



Neutral Citation Number: [2019] EWHC 1186 (Comm)

Case No: CL-2017-000379

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 10/05/2019

Before :

THE HON. MR JUSTICE POPPLEWELL

Between :

Stanislav Savchenko

Claimant

- and -

Boris Davletyarov

Defendant

Andrew Scott (instructed by **Macfarlanes LLP**) for the **Claimant**
Alexander Milner (instructed by **Steptoe & Johnson UK LLP**) for the **Defendant**

Hearing dates: 1-4 April 2019

Approved Judgment

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MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. In this action Mr Savchenko claims US\$3.3 million plus interest under the terms of an agreement dated 13 February 2014 by which Mr Davletyarov agreed to transfer shares on 1 April 2017 in return for immediate payment of US\$3.3 million, receipt of which was acknowledged, with an option for Mr Savchenko to terminate the agreement and be repaid the US\$3.3 million at any time prior to the 2017 transfer date. Mr Davletyarov resists the claim on the grounds that the agreement and relevant obligation have been superseded by subsequent agreements in 2015 and 2016; he brings a counterclaim for breach of those subsequent agreements which he values at about US\$4.8 million. The agreements in question are in respect of direct or indirect shareholdings in a Russian bank called CB International Bank of Development (“the Bank”).
2. Mr Davletyarov is a wealthy Russian businessman with interests in a number of commercial ventures. He purchased the Bank in 1994 together with other partners in order for it to hold the funds of his enterprises. By about 2000 he had bought out the original partners, and he thereafter introduced two new shareholding partners who were business associates of his. By the end of 2013 the relevant shareholding structure was as follows:
 - (1) The Bank had 870,000 issued shares with a nominal value of US\$1 each. 82.76% of the shares were held by a Russian company, OOO Intergazfinans (“Intergazfinans”). The remaining 17.24% of the shares were held by Ms Poltorak, who is Mr Davletyarov’s ex-partner. She held those, I find, as nominee for Mr Davletyarov.
 - (2) Intergazfinans was 100% owned by a BVI company, Rosgas SA (“Rosgas”). The shareholding in Rosgas was split between Mr Davletyarov and two close business associates, Mr Kaminsky and Mr Kolikov. Mr Davletyarov held 57.71%; Mr Kaminsky held 30.21%; Mr Kolikov held 12.08%. Those shareholdings in Rosgas were equivalent to indirect shareholdings in the Bank of 48%, 25% and 10% respectively. There was some dispute in the evidence before me whether Mr Kaminsky and Mr Kolikov held their shares as nominees for Mr Davletyarov. I do not find it necessary to determine that issue. What is clear is that they were amenable to disposing of their interests in accordance with Mr Davletyarov’s proposals throughout 2014 to 2016, and that Mr Davletyarov at times contracted as to what was to happen to various shareholdings on the footing that he would be able to procure the transfer by them of their interests in Rosgas.
3. Mr Savchenko has held a number of positions in Russian financial institutions. In 2011 he founded a Russian finance company known as Sparta Finance (“Sparta”) to hold and invest funds on behalf of, amongst others, two self-regulatory organisations which are associated with the construction sector. Sparta is licensed to provide brokerage and trust management services, but does not itself operate as a bank. Mr Savchenko decided to use the Bank to place funds on deposit, both his own and those of his clients, as a result of a connection with the then deputy chairman. By mid-2013 Sparta had deposited over RUB 1,000,000,000 with the Bank (roughly equivalent to about US\$30 million at the

time) of which RUB 500,000,000 was held on long-term deposits. Subsequently, Mr Savchenko and his clients collectively accounted for the majority of the Bank's business.

The evidence

4. There were a number of disputed issues of fact, some of them stark. My task in seeking to resolve them was not facilitated by the state of the evidence. The contemporaneous documentation before the Court was of only limited assistance. It was sparse and obviously incomplete, and at times cryptic or difficult to understand. The witness evidence was, with one exception, unsatisfactory.
5. Mr Savchenko and Mr Davletyarov each gave evidence. Each departed from the evidence in their witness statements in important respects and each gave answers which were difficult to reconcile with contemporaneous documents or were inherently improbable and incredible. I was left with the impression that each had thought carefully about what would assist his case and was prepared to maintain such an account irrespective of the true position. I do not feel able to place any confidence in the evidence of either of them save where it was supported by contemporaneous documents or accorded with inherent probabilities.
6. I also heard evidence from one witness on Mr Savchenko's behalf (Mr Diakovskiy) and three called on behalf of Mr Davletyarov (Mr Gabitov, Mr Ozirniy and Mr Kolikov). Mr Diakovskiy has been Mr Savchenko's Russian lawyer throughout the relevant period. Mr Gabitov is a lawyer by profession and works as Mr Davletyarov's assistant. Mr Kolikov is a long term friend and business associate of Mr Davletyarov. I am afraid I formed the impression that they were each anxious to support the case of the party calling them rather than to assist the court with the truth, and their evidence was coloured by their respective loyalties.
7. Mr Ozirniy was a former colleague of Mr Ryzhov and involved in the agreement in December 2015 under which Mr Ryzhov was to acquire a shareholding, and as such was independent of the parties. He was measured and straightforward in his answers and I felt able to rely on his evidence.
8. There were also letters in the bundles from a number of those who played some part in the events in question. None were accompanied by a statement of truth and the makers did not attend to have the content tested by cross examination. There were doubts about how at least some of them had been procured. In those circumstances I feel able to attach little weight to those documents.

