shortly after which the enforcement process commenced. Hildyard J held ([1423]) that in the wake of the 2008 credit crunch, the market reality was that there was a collapse in real estate values in Russia. I did not understand that finding to be in issue.

485. So far as Western Terminal was concerned, the counterclaimants contend that by September 2012, its value had increased to US$177.44 million, which was approximately four and a half times the amount that OMGP had paid for it at the top of the market shortly before the financial crash. Mr Lord submitted that, as Dr Arkhangelsky described it as a swamp when it was acquired and as there was no evidence that OMG did any work improving the site during the period of its ownership, the value attributed by Mr Thomas appears obviously over-inflated. I agree, although I also think that it is important not to give too much weight to what appears to be an obvious discrepancy for which no real explanation has even been given. At the end of the day, while a reality check is undoubtedly important in a case such as the present, it is only one factor. The credibility of the counterclaimants' case on value is also heavily influenced by the quality of the expert evidence adduced on their behalf.

486. The same can be said about Onega Terminal. Hildyard J explained that there had been some tarmac-laying investment made between 2005 and 2009, but he was satisfied (and I have no reason to disagree) that it did not affect the comparison between the original OMG acquisition price and the value said to be attributable to it in October 2009. Ms Shalaeva's valuation and the auction price actually achieved showed an increase just short of a doubling in value since 2005, while Mr Thomas' valuation showed a more than 12 fold increase as at October 2009 and a more than 20 fold increase as at March 2011.

Valuation: the correct approach

487. It was accepted by the parties that it was appropriate for the valuation to be carried out by reference to the International Valuation Standards ("IVS") published by the International Valuation Standards Council and that the exercise which it was appropriate for the experts to carry out was to find the market value of the assets comprising Western Terminal and Onega Terminal. The market value of an asset is defined by IVS 104 para 30.1 as:

> "the estimated amount for which an asset … should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgably, prudently and without compulsion".

488. It was also common ground that Western Terminal and Onega Terminal were properly to be classified as trade related property (i.e. "any type of real property designed or adapted for a specific type of business where the property value reflects the trading potential for that business"). The consequence of this is that the income approach (which I explain below) is the correct starting point for the valuation: see the guidance given in VPGA 4 in the Red Book Global. This guidance also stresses the importance of a valuer being regularly involved in the relevant market for the class of property "as practical knowledge of the factors affecting the particular market is required". As Ms Shalaeva explained in [3.19] of her supplemental report, the valuers' experience and knowledge of the market must be applied to the "intermediate and final valuation results in order to ensure that the valuation reflects the market environment and its general dynamics". I have no doubt that Ms Shalaeva has much greater practical knowledge of the factors affecting the particular market than Mr Thomas.

489. There was a divergence of view both as to the appropriate date as at which each asset should be valued and as to the way in which the accepted valuation methodologies should be applied for that purpose. IVS 105 makes provision for three principal approaches to determine market value:

i) The market approach, which "provides an indication of value by comparing the asset with identical or comparable (that is similar) assets for which price information is available." This should be applied and afforded significant weight where:

   a) the subject asset has recently been sold in a transaction appropriate for consideration under the basis of value,

   b) the subject asset or substantially similar assets are actively publicly traded, and/or

   c) there are frequent and/or recent observable transactions in substantially similar assets.

ii) The income approach, which "provides an indication of value by converting future cash flow to a single current value. Under the income approach the value of the asset is determined by reference to the value of income, cash flow or cost savings generated by the asset". Para 50.1 of IVS 105 provides that, although there are many ways to implement the income approach, they are all effectively based on discounting future amounts of cash flow to present value.

iii) The cost approach, which "provides an indication of value using the economic principle that a buyer will pay no more for an asset than the cost to obtain an asset of equal utility, whether by purchase or construction unless undue time, inconvenience, risk or other factors are involved". It therefore contemplates the current replacement cost of an asset having made deductions for physical deterioration and all other relevant forms of obsolescence.

490. Both Mr Thomas and Ms Shalaeva used the income approach as the starting point for their valuations. However, Mr Thomas was adamant that the cost approach and market approach could be ignored altogether as both terminals were income-generating assets. In support of his position Mr Thomas pointed to IVS 105 para 10.4, which provides:

> "Valuers are not required to use more than one method for the valuation of an asset, particularly when the valuer has a high degree of confidence in the accuracy and reliability of a single method, given the facts and circumstances of the valuation engagement."

491. Para 10.4 does, however, go on to make clear that this statement is simply stipulating that there is no requirement to use more than one method. All will depend on the circumstances, and more particularly where there are issues as to the reliability of the data:

> "However, valuers should consider the use of multiple approaches and methods and more than one valuation approach or method should be considered and may be used to arrive at an indication of value, particularly when there are insufficient factual or observable inputs for a single method to produce a reliable conclusion."

492. This is consistent with the way the position is explained in the opening to VPS 5 in the RICS Red Book Global, which expresses the point as follows:

> "Unless expressly required by statute or by other mandatory requirements, no one valuation approach or single valuation method necessarily takes precedence over another. In some jurisdictions and/or for certain purposes more than one approach may be expected or required in order to arrive at a balanced judgment. In this regard, the valuer must always be prepared to explain the approach(es) and method(s) adopted"

493. Consistently with the rationale for a cross-checking methodology, Ms Shalaeva considered that it was appropriate for a weighted average approach to be adopted given the shortcomings in the data. The weighting she adopted was 40% for the income approach, 30% for the market approach and 30% for the cost approach. In her view, this itself was an important cross-check against market data. She was clear that the valuation of both Western Terminal and Onega Terminal should correspond to the values of similar properties in the relevant market segments at the same time.

494. I agree with this approach and am satisfied that the reliability of a valuation estimate derived from the income approach depends on the inputs that are used and in the present case, the limitations in the reliability of the input data are clear. I accept Ms Shalaeva's evidence that these limitations included: (a) the lack of operational information as at the valuation dates, (b) the lack of market-based development plans to provide a reliable estimate for future investment and projected cash flows, and (c) the fact that the only comparative data from other cargo terminals because of their size, different (and better) situation within the BPSP, and with different berths and other infrastructure configurations.

495. The experts also disagreed about the consequence of this on the appropriateness of Ms Shalaeva's use of the direct capitalisation method of valuing on an income basis. This involves using a single year cash flow with no explicit projection period to calculate a property's value. The reason Ms Shalaeva took this approach was because of the data limitations I have just described. Mr Thomas disagreed on the basis that there was sufficient information available to make multi-year forecasts for each of the terminals, but I think that the criticisms of his conclusions made by Mr Lord in [69] of his skeleton argument were justified.

496. In particular, I think that Ms Shalaeva's approach to the impact of Mr Thomas' failure to test his results by using scenarios i.e., a method "to develop pictures of the future state of the external environment for the studied object with a number of parameters, the values of which are set in several versions" (see [3.35] of Ms Shalaeva's report) was compelling. She tested her results by the use of other approaches. He only tested his results by using a sensitivity analysis which changed single key inputs. In my judgment this meant that, in the present case, his conclusions were for that reason alone materially less reliable than those of Ms Shalaeva.

497. In my judgment Ms Shalaeva's approach is the right methodology to have adopted in the present case. As Mr Lord submitted, this is also recognised by IVS 104 para 10.6 which contemplates that an iterative process is necessary when the nature, validity and reliability of the input data is open to question, which I am satisfied is the situation in relation to both Onega Terminal and Western Terminal in the present case. I found her explanation of why that was the correct way of approaching this valuation exercise to be persuasive. In particular her explanation of why the right balance was 30 Market / 30 Cost / 40 Income was a compelling analysis.

498. So far as Western Terminal was concerned, the consequence of weighting was to effect a reduction in the point estimate values as at 1 June 2009 and 29 September 2009 from the valuations which Ms Shalaeva would have reached if she had applied only an income approach (RUB 818 million as at 1 June 2009 and RUB 712 million as at 29 September 2012), but all of her results fell within the range she gave. It is also noteworthy that each of the three approaches came up with very broadly comparable figures for both the 2009 valuation date (Income RUB 896 million, Market RUB 790 million and Cost RUB 743 million) and the 2012 valuation date (Income RUB 751 million, Market RUB 702 million and Cost RUB 670 million). Mr Lord described the difference between the income approach figure of RUB 751 million and the point estimate of RUB 712 million derived as a result of blending the three figures as a difference that goes nowhere. Indeed, he relies, and in my judgment correctly, on the fact that there is only a relatively small difference in the figures thrown up by the three different valuation approaches as a helpful reality check.

