Neutral Citation Number: [2020] EWCA Civ 408

Appeal No: A3/2018/1718
Case No: HC-2012-000165

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESSAND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
The Honourable Mr Justice Hildyard

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 18/03/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PATTEN
and
LORD JUSTICE MALES

B E T W E E N:

(1) BANK ST PETERSBURG PJSC
(2) ALEXANDER SAVELYEV

Claimants/Respondents

-and-

(1) VITALY ARKHANGELSKY
(2) JULIA ARKHANGELSKAYA

Defendants/Appellants

OSLO MARINE GROUP PORTS LLC

Additional Party/Appellant

- -

Mr Tim Lord QC, **Mr Simon Birt QC**, and **Mr Richard Eschwege** (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Claimants/Respondents**

The Defendants/Appellants appeared by their McKenzie friend, **Mr Pavel Stroilov**

Hearing dates: 2nd to 5th March 2020

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JUDGMENT

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This appeal raises a short question of law as to the correct standard of proof where issues of dishonesty arise, and a wholesale challenge to the inferences that the judge drew from his primary findings of fact.

2. Bank St. Petersburg PJSC, the first claimant (the "Bank"), claimed some RUB 1.797 billion (about £16.5 million) against Dr Vitaly Arkhangelsky ("Dr Arkhangelsky") under 6 personal guarantees and one personal loan. Dr Arkhangelsky and his wife, Mrs Julia Arkhangelskaya ("Mrs Arkhangelskaya"), together with their company, Oslo Marine Group Ports LLC (together the "appellants") counterclaimed for damages in respect of an alleged conspiracy unlawfully to raid and seize the assets of two of the appellants' main businesses in Russia, Western Terminal LLC, which owned land at Western Terminal, and Scandinavia Insurance Company LLC ("Scan"), which owned land at the Onega Terminal. The counterclaim was made against the Bank and its chairman, Mr Alexander Savelyev ("Mr Savelyev"), the second claimant, (together the "respondents") for unlawfully causing the appellants harm under article 1064 of the Russian Civil Code ("article 1064") amounting to some US$467 million.

3. Mr Justice Hildyard tried the case over 46 sitting days between 28th January 2016 and 11th July 2016. He delivered his judgment almost 22 months later on 9th May 2018. The Bank succeeded on all its debt claims, and there is no appeal from that part of his order. The judge dismissed the appellants' counterclaims. He declined, however, to make the negative declarations that the respondents had sought as to the absence of any dishonesty or deceit, and the appellants' alleged bad faith in raising their counterclaims.

4. In refusing the negative declarations, the judge injected some uncertainty into his findings by saying at [1633] that he had rejected the counterclaims, not as a fiction dishonestly contrived, but on the basis that they had "not been established having regard to the strength of the evidence that was necessary to discharge the burden of proof". He referred at [1634] to his having harboured, throughout the case, before, during and after the hearing, a nagging and discomfiting feeling. That feeling was 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".

5. The judge went on at [1634] to say that the counterclaim had "always faced the difficulty that it relied on proof of the inherently improbable, and a burden of proof that could only be discharged by showing the facts to be incapable of innocent explanation such as to give rise to the inference of the conspiracy". The judge then listed at [1635] 10 specific features of the case that had "encouraged and fomented" his misgivings and which he thought "almost inevitably excited suspicion".

6. It is important in this introduction to list these features as follows:-

i) The material omissions from the repo arrangements (which the judge described at [7] as providing for the transfer of shares in the principal OMG companies to Special Purpose Vehicles), which put the appellants at enhanced risk in the event of default.

ii) The fact, and the respondents' continuing denial of the fact, that at least most of the Renord-Invest group companies (which acquired the appellants' assets when the Bank's security was enforced) were in reality almost certainly owned or controlled by the respondents.

iii) The signs that the respondents were able to and did call upon the police and regional authorities to assist them to take possession of Western Terminal in circumstances that smacked of intimidation and abuse of position.

iv) The resignation and lack of evidence from the principal actress and key witness, Mrs Irina Malysheva, the Bank's deputy chairperson ("Mrs Malysheva").

v) The "chorus of plainly false evidence" that Mrs Malysheva orchestrated in the context of the Morskoy Bank proceedings (which were criminal and collateral enforcement proceedings in Russia).

vi) The "extraordinary fact that not a single independent person participated in any of the auctions [at which the appellants' assets were sold], leaving the only participants as entities subject to common control [with the Bank], so that but for a limitation period the auctions would likely have been held invalid".

vii) The judge's perception that "in the war between the parties, all sense of commercial reasonableness was lost on both sides, and in the case of the [respondents], 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".

viii) "The fact that there have been numerous examples of state-orchestrated or assisted 'raids' in the Russian Federation, of which there are at least disconcerting echoes in this case".

ix) The curiosity that nothing had been revealed about the present trading and financial position of Western Terminal and Onega Terminal, and the possibility that the respondents may have procured for their associates assets of far greater value than they have accounted for.

x) The judge's recognition that not all the truth may have been revealed by the evidence, and that the negative declarations sought might be deployed to suggest broader findings and firmer conclusions than the evidence justified, or simply to vilify the appellants.

7. Against this background, the appellants raise two central grounds of appeal. First, they say that the judge misdirected himself as to the standard of proof, setting too high a bar for dishonesty to be established. Secondly, they say that the judge adopted a

piecemeal approach which prevented him from standing back to see how his misgivings built up to an irresistible inference of the fraud alleged. In oral argument, they relied also on certain alleged inconsistencies in the judgment. They pray in aid the judge's delay and the inequality of arms between the two sides to the litigation.

8. The respondents accept that some of the judge's formulations of the standard of proof may have been infelicitous, but submit that, overall, the primary findings of fact that he made were overwhelming and cannot and should not be disturbed by this court. They point to the appellants' dishonest defence of forgery and their persistent denial that they had signed up to the repo arrangements in the first place, as central planks of this argument. They go so far as to say that it would have been perverse for the judge to have found in the appellants' favour. In the alternative, the respondents say that, even if the court does accede to the appellants' submissions, the judge ought anyway to have dismissed the counterclaim on grounds of illegality. Dr Arkhangelsky admitted in evidence that he paid some US$160 million in bribes to obtain licences for the acquisition and development of his port businesses.

9. Before dealing with these matters, I will need to delineate the issues in the order I intend to deal with them, outline some of the basic facts that the judge found, summarise the judge's approach, deal with the appropriate standard of review that this court should adopt, and say something briefly about Russian Law. I should mention, however, that this judgment cannot possibly address all the facts and issues that the judge dealt with in his 390-page judgment. Both parties have paid tribute to the comprehensive, indeed meticulous, nature of that judgment, and only one substantive finding of primary fact is challenged. I will, therefore, allow the judge's judgment to speak for itself, and assume that the reader of this decision will refer to it for the full facts. I will try to use the same abbreviations as the judge did in his judgment.

The issues

10. I intend to approach the issues raised by the grounds of appeal and the respondents' notice in the following order:-

    i) **The standard of proof issue**: Did the judge apply the wrong standard of proof when refusing to draw inferences of dishonesty and conspiracy from the factual elements relied upon by the appellants?

    ii) **The assessment issue**: Was the judge wrong to adopt a piecemeal and inconsistent approach to his determination of the facts, without considering the evidence in the round?

    iii) **The Baltic Fuel Company issue**: Was the judge wrong to conclude that Baltic Fuel Company was not owned or controlled by the respondents?

    iv) **The delay issue**: Does the 22 months delay between the trial and judgment mean that the judgment is unsafe?

    v) **The article 1064 issue**: Did the judge misapply article 1064 by placing the burden of proving dishonesty on the appellants?

vi) **The illegality issue**: Ought the judge to have held that the counterclaim was barred by illegality?

vii) **The disposal issue**: If the appellants succeed on one or more of their grounds of appeal and the respondents fail on the illegality issue, what orders should this court make?

Some of the basic facts

11. The way that the judge dealt with the facts in this case is fundamental to the appeal. As I have already said, the respondents submit that his findings were all one way, and that no other conclusion on the alleged conspiracy was open to him. Conversely, the appellants do not appeal the judge's findings of primary fact, but say that, at least, they are all consistent, and I think they say, only consistent with the alleged conspiracy and the alleged dishonesty of the Bank in the realisation of the appellants' assets.

12. I should deal at once with one factual issue that took some time in argument. It concerns the nature of the conspiracy that the appellants were alleging. The judge dealt with this at [866]-[876], but the respondents summarised it more pithily. They said that the conspiracy was pleaded in three alternative ways as follows:-

i) The primary case was that there was a conspiracy in or around December 2008 involving at least eight separate agreements over seven months involving numerous individuals (including allegedly corrupt officials in Russian law enforcement).

ii) A secondary alternative case, pleaded shortly before the trial, was that there was a conspiracy in or about February/March 2009 involving at least seven separate agreements over four months involving numerous individuals (including allegedly corrupt officials in Russian law enforcement).

iii) A third alternative case, pleaded by amendment during the trial, was that there was a conspiracy at some time after March 2009 based on a dishonest agreement between the Bank and Renord-Invest, which resulted in collusive sales at undervalues which were inconsistent with honesty.

13. It was common ground by the end of the argument that the third alleged conspiracy would be most likely to stand with the judge's findings of fact to the effect that there was no forgery of the guarantees and personal loan and no 6-month moratorium agreed in December 2008, so that there could be no claim for so-called "business losses" ([1553]-[1558]). The business losses of US$467 million were claimed on the basis that, absent the repo agreement and had the moratorium been adhered to, the appellants' businesses would have been refinanced and made profits going forward. That claim was, the appellants accept, unsustainable once the findings on forgery and the moratorium were not challenged.

14. The respondents' interpretation of this situation was that no conspiracy could have started until at least March 2009, probably 10th March 2009, when the process of removing the Directors-General in Western Terminal and Scan was begun ([513]). The appellants adopt a more nuanced approach, submitting that the three versions of

the conspiracy are a distinction without a difference, because the only question is the date on which it can be said to have started. If there was a later conspiracy to remove the pledged assets into the hands of the Bank and its "loyal friends", as the judge described them (see, for example [1203]), by dishonest means, it does not matter precisely when the dishonesty actually began.