Narrative

9. By late 2013 Mr Savchenko and Mr Davletyarov were in negotiations for the sale of a shareholding in the Bank. Mr Savchenko's evidence was that these followed overtures by other Bank officers from the summer of 2013 and that terms were agreed in principle at a meeting between him and Mr Davletyarov on about 12 December 2013. Mr Davletyarov's evidence was that there was some contact before the end of the year but little meaningful negotiation before January 2014. The earliest draft of an agreement which survives was sent under cover of an email of 12 January 2014 which provided for Mr Davletyarov to transfer a 36.25% shareholding in Rosgas (equivalent to a 30%

interest in the Bank) to Mr Savchenko for US\$3.3 million with an option for subsequent repurchase and repayment of the same price.

10. The negotiations resulted in a signed written agreement dated 13 February 2014 (the “2014 Agreement”) which provided for the transfer of a 36.25% shareholding in Rosgas but not by way of an immediate or unconditional sale. The key features of the 2014 Agreement for the purposes of the parties’ dispute are as follows:
 - (1) Mr Savchenko was to acquire from Mr Davletyarov a 36.25% shareholding in Rosgas for US\$3.3 million (clause 1). The right to transfer of the shares was deferred to 1 April 2017 (Clause 3).
 - (2) This transfer right was expressed in clause 3 to be conditional on the fulfilment by Mr Savchenko of two conditions. The first was payment of the price of US\$3.3 million, which by clause 3.3 the parties confirmed had already occurred prior to signing the agreement. The second was an undertaking by Mr Savchenko to support at least 50% of the Bank’s capital structure (that is by keeping funds on deposit at the Bank equivalent to 50% of its total reserves) (clause 3.2), an obligation which was to be overseen by a committee of named representatives of both parties (clause 3.4).
 - (3) Notwithstanding the deferred date of transfer of the shares, in the meantime Mr Savchenko was to have all the rights of a 30% shareholder of the Bank, including specifically to have two seats on the board of 6 directors and 30% of the profits (Clauses 4, 4.1 and 4.3). He was also to have the right to develop the Bank’s business and manage its treasury function (clause 4.2).
 - (4) At any time before 1 April 2017 Mr Savchenko would have the unilateral right to terminate the agreement by written notice, in which case Mr Davletyarov would pay to Mr Savchenko US\$3.3 million (clause 5).
 - (5) Clause 6 contained a number of specific undertakings by Mr Davletyarov which precluded any actions which would result in a change to the Bank’s ownership structure or a dilution in any of the relevant shareholdings, without Mr Savchenko’s consent.
11. Pursuant to the 2014 Agreement, Mr Savchenko exercised his right to appoint two of the Bank’s directors (appointing himself and a Ms Golovina), and took over day-to-day responsibility for the Bank’s treasury function, which resulted in Mr Savchenko having control of the Bank’s activities, subject to the oversight functions of the Board.
12. In 2014 the Russian economy came under strain as a result of sanctions imposed by the European Union and the United States in relation to events in the Crimea. The rouble fell against the dollar by over 50%. In March 2014 the Russian Central Bank imposed stricter capital adequacy requirements on the Bank. Messages from Mr Savchenko to Mr Davletyarov in July 2014 suggest that the Bank was having severe liquidity problems in maintaining reserves sufficient to meet its capital adequacy requirements. Mr Davletyarov contended that these difficulties were at least in part due to Mr Savchenko’s poor management of the treasury function, but no specific failings were identified or made out on the evidence.