499. So far as Onega Terminal was concerned, the position was different, because the effect of weighting was to increase not reduce the point estimates for the assets as at the various valuation dates. To the extent that these minor differences are relevant, Ms Shalaeva's approach therefore benefited the counterclaimants. As with Western Terminal all of her results fell within the range she gave and each of the three approaches came up with very broadly comparable figures.

500. Another methodological issue that arises is the use of what the IVS calls synergistic value. The way that Mr Thomas explained the interrelationship between the need to take into account synergistic value and the use by Ms Shalaeva of the market approach and the cost approach as an appropriate weighting cross-check was as follows:

> "Inclusion of Synergistic Value is crucial to the valid determination of Market Value using the Income Approach. IVS 2 states that, "Synergistic Value is the result of a combination of two or more assets or interests where the combined value is more than the sum of the separate values." Use of the Market or Cost approach, excludes synergistic value and introduces a strong bias toward minimizing Market Value and thereby renders the Valuation Conclusions invalid."

501. I agree with Ms Shalaeva that this criticism is misplaced and that one reason for this is that "the market approach to valuation can also capture the synergistic effect where close comparable analogues are used" (see [3.28] of Ms Shalaeva's supplemental report). However, of rather greater significance is the fact that Synergistic Value is a different basis of value from Market Value and will often not be appropriate because "any synergies may only be available for a specific buyer, not the general or willing buyer" (see [3.30] of Ms Shalaeva's supplemental report). As it is put in para 70.1 of IVS 104:

> "If the synergies are only available to one specific buyer then Synergistic Value will differ from Market Value, as the Synergistic Value will reflect particular attributes of an asset that are only of value to a specific purchaser."

502. In the present case there is no evidence that Western Terminal and Onega Terminal have significant synergistic value taken together and Ms Shalaeva, with the benefit of a much greater familiarity with the BPSP market than Mr Thomas, confirmed that she is unaware of any transaction "where a complex of port-related or similar logistical assets in St Petersburg have been sold in the market at a price many times higher than that of any comparable assets". She then explained that, in the present case, any synergistic value for Onega Terminal could only be available to one specific buyer, SFP or ROK No 1 Prichaly, which controlled the berth. As they would be in a strong position to negotiate any purchase, it cannot therefore be assumed that the synergistic value for Onega Terminal would be significant. I agree, and I also agree with her view that Mr Thomas' attribution of significant synergistic value to Western and Onega Terminals seems to reflect the fact that he has in effect valued them as businesses (i.e., investment projects), not as real estate.

503. Another comparative exercise carried out by Ms Shalaeva, which was criticised by Mr Thomas, was her use of post-valuation date data as a cross-check of the result calculated through the income approach. Mr Thomas' view is that this is inappropriate and indeed prohibited by IVS 104 para 10.5:

> "Most bases of value prohibit the consideration of information or market sentiment that would not be known or knowable with reasonable due diligence on the measurement/valuation date by participants."

504. In my view, the claimants were correct to submit that these and other cross-checks applied in the way they were applied by Ms Shalaeva give a sense of reality to any valuation estimate. This is a particularly appropriate response in a situation in which there was no properly functioning market for real estate assets in what Hildyard J called in [1422] of his judgment "the particular circumstances in Russia in the wake of the credit crunch and collapse in asset (and especially real estate) values from and after September 2008". Ms Shalaeva's report contains detailed evidence of the extent to which industrial land prices in St Petersburg fell steeply after 2008 with what she called minimum prices being achieved in 2008 to 2009. This reflected a decrease in direct foreign investment into Russia and a more general decrease in economic activity over the relevant valuation period. She also explained that in her view the potential number of buyers for land in BPSP is likely to have been restricted and limited to those who had logistical operations or facilities at the port. All of these considerations seem to me to be material and established on the evidence as capable of affecting what Hildyard J called the "market reality".

505. In my view, Mr Thomas' approach and the valuations which he has reached do not reflect that market environment. There is force in Ms Shalaeva's evidence that the figures he has arrived at as unit values for Western Terminal and Onega Terminal

> "are so high that there are no other examples of such values in the whole industrial and logistics property market of St Petersburg over the years. I therefore doubt that there could be any investor to whom such values for [Western Terminal] and [Onega Terminal] as estimated by Mr Thomas might seem attractive."

506. But stepping back from the detail I think it is clear that the overarching reason why Mr Thomas' valuation produced results which in my view was wholly unrealistic, is (as Ms Shalaeva said in her supplemental report) that he did not value either asset as an income producing piece of real estate. Rather he valued Western Terminal as an investment project and carried out a business valuation of Onega Terminal. This approach can more clearly be seen when considering the significance attributed by Ms Shalaeva and Mr Thomas respectively to what might be called the value-affecting factors relating to both Western Terminal and Onega Terminal to which I will turn shortly.

507. The essential difference therefore is that Mr Thomas' focus was on the investment potential (albeit speculative) for the two sites. His concentration was on transforming what was already there. In my judgment it was very far removed from a valuation of either terminal in its existing physical state.

Value-affecting factors: Western Terminal

508. There are a number of value-affecting factors relating to Western Terminal on which the experts disagreed and in respect of which it is appropriate for me to express my conclusions on the evidence. Each of these factors is a benchmark for the purpose of developing a discounted cash flow valuation, because each relates to the way in which the assets are capable of being operated so as to generate future income. They are all intimately interconnected, and there is much cross-over between them, although I shall deal with them separately for ease of description. In each respect I prefer the evidence of Ms Shalaeva, who made clear that she had regard to the data benchmarks applicable to the reasonably efficient operator. The evidence that this was the appropriate basis for assessing appropriate market standard inputs was in my view compelling.

509. By contrast, much of what Mr Thomas had to say was based on a theoretical calculation of what could be squeezed out of the asset without taking full account of the restrictions that might arise so far as any reasonably efficient operator is concerned. It seems to me that this test does not detract in any way from what is the highest and best use for the relevant asset, but it does demand a reasonable approach to what a reasonably efficient operator is able to achieve from the asset which is being valued.

510. The first factor related to location and configuration. I have no difficulty in accepting Ms Shalaeva's evidence that the value of real estate is always affected by the advantages and disadvantages of its physical location and I did not understand Mr Thomas to disagree in principle. Western Terminal was said by Ms Shalaeva to have a number of inherent disadvantages: in particular it is further away from the fairway than potential

competitors and access to it is obstructed by an island surrounded by shoals. She also pointed out that it had the longest pilotage of any cargo berth in the BPSP, some 26.8 nautical miles from the receiving buoy. It also suffered from a complex shape to its coastline with the two existing berths set at an acute angle to each other and shallow draft at the mooring line for SV-15. She said that SV-16M was not a cargo berth for trans-shipment purposes, but was only a fuel berth for bunkering tugs.

511. Ms Shalaeva also said that the origins of Western Terminal were relevant to this point because it was originally part of a military shipbuilding works. The berths were therefore originally constructed for shipbuilding and so were not well suited for cargo loading and unloading operations, although Hildyard J recorded at [150] that it had at one stage handled and stored refrigerated containers and nuclear waste. It would only be possible to expand the terminal to incorporate a third berth in addition to the existing cargo handling (SV-15) and bunkering (SV-16M) berths if the land site were to be enlarged by reclamation from the sea.

512. Mr Thomas took a different approach without disagreeing that location was an important consideration. He pointed to the short distance from the port entrance which he said was important to operations with large vessels. He also identified an order of the captain of the BPSP identifying SV-16M as operational, but I accept Ms Shalaeva's evidence that the nature of the order made clear that while it can be used for bunkering tugs it cannot be used for cargo processing. Mr Thomas also said that his valuation contained a detailed capital budget to reconstruct the entire 500 metre length of quay at Western Terminal as well as berth SV-16M including the cost of dredging to allow both berths at the terminal to meet the requirements to receive average sized container ships.

513. I shall revert to the capital expenditure consequences of this evidence later, but in my judgment, this is a good example of Mr Thomas' approach to valuation being skewed by his focus on an investment approach. It is clear that very substantial sums would have had to be spent to enable even a prospect of realising the potential enhancements referred to by Mr Thomas. But even if that issue could be overcome, there was no evidence of any credible development plans nor that such developments were likely to be approved by the authorities. In my view, Mr Thomas' own lack of experience of the St Petersburg market means that, even if this were to be a legitimate approach, I can give little weight to his opinion as to what might be achievable. While it is possible to take some capital expenditure into account when valuing an income producing piece of real estate, Ms Shalaeva made clear (and I accept) that it is necessary for there to be a proper business plan, without which there is no means of assessing whether the proposal is simply a sensible and obvious market investment or an aspirational punt. In my view, Mr Thomas' opinion that these types of enhancement were achievable was wholly speculative and ultimately legally irrelevant.