15. All that said, the appellants' approach means that the only claim that survives, even if this appeal succeeds, is a claim for the loss of the value of the appellants' pledged assets. I will return to this aspect of the case in the context of the meaning of "harm" under article 1064. But for present purposes, it suffices to understand that the remaining allegation of conspiracy is one that started in or after March 2009, related to the allegedly dishonest way in which the Bank pursued its enforcement strategy, including numerous legal proceedings and the auction sales of the appellants' assets, and allegedly resulted in the loss of the surplus value of the assets, over and above the debts owed to the Bank.

16. With that in mind, it is useful now to set out the respondents' summary of the basic facts found by the judge, which they submit make his ultimate decision to dismiss the counterclaim inevitable. Their approach was to take the judge's summary at [901] of the primary facts relied on by the appellants as demonstrating conspiracy and collusion, and to compare that with the facts that he found. I reproduce that exercise in an amended form, interposing some of the passages relied on by the appellants, in the following 16 sub-paragraphs:-

    i) The first primary fact relied on was the alleged forgery that the judge had already rejected as explained at [903]-[908].

    ii) The second primary fact relied on was the events of December 2008 in respect of which the judge had found that the parties had agreed to the repo documents, there was no agreed general moratorium and none was promised (see [811], [817], [820-824], [831], [834], [917], [947]- [950], and [959]-[960]). Moreover, the appellants had a right to repurchase the shares in their companies if the relevant conditions were satisfied. There were findings also as to Dr Arkhangelsky's desperation and default being inevitable. Dr Arkhangelsky had lied about the conclusion of the repo arrangements ([809]-[810]).

    iii) The third primary fact relied on was the unusual features of the repo arrangements, including the fact that the "Original Purchasers" (who were parties connected to the Bank) were introduced as counterparties to purchase the appellants' assets, which were said of themselves, and in context, to suggest dishonest collusion and "raiding". The respondents point out that the repo arrangements were found to be consensual, Dr Arkhangelsky was not tricked into them, and they were not devised for the purpose of a raid ([834], [917], and [959]-[960]).

    iv) The fourth primary fact relied on was the introduction of Mrs Malysheva to control and direct implementation of the Bank's strategy in all matters concerning OMG, subject to the direction of Mr Savelyev and the Management Board. The judge found that Mrs Malysheva's involvement was to be expected given her experience of handling events of default ([969]).

v) The fifth primary finding of fact relied on was the refusal in March 2009 of extensions to the PetroLes and Vyborg Shipping loans and the allegation that the Bank and/or Mr Savelyev wilfully contrived to ensure an event of default before the appellants could arrange repayment. The judge held that the Bank was entitled to refuse loan extensions in March 2009 and did not engineer default ([831]-[833]), the Bank's decision not to extend the loans was "readily understandable" ([993]-[994]). It was under no duty to assist the borrower, rather it was entitled to act exclusively in its own interests subject to realising the security in a manner consistent with the law ([1016]-[1017]).

vi) The sixth primary fact relied upon was the rationale and true objectives of the transfers of shares in Scan from the Original Purchasers to the Subsequent Purchasers (those parties were connected to the Bank) in late March/early April 2009. Here, the judge held that the interpolation of the Original Purchasers under the repo arrangement was not intended to pave the way for a raid ([944]-[945]). Whilst the respondents say that the judge found that the transfer of Scan shares from the Original Purchasers to the Subsequent Purchasers did not indicate any fraud, in fact he said that the Bank's explanation was "neither very clear nor entirely compelling" ([1024]), and that it did not "necessarily [indicate] any appreciation or even private suspicion of fraud on the part of the Bank", but did show the influence of Mrs Malysheva and Mr Sklyarevsky and their determination to bring all the Bank's planning under their control. The transfers directed by them also confirmed the direct control of the Bank over the Renord companies concerned ([1025]).

vii) The seventh primary fact relied upon was that the Bank procured the removal of Dr Arkhangelsky and Mr Vinarsky as Directors-General of Scan and Western Terminal on a trumped-up basis. The judge found at [1035] that Mr Savelyev and his managers avoided a meeting, and the Bank had no wish to negotiate with Dr Arkhangelsky. He concluded at [1038] that he did not think that the inference that there was a raid, as distinct from a determination to wrest control from Dr Arkhangelsky as a means of securing the assets, could fairly be drawn from the facts "especially given the nature of the inference sought to be drawn".

viii) The eighth primary fact relied on was the wars in the Russian courts, the curious stances in them of the protagonists and their ultimate resolution in favour of the respondents. The judge found at [1044] that by the end of March 2009, the Bank was intent on removing from the appellants "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". He went on, however, to say that "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". It was, the judge thought, "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". The respondents rely on the 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]), the appellants' success before some Russian courts told against their case that the final decisions showed political interference ([555(4)]), and the appellants' initial success before the Russian courts meant that the Bank needed to find ways to protect its security ([1045]).

ix) The ninth primary fact relied upon was Mrs Malysheva's aborted efforts to put transactions in place in relation to the assets of Western Terminal and Scan, such as the Gunard Lease (a lease entered into on "very extraordinary" "uncommercial" terms, which invited a dark interpretation ([580], [1061] and [1318])), which could have no legitimate justification. The respondents rely on the finding at [1321]-[1326] that the Gunard Lease in fact had "no impact on the auction sale process". It may be noted, however, that judge did say at [1326] that he could not "exclude the possibility that it was put in place and held in abeyance in case it was needed to depress demand and reduce the market value of the assets", but the evidence was not sufficient to warrant such a finding.

x) The tenth primary fact relied upon was the unlawful seizure of control of Scan and Western Terminal, and the use of political and police connections in order to deploy a police-assisted force to take physical possession of Western Terminal. The respondents contend that the fact that there were police raids could not show a State conspiracy when the Russian courts ultimately upheld Dr Arkhangelsky's complaint about them ([1073]).

xi) The eleventh primary fact relied on was the allegation that the Bank waged a relentless campaign against Dr Arkhangelsky causing him to flee to France with his family in June 2009 and thereafter to seek asylum and abandon any prospect of safe return. The judge held at [1089] that Dr Arkhangelsky was not forced to flee Russia, but it did become senseless and dangerous to return. He did not make the finding that the appellants sought, namely that he was forced to leave as part of a State-organised conspiracy ([1075]-[1088]).

xii) The twelfth primary fact relied upon was that criminal charges brought 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 extradition proceedings. The respondents contend that the false evidence given by the Bank's witnesses in the Morskoy Bank loan investigation has to be seen in the context of what the appellants were telling the Russian courts. They submit that the judge found that their false evidence did not support the inference that the repo arrangements were fraudulent. As the judge found: "the purpose of the concocted chorus was to support and substantiate the criminal proceedings, as part of the continuing war against Dr Arkhangelsky" ([1110]-[1115]).

xiii) The thirteenth primary fact relied upon was that the events in the round displayed tell-tale signs of a classic raid. The judge found at [1131] that a "debateable" report produced by the appellants (as to which see [1127]-[1129]) offered "some confirmation of the prevalence of 'raiding' in the

Russian Federation", and found "its adumbration of the usual characteristics of the practice" useful, but thought that each case had to be assessed on its own facts. In particular, he thought that it was the element of premeditation, and the ability unilaterally to bring about the premeditated result, which was the overall characteristic. The respondents submit that the signs of a classic raid were irrelevant given the actual facts of this case ([1131]-[1134]). The judge said at [1132] that he suspected that the most telling indication of a raid was "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".

xiv) The fourteenth primary fact relied on related to the true nature and purpose of the long series of transactions relating to the assets of OMG. The appellants alleged that the sellers and purchasers at each of the auction sales of the pledged assets, and the ultimate purchasers, were connected parties owned or controlled by the Bank and/or Mr Savelyev. The respondents point to [1422], [1512], and [1525] as showing that the series of transactions involving the assets and auction sales amounted to nothing because the auction sales were not improper or rigged. [1289]-[1290] show that the substantive validity of an auction is, under the applicable Russian law, the responsibility of the auction organisers, [1299] shows that the price is fixed by the court or a licensed appraiser, and [1345] shows that advertisement is a matter for the auction organisers. The judge's conclusions at [1346]-[1349] were, however, that "separate sales of assets flawed by fragmentation after inadequate marketing and advertisement" were obviously likely to have had some effect. The fact was, as he said, that, in the event, no third parties emerged sufficiently interested even to attend at the various auctions. On that basis, the judge thought it "more likely than not, that by this time the [respondents] 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". The lack of third party interest "undoubtedly suited the [respondents] and may well have been vital for the accomplishment of what had become their preferred outcome". As the respondents submitted, however, the judge also found that it was not incumbent on them to do anything more than Russian law and practice required, and they were entitled to pursue their own interests as they perceived them. At [1349], the judge found that a marketing exercise which appeared to the auction organisers to be compliant with their obligations was undertaken, unless there was sufficient evidence to establish that the organisers themselves were complicit. In that regard, the judge concluded at [1367] that the auction organisers might have been comforted in "the minimalist approach they seem to have adopted" by a perception that the respondents and/or Renord-Invest were not pressing, and had no wish, for anything more to be done. He did not, however, think there was "any evidence that the auction organisers were themselves prevented or deterred by the [respondents] or Renord-Invest from further effort as regards presentation and marketing". There was no 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". At [1385]-[1386], the judge held that bid rigging did not suffice, because the appellants still needed to show that the result of the auctions would have been different, which they could not do.

xv) The fifteenth primary fact relied on was that, 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. The respondents point to [1335(10)], where the judge said that he tended to think that the respondents and/or their associates or loyal friends had resolved to retain within their circle and exploit Western Terminal for their own advantage, using the resources they could command, but he "did 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" (and see [1335], [1338], and [1375-1377] as to the values achieved). At [1413], the judge concluded that the available evidence did not substantiate the argument that ROK No. 1 Prichaly was a party to a dishonest conspiracy and acquired the Onega Terminal land at a gross and fraudulent undervalue: "[s]peculation may be understandable, suspicion inevitable: but it is not proof". [1415-7] show also that Dr Arkhangelsky was found to have benefitted from the sale of the Onega Terminal, because it reduced his exposure.

xvi) The final primary fact relied on was described by the judge as the disputed valuation evidence and any conclusions or inferences to be drawn from it. The respondents said that, even though the judge rejected both sides' evidence, nothing he said could support the inferences that the appellants sought to draw from it.