13. Mr Savchenko's evidence was that from the middle of 2014 he was therefore unable to withdraw his own and his clients' funds as he wished, and that in the summer of 2014 Mr Davletyarov initiated discussions about terminating the 2014 Agreement and repaying him because Mr Davletyarov recognised that it would be necessary to change the ownership structure to bring an injection of new funds; that these negotiations were detailed and advanced by December 2014; that Mr Davletyarov's stance was to offer to repay only half of the US\$3.3 million on the grounds that he could not afford to pay any more; and that this proposal was rejected by Mr Savchenko. Mr Davletyarov disputes that there were any such negotiations. I find that there were some negotiations and that at some stage Mr Davletyarov proposed to pay half of the US\$3.3 million: there is in the documents a draft agreement sent by his close associate Mr Kolikov to him on 5 December 2014 which provides for a payment to Mr Savchenko of US\$1.65 million. Beyond that, the nature and course of any negotiations between the two is unclear.
14. It is, however, apparent that at about this time there were negotiations being undertaken by Mr Davletyarov for disposal of an interest in the Bank elsewhere. In October 2014 Mr Davletyarov was in negotiations to sell the full 100% interest in the Bank to a group of investors represented by Mr Gadzhiev and Mr Abdullaev. The former was President of the International Bank of Azerbaijan, which was holding several million dollars locally on an account in the Bank's name which the Bank was having difficulty repatriating to Russia. The price in the draft agreement in the bundles was the value of the Bank's assets, plus a premium of US\$5 million for the goodwill and a further US\$20 million for the building occupied by the Bank. By January 2015 the negotiations involved a different structure, with the two individuals representing a group which would acquire another bank which would then be merged with the Bank.
15. As a result of the problems facing the Bank, Mr Savchenko and Ms Golovina resigned from the Bank's board of directors in around June 2015. However, Mr Savchenko and his colleagues continued to run the Bank's treasury functions and to exercise control over the Bank's day to day operations. At around this time, Mr Savchenko claims to have told Mr Davletyarov that he no longer wished to acquire the shares in the Bank and that accordingly he wished to be paid the full US\$ 3.3 million under the 2014 Agreement.
16. On 11 December 2015 Mr Davletyarov entered into an agreement for the sale of the Bank with a Russian businessman named Mr Mikhail Ryzhov (the "2015 Agreement"). The relevant terms of that agreement are as follows:
 - (1) Mr Ryzhov was described as acting on his own behalf and in the interests of other unnamed buyers who were collectively defined as "the Buyer's Party"
 - (2) The sale was of a 100% interest in the Bank which was to be effected by a transfer of Ms Poltorak's 17.24% and either a direct transfer by Intergazfinans of its shares in the Bank, or a transfer of all Rosgas' 100% shareholding in Intergazfinans. Mr Davletyarov was the sole selling party, but by clause 1.3 represented that he was in a position to procure these transfers.
 - (3) The price was US\$3.93 million, to be secured by the provision of a promissory note, of which RUB 10 million (c. US\$145,000) was payable within three days

of transfer of shares and the remaining US\$3.785m at a time and by a method to be agreed.

- (4) Clause 4 of the agreement warranted that the shares which were the subject of this transfer (i.e. those held by Ms Poltorak and Intergazfinans in the Bank, and those held by Rosgas in Intergazfinans) were not promised to any other person and were not burdened by any rights of others.
17. Mr Savchenko was not a named party to the 2015 Agreement. What is on any view clear, and was not really in dispute, is that Mr Savchenko was aware of the terms of the 2015 Agreement and agreed to Mr Davletyarov entering into the agreement with Mr Ryzhov on those terms. It is Mr Davletyarov's case, disputed by Mr Savchenko, that Mr Ryzhov was acting on Mr Savchenko's behalf as his nominee. Mr Savchenko's evidence, on the other hand, was that he already knew Mr Ryzhov as a representative of one of Sparta's trading partners and put him in touch with Mr Davletyarov and Mr Kolikov with a view to his negotiating for a purchase of the Bank, which he was keen to achieve in order to secure an injection of funds which would enable his clients and himself to be repaid their deposits; and that he had no interest in the purchase other than his desire to sever his links with the Bank. It is common ground that during the negotiations he was present at a number of meetings himself, and his lawyer, Mr Diakovskiy was involved in preparing drafts of the transaction. Mr Ryzhov was separately represented by his lawyer, Mr Ozirnii.
18. I reject the submission that Mr Ryzhov was acting as nominee or agent for Mr Savchenko or that the latter was the true counterparty to the 2015 Agreement. It is not supported by the evidence of Mr Ozirnii, who described Mr Savchenko as a "partner" of Mr Ryzhov but was careful not to ascribe to the latter the status of agent. What he meant by this is that Mr Savchenko was working closely with Mr Ryzhov for the latter to acquire the shares in his own name, and that there were discussions or arrangements between the two of them as to what Mr Ryzhov might do in relation to the shares or the workings of the Bank following purchase.
19. I accept that the circumstances in which Mr Savchenko agreed to Mr Davletyarov entering into the 2015 Agreement with Mr Ryzhov involved all three contemplating that Mr Savchenko would have arrangements with Mr Ryzhov and that they might, at least, involve an arrangement under which he would receive from Mr Ryzhov some or all of the 30% interest in the Bank to which he would have been entitled under the 2014 Agreement. There were clearly discussions between them in which that was to be one of the possibilities. This is supported by the correspondence between Mr Ozirnii and Mr Kolikov on 17 and 18 December 2015, referring to a proposed transaction for 30% as "sort of exercise of Stas' option" and Mr Ozirnii's reference to "Stas's 30" as something which he has been told by Mr Ryzhov is something about which "they [i.e. Mr Savchenko and Mr Ryzhov] have an arrangement." Mr Savchenko's evidence was that the arrangement with Mr Ryzhov was that he would get his and his clients' money back from the Bank as soon as Mr Ryzhov paid for his shares. It may be that that was also one of the possibilities which was under discussion and even what was ultimately agreed. I find it impossible to tell exactly what arrangement was ultimately concluded, if any, not least because Mr Savchenko's emails with Mr Ryzhov were not disclosed. However, the correspondence refers to the 30% in the context of transfer of shares, and I am satisfied that what was contemplated as at least one possibility was that Mr Savchenko might get some or all of his 30% interest in the Bank as a result of the

transfer of the shares to Mr Ryzhov under the 2015 Agreement. That conclusion is supported by Mr Orzirnii's evidence, which I accept, that after the 2015 Agreement was executed, Mr Ryzhov instructed him to "move 30% of the bank's, or rather to begin documenting the movement of the 30% towards the exercise of Mr Savchenko's option" and that in this way Mr Savchenko was being identified, after the event, as one of the beneficiaries of the 2015 Agreement.

