Neutral Citation Number: [2019] EWHC 1557 (Comm)

Case No: CL-2017-000737

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2019

Before:

THE HON. MR. JUSTICE PICKEN

- -

Between:

MR RUSTEM MAGDEEV — **Claimant**

- and -

MR DIMITRY TSVETKOV — **Defendant**

- and -

(1) MR EMIL GAYNULIN
(2) EQUIX DIAMONDS DMCC
(previously EK DIAMONDS DMCC)
(3) EQUIX GROUP LIMITED
(previously EK LUXURY GOODS LIMITED)

Additional Parties

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- -

Robert Anderson QC and **Harry Adamson** (instructed by **Ignition Law Services Ltd**) for the First Additional Party
Charles Béar QC and **Anna Dilnot** (instructed by **PCB Litigation**) for the Defendant.

Hearing date: 7 May 2019
Draft judgment supplied to the parties: 10 June 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR. JUSTICE PICKEN:

1. This is an application, made in relation to proceedings in which a trial has been fixed for early next year, by the First Additional Party ('Mr Gaynulin') for all or part of the Additional Claim brought against him by the Defendant ('Mr Tsvetkov') to be struck out, alternatively for summary judgment to be given dismissing Mr Tsvetkov's Additional Claim against him.

2. The Claimant ('Mr Magdeev'), the Second Additional Party ('EK Diamonds') and the Third Additional Party ('EKLG') have not taken part in the proceedings arising from this application.

Background

3. Mr Magdeev, Mr Tsvetkov and Mr Gaynulin are businessmen operating in multiple jurisdictions. In or around 2011, Mr Tsvetkov started a business trading in jewellery manufactured by Graff Diamonds Ltd ('the Graff Business'). For the purpose of carrying out the Graff Business, in 2014, Mr Tsvetkov incorporated EK Diamonds in Dubai and EKLG in Cyprus.

4. Mr Magdeev has brought proceedings against Mr Tsvetkov ('the Primary Claim') on the basis of two written agreements. The first of those agreements ('the First Agreement') was concluded in Cyprus on 9 October 2014 between Mr Magdeev and EK Diamonds with Mr Tsvetkov acting as the guarantor of EK Diamonds' obligations. It provides that:

   "*Within 3 (Three) working days from the date the Present Agreement is signed by all Parties the Investor [Mr Magdeev] shall initiate a bank transfer from his personal bank account in the amount of 10,000,000.00 (Ten million) US Dollars … to the following bank account of the Trading Company [EK Diamonds] … .*"

5. The First Agreement goes on to state that this amount is provided to EK Diamonds for a period of three calendar years, without interest, and exclusively for the purpose of giving a deposit to Graff Diamonds Ltd. As regards Mr Tsvetkov's liability as the guarantor of EK Diamonds' obligations the agreement provides that:

   "*The Guarantor [Mr Tsvetkov] shall be fully liable in the (sic) favor of the Investor [Mr Magdeev] for the responsibilities of the Trading Company [EK Diamonds] as per the terms and conditions of the present Agreement*".

6. Less than a year after the First Agreement was concluded, on 21 August 2015, Mr Magdeev and Mr Tsvetkov concluded a second agreement ('the Second Agreement'). On its face, the Second Agreement concerns a loan of €5 million from Mr Magdeev to Mr Tsvetkov. It provides that:

   "*In accordance with the terms and conditions of the present Agreement the Lender [Mr Magdeev] shall provide the borrower [Mr Tsvetkov] with the loan … in the total amount of €5,000,000.00 (Five Million Euro ONLY) by transferring the said funds to the following bank account of the Borrower [Mr Tsvetkov] … .*"

7. According to the terms of the Second Agreement, this sum was to be returned by Mr Tsvetkov in two tranches. The first tranche (amounting to €2,545,000 including interest) was due on or before 31 October 2015 and the second tranche (US$2,965,000 including interest) was due on or before 28 February 2016. As described in more detail below, Mr Tsvetkov alleges that the Second Agreement formed part of a wider transaction and that it cannot be understood solely by reference to the written agreement.