17. I do not pretend that the above summary captures every finding of fact upon which the respondents rely, but it gives a picture that is sufficient for present purposes.

The judge's approach

18. The judgment demonstrates a methodical approach. The issues are carefully identified and then dealt with sequentially. Relevant evidence is identified at each stage and conclusions are drawn in relation to each issue as it is dealt with. There are frequent references in the judgment to earlier and later sections and findings already made or to be made.

19. There are a few, perhaps disparate, features of the judgment that are worth mentioning at this stage, since they are relevant to issues that the court has to determine.

20. In a section entitled "[l]ogistics of the trial and the disparity in legal representation" at [32]-[41], the judge explains the tortuous process that he followed that enabled him to satisfy himself that he had reached a decision after full and fair consideration of the evidence and of the competing submissions and legal arguments. He was satisfied that his conclusions were not "skewed in consequence of the different resources of the parties". In that section, he sought to explain, but nonetheless expressed regret for, the delay in delivery of the judgment.

21. The judge dealt at length with Dr Arkhangelsky, whom he regarded as confident in his own abilities ([79]) and "having a propensity to see things as he wished them to be in his ego-centric view of the world" ([82]). Later he described him as "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" ([822)]. The judge explained how Dr Arkhangelsky had admitted in evidence the bribes he had paid to acquire the Western Terminal, and dealt with numerous inaccuracies and lies in his evidence. I need not catalogue them.

22. The next feature of note is the section at [225]-[236] in which the judge explained his conclusion that OMG's business was, as he put it, "built on sand", in that it could not survive on its operational turnover, but could only survive by borrowing to buy further assets to support further borrowing. At [237], the judge said that by the end of 2008, and probably throughout, "the reality was that 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". Dr Arkhangelsky was well aware that OMG was in deep trouble ([239]).

23. The judge then dealt in great detail with the evidence concerning the alleged moratorium, debt rescheduling, and the manner in which the repo arrangements were entered into. It can be noted that at that stage the Bank was relying on a series of valuations of the pledged assets prepared by Lair LLC, which showed that "the value of the pledged assets comfortably exceeded its loans" ([313]). The reality, he said, was that, by the end of 2008, there was no prospect of OMG raising replacement funds ([389]-[392]).

24. The judge then dealt with the events that founded the claim and counterclaim in chronological order, before deciding the two main issues that he identified in relation to the claim (forgery and the moratorium) against the appellants. He turned to the counterclaim at [855], and, as I have said, set out the 16 features of the conspiracy on which the appellants relied at [901]. A series of lengthy sections followed dealing with each of those features, and referring back, where necessary, to findings already made.

25. It is perhaps worth recording the judge's conclusions at [1524]-[1525] on the all-important auction sales of the appellants' pledged assets. I do so because both sides seek to rely heavily on parts of these two paragraphs, and it is worth reciting the whole as follows:-

> "1524. I return to the overall question, which needs to be revived after being drowned in the above detail: in effect, whether (as the Counterclaimants assert) the auction sales were dishonestly orchestrated to yield hugely discounted values with a view to the Claimants and their loyal associates scooping the real value at the later stage of subsequent sales.
>
> 1525. From this long analysis of the auction sales I have concluded as follows:
>
> (1) The extraordinary fact that no independent third parties attended any of the public auctions (save, it appears, those concerning the personal chattels) remains arresting.

(2) However, whilst that might initially suggest some failure of advertisement, improper exclusion, or insidious means of control, neither the manner in which the auctions were apparently advertised or organised, nor any of the evidence relating to their conduct, is such as to elevate that suggestion into proof or establish an inference of dishonesty.

(3) The values achieved for the assets as sold were low; but they are not so inconsistent with credible expert evidence as to demonstrate dishonesty.

(4) The imposition of encumbrances on assets prior to sale which could be released after sale, such as the Gunard Lease, invite a dark interpretation. But in the end I have concluded that the primary purpose was protection of the assets concerned rather than their extraction at a reduced price for the benefit of the Bank and its associates (see paragraphs [1316] to [1326] above).

(5) The Counterclaimants' case that the Claimants adopted a repeated tactic of presenting and packaging the assets to be sold at auction, and of sequencing the sales, so as to minimise rather than maximise their interest and value to all but an ultimate buyer who could bring together separate assets and realise their true value, has caused me considerable concern. The way that the assets at Western Terminal and at Onega Terminal were packaged for sale and the sequence in which they were sold does not seem likely to encourage third party interest nor to maximise the amounts applicable in reduction of indebtedness. The Counterclaimants' fundamental allegation that this was a stratagem designed to reduce the amounts realised for payment down of indebtedness whilst maximising the benefit for the Claimants and their associates has throughout the case struck me as plausible. However, in the end I have concluded that the Bank being entitled to sell assets separately pledged separately, the justifications advanced by the Claimants for the packaging and process of sale are not so implausible that they must be rejected, bearing in mind the heavy onus of proof in the context of an assertion of dishonesty.

(6) The Counterclaimants' case that the fact that no third parties attended any of the auction sales was because there was inadequate advertisement and marketing has not been established. In any event, there is no longer any real dispute that the basic minimum standards were met, demonstrating compliance with the Russian law, even if not much more was done than that. The same applies to the marketing efforts made: no more than the basic minimum was done (and see paragraph [1344] above). But in each case, absent proof that that which should have been done was intentionally left undone there is no basis for the inferences invited.

> (7) The Counterclaimants' case that the auction organisers were knowingly complicit in a conspiracy orchestrated by the Claimants, involving at the behest of the Claimants (a) inadequate advertisement and marketing, (b) improper exclusion of potential participants, (c) artificially reduced and improper starting prices, and (d) bid-rigging has not been made out.
>
> (8) In such circumstances, and in the absence of proof of dishonest collusion, any claim in respect of the auction processes is barred under Russian law.
>
> (9) I have also and in the round not been persuaded by the Counterclaimants' over-arching submission that the values achieved for the assets sold at auction were so low that only dishonesty can explain them".

26. The judge then dealt with illegality, rejecting the defence at [1527]-[1547], before turning to the respondents' important submission for our purposes that there was no loss. That was on the basis of their own valuation evidence, the crash in real estate prices in Russia at the end of 2008, and the fact that bank lending for commercial property development had dried up. The judge felt unable at [1551] to rely on the experts, who he felt "had descended into advocacy". His conclusion at [1552] was that he declined to determine substitute asset values. He said that if he was overturned on the auction processes being "actionably improper", "then the issue of loss will have to be re-addressed in light of the factors supporting that reversal, and their effect in terms of assessing value".

27. Thereafter, the judge dealt with the business loss claim I have already mentioned and the argument that he had heard about reflective loss (which issue was not raised before us). He then dealt with the respondents' allegations that the appellants were hiding significant assets. He did not find that they had a hidden pot of gold, and decided that he did not have the means of determining the issue, and that he did not need to do so ([1618]).

28. Lastly, the judge dealt with the respondents' claim for negative declarations, refusing them. The nature of the declarations that were sought is relevant, because they went further than was at one stage submitted by counsel for the respondents. The declarations sought were in summary that: (i) the respondents were not party to the conspiracies or schemes alleged in these and other proceedings, (ii) the respondents had not committed the torts of deceit, intimidation and/or conspiracy as alleged, (iii) the respondents had not committed the equivalent of those torts under articles 15 and 1064 of the Russian Civil Code as alleged, (iv) the respondents had not acted in breach of other articles of the Russian Civil Code as alleged, and (v) such allegations were made by the appellants dishonestly, knowing them to be false and/or recklessly, not caring if they were.

29. The judge said at [1621] that "the claim for declaratory relief [had] been accorded some importance by the [respondents]". Before the judge mentioned the features of the case that troubled him at [1635], and that I have already adumbrated, he said at [1632-33] that the respondents had "throughout disparaged … the Counterclaim as

"one of the most remarkable fictions to come before the English Court"", but that he has found "the matter to be much more finely balanced". That, he said, was so "even though [he had] found Dr Arkhangelsky to have been, in several instances, dishonest". The judge described it as "one of the features of this unusual case" that "whilst the main claims are founded and have eventually been established on the basis of Dr Arkhangelsky's dishonesty, that finding has not of itself much assisted or been relevant in the determination of the Counterclaim, which has been barely concerned with his conduct and has focused almost entirely on the alleged dishonesty of the [respondents] and their associates". His rejection of the very serious allegations that the appellants put forward did not mean that he had rejected the claims as being "a fiction dishonestly contrived: only that the claims [had] not been established having regard to the strength of the evidence that was necessary to discharge the burden of proof".

The appropriate standard of review for this court to adopt

30. The respondents emphasised the need for exceptional circumstances to justify an appellate court interfering with a judge's factual determinations. They pointed to 5 cases. In *McGraddie v. McGraddie* [2013] UKSC 58, Lord Reed said at [2] that it had been long settled that an appellate court should intervene only if it is satisfied that the judge was plainly wrong. Lord Reed cited Lord Greene MR in *Yuill v. Yuill* [1945] P 15 at page 19 as holding that it could "only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion". As the Canadian Supreme Court said in *Housen v. Nikolaisen* [2002] 2 SCR 235 at [14] "[t]he trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged".

31. In *Henderson v. Foxworth Investments Ltd* [2014] UKSC 41, Lord Reed said at [62] that "the adverb "plainly" [in plainly wrong] does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached".