20. Following the signing of the 2015 Agreement Mr Savchenko remained engaged in the management of the Bank together with Mr Ryzhov. They moved the Bank's offices to a new building, in which Sparta's offices were also located, and opened a number of new offices in cities in Russia.
21. On 18 January 2016 Ms Poltorak entered into sale-purchase agreements to transfer her 17.24% of the shares in the Bank to a Ms Lemesheva (9.8%) and Ms Litvinova (7.44%). The agreements provided for a price of about RUB 37.5m and RUB 28.5m respectively, which was deemed to have been paid. It is not clear whether any money changed hands, but the shares were transferred and those two individuals remained shareholders in the Bank at all material times thereafter. It is Mr Davletyarov's case, disputed by Mr Savchenko, that those individuals were nominees for Mr Savchenko. Whilst they may well have been (and remain) nominees for someone, there is no real evidence to support the assertion that Mr Savchenko is or was their principal and I do not find that to be the case. No other shares, whether in the Bank or Intergazfinans, were transferred pursuant to the 2015 Agreement.
22. In May 2016 the Central Bank of Russia further increased the capital adequacy requirements of the Bank. As a result Mr Ryzhov cancelled his purchase, with Mr Davletyarov's agreement, or so Mr Savchenko was told by Mr Davletyarov and accepted at the time.
23. Mr Savchenko and Mr Davletyarov entered into a further written agreement dated 22 July 2016 ("the July 2016 Agreement"). The relevant terms of this agreement were as follows:
 - (1) Mr Davletyarov agreed to transfer his 57.71% share in Rosgas to Mr Savchenko "by way of signing a share sale-purchase agreement and transfer instruction by the deadline of 22 July 2016" (clause 1.1).
 - (2) Mr Davletyarov also agreed to procure the repatriation of US\$3 million from the Bank's account at International Bank of Azerbaijan to an account in its name at Sberbank.
 - (3) In return Mr Savchenko agreed to procure the fulfilment of four financial obligations (clause 2):
 - (a) The restoration of a deposit of some RUB 4.8 million in the name of a Ms Bodina who was a personal friend of Mr Davletyarov, which had been used as blocked collateral to secure some borrowing of the Bank (clause 2.1);
 - (b) The "refund of OOO Wilton & Co of the bank's promissory note" in an amount of RUB 60 million (clause 2.2) and an identically worded

obligation in relation to a promissory note of OOO Mandeliks in the sum of RUB 62.2 million (clause 2.3). Wilton and Madeliks were companies in which Mr Davletyarov had a beneficial interest. These were references to promissory notes which those companies had issued in favour of the Bank so as to enable the Bank to take out further borrowing.

- (c) The transfer of a 100% shareholding in OOO Faraday. Faraday was stated to have rights to repayments by 22 August 2016 under loan agreements with OOO Industrialnyi Lizing and a Mr Kriskevich (clause 2.4).
- (d) The payment of US\$1.1 million to SNG Allianz and US\$1.4 million to Mr Davletyarov, in each case out of the US\$3m repatriated from the International Bank of Azerbaijan (clause 2.5 and 2.6).

- 24. Mr Savchenko's evidence was that this involved almost no additional consideration being provided by him for an increased shareholding because the Wilton and Mandeliks promissory notes could easily be replaced by notes issued by other companies which would not have to be backed by real assets; Faraday was a special purpose vehicle which formally belonged to third parties but had been established at the request of the Bank's management, under whose control it was, and the sums in question were loans made by the Bank on which Industrialnyi Lizing and Kriskevich had defaulted; and the payment obligations to SNG Allianz and Mr Davletyarov were to be funded out of the monies repatriated from International Bank of Azerbaijan.
- 25. More importantly, he suggested in his witness statement that this agreement was never intended to be performed by transfer of the shares as Mr Davletyarov knew. He did not want to acquire the Bank or any interest in it and was only interested in getting his money and that of his clients. He was told by Mr Davletyarov that the latter would not be able to afford to pay him the US\$3.3 million unless a new buyer was found for the Bank. This agreement was therefore something which he wished to procure only so that he could show it to his clients "as a token" to persuade them he was doing something to assist in them being repaid their deposits. It was, he says, the subject matter of a side agreement between himself and Mr Davletyarov that he would not attempt to enforce it for two months whilst they continued efforts to try to find a third-party purchaser.
- 26. I do not accept Mr Savchenko's evidence that there was a side agreement that it should not be enforced for two months, which is inconsistent amongst other things with the identified dates included in the agreement itself and several acts of part performance, including the execution of the share-purchase agreement and repatriation of funds from the International Bank of Azerbaijan. In any event, the evidence did not support his case that it was his expressed intention that there would never be a transfer to him of the shares for which the agreement provided. Mr Savchenko's evidence in his witness statement about the side agreement did not go so far as to suggest that the July 2016 Agreement was not intended to have legal effect or that he could not rely on it, but rather simply that he would not enforce its terms for two months. The effect of his evidence as a whole was that it remained a possibility that the share transfer to him would be enforced if only as a position of last resort notwithstanding that the preferred outcome was sourcing of a third-party purchaser willing to inject further capital. If the agreement was to provide the comfort to his clients which he professed was its