8. The First Agreement is expressed to be subject to "*UK precedent law*" whereas the Second Agreement does not contain an express choice of law provision. For the purposes of the present application, the parties have invited me to proceed on the basis that both agreements are governed by English law, and I will do so.

9. In the Primary Claim, Mr Magdeev alleges that Mr Tsvetkov failed to repay the sums due under the First Agreement (Mr Tsvetkov's obligation to do so having accrued upon EK Diamonds' failure to repay the loan) and under the Second Agreement. Mr Tsvetkov asserts a number of defences in response.

10. In response to Mr Magdeev's claim based on the First Agreement, Mr Tsvetkov alleges that:

    (1) Mr Magdeev received several payments that cumulatively discharged the loan under the First Agreement;

    (2) an oral agreement concluded between Mr Magdeev, Mr Tsvetkov and Mr Gaynulin in Moscow on 7-8 December 2015 ('the December 2015 Oral Agreement') had the effect of terminating the First Agreement;

    (3) Mr Magdeev represented to Mr Tsvetkov in December 2015 that he would not enforce the payment obligations under the First Agreement and, consequently, he is estopped from doing so; and

    (4) Mr Magdeev's resignation from the board of EK Diamonds in early 2016 and the termination of his employment contract with EK Diamonds had the effect of discharging Mr Tsvetkov's guarantee under the First Agreement.

11. In response to Mr Magdeev's claim based on the Second Agreement, Mr Tsvetkov alleges that:

    (1) it was an implied term of the Second Agreement, in the form of a condition precedent to Mr Tsvetkov's liability, that Mr Magdeev would not do anything to prevent or obstruct the sale of a certain diamond by EKLG;

    (2) even if it did not amount to a condition precedent, there was an implied term to this effect and the non-repayment of the loan under the Second Agreement was caused by Mr Magdeev's breach of that implied term;

    (3) the December 2015 Oral Agreement had the effect of terminating the Second Agreement; and

(4) Mr Magdeev represented to Mr Tsvetkov that he would not enforce the payment obligations under the Second Agreement and he is, consequently, estopped from doing so.

12. Mr Tsvetkov also has a counterclaim against Mr Magdeev and an Additional Claim against Mr Gaynulin ('the Conspiracy Claim'). In broad terms, the Conspiracy Claim alleges that, from the second half of 2017 onwards, Mr Magdeev and Mr Gaynulin conspired to injure Mr Tsvetkov by depriving the Graff Business of its assets. The Conspiracy Claim is formulated on the basis of the tort of unlawful means conspiracy, alternatively on the basis that the conspiracy had the predominant purpose of injuring Mr Tsvetkov.

13. I should explain that the above sets out the position as it appears at present on the pleadings. That must be the focus for present purposes, not least because it is the basis on which the application has been made and was argued at the hearing which took place on 7 May 2019. However, after circulation of the draft judgment and just two days before formal hand down, the Court was informed that Mr Tsvetkov has located a document which purports to show that Mr Magdeev assigned the Second Agreement to his son, Mr Ernest Magdeev, on 16 November 2015. This document was apparently located by Mr Tsvetkov on 19 May 2019 and provided to his solicitors the next day. It was not, however, provided to the Court or to Mr Gaynulin (or, indeed, to Mr Magdeev) until a month after this, on 18 June 2019, accompanied by the suggestion that this judgment should be altered to take account of an (as yet necessarily) unpleaded defence on Mr Tsvetkov's part that the Primary Claim is not a claim which Mr Magdeev has any entitlement to assert because he no longer has any rights in respect of the Second Agreement. I am clear that this would not only be inappropriate, given that the purpose of circulating a judgment in draft form is merely to enable any typographical or similar errors to be identified and not to enable a party to seek to re-argue the case (see, e.g., ***R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*** [2011] QB 218 per Lord Judge at page 315C-D), but that it is also unnecessary in circumstances where, as matters stand, that new potential defence has not yet been pleaded. The application and so this judgment are concerned with the issues as currently identified (including, as I shall explain, certain proposed amendments previously indicated by Mr Tsvetkov), not an issue which has emerged so very belatedly - after the hearing and after production of the draft judgment.