32. In *Fage UK Ltd v. Chobani UK* [2014] EWCA Civ 5, Lewison LJ said the following about overruling inferences to be drawn from primary facts, which is of particular relevance in this case:-

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include

> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done".

See also *JSC BTA Bank v. Ablyazov* [2018] EWCA Civ 1176 at [30]-[46] per Leggatt LJ, and *Perry v. Raleys Solicitors* [2019] UKSC 5 at [52] per Lord Briggs.

33. For my part, I entirely accept and endorse all these passages. They apply with particular force to a determination made by a judge after a long trial as in the present case. The danger of island hopping is acute. That said, if an appellate court is satisfied that a decision is affected by legal error, it may have no choice but to intervene unless it can be satisfied that the decision is otherwise demonstrated to be safe and reliable.

Russian law generally

34. I do not propose to spend much time dealing with Russian law because much of it was common ground at trial, and though the appellants tried to row back from that common position, they did not make much headway.

35. The simple position is that the appellants' counterclaim was brought under article 1064, which provides in English translation as follows:-

> "Article 1064. General Bases of Liability for the Causing of Harm
>
> 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.
>
> 3. Harm caused by lawful actions shall be subject to compensation in the cases provided by statute".

36. It was also common ground that the judge's citation at [787] from *Fiona Trust v. Privalov* [2010] EWHC 3199 ("*Fiona Trust*") at [94]-[95] accurately stated the elements of a claim under article 1064 as follows:-

> "[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".

37. I did not understand two further statements of Russian law made by the judge to be disputed. At [860], he said that "once harm is established, it is presumed to have been caused unlawfully unless specifically justified in law by the person who caused the harm", and at [861] "it would not be a lawful justification for the [respondents] to say that they or any third parties acted in accordance with contractual arrangements that they had entered into with OMG companies or others, in circumstances where they had acted dishonestly". Only the good faith enforcement of rights is sufficient to negate fault for the purposes of article 1064. Furthermore, it was recorded at [862] that it was common ground between the Russian law experts that if the appellants succeed in proving their factual case as to the dishonest conspiracy to steal their assets, liability under article 1064 was established.

38. In these circumstances, it seems to me to be obvious that the case before the judge had been correctly conducted on the basis that it fell to the appellants to prove their dishonest conspiracy allegations, because that was necessary to establish "harm' for the purpose of article 1064. Put shortly, the Bank was at liberty to cause harm by enforcing its contractual rights honestly, but not by doing so dishonestly. I will return to the contention that the burden of proving honesty shifted to the respondents briefly under the article 1064 issue below.

The standard of proof issue: Did the judge apply the wrong standard of proof when refusing to draw inferences of dishonesty and conspiracy from the factual elements relied upon by the appellants?

39. The appellants submit that the judge "misdirected himself as to the applicable standard of proof, and has effectively applied an erroneous 'heightened' civil standard of proof". There was, submitted the appellants, no proper reason to prefer, again and again, a benign explanation of the respondents' overall motives, when there were wide-ranging findings of dishonesty against them. It was submitted that the seriousness of the allegations seems to have deterred the judge from a robust and dispassionate consideration of the balance of probabilities. It was, said the appellants, a classic misapplication of *Re H* (see below) and *SSHD v. Rehman* [2001] UKHL 47.

40. In the course of argument, Mr Pavel Stroilov, for the appellants, sought to summarise the paragraphs in the judgment that included what he described as the alleged misdirections as follows. I have emphasised in bold the particular passages criticised:-

    i) [1634], where the judge said at the end of the judgment that "[t]he Counterclaim always faced the difficulty that it relied on proof of the inherently improbable, and **a burden of proof that could only be discharged by showing the facts to be incapable of innocent explanation** such as to give rise to the inference of the conspiracy or conspiracies pleaded" (see also [958]-[960], [1010]-[1017], [1346]-[1349], and [1367]).

    ii) [942]: In relation to the repo arrangements, the judge said: "What is necessary for me to decide is **whether the justification offered is a plausible one**".

    iii) [958]-[960]: In relation to the repo arrangements: "**The more benign interpretation can only be dislodged by evidence of sufficient strength to oust it in favour of a more malign one**", and "In other words, there is in my judgment, nothing sufficient to contradict the more benign view of the facts that (as it was put in the Claimants' written closing submissions)".

    iv) [1044(4)-(6)]: In relation to the curiosities of the repo arrangements, the judge said: "(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", and "(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".

v) [1111-2]: In relation to the false evidence given in the criminal proceedings in respect of Morskoy Bank loan, the judge said: "I must remind myself (not for the first or last time in this case) that **the more serious the allegation the more assiduous must be the exploration of alternative explanations, and the more cogent must be the evidence of a malign rather than a more benign rationale**", and "[t]hough I continue to harbour doubts as to these more benign origins, for what on any view is an extraordinary fabrication, **I cannot exclude them**".

vi) [1124]: In relation to State assistance in dishonest collaboration, the judge said that "The [appellants] submitted that the pattern was too clear **to admit of a benign interpretation** and plainly smacked of coordination in accordance with a preconceived plan".

vii) [1133]: In relation to the planning of a raid in December 2008/January 2009, the judge said: "**Given the gravity of what is alleged, and its consequences, and the need for cogent proof**, I do not consider that there is sufficient evidence to show that the Bank was intending to engineer a default, or to demand repayment not otherwise due".

viii) [1138]: In relation to the evidence of the implication of Mrs Matvienko and Gen. Piotrovsky and other "corrupt officials" in a raid, the judge said: "Again, I take into account that **the more serious the allegation and the more improbable the event sought to be established**: "the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established" … per Lord Nicholls in *Re H (Minors)* [1996] AC 563".

ix) [1140]: The judge said: "This requires an assessment as to whether the long train of events following default, adumbrated in sub-paragraphs [(8)] to [(15)] of paragraph [901] above, reveals a pattern of conduct as well as an ultimate result **consistent only** with a pre-conceived and co- ordinated 'raid'".

x) [1241]: In relation to the ownership of Baltic Fuel Company, the judge said: "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".

xi) [1265]: In relation to the auction sales, the judge said: "To determine whether the auctions were abnormally conducted with features and results **having no plausible innocent explanation such as to support an inference of conspiracy**, I turn to address the following sub-issues".

xii) [1346]-[1349]: In relation to the dampening of third party interest in the auction sales, the judge said: "On that basis, the lack of third party interest

undoubtedly suited the [respondents] and may well have been vital for the accomplishment of what had become their preferred outcome", and "[t]hat said, however, it was not incumbent on the [respondents] to do anything more than what was required by the relevant Russian law and practice".

xiii) [1366-7]: In relation to the complicity of the auction organisers, the judge said: "But once again, unanswered questions and surprising indifference is not proof of impropriety **if there are any benign explanations which are not implausible**".

xiv) [1525(5)]: In his conclusions on auction sales, the judge said: "However, in the end I have concluded that the Bank being entitled to sell assets separately pledged separately, the justifications advanced by the [respondents] for the packaging and process of sale **are not so implausible that they must be rejected, bearing in mind the heavy onus of proof in the context of an assertion of dishonesty**".

41. The respondents did not accept that any of these formulations was either wrong in law or inappropriate. Indeed, Mr Tim Lord QC, leading counsel for the respondents, highlighted a number of passages in the authorities. For example, in *Three Rivers District Council v. Bank of England* [2001] UKHL 16; [2003] 2 AC 1 ("*Three Rivers*"), Lord Hope said at [55] that "[a]s the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest". The context was, however, that of pleadings that did not expressly mention fraud, not a case like this. The following passage from the same case from Lord Millett's speech makes this clear:-

> "186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved".[1]

[1] It may be noted that Lord Millett said something similar in the same context in *Paragon Finance v. Thakerar* [1999] 1 All ER 400 at 402.

42. Thus, when Lord Millett said that it was not open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty, he was not laying down a general rule that can affect a case like this where there were multiple allegations founding an inference of dishonesty, many of which are themselves allegations of dishonesty that have been found proven.

43. The judge received some submissions on standard of proof, and he mentioned in his judgment the well-known cases of *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 ("*Re H*") and *Re B (Children)* [2009] AC 11 ("*Re B*").

44. It does not seem to me that the law is now much in doubt. It is encapsulated in the following passages from Lady Hale's judgment in *Re B*, which, though stated to be applicable to care proceedings are, I think, of more general application in civil proceedings:-

> "64. Lord Nicholls's nuanced explanation [in *Re H*] left room for the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", to take hold and be repeated time and time again in fact-finding hearings in care proceedings" …
>
> 70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. 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. …
>
> "72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

45. 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."

46. Mr Lord also relied on [51]-[58] in Bryan J's judgment as to the inherent improbability of fraudulent conduct. He cited Andrew Smith J in *Fiona Trust* at [1438], where he said that:-

> "[i]t is well established that "cogent evidence is required to justify a finding of fraud or other discreditable conduct": per Moore-Bick LJ in *Jafari-Fini v Skillglass Ltd.*, [2007] EWCA Civ 261 at para.73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: "where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger", per Rix LJ in *Markel v Higgins*, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungoed- Thomas J put it in *In re Dellow's Will Trusts*, [1964] 1 WLR 415,455 (cited by Lord Nicholls in *In re H*, [1996] AC 563 at p.586H), "The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it". Associated with the seriousness of the allegation is the seriousness of the consequences, or potential consequences, of the proof of the allegation because of the improbability that a person will risk such consequences: see *R(N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA 1605 para 62, cited in *Re Doherty*, [2008] UKHL 33 para 27 per Lord Carswell".

47. As it seems to me, in commercial cases, there will be a wide spectrum of probabilities as to the occurrence of reprehensible conduct. It is not appropriate for this court to lay down any more specific guidelines than in the well-known cases that I have referred to. This was a very unusual case, if only because the judge held that both parties had behaved dishonestly and lied to the court. In such circumstances, 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.