intention, that can only have been on the basis that there would be some benefit to them and him if the transfer occurred even if that were not the preferred route. In his evidence to the Court Mr Savchenko recognised this possibility, saying “I agreed to execute that contract so that in case he did not manage to sell the bank to third parties, I would still be able to offer the bank to my clients.”

27. Mr Davletyarov fulfilled the terms of clause 1.1 of the July 2016 Agreement by signing a share sale-purchase agreement and transfer instruction by the deadline of 22 July 2016. The sale-purchase agreement provided for transfer of the shares at their nominal value of US\$1 each. The US\$3 million funds were also successfully repatriated to the Bank from the International Bank of Azerbaijan.
28. Mr Davletyarov entered into a further agreement for sale of an interest in the Bank by a written agreement date 7 September 2016 with Mr Oleg Slyshchenko (“the September 2016 Agreement”). The relevant terms were as follows:
 - (1) The sale was of a 100% shareholding in Rosgas, and therefore an indirect 82.76% interest in the Bank. No provision was made for any transfer of the 17.24% now held by Ms Lemesheva and Ms Litvinova. Although Mr Kolikov and Mr Kaminsky, who owned 42.29% of the Rosgas shares which were to be transferred, were not parties to the agreement, they were identified in the definition of “Sellers” and by clause 1.3 Mr Davletyarov guaranteed that he was in a position to procure the transfer of the full 100% shareholding in Rosgas.
 - (2) The price was:
 - (a) RUB 870,000
 - (b) US\$835,751.52 by 24 November 2016
 - (c) Transfer to Mr Davletyarov or his nominee of rights of the Bank against various entities with which he was connected, essentially by way of forgiveness of debt, comprising a US\$1.1m loan to SNG Alliance and the Wilton and Madeliks promissory notes of a little over RUB 122 million.
29. It is common ground that as for the 2015 Agreement, Mr Savchenko’s lawyer, Mr Diakovskiy, assisted in the documenting of the agreement, and it is clear that Mr Savchenko was aware of its terms and consented to Mr Davletyarov entering into the agreement on those terms.
30. The September 2016 Agreement was part implemented by two share-purchase agreements dated 8 September 2016 between Mr Davletyarov and Mr Kravchenko (as to 39.71%) and Mr Filin (as to 18%), in each case at the nominal value of US\$1 per share.
31. It is Mr Davletyarov’s case, disputed by Mr Savchenko, that Mr Slyshchenko, Mr Kravchenko and Mr Filin were nominees for Mr Savchenko, and that it was Mr Savchenko who was his true counterparty as principal to the September 2016 Agreement. There is no sound evidential basis for reaching that conclusion, although it may well be that Mr Savchenko had more or less formal arrangements with Mr

- Slyshchenko in relation to the workings of the Bank and/or its shares following acquisition. Mr Davletyarov's counterparty was Mr Slyshchenko as principal.
32. On 9 December 2016 the Russian Central Bank revoked the Bank's licence. The Bank entered a form of insolvency procedure under the supervision of the Deposit Insurance Agency, an entity of the Russian State.
 33. On 27 March 2017, Mr Savchenko served a termination notice under clause 5 of the 2014 Agreement on Mr Davletyarov in which he demanded payment of US\$3.3 million. It was common ground by the time of the trial that this was valid and timeous notice under clause 5 so as to entitle him to payment if clause 5 remained in force. The sole legal issue in relation to the claim is whether clause 5 had ceased to have effect as a result of the subsequent agreements.
 34. There was also a dispute on the evidence as to whether Mr Savchenko had ever in fact paid any part of the US\$3.3 million to Mr Davletyarov prior to the 2014 Agreement. His evidence was that he had done so in late December 2013 by way of a series of rouble payments equivalent to that sum from three identified Russian companies to other Russian companies which he said were nominated by Mr Davletyarov. He did not claim that he had any ownership interest in the transferring companies or that Mr Davletyarov necessarily had any ownership interest in the receiving companies but contended that these were payments using "technical companies" which were common at the time. Mr Davletyarov's evidence was that he knew nothing of these payments which were not to companies owned or nominated by him. He said that he had been prepared to agree to the acknowledgement of receipt in clause 3 of the 2014 Agreement because he had been told that Mr Savchenko had introduced that additional sum to the Bank, so that he was in a position to transfer it at any stage.
 35. This dispute is not legally relevant to the issues on the claim because it is accepted on Mr Davletyarov's behalf that clause 3 gives rise to a contractual estoppel for the purposes of his obligations under clause 5, and that non-payment cannot afford a defence to the claim if clause 5 of the 2014 Agreement survives the subsequent agreements. However both sides submitted that the fact of payment, or non-payment, respectively, informed the assessment of the probabilities of the parties' intentions, conversations and actions in relation to the subsequent agreements. Mr Scott further submitted that the contractual estoppel precluded Mr Davletyarov from denying payment for these purposes also.
 36. I have not found it necessary to resolve this dispute for two reasons. First, the parties' subjective intentions are irrelevant to the interpretation of the subsequent written agreements and their effect on the obligations under the 2014 Agreement. So far as concerns my assessment of what the protagonists said and did at the time, I do not consider that the resolution of any disputed issue is assisted by a determination of the US\$3.3m payment issue. That is because by the time the parties came to enter into the 2015 and 2016 agreements, the position had changed from that which obtained in 2014 because of the problems with the Bank's liquidity.
 37. Secondly, at the time of the 2014 Agreement the difference between the parties' positions might not have been considered as significant as at first sight appears. This was a small bank of which the beneficial ownership rested with Mr Davletyarov and those closely associated with him, and my assessment is that he expected to be able to