14. In order to provide context to the parties' submissions on this application, it is necessary to describe the particulars of Mr Tsvetkov's Conspiracy Claim in a little more detail. In substance, Mr Tsvetkov alleges that Mr Magdeev induced Mr Gaynulin to act in concert with him by threatening him "*with reprisals*". As a result, at a meeting of the "*respective organised-crime patrons of Mr Magdeev and Mr Gaynulin*" in July 2017, it is alleged, Mr Magdeev and Mr Gaynulin agreed to co-operate with each other in order to extort money from Mr Tsvetkov.

15. The conspiracy is alleged to have had the effect of depleting the assets of EK Diamonds and EKLG.

16. In relation to the assets of EK Diamonds, Mr Tsvetkov alleges that Mr Gaynulin had effective control over EK Diamonds' bank account. In May 2017 (and so before the alleged conspiracy was hatched), it is alleged that Mr Gaynulin procured the withdrawal of almost all the funds from EK Diamonds' account leaving it with only a

token balance. Subsequently, following the July 2017 meeting described above, Mr Gaynulin is alleged to have acted in concert with Mr Magdeev in maintaining EK Diamonds' bank balance at an uncommercially low level.

17. These matters are set out in some detail in paragraphs 56(1)-(9) of the draft Re-Amended Defence and Counterclaim (and Particulars of Additional Claim), although they appeared also in the original (and to date the only formal) version of that document. Paragraph 56(10), then, states:

"In all the circumstances it is to be inferred that the purpose of imposing the fixed charges and/or dividing up the stock between the shareholders and/or running down the Graff Business and/or depriving EK Diamonds' bank account of funds was to deprive the Graff Business of assets otherwise available to use to earn revenue and/or to satisfy any judgment which Mr Tsvetkov as a contingent creditor might thereafter obtain against the companies. In turn, the purpose of so depriving the companies was to harm Mr Tsvetkov and to increase the pressure on Mr Tsvetkov to yield to Mr Magdeev's demands."

18. In Mr Tsvetkov's (unamended) Defence and Counterclaim (and Particulars of Additional Claim), the loss he suffered as a result of the conspiracy as far as the First Agreement is concerned is described at paragraphs 58(1), (3) and (4) in this way:

"(1) EK Diamonds has not been able to repay the loan under the First Agreement.

…

(3) Mr Tsvetkov has therefore suffered loss and damage in a sum equivalent to any liability that he is found to have to Mr Magdeev in these proceedings.

(4) Alternatively, Mr Magdeev has lost the chance that EK Diamonds would have repaid the loan under the First Agreement … ."

It can be seen, therefore, that it is the damage sustained by *EK Diamonds* which is said to give rise to Mr Tsvetkov's liability under the First Agreement (and the guarantee which he thereby gave Mr Magdeev).

19. Mr Tsvetkov's case concerning the Second Agreement and the impact that the conspiracy had on EKLG's assets is more complex. As highlighted above, Mr Tsvetkov alleges that the Second Agreement was not simply a loan of US$5 million from Mr Magdeev to him but was part of a wider transaction pursuant to which Mr Magdeev, Mr Tsvetkov and EKLG agreed to purchase a large 40-carat pear-shaped diamond ('the Diamond') for between US$13-15 million and then sell it. Mr Magdeev agreed to lend US$10 million from his Swiss bank account to EKLG to enable it to purchase the Diamond. To meet the requirements of Mr Magdeev's bank and to maintain confidentiality as against Mr Gaynulin, the funds were routed to EKLG in two separate tranches. Half the amount was paid by Mr Magdeev (and his son) directly to EKLG as a subscription for new preference shares. The other half was loaned by Mr Magdeev to Mr Tsvetkov and then paid by Mr Tsvetkov (and his wife) to EKLG as subscription for preference shares, which Mr Tsvetkov agreed to hold for the benefit of Mr Magdeev. Mr Magdeev and Mr Tsvetkov agreed that they would divide the profits from the sale of the Diamond equally. Although US$10 million was

transferred to EKLG as described above, the preference shares were, in fact, never issued. Further, pursuant to the alleged conspiracy, Mr Magdeev and Mr Gaynulin created fixed charges over the jewellery stock of EKLG. In consequence, EKLG was unable to sell the Diamond and, as a result, the contemplated mechanism of repayment under the Second Agreement could not take place.