48. I come now, against that background, to the important question of whether the very experienced High Court Judge who tried this case allowed himself to stray from applying the correct standard of proof. I have concluded, I am afraid, without hesitation that he did. There are indications throughout his findings of fact on the counterclaim that he was, as the appellants submit, applying too exacting a standard. It is not just what he said at [1634] to the effect that appellants faced the difficulty that they relied on proof of the inherently improbable, when he had just held that the respondents had behaved in a wholly dishonest manner and committed multiple incidents of perjury before him. The judge's statement that the appellants' "burden of

proof that could only be discharged by showing the facts to be incapable of innocent explanation" was, in the context of this case and what had gone before in his judgment, simply wrong.

49. There are, moreover, multiple references throughout the critical fact-finding on the counterclaim, which indicate that he was applying too high a standard. A few examples from the above summary of so-called mis-directions will suffice.

50. At [942], the judge was wrong to describe his task, in relation to the repo arrangements, as being to "decide … whether the justification offered is a plausible one". That was part of his task, but not the whole of it. He had then to determine, standing back from this allegation (and later looking at all the allegations together) whether fairly regarded, it was in all the circumstances of the case, and on the evidence before the court, more likely or not that the explanation for the so-called curiosities of the repo arrangements was the respondents' explanation or the conspiracy alleged.

51. At [1111], the judge was dealing with what he had found to be the respondents' concerted perjury in the criminal proceedings in respect of the Morskoy Bank loan. Their conduct was plainly dishonest. Yet, having correctly reminded himself of the need for cogent evidence of what he described as a "malign rationale", he goes too far in saying that, although he continued to harbour doubts as to the respondents' suggested innocent explanations of its own perjury and its "extraordinary fabrication", he could not exclude them. It is likely from what he said that he regarded the innocent explanation as a remote possibility, but declined to accept the "neatly and powerfully made" inference of fraud suggested by the appellants, because there was some other possible, but remote, explanation. He seems, in my judgment, to have lost sight, in relation to these important events, of the true standard of proof, namely what explanation was more probable than not, having taken account of the nature and gravity of the allegation.

52. Again, at the important [1138], the judge relied on *Re H* in somewhat inappropriate circumstances. He had just said how unsettled he was about the evidence of a "concocted chorus and of state assistance", before rejecting the inference that it evidenced a conspiracy to raid involving Mrs Matvienko, Gen. Piotrovsky, and other "corrupt officials". When he said that he had to take into account that "the more serious the allegation and the more improbable the event sought to be established, "the stronger must be the evidence that it did occur"", he seems rather to have allocated insufficient weight to the unlikely events that he was considering that he had held had occurred.

53. [1140] is another important paragraph, because it seeks an explanation for the "long train of events following default, adumbrated in" [901(8)-(15)]. The judge fell again into error, when he required the "pattern of conduct as well as [the] ultimate result" to be "consistent only" with a pre-conceived and co- ordinated raid". He ought to have been asking himself, once again, whether the events he had found showed that the pre-conceived and co-ordinated raid was more likely than not, having regard to the nature and gravity of the allegation.

54. In an equally important passage at [1265] in relation to the auction sales, the judge once again sets the appellants too high a standard of proof. He said that he had to

decide "whether the auctions were abnormally conducted with features and results having no plausible innocent explanation such as to support an inference of conspiracy". The question was not simply whether there was no plausible innocent explanation for the reasons I have already given. A similarly inappropriate formulation is repeated at [1366] in relation to the complicity of the auction organisers, when he says that what he finds will not be "proof of impropriety if there are any benign explanations which are not implausible". A further similar formulation is adopted at [1525(5)] in the judge's conclusions on auction sales, where he says that the respondents' justifications for the conduct he has found "are not so implausible that they must be rejected, bearing in mind the heavy onus of proof in the context of an assertion of dishonesty". In the context of his having determined that the respondents had behaved dishonestly, this approach distorted the appropriate standard of proof that I have already repeated several times.

55. These errors were, in my judgment, compounded by the misgivings enumerated by the judge in [1635]. Each of those features either cast doubt on findings of fact that he had made in the respondents' favour, or were, as I shall explain in the next section of this judgment, inconsistent with such findings. [1630]-[1635] seem to me to imply that the judge may well not have considered the conspiracy alleged by the appellants to be in the least improbable, but that he had felt himself unable to determine that it had happened, because of the improperly high standard of proof that he was applying.

56. I have considered whether the fact that, in such a long judgment, there are only relatively few signs that the judge adopted the wrong standard of proof, should influence our decision. It seems to me, however, that the paragraphs in which the errors that I have identified are found are crucial to the conspiracy alleged. They relate, critically, to the extraordinary nature of the repo arrangements, to the dishonest pursuit of the Morskoy loan proceedings, to the evidence of state intervention, and most crucially to the conduct of the auction sales. Reading the judgment, fairly and as a whole, has left me in little doubt that the judge has applied too high a standard of proof throughout his treatment of the appellants' counterclaim. The other paragraphs identified in [40] above are not so clearly inappropriate as those I have specifically mentioned in this section, but they lend some support to the view that the judge was proceeding on the basis of the wrong standard at all material stages.

57. I will consider the effect of the outcome under this ground of appeal, when I come to consider the disposal issue. I have not overlooked, in this connection, the first point of the respondents' notice to the effect that the judge should and could have dismissed the counterclaim on the basis of more than a failure to discharge the burden of proof. As it seems to me, however, this is more appropriately considered in the next section.

The assessment issue: Was the judge wrong to adopt a piecemeal and inconsistent approach to his determination of the facts, without considering the evidence in the round?

58. I can deal with this issue relatively briefly in the light of what I have already held as to the standard of proof. The foundation for the respondents' response to this ground of appeal has already been explained in [16] above when I set out their case on the 16 facts relied upon by the appellants in [901] of the judgment.

59. It is also clear from what I have already said above about the structure of the judgment that the judge seems rather to have compartmentalised his treatment of the appellants' 16 points. It was an entirely logical and comprehensive approach. But nonetheless, I think there was substance in Mr Stroilov's submission that, at no stage, did the judge properly take account of his previous findings in considering the likelihood of the later facts having occurred. Put another way, what is lacking in the judgment is an element of standing back and considering the effects and implications of the facts he had found taken in the round. Let me say at once that this approach would not necessarily be fatal to the findings he has made. It would, in my judgment, depend on whether it could properly be said that the somewhat piecemeal approach that he adopted unfairly affected the judge's evaluation of the facts. I will come to that question shortly.

60. It is useful, however, to give some examples of the problem that the appellants have identified.

61. The first concerns the judge's treatment of the important issue of loss. 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. At [1376], the judge found that the value established by the court-approved valuation and a pre-packaged sale did not mean that "the value so established was false or deficient". At [1386], he found that there was no evidence of any loss caused by bid-rigging. At [1417], he found that Dr Arkhangelsky suffered no loss in relation to the sale of the Onega Terminal. In [1552] the judge declined to determine substitute asset values. When, however, he came to his final paragraphs at [1635(9)], he cast serious doubt over those previous findings by referring to the possibility that the respondents "may have procured for their associates, and may yet have some interest in, assets of far greater value than they have accounted for".

62. After explaining all the puzzling and concerning "curiosities" of the repo arrangements considered at [935]-[960] including the omissions from them, the judge concluded at [959]-[960] that, even though they had conferred the keys to Dr Arkhangelsky's companies on default, the arrangements were consistent with the Bank wanting to avoid facing the delaying tactics of a recalcitrant borrower. The judge then cast doubt on that finding by saying at [1635(1)] that he found it suspicious that the material omissions from the repo arrangements had put the appellants at enhanced risk in the event of default.

63. After a lengthy section covering the ownership of the Renord companies and the other original and ultimate purchasers of the pledged assets, the judge concluded at [1203] that: "Renord-Invest and its group companies, and (b) SKIF and companies associated with it as described above, were vehicles used by the Bank and/or Mr Savelyev, with the top managers and "loyal friends" he gathered around him, for the purposes of the repo transactions and the transactions which followed in respect of the pledged assets". The Renord-Invest and SKIF companies could all be treated as within a group controlled by the Bank and/or Mr Savelyev [1205], and that obviously raised "a question as to the validity (and propriety) of the auction sales where the only participants were under common direction or control". At [1635(2)], the judge

expressed his nagging suspicions about these facts and the respondents' continuing denial of them. He said that the "Renord-Invest group companies (which acquired the appellants' assets when the Bank's security was enforced) were in reality almost certainly owned or controlled by the respondents". At [1635(6)], he said, as was obviously the case, that it was extraordinary that not a single independent person participated in any of the auctions, so that but for a limitation period the auctions would likely have been held invalid.

64. This latter paragraph [1635(6)] is inconsistent, in my judgment, with his earlier repeated findings that the auctions had been valid and in compliance with Russian law (see, for example [1525(6)]).

65. The suspicion expressed by the judge at [1635(3)] is also of particular concern. He said that the fact that the circumstances in which the respondents were able to and did call upon the police and regional authorities to assist them take possession of Western Terminal "smacked of intimidation and abuse of position". Yet, at [1135]-[1138], the judge had simply said that there were "clear signs that the [respondents] enjoyed an unusual ability to call on state resources and assistance at the local level to reinforce the exercise of their legal rights", and 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". However unsettling the judge found it at [1138], it did not implicate the participants in a conspiracy. It is hard, I think, to square that conclusion with the judge's later suggestion of intimidation and abuse of position.

66. At [1635(8)], the judge recorded his suspicion about the "at least disconcerting echoes in this case" of the "numerous examples of state-orchestrated or assisted 'raids' in the Russian Federation". At [1131]-[1133], however, the judge had concluded that the expert evidence of such raids in the Russian Federation, whilst useful, was of limited assistance because (obviously) each case had to be assessed on its own facts. He did not think that the evidence was sufficient to demonstrate the necessary premeditation in December 2008/January 2009, when the repo arrangements were made, finding the absence of an agreed moratorium crucial, if not determinative. The judge did not, however, consider again, in the same context, whether the necessary evidence of predetermination existed at any later stage. Moreover, his suspicion about the disconcerting echoes of a state-orchestrated raid might have been reinforced by the later events including the "chorus of plainly false evidence" in the Morskoy loan proceedings, the deployment of a police-assisted force to take physical possession of Western Terminal, and the unmarketed auctions at which only companies controlled by the respondents or "loyal friends" were bidding.