514. Mr Lord submitted that the evidence established that, where there is a proposal to take the property out of its current market position and transform either its physical state or the nature and essence of the trade being carried on, a valuation which reflects this will shift from a trade related property valuation to one which is a valuation of an investment project. I agree. It is not a market valuation, but rather it is what Mr Lord called "the investment plans of that particular investor". I also agree that there was no sufficient evidential base to enable such an investment project valuation to be carried out in the present case.

515. Ms Shalaeva also explained that BPSP was facing increasing competition from other ports in the Baltic basin and in particular Ust' Luga and Bronka Port, both of which had a number of competitive advantages over the BPSP. She said that although Bronka was not fully operational until 2015 the relevant plans were in the public domain as early as 2009 meaning that its potential competitive effect was well known by market participants from then on. Ms Shalaeva's evidence was consistent with Hildyard J's conclusion at the original trial when dealing at [1450(5)] of his judgment with Ms Simonova's suggestion that Ust' Luga has a significant drawback in that it requires an additional 150 kilometres of road transportation:

> "But Ust-Luga would have been a significant competitor to any developed Western Terminal. Ust-Luga's location provided it with direct access to the transportation network which gave it a distinct advantage over a port located by the city centre. There is force in the Claimants' submission that given its significantly lower tariffs, Ust-Luga would have exerted downward pressure on the charges at Western Terminal."

516. So far as competition within BPSP was concerned, Mr Thomas had identified six other container terminals for comparison with Western Terminal. Ms Shalaeva explained that this exercise did not have proper regard to the physical parameters and locations of those competitors by way of comparison to Western Terminal. I agree with her conclusion that "once one takes into account the geographical areas, number and length of berths and geographical positions of these other terminals, they are of a considerably larger scope and have many advantages over Western Terminal". It may therefore have needed to offer lower tariffs to attract custom or lose a part of its utilisation compared to the average in the market.

517. Taken overall, I am satisfied that Mr Thomas has materially overestimated the attractiveness of Western Terminal in the form it took at the time of its auction. In my judgment, the disadvantages of it as an asset were significantly downplayed by him in his report, and he failed to take them adequately into account when making such judgments as he did on the other input factors to which he had regard when reaching his conclusions.

518. The next of those factors relates to the fair maintainable turnover that could be generated by a reasonable efficient operator. This is the container throughput capacity at Western Terminal, which Ms Shalaeva said was likely to be 160,000 TEU per annum. She said that the maximum possible capacity was 240,000 TEU per annum based on generally accepted planning data and market information, a figure which Hildyard J was satisfied constituted Western Terminal's total capacity "on the most generous assumptions". However, she did not agree that anything like that figure was likely to be generated by a reasonable efficient operator.

519. Ms Shalaeva gave a detailed explanation of how she reached the figures that she did. This was ultimately based on a figure of 1,000 TEU per metre of berth. She excluded SV-16M for the usage reasons I have already mentioned, viz. that the order of the captain of the BPSP does not have the effect contended for by the counterclaimants. Its use is heavily restricted: it is not a cargo berth and cannot be used for containers without major works. There was also detailed evidence about the physical constraints of using both berths at the same time (they are at an acute angle to each other) even if SV-16M were to be extended.

520. Mr Thomas disagreed with Ms Shalaeva's assessment. His projected capacity was 500,000 TEU per annum. This figure was based on an extension of the length of both berths. It was said that SV-15 currently at 160 metres long could be extended to 170 metres and SV-16M currently 30 metres long could be extended to 210 metres. However, this could only be achieved by reclaiming additional land and it would not have achieved the result for which Mr Thomas argued for a different reason. As Ms Shalaeva explained in a passage from her supplemental report that I found compelling:

> "Moreover, if SV-16 were extended, both berths would have lost a considerable part of their working efficiency in relation to each other. With the two berths at an acute angle, the presence of a ship at one berth would restrict the ability of another ship to dock at the other berth. In addition, if two vessels wish to dock at or leave the terminal at the same time, this may not be possible due to the small space in front of the berths. In practice, the competition between terminals in the BP means that any vessel faced with these difficulties could easily find another terminal at which to dock."

521. It is also of note that these works would on Mr Thomas' evidence still only provide a capacity of 380,000 TEU per annum based on 1,000 TEU per metre of berth, i.e., well short of the 500,000 TEU he said was the right figure in his original report. It was only during the course of his cross-examination that it transpired that his figure was only achieved by creating a further 120 metre berth on a piece of shoreline that was opposite the shoals, ran at another angle, had only a very shallow draft and was not yet used for that purpose. That this was the basis on which he was proceeding was not at all clear from his report. I merely note at this stage that the way in which Mr Thomas came to explain how it was that he arrived at a figure of 500 metres as a useable berth length was highly unsatisfactory and I regret to say that those parts of his report on which he relied when challenged by Mr Lord as to how he did so were very misleading.

522. One further related point emerged during Mr Thomas' cross-examination flowing from the fact that the average St Petersburg container ship has a length of c.200 metres. While Mr Thomas initially seems to have said that, after reconstruction, Western Terminal would have 500 metres of reconstructed quay, and two fully functioning berths, the three berths that he in fact contemplated could not each service the average BPSP container ship, whatever the eventual length configuration of each of the berths. This is therefore another reason to cast doubt on whether what he said followed, viz. that, applying a capacity formula which allowed for 1,000 TEU per annum to be processed for every one metre of quay, the total Western Terminal capacity was to be assessed at 500,000 TEU per annum, not the 160,000 relied on by Ms Shalaeva.

523. Quite apart from the berth capacity, the difficulty with Mr Thomas' 500,000 TEU figure was the physical ability of the site itself to accommodate that number of containers. Ms Shalaeva's evidence, which seemed to me to be credible, was that it reflected an accommodation of almost twice as many containers as any other site in the BPSP. Mr Thomas also relied on the ability of the Western Terminal to allow for direct ship-to-rail processing based on existing rail infrastructure and the possibilities of an efficient unloading, stacking and reloading capability using the available land for storage and processing of containers, which in my view was unsubstantiated.

524. It is also of note that the 500,000 figure was the same as the figure for which the counterclaimants argued at the original trial based on evidence which Hildyard J

rejected as being inconsistent and unrealistic. He pointed out that it would have meant that, by 2011, Western Terminal would have become the second largest container handling terminal in Russia, a highly implausible outcome in light of its limitations as a site. Based on the evidence before me, I agree with that assessment. Mr Lord also pointed out that the approach taken by Mr Thomas on this issue simply looked at the space footprint for the containers without taking into account the additional time that higher container stacking would mean was required to unstack and move them around. In other words he did not have proper regard to the critical question of turnover and throughput. In my judgment, in all the circumstances, the capacity figure advanced by Ms Shalaeva is justified by the evidence. The capacity figure advanced by Mr Thomas is not.

525. The next factor related to utilisation rates, i.e., actual throughput. Ms Shalaeva took a lower rate (60%, i.e., 96,000 TEU actual throughput on the basis of a 160,000 TEU total capacity) than Mr Thomas whose figure grew from 78% to 84% through the second to fourth forecast years (i.e., 390,000 to 420,000 TEU pa actual throughput on the basis of a 500,000 TEU total capacity). Ms Shalaeva's figure was reached on the basis of published rates generally in the BPSP which varied between 40% and 80%. She said that 60% was appropriate for the position of Western Terminal in the market having regard to a number of relevant factors including the location issues I have already described.

526. On this issue as well, I agree with Ms Shalaeva. There is an element of judgment involved, but I think she took a realistic and reasonable approach. By contrast, Mr Thomas' estimates were unrealistic and like much of his report were based on views that had already been expressed by Ms Simonova at the original trial and rejected by Hildyard J. While I have reached the same conclusion as Hildyard J did based on Ms Shalaeva's evidence, I draw comfort from what he said in his judgment at [1450](2)] when explaining why the 420,000 TEU pa actual utilisation figure was wholly unrealistic:

> "Her assumptions as to throughput also appear over-optimistic. On the basis of a total capacity of 500,000 TEUs, Ms Simonova assumed a throughput of 420,000 TEUs per annum. That would be equivalent to 15% of the total activity in the Big Port of St Petersburg, generated from a land site that was only 1.5% of the total area of the Big Port of St Petersburg. By way of comparison, the largest operator in the Big Port, CSJC First Container Terminal, occupied a 74 hectare space and produced a turnover of 1,000,000 TEUs per annum. As a reality check, in 2014 Global Ports, the largest operator of berths and porting facilities in Russia, had throughput at its First Container Terminal in St Petersburg of 1.25 million TEUs per annum. On Ms Simonova's analysis, Western Terminal would within only 5 years achieve a capacity equivalent to 40% of Global Ports. That is difficult to accept as realistic."