extract funds as he wished for so long as the Bank was liquid and could meet its capital adequacy requirements, which it was and could at the time. If what Mr Savchenko did was to pay into the Bank rather than to Mr Davletyarov's nominee companies, the Bank would be US\$3.3 million better off and Mr Davletyarov would have believed that an equivalent sum was available to him. Such sum might be credited to an account in the name of Mr Savchenko on the Bank's books, but that would be a debt due from the Bank, not Mr Savchenko's property. If Mr Davletyarov did not then distinguish carefully between his personal position and that of the Bank, either as to the receipt or the repayment obligation in relation the US\$3.3 million, I would not expect to derive clear assistance on subsequent events from whether the funds were introduced into the Bank, as Mr Davletyarov contends, or directly to Mr Davletyarov's nominees, as Mr Savchenko contends. Moreover and importantly the parties were simply in a different bargaining position from mid-2014 onwards following the banking crisis and collapse of the rouble, and Mr Savchenko's bargaining position was not going to be materially different if he had paid US\$3.3m to Mr Davletyarov from that if he had paid it into the Bank.

The effect of the 2015 Agreement

38. There was little dispute about the relevant law. The test for the implication of terms is that identified by the Supreme Court in *Marks & Spencer plc v. BNP Paribas* [2016] AC 742 per Lord Neuberger at [14]-[32] and can for the purposes of this case be simplified into the proposition that a term will be implied into a contract where it is necessary to give the contract business efficacy. In *Baird Textile Holdings Ltd v. Marks and Spencer plc* [2001] CLC 999 the Court of Appeal assimilated the test of necessity for implying the existence of a contract and its terms with the test for necessity for implying terms into an existing contract: see in particular per Mance LJ at [61]-[62]. As to what is meant by "necessary to give business efficacy" there is helpful guidance in the speech of Lord Neuberger in the *BNP Paribas* case at the end of paragraph 21, in which he explains that the test is not one of "absolute necessity" because it is linked to business efficacy, but that "it may well be that the more helpful way of putting [the] requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."
39. Mr Savchenko was aware of the terms of the 2015 Agreement and consented to its conclusion notwithstanding that he was not a party to it. Those terms are necessarily inconsistent with the continued existence of the rights and obligations in the 2014 Agreement. The 2015 Agreement was for the sale of a 100% interest in the Bank, to be effected (apart from the transfer of Ms Poltorak's 17.24%) either by a direct transfer by Intergazfinans of all its shares in the Bank or by a transfer of all Rosgas' 100% shareholding in Intergazfinans. Although neither method would strictly speaking prevent the transfer by Mr Davletyarov to Mr Savchenko of a 36.25% shareholding in Rosgas, each would result in the shareholders of Rosgas ceasing to have any indirect interest in the Bank, so that a transfer of shares in Rosgas would confer no interest in the Bank. Such a course would be inconsistent with the very purpose of the 2014 Agreement which was to transfer an indirect interest in the Bank, a purpose reflected in the wording of the Agreement which was headed as being an agreement to transfer stock in a bank and which provided at paragraph 1 that Mr Savchenko was to acquire a 30% interest in the Bank by means of the transfer of a 36.25% shareholding in Rosgas.

It was to prevent any such result that Mr Davletyarov agreed in clause 6 of the 2014 Agreement not to take any steps which would result in changes to the Bank's ownership structure.