67. I have considered very carefully whether these inconsistencies, and others that I have not specifically identified, are sufficient to render the judgment inherently unsafe. The respondents submitted forcefully that the 16 primary facts they had identified made it inevitable that the same conclusion would anyway have been reached. This submission was, however, somewhat undermined by the respondents' counsel's answer to my direct question on the point on the last day of the hearing.

68. I put to Mr Lord the inconsistency on loss that I have explained at [61] above. He had already described the end of the judgment as "quixotic" and as an unorthodox codicil. Mr Lord's response was to say that the judge was "speculating about what may happen", that it was "inappropriate for [the judge] to muse in [that] way at the end,

that he "shouldn't have done so", and there was no basis for him to have done so. In response, I suggested that the respondents had, therefore, identified [1635] as a problem with the judgment, and asked whether that made it unfair for the appellants to be hoist with a judgment which was equivocal. Mr Lord said that it would be unfair for the respondents to be deprived of the dismissal of the counterclaim "because of the speculation at the end of the judgment that was both unnecessary and at odds with his findings in the judgment". Once it is accepted, as I think it must be, that the judge's suspicions and misgivings expressed at [1630] to [1635] are at least partially at odds with a significant number of his findings of fact in the rest of the judgement, I find it hard to see how the judgment as a whole can be said to be as safe as the respondents submit.

69. The 16 primary facts relied on by the respondents (summarised at [16] above) are, I think, indicative that the judge undertook an exercise that resulted in his determining the counterclaim by reference to 16 silos. I shall identify which of these findings are, in my judgment, safe, since that will inform the treatment below of the disposal issue.

i) The judge's findings on the forgery allegations seem to me to be reliable and unaffected by the problems I have identified.

ii) The finding about the absence of a moratorium are in the same category, as are the findings about the conclusion of the repo arrangements.

iii) In respect of the inferences to be drawn from the nature of the repo (including the fact that the Original Purchasers were the counterparties used to purchase the appellants' assets), I am not persuaded that the judge's findings are safe.

iv) The judge's findings as to the introduction of Mrs Malysheva are not called into doubt by any other aspects of the judgment.

v) I cannot see anything unsafe about the judge's findings concerning the refusal in March 2009 to extend the PetroLes and Vyborg Shipping loans, and the calling of an event of default before the appellants could arrange repayment.

vi) The inferences that the judge was prepared to make about the 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 are thrown into doubt by a number of his later comments.

vii) The primary facts found by the judge as to the removal of Dr Arkhangelsky and Mr Vinarsky are not in doubt, although the inferences to be drawn from these events seem to be called into question.

viii) The judge made a number of findings of primary facts about the conduct of the wars in the Russian courts. None of these is challenged, but once again the inferences must be questionable bearing in mind my earlier conclusions.

ix) The same conclusions apply, in my judgment, to the judge's findings concerning the transactions relating to the assets of Western Terminal and Scan, such as the Gunard Lease.

x) There is no doubt as to the findings of primary fact concerning the unlawful seizure of control of Scan and Western Terminal, but again the inferences to be drawn from them are unsafe.

xi) The same conclusions apply to the facts and inferences arising from the alleged relentless campaign against Dr Arkhangelsky.

xii) The inferences to be drawn from the Bank's conduct of the Morskoy Bank loan proceedings, but not the findings of fact themselves, are thrown into doubt by the inconsistency in the judgment.

xiii) As I have already indicated, 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 the judgment.

xiv) The findings of fact concerning the valuation of the pledged assets sold at the impugned auctions are called into question by the judge's equivocation as to the profits made by the parties connected to the respondents. Moreover, the judge's findings as to the propriety and the validity of the auctions are equivocal.

xv) For the same reasons as those given above, the findings as to the respondents' motives for acquiring the pledged assets require reconsideration.

xvi) As I have already said, the judge's findings as to valuation will have to be reconsidered.

70. I am not, therefore, persuaded that the judge's overall determination of the counterclaim is reliable. It was affected by inconsistencies, and a failure to consider how the extraordinary facts that he had found at one stage affected the likelihood of the appellants' allegations at a later stage.

71. Before leaving this ground of appeal, I should, despite the criticisms I have made, pay tribute to the logic and comprehensive nature of the judgment. It is remarkable for the evidence that it provides of the judge's sheer hard work. It is easy to be critical. Judgments look very different through the lens of an appellate court. Nothing I have said should be taken to impugn the judge's abilities or his overwhelming and transparent effort to be fair to both parties in what was a hugely difficult case.

72. The problems in this case were, I suspect and as I shall later explain, most likely to have been caused by the scale of the task and the time it took, for whatever reasons, to produce the judgment. The final judgment reads as if it was (which it must have been) prepared in stages over quite a long time, so that each of the individual findings does not quite have the necessary interaction with what has gone before.

73. These conclusions deal also with the first point made in the respondents' notice to the effect that, once the judgment is read as a whole and the judge's multiple findings are properly taken into account "it is clear that the Judge did not reject the conspiracy only on the basis of burden of proof". The respondents conclude that, given such findings which are not challenged, the judge "could never have found that there was a conspiracy". I do not agree for the reasons I have given. I do not know what the

judge might have found if he had applied the correct standard of proof. Moreover, the inconsistencies and the application of a piecemeal approach seem to me to render his conclusions on the counterclaim unsafe.

The Baltic Fuel Company issue: Was the judge wrong to conclude that Baltic Fuel Company was not owned or controlled by the respondents?

74. This issue raises the only direct appeal against a finding of primary fact. The judge found at [1241] that the hard evidence to demonstrate ultimate control and ownership of Baltic Fuel Company (if not Renord-Invest) remained meagre. He thought it was not such as to displace the possibility that Mr Smirnov controlled or owned Baltic Fuel Company. Both sides accept that a finding to the contrary would not have been crucial to the outcome, particularly as the judge does not later single out Baltic Fuel Company for special treatment, although he did say at [1231] that it would have been "a powerful piece of evidence of collusion".

75. The appellants do, however, draw attention to the fact that the judge applied the same analysis to every Renord company involved in this case with the sole exception of Baltic Fuel Company. They submit that nothing in the judgement justifies making that exception, and that no proper reason is given for it. The respondents submit that the judge was justified in refusing to draw the inference requested by the appellants.

76. I take the view, in the light of my previous conclusions, that it would be unwise for this court to attempt to reconsider this finding. Since there is going anyway to be a further hearing (as to which see below) this question should be remitted alongside other matters that require reconsideration.

The delay issue: Does the 22 months delay between the trial and judgment mean that the judgment is unsafe?

77. The judge regretted his delay in preparing his judgment in this case. We were shown evidence that, when enquiries were made of the judge some 7 months after the trial, his clerk said that the delay had been caused by the need to write a judgment in a preceding case. Later enquiries were met with the answer that further delay had been caused by subsequent cases, and some medical problems.

78. On any analysis, in my judgment, the delay in this case was inexcusable. The unwritten rule applicable to both the Business and Property Courts and the Court of Appeal is that judgments should be delivered within 3 months of the hearing. The question, however, is whether the delay is, in itself enough to require a retrial.

79. The parties cited a line of cases on delayed judgments. In *Rolled Steel Ltd v. British Steel Corporation* [1986] Ch. 246 at page 310, and in *Bishopsgate Investment Management Ltd. v. Maxwell* [1993] BCC 120 at page 138, stringent criticisms were made of judgments delayed by some 8 and 5 months respectively. In *Goose v. Wilson Sandford* [1998] TLR 85 ("*Goose*"), the delay was some 20 months, although, as in this case, the judge had the benefit of transcripts of the evidence. The Court of Appeal ordered a retrial because some of the judge's conclusions were held to be unsafe as a result of the delay. Peter Gibson LJ said this:-

> "112. A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again.
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> 113. Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weakened the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of 20 months, Harman J. denied himself the opportunity of making this further check in any meaningful way. …"

80. *Goose* was rather different from the present case, but it shows that the delay is a factor to be taken into account when the appellate court is considering the judge's findings and treatment of the evidence. Peter Gibson LJ's approach was approved by Lord Woolf MR in *Gardiner Fire Limited v. Jones* [1998] 10 WLUK 319 at pages 2 and 3. Moreover, in *Cobham v. Frett* [2001] 1 W.L.R. 1775 at page 1783, Lord Scott said that, if excessive delay is to be relied on in attacking a judgment, "a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant", but that "[i]t can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons

for his conclusions in order to ensure that the delay has not caused injustice to the losing party".[2]

81. In *Bond v. Dunster Properties Ltd* [2011] EWCA Civ 455, there was 22 months delay. Arden LJ emphasised at [7] that "[a]s in any appeal on fact, the court has to ask whether the judge was plainly wrong", but said that, in the case of a seriously delayed judgment, if the reviewing court found that the judge's recollection of the evidence was at fault on any material point, then (unless the error could not be due to the delay) it would order a retrial if it could not be satisfied that the judge came to the right conclusion. That approach has no application in this case, where the judge meticulously re-read all the transcripts. But Arden LJ's judgment emphasises once again that delay, by itself, is not a ground for allowing an appeal.

82. In my judgment, as I have already indicated, the delay in this case had a rather different effect from that suggested in the authorities. The judge mitigated the delay by reading the transcripts assiduously. He did not forget or omit consideration of any material parts of the evidence. Instead, he undertook a minute, indeed commendable, analysis of the evidence on each separate point. The delay may, however, I think, have meant that he was less able to deal with findings he made in the round, perhaps because the findings on one part of the case were made at such a remove in time from other findings.

83. Nonetheless, I would not allow this appeal solely on the grounds of the delay, regrettable as that delay undoubtedly was.