527. Finally on utilisation, Mr Thomas appears to have used the Baltiysk terminal in Kaliningrad operated by the Baltic Stevedoring Company ("BSK") as a comparator. Ms Shalaeva identified a number of differences between the two properties which she said were fundamental and required considerable adjustments. Mr Thomas did not accept that he had used the port of Baltiysk as a comparable, but simply said that he referenced the terminal for the sole purpose of demonstrating that Western Terminal,

with a similar land area, had a similar turnover capacity and possessed sufficient land to accommodate container storage requirements based on 500,000 TEU per annum.

528. Ms Shalaeva explained why it was an unhelpful illustration, not least because Mr Thomas' information was derived from an unreliable source (he took them from a third party's website) while BSK's own website reported a lower throughput of 400,000 TEU per annum and in respect of a much larger territory area (26 hectares). Taken in the round, I did not find the comparison BSK / Baltiysk and the Western Terminal to be of any assistance.

529. The next factor is tariffs. Both experts explained that they were regulated. Ms Shalaeva used US$127.5 per TEU derived from the tariffs which I am satisfied were in use at another container terminal (Petrolesport) at the relevant time in 2012. Mr Thomas' figures were in excess of US$140 per TEU with additional charges. Ms Shalaeva explained that the computation of the figures used by Mr Thomas were liable to inflation because they were derived from forwarding company data, unlike her figures which were based on the actual tariffs applied. She also said that the storage fees were illegitimate at the level contemplated by Mr Thomas, because the whole basis of Mr Thomas' valuation contemplated a very rapid turnover with minimal time for storage

530. Mr Stroilov criticised the approach that Ms Shalaeva had taken to arriving at the figure of US$127.5 per TEU. He said that her credibility hit the floor because she refused to accept in cross-examination that her reduction from what was called a category 1 tariff of US$150 per TEU was unjustified. I do not agree with this submission. The evidence was that category 1 tariffs were charged to cover the movement of containers from ship to warehouse and then to vehicle or vice versa, category 2 tariffs were charged to cover ship to warehouse or vice versa and category 3 tariffs were charged to cover warehouse to vehicle or vice versa. The evidence was that category 2 and 3 tariffs are charged when the service is split, i.e. when the category 3 service is provided by a third party. This means that there should be a reduction from the US$150 per TEU tariff when identifying an average to take account of the amounts actually receivable by the operator of the terminal where a category 3 tariff is not payable to it. In my judgment, that is what Ms Shalaeva explained she had done and in all the circumstances that was a reasonable approach for her to adopt.

531. Overall, I prefer Ms Shalaeva's evidence on the tariff issue. I am satisfied that the tariffs she has adopted were reasonable and that the approach adopted by Mr Thomas led to an overinflated figure. In reaching that conclusion I also bear in mind that Hildyard J had concluded that tariffs at Ust' Luga (a recently constructed port west of Saint Petersburg, located on the gulf of Finland near the Estonian border) were 30-40% lower than at St Petersburg and I agree that over time they would have exerted downward pressure on the tariffs chargeable at Western Terminal.

532. The next factor related to operating expenses in respect of which Mr Thomas' calculations were equivalent to an average EBITDA as a percentage of total revenue in 2012 of 62% which equated to 38% operating expenses. Ms Shalaeva said that operating expenses at that level were too low because the market average of EBITDA as a percentage of total revenue for the four leading container operators was around 50% and any figure above 60% would have been a rare exception. The result is that the EBITDA figure relied on by Mr Thomas would not just be above the average for most leading operators in the BPSP, it would in Ms Shalaeva's view be wholly

unrealistic. I also agree with her conclusions on this factor. In my judgment her approach is preferable to that of Mr Thomas for the reasons she gave in her supplemental report.

533. I have already alluded to the final factor which relates to the figures used for the purposes of calculating the capital budget for reconstruction of Western Terminal. This point requires the valuer to make a proper assessment of the amount of capital expenditure required to enable the asset to achieve its full potential. In the case of Western Terminal this was said by the counterclaimants to be 500,000 TEU per annum.

534. Mr Thomas said that US$63 million would be required over two years. This is to be contrasted with the figure of US$104.5 million used by Ms Simonova in her report for the counterclaimants at the original trial and US$220 million put forward by Mr Luke Steadman, a partner at Alvarez & Marsal who also gave evidence for the counterclaimants at the original trial. As Hildyard J recorded in [1450(3)] of his judgment when expressing concern about the credibility of Ms Simonova's evidence, Mr Steadman assumed a $220 million investment for the purpose of achieving a capacity figure of 500,000 TEU. It is striking that, on the basis of Mr Thomas' evidence, the counterclaimants' case is now that the same capacity figure can be achieved with a capital expenditure of rather less than 30% of the amount suggested by Mr Steadman and approximately 60% of what even Ms Simonova suggested, the latter of which Hildyard J had already treated as an implausible saving of US$115 million.

535. Ms Shalaeva did not advance a figure. She was of the view that the investment amounts provided for in Mr Thomas' report could not be checked and were not understood on the basis of the data included. The imprecision of his evidence on this point was rather confirmed by his oral evidence. He was asked in cross-examination about the basis for his calculation which lead to the following exchange:

> Q. Can you explain to his Lordship what -- in terms of the detail, what has led you to say that the capital expenditure would now only be about 63 million, when you said it would be about $104.5 million five years ago. What has changed?
>
> A. I think primarily what has changed would be the concrete of hardstanding. Now, I would need to go back with the detailed original budget, or detailed budget, and look to identify, and I am happy to do that and report back to you, but there are minor differences that add up to a lower value, okay. But we didn't -- I didn't just sit down and say: you know, I had better not come up with 170, or 147 million, I had better come up with 177 million, so I will just arbitrarily reduce the capital costs by $30 million. This, we did not do, okay. Do we have different numbers? Yes."

536. This was far from helpful as a reply, but it illustrates the unsatisfactory nature of Mr Thomas' evidence more generally. It demonstrates that what his valuation was really all about was an attempt to estimate costs and benefits attributable to the potential for developing the Western Terminal asset substantially and materially beyond its existing use. In my judgment, as Ms Shalaeva explained that is not a proper approach to valuing its market value at the relevant time.

Value-affecting factors: Onega Terminal

537. There were also a number of value-affecting factors relating to Onega Terminal on which the experts disagreed. Many of them are similar to the types of factor which I have described in relation to Western Terminal, but not surprisingly their impact and relative significance is different. A description of their nature and my conclusions on the evidence follows.

538. The first factor related to market positioning. In my view it is difficult to underestimate the significance of one of the principal differences between Onega Terminal and Western Terminal, which also featured as a very significant factor in Ms Shalaeva's reports. As Hildyard J explained in [1463] of his judgment:

> "[Onega Terminal] was not a 'port' or a 'transhipment terminal': it had no access to the sea. It did not have its own berth on its own land, but had to rely on two berths owned by the SFP."

539. In Ms Shalaeva's view, the consequence of that was that for valuation purposes, Onega Terminal had to be treated as a storage area which potentially could be part of a larger container terminal, and as such could properly be compared with other industrial land plots. She said that, without access to the berth controlled by SFP, it had no material value as a trans-shipment terminal. In her view the fact that Onega Terminal had operated as a car terminal historically was a factor based on individual business characteristics which could not be the basis for a market value appraisal.

540. Mr Thomas disagreed with this approach, which he said involved a valuation on the basis that Onega Terminal could not be used as part of a Ro-Ro terminal. He said that "the fact that Onega Terminal does not own the berth does not impede or negate the ability to operate a Ro-Ro business". He relied on the fact that Onega Terminal processed 151,000 vehicles in 2008, working in coordination with the berth owned by SFP by a private, secured, specially-paved road. This permitted vehicles to be driven directly from a ship at berth to the specially-paved vehicle storage areas which formed part of Onega Terminal. He said that if Onega Terminal was operating as a Ro-Ro transhipment terminal in 2007, 2008 and in 2015 (as was accepted by Ms Shalaeva to be the case) it made no sense that it could not do so as at the dates of her valuations. In his view Ms Shalaeva arbitrarily excluded the largest source of income at Onega Terminal, thereby using an income approach which was highly biased towards minimising value.

541. In Ms Shalaeva's view, that lack of access should be reflected in the discount rate or operating expense value if Onega Terminal is to be considered a terminal at all. Mr Thomas disagreed with this view, on the basis that it did not recognise the fact that the Onega Terminal and the berth operate collectively to process vehicles and containers. He described the terminal and the berth as "mutually accessible", by which he meant that the berth cannot process large quantities of vehicles without utilising Onega Terminal's territory for storage and customs clearance. It followed that, if Onega Terminal's value was reduced on the basis that it had no access to the berth, the berth likewise has minimal value because it does not have access to Onega Terminal.