40. Mr Scott accepted that the 2015 Agreement must have involved a waiver or termination of some aspects of the 2014 Agreement, but submitted that what mattered for the purposes of the present dispute was whether the 2015 Agreement was necessarily inconsistent with the US\$3.3 million payment obligation in clause 5; that any implied agreement as to the effect of the 2015 Agreement on the 2014 Agreement could be no greater than was necessary; and that it was not necessary to imply the termination of the payment obligation in clause 5, which could simply be complied with by making the payment, whatever inconsistency the 2015 Agreement might have with other aspects of the 2014 Agreement.
41. I am unable to accept this submission for a number of reasons.
42. First, the right to repayment under clause 5 is in my view intrinsically linked to the right to transfer of the shares on 1 April 2017, and I do not think it is possible to treat the repayment obligation in clause 5 as surviving independently of a right to transfer of the shares (which the 2015 Agreement would preclude in commercial terms). The right to transfer of the shares on 1 April 2017 in clause 3, and the right to terminate that obligation in return for a payment of US\$3.3 million are two sides of an inseparable bundle of rights and obligations.
43. The 2015 Agreement does not contain optional arrangements: it involves an outright purchase of the shares by Mr Ryzhov. Once it is accepted, as Mr Scott does and must accept, that the necessary implication of the 2015 Agreement is that it supersedes the share transfer obligations in the 2014 Agreement, it is not commercially coherent that it should leave in place a contractual bargain which is part and parcel of that prior transfer agreement.
44. Secondly, Mr Scott's argument is in substance that it is uniquely the clause 5 payment right which survives from the 2014 Agreement. However, that right is expressed to be contingent on the termination of the agreement by notice, and if there are no surviving substantive rights and obligations there is nothing to terminate.
45. Each side sought to characterise the 2014 Agreement in a particular way in order to support their case. Mr Milner characterised it as a deferred purchase agreement and no different in its concept from the different format of the first draft which provided for an immediate sale and transfer with a resale and repayment at the end of the period. Mr Scott characterised it as an option to purchase or not to purchase at the end of the period, so that what was in issue was whether that option not to purchase survived. The agreement might be characterised in either way, and I am wary of placing too much weight on an *a priori* categorisation of an agreement with its own bespoke features. However if Mr Scott's characterisation is right the clause confers an option not to purchase that which there is no longer a right to purchase, which is not therefore in substance an option at all. Clause 5 speaks of "the right... to terminate the agreement" but if there is no longer a right to transfer of the shares under the agreement or of any other rights under the agreement, the "right to terminate" is not in substance a right or liberty at all.

46. Third, Mr Scott's argument does not merely involve the survival of the clause 5 obligation but rather posits a variation of it. This is a matter of substance not of form. Clause 5 provides that the payment obligation does not arise unless and until a notice is given of termination of the agreement. It contemplates that in the meantime there will remain at least four sets of rights and obligations set out elsewhere in the agreement, all of which are referred to directly or indirectly in clause 5 itself which identifies when and how they are to come to an end:
- (1) Mr Savchenko's contingent future right to the transfer of the shares under clause 3.1;
 - (2) Mr Savchenko's quasi shareholder rights to two seats on the Board and 30% of the profits under clause 4;
 - (3) Mr Savchenko's right to develop the bank's business including managing the treasury function of the bank;
 - (4) Mr Savchenko's capital funding obligations under clause 3.2.
47. The 2015 Agreement is inconsistent with the survival of any of these interim rights and obligations. The transfer of the 30% interest in the bank on 1 April 2017 is rendered impossible. So too is Mr Davletyarov's ability to procure for Mr Savchenko two seats on the board, an ability which disappears with the loss of majority shareholding resulting from the 2015 Agreement. So too is Mr Davletyarov's ability to procure Mr Savchenko's control of the treasury function. The 2015 Agreement further deprives Mr Davletyarov of the benefit of being able to require Mr Savchenko to fund 50% of the Bank's capital requirements and his expectation of the benefit of Mr Savchenko performing the day to day operation of the bank which goes with control the treasury function (which although not an obligation is an entitlement Mr Davletyarov could expect Mr Savchenko to exercise for so long as Mr Savchenko remained under an obligation to provide 50% capital support for the Bank). That funding obligation and management function cannot sensibly have been intended to survive the 2015 Agreement with its 100% transfer of ownership to a third party.
48. So the repayment right in clause 5 in the 2014 Agreement as agreed is a contingent right which is bound up with other rights and performance of other obligations until it is triggered. It becomes something of a different nature if it is freed from those interim rights and obligations. Mr Savchenko's continuing right to call for repayment of US\$3.3m from Mr Davletyarov on demand at any time up to 1 April 2017 is in return, in part, for Mr Savchenko running the Bank for as long as Mr Savchenko wishes to prior to 1 April 2017, and funding 50% of the Bank's capital for so long as he does so. That quid pro quo cannot survive the 2015 Agreement because it is inconsistent with it, and so if Mr Scott's argument were right, the clause 5 repayment right is changed into a simple entitlement to demand payment of US\$3.3 million at any time over a period of over 16 months without any interim obligations, which is not what clause 5 provides for. Put another way, the payment right in clause 5 would be converted from one which required fulfilment of a funding obligation unless and until the payment option were exercised to one in which it became a freestanding right to claim repayment at will during a given period without a continuing funding obligation.