84. I should conclude on this point by reiterating that the "3-month" general rule should be adhered to even in long and complex cases. Justice delayed is justice denied. The parties to civil, and particularly commercial, litigation are entitled to receive their judgments within a reasonably short period of time. That period should not be longer than 3 months. As has been repeatedly said, any other approach will lead to a loss of public and business confidence in our justice system.

The article 1064 issue: Did the judge misapply article 1064 by placing the burden of proving dishonesty on the appellants?

85. As I have already indicated, I regard this argument as ill-founded. 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.

86. Moreover, the ground that I have described is not reflected in paragraph 2 of the grounds of appeal,[3] which is based on article 10 of the Russian Civil Code.[4] I would

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2 See also Lord Phillips MR in *Habib Bank Ltd v. Liverpool Freeport (Electronics) Ltd* [2004] EWCA Civ 1062 at [17]-[20].

3 Ground 2 provided that "[t]he Learned Judge has failed to apply Article 10 of Russian Civil Code: "*abuse of right*", defined (on the evidence of the Russian law experts) as conduct which is formally lawful but nevertheless unfair and harmful to the Counterclaimants. The factual findings lead to an irresistible conclusion that the Claimants' conduct amounted to 'abuse of rights' rather than lawful

have been disinclined to allow permission to amend the grounds had it been sought, which it was not.

The illegality issue: Ought the judge to have held that the counterclaim was barred by illegality?

87. The circumstances in which a court should refuse to enforce a claimant's rights on the grounds of illegality are now established by the majority of the Supreme Court in *Patel v. Mirza* [2016] UKSC 42, [2017] AC 467 ("*Patel v. Mirza*"). Lord Toulson expressed the matter as follows:-

> "101 … one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality …
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> 120 The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate".

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exercise of those rights. The Russian law evidence on that point was before the Court, but there is no meaningful analysis of it in the judgement".

[4] Article 10 provides "Limits on the Exercise of Civil Law Rights: Actions by citizens and legal persons carried out solely with the intention of inflicting harm upon another person as well as abuse of a legal right in any form shall not be permitted".

88. In *Singularis Holdings Ltd (In Official Liquidation) v. Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84, [2018] 1 WLR 2777 the Court of Appeal (Vos C, with whom Gloster and McCombe LJJ agreed) suggested at [65] that "an appellate court should not interfere [in a lower court's decision on illegality under *Patel v. Mirza*] merely because it would have taken a different view had it been undertaking the evaluation. The test involves balancing multiple policy considerations and applying a proportionality approach. Accordingly, an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant".[5]

89. The respondents argued that the corrupt payments made by the appellants fatally tainted their counterclaim. It was said that, without such corrupt payments, the value of Dr Arkhangelsky's businesses and real estate could not be maintained. Before us, the respondents contended that the judge had failed to apply *Patel v. Mirza* correctly. They criticised his reasoning at [1544]-[1546] to the effect that it would be rare for the court to "refuse a person the opportunity to vindicate a right on the grounds that the integrity of the system may thereby be imperilled". The judge pointed out that that the respondents were contending that the appellants should be prevented from vindicating their rights in respect of dishonest dealings with their property, when their property was not obtained illegally. On that basis, the judge said that "by reference to the factors adumbrated illustratively by Lord Toulson, this case seems to me some distance from an appropriate case in which to deprive the [appellants] and insulate the [respondents] in the name of preserving the integrity of the judicial process".[6]

90. The respondents argued that the judge failed to take into account that (i) bribery is a serious crime and civil wrong, and is morally reprehensible (ii) there was no relevant public policy which may be rendered ineffective or less effective by denial of the appellants' claim (iii) the appellants could not have profited from the value of the properties without Dr Arkhangelsky's bribery, and (iv) an award of damages would effectively reward that bribery.

91. In my judgment, the judge's evaluation was a proper application of the tests in *Patel v. Mirza.* It would do nothing to prevent or discourage bribery to deny the appellants' claim for damages for a subsequent dishonest conspiracy. The two events are not as closely connected as the respondents contend. Secondly, there is a strong additional public policy in allowing the appellants to vindicate their rights (if they are shown to be entitled to do so) for the respondents' dishonest conspiracy to remove their property. Finally, in my judgment, the denial of the appellants' counterclaim would not be a proportionate response to the illegality, bearing specifically in mind that punishment for bribery is generally a matter for the criminal courts.

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5 The Supreme Court upheld the Court of Appeal's decision at [2019] UKSC 50, but expressed its reservations about this passage. Lady Hale at [21] said that it was not necessary to resolve the question in order to resolve that appeal but that "it should not be assumed that this Court will endorse the approach of the Court of Appeal".

6 The judge noted at [1546] that the decision might be less clear-cut in the context of the claim to business values, but "even then I would consider, upon proof of dishonesty on the part of the respondents] in respect of assets entrusted to them, that the integrity of the judicial process would be besmirched and not safeguarded by the Court declining to intervene".

92. Accordingly, it has not been shown that the judge proceeded on an erroneous legal basis, and I would anyway have agreed with his decision.

The disposal issue: If the appellants succeed on one or more of their grounds of appeal and the respondents fail on the illegality issue, what orders should this court make?

93. Before dealing with the way in which this appeal should ultimately be determined, I should mention briefly the sixth ground of appeal to the effect that the Appellants were denied a fair trial due to an extreme inequality of arms between the parties in terms of legal representation and resources.[7]

94. The respondents submitted, correctly I think, that the relevant question is whether the court is put in a position where it "really cannot do justice in the case because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide" (see *Perotti v. Collyer-Bristow* [2004] 2 All ER 189 per Chadwick LJ at [32]). It is not, as Chadwick LJ also said, a question of whether the case could have been better presented.

95. In my judgment, this case is very far from one in which the appellants could make a valid complaint under article 6 of the European Convention on Human Rights. They have had the services of a most insightful and intelligent McKenzie friend, Mr Stroilov, whose submissions were of a quality quite equal to many qualified English advocates. The judge too described him as having provided impressive work and assistance at [36] and [1640].[8] The appellants may not have had the available resources of the respondents, but such inequality is unfortunately commonplace in these courts. The test adumbrated by Chadwick LJ is not satisfied here. The trial was fair, and, as now appears, the appellants' appeal has been successful. These conclusions make it unnecessary to deal with the third point raised by the respondents' notice concerning Dr Arkhangelsky's allegedly hidden assets.

96. The court sought submissions from the parties as to the relief that should be granted in the event that the appellants succeeded as they have. The appellants submitted that the appeal should be allowed and that we should give judgment for the appellants on their counterclaim remitting the assessment of quantum to Hildyard J or another judge. The respondents submitted that, since the primary facts were not challenged, the matter should be remitted to the judge to reconsider the matter in the light of this court's concerns about specific paragraphs.

97. The problem, as I see it, is that many of the judge's findings of fact are indeed not challenged, but valid concerns have been raised as to his approach to and evaluation of those findings. We should, I think, avoid requiring the parties to go through another massive trial if we possibly can. Such a retrial must be a remedy of last resort. That makes Mr Stroilov's plea that we should deal with the matter ourselves attractive. It is, however, in my judgment, simply impossible. We have not had the time or the submissions to enable us to do so. No appellate court could presume to be

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7 The appellants referred to *Airey v. Ireland* (1980) 2 EHRR 305 at [24]; *Steel and Morris v. UK* [2005] ECHR 103; and *R (Gudanaviciene) v. Director of Legal Aid Casework* [2015] 1WLR 2247.

8 It is to be noted also that the judge said at [1605], that he had "throughout these proceedings been especially anxious to ensure fairness to Dr Arkhangelsky and to minimise grounds for any perception on his part of being at a disadvantage".

in as good a position as the judge to re-determine such nuanced and complex issues. I have no doubt that the matter must be remitted. The questions are (i) whether it should be remitted to Hildyard J, (ii) what the first instance judge should be directed to do, and (iii) what evidence should the parties be permitted to call at the further hearing.

98. In my view, it would not be appropriate to remit the matter to Hildyard J, but not because I have any doubt about his ability to reconsider the matter fairly. Both parties have accepted that he could do that, and I agree with them. But I do not think it would be fair to Hildyard J to remit it to him. He lived with this matter for nearly 3 years, and I think it would be easier for a fresh pair of eyes now to look again at the facts with the benefit of the judgments of this court.

99. Neither party has suggested that the primary findings of fact concerning forgery, the conclusion of the repo arrangements and the moratorium should be revisited. Mr Stroilov does, however, suggest that the inferences to be drawn from the repo arrangements (but not the forgery or the moratorium) should be reconsidered. I agree. That is one of the concerns of inconsistency expressed above. The same applies to the rationale and true objectives of the transfers of shares in Scan from the Original Purchasers to the Subsequent Purchasers, the removal of Dr Arkhangelsky and Mr Vinarsky, the conduct of the wars in the Russian courts, the transactions relating to the assets of Western Terminal and Scan, such as the Gunard Lease, the unlawful seizure of control of Scan and Western Terminal, the allegedly relentless campaign against Dr Arkhangelsky, the Bank's conduct of the Morskoy Bank loan proceedings, and the allegedly tell-tale signs of a classic raid. On these matters, I do not see that it could or should be open to the parties to call any further evidence (subject to something I say below at [104]). The judge's findings of primary fact can stand. It is only the evaluation of those facts and the inferences to be drawn from them that require reconsideration for the reasons I have given.

100. The position is very slightly different with respect to the allegations of the connection between the Bank and its loyal friends. There the bulk of the judge's findings of primary fact will stand, but the judge should reconsider the position of Baltic Fuel Company. Once again, no further evidence should be called (subject also to [104] below).

101. 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.

102. I was much attracted, during argument, by the contention that it would be unfair to allow the parties to call new evidence of valuation, when all or most of that evidence had been rejected by the judge. On reconsideration, however, I do not see how that can be avoided, since the question of harm is so central to the respondents' liability.