542. I am satisfied that Ms Shalaeva is correct on this point. As she explained in her supplemental report, berths are the principal income generating structures and

instruments within a port. Their significance as an income generating location is shown through a wide range of indicators, including revenue and profit per berth length for measuring and comparing the efficiency of terminals, both factors to which I have alluded when discussing the evidence in relation to Western Terminal as well. She also pointed out that Mr Thomas' approach to valuation of Onega Terminal is inconsistent with his approach to valuation of Western Terminal because, for the Western Terminal valuation he attributed the trans-shipment revenue to the berths and not to the land plot while for the Onega Terminal valuation he attributed it to the land plots (as Onega Terminal had no access to a berth in its own right). The inconsistency is in my view both obvious and revealing.

543. The next factor was whether in any event it is more appropriate to value Onega Terminal as a part of a container terminal, or whether it should be valued as a Ro-Ro terminal because, as Mr Thomas said, that was its existing business use. Ms Shalaeva contended that the former was more appropriate because of its greater ease of use and lower dependency on market fluctuations. She also said that there were numerous Ro-Ro terminals in BPSP by the end of the 2008-2009 financial crisis and the car terminals at Ust' Luga were gaining a growing market share. For that reason (i.e., the increased competition) she considered that the Onega Terminal's historical data was less valid for forecasting purposes.

544. Mr Thomas disagreed. He said that the Onega Terminal should be valued as a combined Ro-Ro and container terminal because that is what it is. In his view, to arbitrarily exclude Onega Terminal's Ro-Ro transhipment business is an error which creates a strong bias towards minimising market value. He said that his opinion was evidenced by data for six Ro-Ro terminals operating between 2007 and 2014, which maintained throughput of between 400,000 and 530,000 vehicles during the period 2011 to 2014. He also disagreed with Ms Shalaeva's view in relation to ease of use on the basis that no equipment is required to drive vehicles from the berth for storage at Onega Terminal whereas containers require expensive and highly specialised cranes for unloading, stacking and reloading functions.

545. I also agree with Ms Shalaeva's view on this point. The flaw in Mr Thomas' approach is that the mere fact that the business presently occupying Onega Terminal used it as a Ro-Ro terminal does not mean that the valuation of the real estate asset is to be valued as a Ro-Ro terminal. It is another example of the approach he took to valuation of a business, rather than finding the market value of a real estate asset. The question is what is the use for which Onega Terminal is best suited. I was persuaded that, for the reasons explained by Ms Shalaeva in her reports, it is more suited to handling other types of cargo. Furthermore and critically, the fact that it did not have its own berth and therefore, in order to function properly as a Ro-Ro terminal, required access to a berth owned and controlled by others, meant that the assumption of a berth or berth dependent business should not feature in the valuation in the manner for which Mr Thomas contended: future usage cannot be assumed and "the risks as to lack of access must be taken into account".

546. The next factors related to capacity and utilisation. Ms Shalaeva considered the annual capacity of 240,000 cars for which Mr Thomas contended to be far too optimistic in light of the average parameters for the Ro-Ro terminals in the market. She said that this would require a minimum of 300 metre long berths. Mr Thomas disagreed. He pointed to the fact that in 2008 a cumulative total of 151,000 cars were unloaded and

transferred to Onega Terminal. He said that Onega Terminal had a sufficient land area to accommodate car storage for an annual throughput ranging from just over 100,000 vehicles to 203,388 vehicles in year 4 of the 2011 valuation. He said that throughput was constrained, not by the existence of a single berth or berth length, but more by the frequency with which ships dock at the berth which in turn is driven by market demand.

547. Ms Shalaeva explained in her supplemental report why it was that Mr Thomas' estimates and assumptions were far too optimistic. His forecast of Ro-Ro utilisation rates (85%) was materially higher than competitor terminals. There is plainly substance in this criticism because it bore no relationship to the 38% rate, which appeared from the evidence at the original trial to be "be the more appropriate utilisation figure". Likewise, the same evidence, explaining that the maximum utilisation of such a terminal was around 60%, undermined Mr Thomas' container utilisation rates range which in the reversion year was between 65% to 90%.

548. Another reason for his over-optimism was that Mr Thomas' evidence did not adequately account for the competition already existing in the BPSP market and the fact that Ust' Luga had just started processing cargo including Ro-Ro cargo with a number of advantages over and above BPSP. Ms Shalaeva carried out a detailed comparative analysis of available berth lengths and average areas for processing cargo and took into account the fact that Onega Terminal would be the smallest of the Ro-Ro terminals and had no berth. Ms Shalaeva pointed out that Mr Thomas' approach assumed that, despite these limitations Onega Terminal would achieve a turnover per hectare per annum far in excess of any other Ro-Ro terminal. She said that she was unable to find any other examples in the market and concluded that Mr Thomas' figures were not realistic.

549. I agree with Mr Shalaeva's views on all these issues. In my view, Mr Thomas' approach was indeed unrealistic. In particular, I was convinced by her evidence as to why, even if Onega Terminal had indeed processed 151,000 cars in 2008, there was no realistic ability for it to grow its market share in the context of a more difficult market for imported cars and greater competition for Ro-Ro handling going forward. She also expressed a further view in relation to Mr Thomas's suggestion that some of Onega Terminal (asset 4) could be used to handle containers at a rate of 75,000 TEU per year. In my judgment she was correct to expressed doubts that such usage would be logistically possible, when sought to be introduced in conjunction with a Ro-Ro facility.

550. The next factor related to tariff rates. Mr Thomas assumed Ro-Ro tariffs rising from US$125 to US$220 per car over the period of 2009 to 2015. But this ignores regulations which inhibited tariff growth in the period from 2008 to 2013, as well as the downward competitive pressures and the general crisis in the Russian car market at the time. In my view, based on Ms Shalaeva's evidence which I accept on this point, Mr Lord was correct to submit that:

> "Mr Thomas's revenue forecasts are only upwards, but Ms Shalaeva shows that his forecasts bear no sensible relationship to the market dynamics at the relevant time: 2008 was the highpoint for the car market in Russia; after 2008 the market collapsed and it has still not recovered to its 2008 level. There must be real doubt as to the realism of Mr Thomas's projected tariffs given the physical constraints on the OT infrastructure."

551. In short, I accept Ms Shalaeva's view, based as it was on a detailed analysis of the market, that the situation in 2008 and in 2012 did not evidence the tariffs suggested by Mr Thomas which he said had been increasing over time. I also think that she was correct to conclude that there were flaws in Mr Thomas' evidence because he did not take account of the competition from Ust' Luga and Bronka on any of the likely revenue of a Ro-Ro facility Onega Terminal.

552. The next factor was a disagreement between the experts in relation to operating expenses. Ms Shalaeva said that Mr Thomas' projected operating expenses reflected an average ratio below the market average of 0.5 to 0.6 which itself led to an above-average EBITDA figure as compared to most operators in the BPSP. This was unjustified and in particular there was no payment of rent for the berth included in Mr Thomas' calculations, which in Ms Shalaeva's view could have constituted up to 25% of total revenue.

553. There was also disagreement between the experts as to required capital expenditure, and in particular to the need to make provision for paving the Onega Terminal land. Ms Shalaeva said that at least 30% is unpaved and was likely to have been so on the valuation dates. This disagreement was also reflected in the experts' approach to investment. Again I think that there is substance in this criticism.

554. Finally Mr Thomas used a discount rate that was lower than the discount rate used for Western Terminal. I am persuaded that this was necessarily inappropriate because the absence of its own berth and the consequential ability to process its own cargo without third party consent (or more accurately the use of land in different ownership) gives rise to a higher level of risk and additionally the need for an adjustment to reflect the overall quality of Onega Terminal as an asset.

The market approach

555. I can take this part of the evidence quite shortly. As I have already explained I prefer Ms Shalaeva's view that a valuation that gives some weight to the approaches other than an income approach (and as a cross check) is appropriate in the present case. In my view, Ms Shalaeva's market approach was both appropriate and carried out in a logically coherent and compliant manner.

556. All the comparable market information Ms Shalaeva could access was used in her report, including both port properties and what she called industrial land plots with some specific port real structures. I am satisfied that this was a comprehensive exercise and I do not accept Mr Thomas' evidence that there are no available comparables and so this approach cannot be used at all. Ms Shalaeva explained in evidence that I found of assistance that both Terminals belonged in the industrial lands market segment for this purpose, with the specific port infrastructure such as berths being assessed separately.

557. She identified three land plots located in the BPSP with data as at November 2011, and 20 more recent comparables with industrial and warehouse permitted use. She narrowed those down to exclude plots with significant variances and then applied a number of adjustments to reflect differences such as location, land area, tenure, utilities

and the like to make the sample what she described as 'homogenous' for the purposes of taking a mean unit value as the property value indicator. Even though a number of these comparables were outside the immediate port area, I think that this was an entirely legitimate approach because she then blended the 2011 data for land plots within the commercial port as corroboration.