49. Fourth, if it had been intended that a \$3.3m payment obligation by Mr Davletyarov should, uniquely or almost uniquely, survive from the 2014 Agreement, it is surprising that it was not expressly recorded at the time or indeed at all. I recognise that this point has greater force in relation to the July 2016 Agreement, which was between the same parties, but it is not without force in the context of an agreement which Mr Savchenko's lawyer was involved in drafting and which on any view required Mr Savchenko's consent if it was to be capable of fulfilling its purpose of enabling Mr Davletyarov to transfer an interest in the Bank which he had previously promised to transfer to Mr Savchenko. If it had been intended by both sides to carve out one particular aspect of one clause of the 2014 Agreement for survival, it is surprising that there is no expression of that intention by either side at the time or indeed over the following 2 ¼ years.
50. Fifth, I have held that the circumstances in which Mr Savchenko agreed to Mr Davletyarov entering into the 2015 Agreement with Mr Ryzhov involved both contemplating that Mr Savchenko would have arrangements with Mr Ryzhov and that they might, at least, involve an arrangement under which he would receive some or all of the 30% shareholding to which he would be entitled under the 2014 Agreement. Yet the 2014 Agreement itself clearly did not contemplate Mr Savchenko getting both an interest in the Bank and US\$3.3 million back; and nor therefore can his consent to the 2015 Agreement have been consistent with that possibility. Yet that would be the effect of a continued right to repayment of US\$3.3 million under clause 5 of the 2014 Agreement.
51. For all these reasons it follows, in summary, that the 2015 Agreement is simply not consistent with the continued existence of clause 5 of the 2014 Agreement. The survival of the payment obligation in clause 5 in isolation would, in the words of Lord Sumption, lack commercial coherence and practicality, and in agreeing to the 2015 Agreement being entered into Mr Savchenko and Mr Davletyarov necessarily agreed that the 2014 Agreement should be wholly superseded.

The effect of the July 2016 Agreement

52. The terms of the of the July 2016 Agreement are also necessarily inconsistent with the continued existence of the rights and obligations in the 2014 Agreement between the same parties. Had the 2014 Agreement not been superseded by the 2015 Agreement, it would have been superseded by the July 2016 Agreement. The July 2016 Agreement concerned transfer of all of Mr Davletyarov's shareholding in Rosgas, which would include the shareholding which was the subject matter of the 2014 Agreement. As I have explained, any side agreement as to a delay in enforcing the terms of the July 2016 Agreement did not constitute an agreement that the share transfer and other terms were not thereafter enforceable. The July 2016 Agreement was intended to be of legal effect, including the entitlement to transfer of the shares. Transfer of the shares would be inconsistent with the transfer of the same shares under the 2014 Agreement. That being so, the existence of that agreement is inconsistent with the continued existence of any part of clause 5 of the 2014 Agreement payment obligation for similar reasons to those I have articulated in relation to the 2015 Agreement.
53. Moreover if the right to recover US\$3.3 million under clause 5 of the 2014 Agreement were to survive the existence of the July 2016 Agreement, the effect would be that Mr Savchenko would be entitled to acquire the entirety of Mr Davletyarov's interest in the Bank for what Mr Savchenko sought to characterise as no real consideration: he would

be entitled to get back the US\$3.3 million by cancelling the 2014 Agreement and was not having to provide any real additional consideration, on his case, under the July 2016 Agreement. Yet his evidence and case was that the consideration under the July 2016 Agreement involved the transfer of almost no funds by him to Mr Davletyarov or the Bank *because* of the US\$3.3 million he had already paid. It was no doubt in recognition of the commercial unreality of a bargain conferring an entitlement to Mr Davletyarov's entire interest in the Bank for no real consideration that he sought to portray the July 2016 Agreement as one which was not intended to take effect by transfer of the shares. But I have concluded that that was at least one contemplated purpose of the July 2016 Agreement, and such an outcome is commercially inconsistent with a right to repayment of US\$3.3 million as well.

The effect of the September 2016 Agreement

54. The effect of the September 2016 Agreement was to supersede the July 2016 Agreement. That was what was contemplated, on Mr Savchenko's case, by the side agreement at the time of the July 2016 Agreement; and the sale of 100% of the shareholding in Rosgas by the September Agreement was inconsistent with the sale of a smaller shareholding in Rosgas by the July 2016 Agreement.
55. Had the 2014 Agreement not already been superseded by the 2015 Agreement, alternatively the July 2016 Agreement, it would have been superseded by the September 2016 Agreement, for similar reasons to those I have given in relation to the earlier agreements.

Conclusion

56. It follows that Mr Savchenko's claim fails because the payment obligation in clause 5 of the 2014 Agreement upon which he relies did not exist after the 2015 Agreement.
57. It also follows that Mr Davletyarov's counterclaim fails. The primary basis for the counterclaim was breach of the September 2016 Agreement on the grounds that Mr Savchenko was party to it as a principal. I have held that Mr Savchenko was not a party to that agreement, which is fatal to that basis of the counterclaim.
58. The alternative basis for the counterclaim was breach of the July 2016 Agreement. Mr Milner recognised that this could only succeed if, contrary to his case in defending Mr Savchenko's claim, the July 2016 Agreement was not superseded by the September 2016 Agreement. However, I have held that it was so superseded, and accordingly this basis for the counterclaim also fails.