103. Accordingly, I would remit the matter back to a new judge to determine the issue of whether or not the respondents are liable under article 1064 for the alleged dishonest conspiracy. There should be no need for further evidence of Russian law. The question of whether the appellants actually sustained harm will need to be determined again. That can only take place after: (i) any new evidence on the issues arising from the auction sales of the pledged assets, the valuation of those assets, and the respondents' motives for acquiring them, has been heard, and (ii) the evaluation of and inferences to be drawn from the judge's findings and any new findings has been undertaken.

104. Insofar as I have said above that there should be no new evidence on particular issues, I would repeat that I would not want to tie the hands of the judge to whom this case is remitted. If that judge takes a different view, having heard argument, he may do so. The crucial factor is that the new judge is enabled to determine the remaining issues between the parties fairly, even at this late stage, and notwithstanding the chequered history of this case. If that necessitates new evidence in a particular area, so be it.

105. I return finally to the question of the nature of the conspiracy that is alleged. As mentioned above, only the third alternative form of the conspiracy survives intact, but the appellants say that the difference is only a question of the (very uncertain) date on which an agreement to use dishonest means to harm the appellants was made. In my judgment, the appellants should be at liberty to argue that inferences as to an actionable conspiracy should be drawn from all the facts that the judge found, with the exception of those relating to the forgery and the moratorium. It is always impossible for a claimant to assert with any certainty when such a conspiracy began. The claimant cannot know, and the defendant is unlikely to say. The situation is the same here, and the respondents sought, I think, to make rather too much of the disparity between the alleged forms of the conspiracy. The judge seems correctly to have understood that the events he was considering were a seamless sequence.

Conclusions

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.

107. I should say also that I agree entirely with Males LJ's judgment.

Lord Justice Patten:

108. I agree with both judgments.

Lord Justice Males:

109. I agree that this appeal must be allowed for the reasons given by the Chancellor. Because this is, on any view and for many reasons, an unusual and troubling case, I add some observations on two of the central issues in the appeal.

The context for the appeal

110. Before doing so, it is worth recalling that the focus of the appeal has been rather narrower than was the case at the trial. The trial involved hotly contested and wide-ranging issues of fact, affecting both claim and counterclaim, with dishonest factual evidence adduced by both parties. The expert valuation evidence was also partisan and unsatisfactory. The appellants' counterclaim alleged a state-sponsored conspiracy to "raid" their assets which involved extensive forgery of documents, unlawful pressure to enter into the repo arrangements, the Bank's reneging on an agreed moratorium in order to engineer a default, and the seizure of valuable assets. All this was said to result in a claim for "business loss" amounting to some US $467 million. The judge has demonstrated, in findings which are not challenged, that this version of the conspiracy alleged was untenable and that the damages claimed, resting as they did on the false assertion that the appellants would have been able to borrow funds to discharge their loans to the Bank and develop their business, were far-fetched.

111. However, the demolition of the appellants' primary case was not necessarily fatal to a more modest version of their conspiracy case, pleaded by amendment shortly before the trial. It is this version of the conspiracy with which we have been concerned on this appeal and, even then, the principal issue has concerned the conclusions properly to be drawn from the primary facts found by the judge rather than the correctness of those facts themselves.

112. 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. 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.

113. I have described this as a more modest version of the conspiracy for two reasons. First, the area of factual dispute or, more accurately, the dispute as to the inferences which should be drawn from the facts found by the judge, is much more circumscribed than was the appellants' primary case. Second, the loss claimed, although significant, is on any view much less than the "business loss" claim. The appellants' valuation expert, Ms Simonova, put the combined value of the Western Terminal and the Onega Terminal at US $244 million, while the Bank's expert, Mr Millard, put it at only US $25 million, less than the amounts achieved at auction (see [1434] and [1435]). The evidence of both experts was rejected by the judge as unreliable, but the figures indicate at least the range of the dispute. Ms Simonova's figures, in particular, were described by the judge as being based on "bold and optimistic assumptions", containing "obvious flaws" and being highly sensitive to even minor adjustments to her assumptions (see e.g. [1436(2)], [1449] and [1451]). It seems unlikely, therefore, that the true value of these assets was anything close to the figures which she advanced. If that is so, the appellants' real claim (if they have one at all) is likely to be much lower than they would accept.

The standard of proof for dishonesty

114. I agree with the Chancellor that, in addressing the question of dishonesty, the judge appears to have applied a heightened standard of proof. For example, at [1138], citing the speech of Lord Nicholls in *Re H (Minors)* [1996] AC 563, the judge said.

> "Again, I take into account that the more serious the allegation and the more improbable the event sought to be established:
>
> > 'the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established'."

115. The test which the judge set himself was that proof of dishonesty "could only be discharged by showing the facts to be incapable of innocent explanation" (see [1634]). He described this at [1525(5)] as "the heavy onus of proof in the context of an assertion of dishonesty".

116. That this was not merely loose language is apparent from the many references to the burden and standard of proof contained in the judgment.

117. In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not.

118. This is clear from the judgment of the House of Lords in *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11. Lord Hoffmann said:

> "13. … I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. …
>
> 14. Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that –
>
> > 'the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'
>
> 15. I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to

> inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children it would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

119. Lady Hale said:

> "70. … Neither the seriousness of the allegation or 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. …
>
> 72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum …"

120. The judgment of Bryan J in *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) collects together at [46] to [66] a number of similar statements of principle and illustrates that, once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed.

121. In the present case the judge made a number of findings that the Bank had acted reprehensibly and even dishonestly, and that its witnesses had given dishonest evidence. He used strong words, such as "extraordinary", "arresting" and "ruthless" to describe the Bank's conduct. But he appears to have treated the maxim that "the more serious the allegation … the stronger must be the evidence that it did occur" which he took from Lord Nicholls' speech in *Re H (Minors)* as if it were a rule of law, without regard to the qualification expressed by Lord Nicholls himself and explained more fully in *In re B (Children).* Nor, so far as I can see, did the judge ever ask himself whether, in the light of the facts which he found to be proved and the dishonest

evidence which he had heard, the dishonesty alleged against the Bank in the realisation of the assets remained "inherently improbable". If he had done so, he may well have concluded that it was not, and that it was more probable than not that the Bank had acted dishonestly in the realisation of the appellants' assets.

122. The concluding paragraphs of the judgment, in which the judge refused to make declarations in favour of the Bank and Mr Savelyev, underline this. His comment 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" ([1634]) seems to recognise that he may have been viewing the evidence through the wrong lens. The list at [1635] of the features which had "encouraged and fomented" his misgivings gives the strong impression that despite his findings made (as he put it) "on the basis of the available evidence, having regard to the burden of proof", the judge was in reality unconvinced by his own judgment.

123. In my judgment, therefore, the judge has misdirected himself as to the standard of proof required to be satisfied in this case, with the consequence that his findings as to the absence of dishonesty on the part of the Bank in the realisation of the assets cannot stand.

Loss

124. This would not matter if, as the Bank contends, the judge has made findings that the market value of the appellants' assets did not exceed the prices achieved at auction. In that event the appellants would have failed to prove the "harm" which they need to prove for the purpose of Article 1064.

125. I would accept that there are some passages in the judgment which appear to set out such findings, in particular to the effect that there was no evidence that any independent third parties were interested in bidding for the assets. But I cannot accept that this is the effect of the judgment when fairly read as a whole. In this regard I would draw attention to three points.

126. First, the judge describes "the values achieved for the assets as sold" as "low", even if not "so low that only dishonesty can explain them", ([1525(3) and (9)]. He did not explain by reference to what measure the values achieved were "low", but one obvious possibility is that he had in mind their market value. Moreover, he continued to have a perception that the Bank had profited from the opportunistic and ruthless pursuit of its commercial objectives ([1635(7)]), procuring for its associates "assets of far greater value than they have accounted for" ([1635(9)]). That would not be so if the auction purchasers had paid the fair market value of the assets.

127. Second, and standing back, the Bank took considerable trouble, on the judge's findings, to ensure that the assets were sold cheaply to entities under its ownership or control. Thus it ensured that the assets were sold in unattractive packages with minimal if any marketing (which was not unlawful under Russian law, but was at least surprising, indicating as it does no interest on the part of the Bank in maximising its recovery) ([1525(5)]); it deliberately misled the Russian court by concealing the true nature of a "contrived" and "preconceived" plan to obtain the court's blessing for an auction sale of the Western Terminal assets at a greatly reduced valuation ([1372]

and [1373]); it was guilty of "bid-rigging" by concealing the fact that all those participating in the auctions were effectively its own creatures ([1525(2)]), a fact which would probably have meant that the auctions were invalid under Russian law ([1525(6)]); and it lied repeatedly about what it had done ([1525(2)]). All this begs the question, why did the Bank go to so much trouble if the assets were indeed of so little value that no independent interest was to be expected? The judge never gave an answer to that question.

128. Finally on this point, there is the judge's statement at [1552]:

> "In all the circumstances, and given that the enquiry is upon an hypothesis I have rejected, I decline to determine substitute asset values. If my conclusion that the Counterclaimants have not demonstrated that the auction processes were actionably improper is overturned, then the issue of loss will have to be re-addressed in light of the factors supporting that reversal, and their effect in terms of assessing value."

129. As already noted, the judge had already found that the evidence of both valuation experts was deeply flawed. He might have said in those circumstances that the appellants had simply failed to prove that the true value of the assets was greater than the prices achieved at auction. But he did not. Instead he appears to have contemplated that, even if it would be difficult, the evidence would if necessary enable him to determine "substitute asset values" and he appears also to have contemplated, at any rate as a real possibility, that the result of this exercise might be that the real value of the assets was greater than the auction prices.

130. In these circumstances, and in view of the somewhat contradictory nature of the judgment on this issue, which may be a consequence of the lengthy period over which it was produced, it would not be safe to dismiss this appeal on the basis that the judge's misdirection as to the standard of proof of dishonesty made no difference to the outcome.

Disposal

131. For these reasons and the reasons given more fully by the Chancellor, I would allow the appeal and would order a retrial on the basis proposed by him.