558. The comparables she ended up with were all valued as at July 2020, which was obviously much later than the valuation date. She was then able to index them back to the relevant valuation dates. Despite criticism from Mr Thomas that this amounted to the illegitimate use of post-valuation data, I am satisfied that the approach Ms Shalaeva took was both permissible and appropriate, because she was not using this data directly in her calculations, but she was using it as a starting point to which she then applied what she described as reliable industry standard indices.

559. This exercise resulted in a market approach valuation for Western Terminal of RUB 702.154 million as at September 2012 and RUB 789.59 million as at 1 June 2009, both of which were less than the result on the income approach but more than the result of a cost approach. So far as Onega Terminal was concerned, a market approach valuation produced a figure for Assets 1A, 1B, 2A, 2B and 2C of RUB 224.5 million as at October 2009 and for Assets 3 and 4 of RUB 225.97 million for 2011. Overall these were slightly higher than the income approach valuations.

560. I accept the claimants' submission that this exercise has produced a reliable market approach valuation at the re-trial despite the fact that the expert evidence at the original trial failed to do so. But the reason that Hildyard J was so unimpressed with the evidence adduced by Mr Millard in particular was that his choice of comparables and his use of percentage uplifts were flawed. In my judgment, Ms Shalaeva's evidence does not suffer from the same deficiencies. In short, the exercise that she carried out was reliable, while that adopted by Mr Millard left Hildyard J with serious reservations ([1448] of his judgment), which were amongst the reasons he declined to determine valuations at the original trial.

The cost approach

561. The final aspect of Ms Shalaeva's valuation was based on the cost approach, which she used to corroborate the results of the other two. As with the market approach, and as I have already said when explaining my views on methodology, I think that this was an appropriate approach for Ms Shalaeva to adopt. In my view, she made a reasonable assessment of the costs of what she described as a virtual construction of the Terminal. I was unable to identify any respects in which her approach to a valuation based on the cost method was wrong or did not otherwise corroborate the results that she reached.

562. So far as Western Terminal was concerned the cost valuation led to figures which were lower again than the market approach (RUB 742.57 million as at 1 June 2009 and RUB 670.278 million as at 29 September 2012) but within the same broad range.

563. So far as Onega Terminal was concerned, Ms Shalaeva arrived at figures that were greater than those reached by application of the market or income approaches: RUB

229.87 million as at October 2009 for assets 1A, 1B, 2A, 2B and 2C and a 2011 valuation of RUB 250 million for assets 3 and 4.

Assets other than Western Terminal and Onega Terminal

564. As I have already explained, on 25 March 2021, I ruled that the new valuation evidence would be limited to evidence as to the value of the Western Terminal and the Onega Terminal. In relation to the other assets listed as Items 10 to 15 in the Appendix to Issue 2 of the List of Issues, I considered that it was possible for me to reach appropriate conclusions on the basis of the evidence called at the original trial. These assets comprised land at Sestroretsk, the property at 22 Pravdy Street, the apartment at 8a Kharkovskaya Street, the parking spaces at 8a Kharkovskaya Street and the plots of land at Seleznyovo and Tsvelodubovo, the realisation of which I have described earlier in this judgment.

565. In the event, the counterclaimants made no written submissions at the re-trial about these assets and they were not mentioned at the hearing. I could therefore have taken the view that they were no longer advancing a case that they suffered harm under article 1064 arising out of their seizure and/or sale and that they did not rely on any form of gross undervalue as indicative of the existence of a dishonest conspiracy.

566. I do not, however, consider that this would be the right way to proceed, not least because the Court of Appeal ordered a re-trial of the counterclaim, these assets continued to be listed in Appendix II to the Defence and Counterclaim which describes the assets in respect of which they contend that they have suffered harm and the parties have not agreed that they should be deleted from the Appendix to the List of Issues which deals with the matters on which the court should reach a determination. I shall deal with them quite shortly and in the order in which they appear in the List of Issues.

Land at Sestroretsk

567. The land at Sestroretsk was a 2.5 ha plot registered for agricultural use (specifically a fishery) located c.35 km from St Petersburg. It was owned by Scan and was sold at an auction conducted by the Russian Auction House together with Scan's property at Onega Terminal in October 2009. It sold for RUB 106.656m.

568. At the original trial, Mr Millard valued the Sestroretsk land at RUB 68-70m (c.US$ 2.285 million) in October 2009, i.e., less than the amount realised by the Russian Auction House sale. He adopted a market approach and relied on the difficulties that Jones Lang LaSalle had in selling land in the area. Ms Simonova treated the plot as an investment property and used the income or discounted cash flow method for the purposes of her valuation. Applying that approach, she came up with a figure of RUB 564.405 million as at December 2008.

569. In [1493] to [1494] of his judgment Hildyard J gave a comprehensive description of the difficulties which he had arising out of what he said was the failure by either expert to reach common ground. As he put it, "Both experts presented extreme positions and

sought to defend them as if there was science behind them, which there was not." It is not necessary for me to repeat what Hildyard J said in those paragraphs, but I should add that it seems to me that Mr Millard's criticism of many of the assumptions made by Ms Simonova in applying her DCF approach was justified.

570. Having reconsidered this evidence, I can see why Hildyard J made findings that he was unable to rely on either expert to reach a concluded view as to the true market value of the Sestroretsk land, but that the auction price achieved was not demonstrated by the counterclaimants to be "so far below the true market value as to suggest and tend to substantiate a claim of dishonest conspiracy" ([1496] of his judgment). I certainly agree with the second aspect of his findings, but in my judgment it is possible to go rather further in the sense that I am satisfied that it is probable that the market value of the Sestroretsk land was no more than the auction price.

571. The reason I have reached that conclusion is that, like Hildyard J, I think that Ms Simonova's valuation (which amounted to a value of US$9.465m per ha) defied common sense. It was almost nine times higher than the value of the other sites considered by Mr Millard to be comparables. While there were some problems with those sites as comparables, they were able to provide what I consider to be a relevant, albeit rudimentary, form of cross-check. In my view, even taking account of the over-pessimistic approach which Mr Millard took, it is more likely than not that the true market value did not exceed the auction price achieved.

Pravdy Street

572. The Pravdy Street assets were sold at auction in six lots for RUB 19.15 million in August 2012 as part of Scan's administration. The two successful bidders were both found by Hildyard J to be Renord-Invest companies: BarD LLC was the successful bidder for Pravdy Street assets 1-4 and Stimul LLC was the successful bidder for Pravdy Street assets 5-6. Mr Millard valued the lots at RUB 38.4 million (US$1.113 million) in June 2009. Ms Simonova valued the lots at RUB 393 million (US$7.849 million) as at May 2015.

573. Mr Millard and Ms Simonova used different comparables for the purposes of their valuations, although only Mr Millard used as a comparable a figure (in the form of an offer price) relating to another lot in Pravdy Street itself. Having reconsidered what they both said, I am satisfied that Mr Millard's comparables were more accurate than those adopted by Ms Simonova. I also consider that it is of some materiality that Hildyard J recorded at [1506] of his judgment that Mr Millard's figures were not challenged in cross-examination at the original trial.

574. At one stage, the counterclaimants appeared to challenge the auction on the basis that the Pravdy Street building should have been sold 'as a whole' rather than in six lots, but Hildyard J was satisfied that this point had no substance, and it was not pursued on appeal, nor was it raised as a separate point at the re-trial.

575. Like Hildyard J (at [1508] of his judgment) I am satisfied that the values in fact realised for the Pravdy Street assets were not so out of kilter as to demonstrate dishonesty. I also accept the claimants' submission that the fact that Scan's receiver organised the

auction and Scan's other creditors made no complaint is a further indication that the auction was not part of any conspiracy. In my judgment the counterclaimants have not established on the balance of probabilities that their true value as at June 2009 was any more than the amount given in Mr Millard's valuation. Although I think that the amount actually achieved at the August 2012 auction was at the bottom end of the value properly attributable to it on an administration sale (taking into account the collapse in property prices from September 2008 referred to by Hildyard J at [1415(1)] and [1423] of his judgment), the counterclaimants have not established that it is probable that the true value at that time was materially more.

Apartment and parking spaces at 8a Kharkovskaya Street

576. The apartment at Kharkovskaya Street was sold at public auction by the bailiff in October 2011 for RUB 11.59 million and was bought by a private individual. The parking spaces were also sold by the bailiff in late 2011 for RUB 1.826 million. Hildyard J also referred to the sale of certain personal chattels in the part of his judgment in which he described these sales ([636]), but they do not appear in the Appendix to the List of Issues and I say no more about them.

577. Both Mr Millard and Ms Simonova agreed that a sales comparison approach was the appropriate basis on which to value these assets. The valuation table produced by the experts (and set out in [1434] of Hildyard J's judgment) identified that Mr Millard valued the apartment at RUB 20.485 million and the parking spaces at RUB 1.478 million, while Ms Simonova valued the apartment at RUB 58,696 million and the parking spaces at RUB 9.579 million. Elsewhere in his judgment ([1514] in which his figures were largely derived from the Appendix to the experts' joint statement), Hildyard J gave the figures in US$ and said that Mr Millard's valuation of the apartment was US$652,000 as at December 2011, and US$460,985 as at May 2015, while Ms Simonova gives valuations of US$ 1.823 million and US$ 1.353 million respectively.

578. Whichever figure is taken, the differences between the experts concerned the size and quality of the apartment. Hildyard J cited a passage from Mr Millard's evidence, which reflected the differences in a manner which gives some colour to anybody more familiar with the London market than that in St Petersburg, which is worth repeating. He said that Ms Simonova's approach was:

> "a little like using apartment prices from Mayfair to infer property prices in Fulham as that is broadly how the areas in question compare."

579. In the event Hildyard J preferred Mr Millard's evidence on the point and so do I. As had often been the case, Ms Simonova was as Hildyard J put it "straining for values beyond the realistic". The consequence is that the answer to Issue 2 in so far as it concerns the apartment and the parking spaces at Kharkovskaya Street is that the true values were likely to have been at or about the figures identified by Mr Millard. I also agree with Hildyard J's conclusion that, although the amounts realised were less than the values he arrived at, they are not so discrepant as to give rise to an inference of dishonesty in the auction process, more particularly when compared to the problems in the Russian property market at this time.

Land at Seleznyovo

580. This is a 14.76 ha plot of agricultural land in the Vyborg region. It was owned by Western Terminal but was not pledged to the Bank. It came under the control of Renord-Invest as part of the repo arrangements and on 29 November 2009 Mercury was registered as its owner for Renord-Invest ([1156(6)]). Hildyard J recorded (at [1478] of his judgment) that he had been assured by Ms Mironova during her cross-examination:

> "that it was intended to apply the proceeds of the sale of the land in diminution of the debts of OMG. There is, however, an issue as to the sale price achieved in addition to the propriety of the deployment of the repo arrangements in this way. There is, once more, a very large gap between the experts as to the value of the land."

581. Mr Millard's valuation (US$529,200 in May 2015 on the most generous assumption) was based on his view that the plot was classified as agricultural land and it was not realistic to assume that it could be developed. Ms Simonova used the income approach and a DCF model to give a value of US$15.142 million, on the premise that a change of use to settlement for residential development would be approved. There was, however, no planning permission in place and the relevant utilities were a long way away from the site. The claimants also submitted that her assumptions on development costs were suspect and that her discount rate was far too optimistic.

582. It follows that the problem for Hildyard J in reaching a clear conclusion was that there was a fundamental disagreement between the experts on the two principal parameters relating to the basis on which Ms Simonova carried out her valuation. The ones which mattered were:

> "(1) the prospect of obtaining permission for change of use, and (2) the extent of the infrastructural problems which would have to be overcome, especially as regards the capacity of any electricity supply to cope with the greatly increased demand from some 102 envisaged houses in a rural area".

583. However, he eventually concluded that Mr Millard's approach was to be preferred, not least because the land had been on the market for sale throughout 2014 and 2015 at an asking price of RUB 12 million (c.US$172,000) but no potential buyer had made an offer. He therefore considered (at [1483]) that an achievable price was "much closer to the order of magnitude of Mr Millard's valuation" and that Ms Simonova's approach was unrealistic.

584. I agree with Hildyard J's view on this point. In my judgment, Ms Simonova's valuation is unrealistic and presupposes a development value which neither the counterclaimants nor she have established is likely to have been achievable as at the valuation date. In all the circumstances, I consider that it is more probable than not that Mr Millard's valuation as at May 2015 is a reasonable estimate of the true value of the land at Seleznyovo.

Land at Tsvelodubovo

585. The land at Tsvelodubovo is an 18.5 ha plot of land owned by Scan in the same region as the Seleznyovo plot. As I have already mentioned earlier in this judgment, it was transferred to Meridian LLC, another Renord-Invest company, in December 2009, and then to Mr Kalinin, to hold on behalf of Renord-Invest, for RUB 500,000. It was valued in Scan's accounts at 31 December 2007, which on the evidence was correctly described by Hildyard J as the "peak of the market" at US$414,000.

586. Mr Millard valued the land at Tsvelodubovo as agricultural land at US$277,500 in May 2015. Ms Simonova estimated its value at US$2.848m. As with the Seleznyovo plot her valuation presupposed immediate development, but based on the criticism of her assumptions recorded in [1499] of his judgment I agree with Hildyard J's conclusion that her valuation was yet again unrealistic. This conclusion is corroborated by the fact that the Tsvelodubovo plot had been on the market for sale since 2014, with an advertised offer price of RUB 2.5m and was unsold. I agree with the claimants' submission that the advertised asking price was the best available indicator of market value. The level at which it was pitched "reflects the difficulty of selling Russian real estate in the relevant circumstances" (as it was put by Hildyard J in [1500] of his judgment).

587. Hildyard went on to conclude in a passage from his judgment ([1502]) with which I agree that:

> "In the light of actual market evidence, I accept that [Ms Simonova's] valuation is unrealistic. Mr Millard's valuation seems to be closer the mark. But in any event, I am satisfied that the prices actually attributed do not demonstrate dishonesty."

588. I go further in this sense, that in the light of the advertised offer price, the evidence of the value of the Tsvelodubovo plot in Scan's accounts, the lack of substance in the development assumptions made by Ms Simonova and the views expressed by Mr Millard in his evidence, I consider it is more likely than not that Mr Millard's valuation is correct. As at May 2015 the right figure for a realistic value of the Tsvelodubovo land was no more than US$277,500.

Conclusions on value

589. As will be apparent from the foregoing, I have reached a very clear opinion that the evidence adduced from Ms Shalaeva is to be preferred to the evidence adduced from Mr Thomas. There was no material respect in which I found her views to be other than well thought-out, carefully expressed and justified firmly without descent into advocacy. I consider that her evidence, combined with the other surrounding circumstances I have mentioned, justifies the conclusions that she reached and I accept those conclusions in full. This relates both to the methodology that she adopted for the purposes of her valuations and to the detailed analysis contained in her reports supporting her conclusions. This is not a case in which it would be appropriate for me to seek to identify some mid-point valuation which reflects anything other than the views of one of the experts. In some respects that is an easy conclusion for me to reach

because I have found myself to be in agreement with Ms Shalaeva on each of the points on which she disagreed with Ms Thomas.

590. Overall, I think that Ms Shalaeva was correct in her criticism of Mr Thomas' approach to the application of his DCF model for both Western Terminal and Onega Terminal. It is striking that when she changed the inputs to reflect what I consider to be a more realistic approach to each of the properties, the figures fell within the same range as those for which she contended. I accept that the way she expressed the position in relation to each of the Terminals supports the claimants' case that the values for which she originally contended are likely to be their true market value. Thus:

i) as to Western Terminal, Ms Shalaeva said:

> "The results show that once I change the key inputs to Mr Thomas' DCF model, even where I use inputs that are more optimistic than my own estimates (e.g. for TEU capacity and utilisation), Mr Thomas' model gives values for WT which range from US$ 11.079m to US$ 27.2m, which is consistent with my own valuation"

ii) and as to Onega Terminal, Ms Shalaeva said:

> "Thus the 2009 value of OT calculated with the DCF model is between US$ 14.744 million and US$ 7.855 million; and 2011 value of OT is in the range of US$ 22.693 million to US$ 8.822 million. Although this range is higher than my original valuation range, I consider my original valuation to be more reliable since the DCF model assumes that OT would be able to obtain access to a berth and it is not at all clear in practice how easy it would be to obtain such access."

591. In any event, it was not suggested by Mr Thomas that there were any flaws in Ms Shalaeva's arithmetic, nor that the adjustments in the inputs led to anything other than the results which she illustrated. As Mr Thomas said, their disagreement related to the parameters and in that respect the disagreement was significant, but having accepted Ms Shalaeva's views on all of those points, it follows that I also accept that the figures she has come up with, the consequence of which is that the amounts for which Western Terminal and Onega Terminal were realised fell within the market value range she estimated.

592. My conclusions in relation to the property other than Western Terminal and Onega Terminal are to the same effect. I therefore agree with the claimants that the consequence is that in broad terms the market values of all of the assets with which these proceedings are concerned were in line with the results of the public auctions or other realisation processes by which they were realised. Self-evidently, this goes a very long way indeed towards undermining the counterclaimants' case that they sustained harm and more particularly that they sustained harm at a level which was sufficiently substantial to support an inference that the claimants were guilty of a conspiracy to raid OMG's assets.

593. However, contrary to the submission made by Mr Lord and as I have already indicated, it does not seem to me that this conclusion finally disposes of the counterclaim. The reason for this is that, anyway theoretically, any level of undervalue however small might constitute harm and, even if the undervalue were not to be gross, it is possible (anyway theoretically) that a conspiracy to raid might have been undertaken motivated

by the alleged conspirators' misplaced belief that the assets were worth very considerably more than in fact proved to be the case.

594. However, I am satisfied that there is nothing in the first of these points. The valuations given by Ms Shalaeva included both ranges and point estimates. While some of the point estimates exceeded the figures achieved at the enforcement auctions and sales, all of the figures so achieved fell within her valuation range. In my view, the bottom of the range is just as reasonable a valuation figure for these purposes as the point estimate. As Ms Shalaeva explained in her first report:

> "Given the limitations to the available data, I qualify my valuation reported on the basis of 'material valuation uncertainty' per VPGA 10 of the RICS Valuation – Global Standards. Consequently, less certainty – and a higher degree of caution – should be attached to my valuation than would normally be the case. For this reason, I have given a range of values and I refer to the most likely interval of the market value in the Valuation Result section of this report. For the avoidance of doubt, my reference to 'material valuation uncertainty' above does not mean that the valuations in this report cannot be relied upon."

595. It follows that, in my judgment, the counterclaimants have failed to establish on the balance of probabilities that they did in fact suffer any harm from the realisations made by the Bank. This alone is a reason for the counterclaim to be dismissed, but I shall also summarise my conclusions on the allegations that the counterclaimants were the victims of conspiracy which would have been actionable under article 1064 if they had been able to establish that it had caused them any harm.

Conclusions

596. I have reached the clear conclusions that despite the sometimes dishonest conduct of the Bank, the counterclaimants' case that they have suffered harm as a result of the claimants' conspiracy to 'raid' their valuable assets must fail. In reaching that conclusion I do not share all of the misgivings expressed by Hildyard J in [1635] of his judgment. In part, this is because I have had the fortification of expert evidence from Ms Shalaeva which was of a very much higher quality than that adduced at the original trial from Ms Simonova and Mr Millard, and which has enabled me to reach conclusions on valuation which were not available to Hildyard J. The businesses were built on sand and Ms Shalaeva's evidence demonstrated that the figures achieved on the sale of the Western Terminal and Onega Terminal assets as trade related property were within a range that reflected their true market value. This casts a much brighter confirmatory light on his conclusion that the evidence does not justify a finding that the counterclaimants' claim should succeed.

597. I have little doubt that the counterclaimants' case as to the conspiracy has been strengthened and encouraged by their wholly misplaced belief that Western Terminal and Onega Terminal were worth very much more than has now turned out to be the case. In my view Dr Arkhangelsky was as deluded about this as he was about the development plans which he sought to sell to financiers in 2008 and 2009. The two points go hand in hand, because it is to be expected that, if these properties did in fact have the value ascribed to them by the counterclaimants, it is surprising that he was

unable to obtain any real interest in refinancing OMG, let alone proposals that were capable of being taken forward.

598. It is also striking that the main target of the 'raid' is alleged to have been assets in a run down part of BPSP, the whole of which seems on the evidence to have been in decline with increasing competition from Ust' Luga and Bronka, and in circumstances in which OMG's valuable asset at Vyborg Port (described by Dr Arkhangelsky as his "only substantial asset") is not alleged to have been the subject of a 'raid'. In my view Hildyard J was right to record as reasonable ([1605] of his judgment) a submission by the claimants, with which I also agree, that:

> "It would be a very odd corporate raid where the 'raider' leaves the 'victim' with the only assets of any value that he has."

599. Of course one of the more striking aspects of this case is the close inter-relationships between the various participants in the enforcement process and the claimants. But it seems to me that, once the true nature of the finding made by Hildyard J in relation to Renord-Invest is appreciated, the position, while still convoluted and open to serious misunderstanding, becomes clearer. Being a Renord-Invest entity is an elusive concept, but as I have sought to explain the probabilities are that the various Renord-Invest entities were used and controlled by the Bank as part of the enforcement process. That does not however mean that, even though described as a Renord-Invest entity, Baltic Fuel which ended up as the ultimate purchaser of Western Terminal was also controlled or owned by the Bank. I am satisfied that the probabilities are that it was not.

600. In any event, I agree that the form of conspiracy which relied on a pre-engineered default and premeditated conduct by the claimants in their design of the repos was very difficult for the counterclaimants to get off the ground once it is appreciated that the calling of a default was a simple case of the Bank protecting its own commercial interests in circumstances in which it had no continuing obligation to support the business. Much of what occurred in the period thereafter was driven by the Bank's desire to defend itself against the conduct of an untrustworthy borrower who seemed prepared to take whatever steps were open to him to challenge the Bank's security. In my judgment, the Bank's desire to protect what it lawfully had was the driver behind its conduct, rather than any desire to acquire more from OMG than that to which it was lawfully entitled.

601. Some of the steps taken by the claimants to that end were taken in a manner that was unattractive (the refusal to talk to their borrower after the decision to call in the loans had been made), disturbing (the seizure of Western Terminal in June 2009 and the search in July 2009 and what appears to have been the abuse of state contacts) and even dishonest (the lies told in the course of the Morskoy Bank Loan proceedings). I have concluded that this conduct was driven sometimes by a misapprehension of their rights, sometimes by a belief that truthfulness in getting to the end result did not matter if the end result was itself justified and sometimes by a relentless aggression driven by a belief that the borrower was dishonest and so the end justified the means. But in my judgment none of this supports an intention to 'raid'. Whether or not the Bank wanted to make Dr Arkhangelsky suffer as a result of the way he had behaved, I do not consider that the disreputable manner in which the Bank behaved from time to time was directed at stealing his property for their own benefit.

602. In any event, it is probable that the position changed when, in July 2009, the Bank discovered that there were serious doubts as to the reliability of Lair's reports on the value of the pledged assets. From then on, it could no longer be said (as had been the case in March 2009) that the Bank's understanding of the value of the assets was that they very considerably exceeded the amount loaned. As the process of auctioning the assets only began later (in October 2009) a conspiracy to 'raid' continuing to operate at that stage is improbable, whether or not the counterclaimants had based their case on a gross undervalue being the principal matter from which such a conspiracy could be inferred. Any motive for a 'raid' is very much more difficult to discern once it is clear (or there is a material risk) that the true value of the pledged assets may be less than the debt outstanding. In such circumstances, the assets stand to be appropriated in discharge of the debt and there would be nothing capable of being retained for the benefit of OMG and Dr Arkhangelsky in any event.

603. It is of course possible that the Bank might have thought that it could still make a turn by raiding the assets even if under-secured, but it seems to me that such a suggestion is trespassing into the realms of speculative fiction, more particularly as, in June 2011, the Bank wrote off a significant part of OMG's indebtedness (see the description of what occurred when it applied the RUB 27 million to the amounts outstanding under the 2007 LPK Scan Loan and Second Onega Loan). This was before the Bank had finished its enforcement against the Onega Terminal pledged assets and is a most peculiar thing to have done if it intended to 'raid' any part of OMG's assets. As Hildyard J observed at [1338(4)] of his judgment, the fact that neither the Bank nor Mercury ever sought to enforce the loans against OMG or Dr Arkhangelsky "tells against malign motive". Furthermore, for the reasons explained by Hildyard J, I do not think that the mere fact that a time came at which the Bank resolved to facilitate the retention and exploitation of Western Terminal for the benefit of its close contact, Baltic Fuel, using the resources it (but not the counterclaimants) could command, gives rise to actionable impropriety as long as fair value was achieved. In my view, it is not only the fact that the value accepted and approved by the Russian court confirmed that fair value as assessed in accordance with Russian law was achieved, it is also the fact that the expert evidence adduced at the re-trial has established that that is the case.

604. I should also emphasise a final point about the auctions, the convoluted conduct of which were at the heart of the counterclaimants' case. In my view the critical points are (a) that the assets were sold in accordance with Russian law principles under which the results of the auctions were valid and (b) that they were sold in a public market by auction organisers whom the counterclaimants have failed to establish were complicit in any form of conspiracy.

605. These conclusions mean that the counterclaimants have failed to establish their claim. They have not shown that they have suffered harm and they have not shown that they are victims of the conspiracy they have alleged. The counterclaim must therefore be dismissed.