20. In the (unamended) Defence and Counterclaim (and Particulars of Additional Claim), the loss alleged to have been been suffered as a result is described at paragraphs 58(2) and (4) as follows:

"*(2) Further or alternatively, EKLG has not been able to sell the Diamond and the contemplated mechanism of repayment of the loan under the Second Agreement has not occurred.*

...

(4) Alternatively, Mr Magdeev has lost the chance ... that the Diamond would have been sold and the loan under the Second Agreement repaid from the proceeds of sale."

It can again be seen, therefore, that it is damage suffered by *EKLG* which is said to give rise to Mr Tsvetkov's liability under the Second Agreement.

21. In the draft Re-Amended Defence and Counterclaim (and Particulars of Additional Claim) now relied upon by Mr Tsvetkov, however, three new heads of loss have been introduced:

(1) Loss and damage consisting in Mr Tsvetkov being unable to earn salary or other income from his employment or role within the Graff Business and EKLG which has, among other things, hindered him from repaying the sums due under the First Agreement and the Second Agreement (the 'Employment Loss').

(2) In or around February 2016, Mr Tsvetkov assumed EKLG's obligation to repay a sum of €4 million to an investor, Mr Mikhail Turetskiy. This gave rise to a liability of €4 million owed by EKLG to Mr Tsvetkov. Mr Tsvetkov alleges that he suffered loss and damage consisting in not being paid this amount by EKLG. Alternatively, it is alleged that Mr Tsvetkov lost the ability to obtain reimbursement from EKLG of the sum of €2 million paid out by Mr Tsvetkov in order to satisfy a debt due by EKLG to Mr Turetskiy (the 'Turetskiy Loss').

(3) Loss and damage consisting of the costs and expenses incurred by Mr Tsvetkov in investigating the alleged conspiracy (the 'Investigation Loss').

22. There is, as yet, no application by Mr Tsvetkov seeking permission to amend and so it would not be appropriate for me to determine whether Mr Tsvetkov should be granted permission to add these heads of loss by way of amendment (*inter alia*, because Mr Magdeev was not represented at the hearing of the present application). However, the parties have invited me to express my conclusions on whether the amended heads of loss survive the grounds on which Mr Gaynulin seeks striking out/summary judgment.

To that extent, essentially on a *de bene esse* basis, I will consider the proposed heads of loss.

Mr Gaynulin's application for strike out/summary judgment

23. Mr Gaynulin seeks to strike out the Conspiracy Claim against him and/or summary judgment on three grounds:

    (1) *Ground 1*: on the basis that the Conspiracy Claim is self-defeating since, if the allegations against Mr Magdeev underlying the Conspiracy Claim are established, then, the Primary Claim will fail. As a result, Mr Tsvetkov has not suffered any loss that he could recover from Mr Gaynulin pursuant to the Conspiracy Claim.

    (2) *Ground 2*: on the basis that the Conspiracy Claim is barred by the principle of reflective loss.

    (3) *Ground 3*: insofar as the Conspiracy Claim relies on Mr Tsvetkov's liability under the Second Agreement, it is factually incoherent.

    Self-evidently, Ground 1 only applies to Mr Tsvetkov's claim for loss consisting of his liability to Mr Magdeev under the Primary Claim. In other words, it applies to the entirety of Mr Tsvetkov's unamended Additional Claim but not to the new heads of loss that Mr Tsvetkov seeks to add by way of amendment.

24. Before considering each of these grounds in more detail, it is necessary to say something about the principles by reference to which the Court will approach applications for strike out/summary judgment. Since these principles are largely uncontentious, I can deal with them briefly.

Principles applicable to strike out/summary judgment

25. Pursuant to CPR 3.4(2), the Court may strike out a statement of case if it appears to the Court:

    "*(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

    (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

    (c) that there has been a failure to comply with a rule, practice direction or court order."

26. Paragraph 1.4 of Practice Direction 3A provides the following examples of cases that may fall within the scope of ground (a):

    "*(1) those which set out no facts indicating what the claim is about, for example 'Money owed £5000',*

    (2) those which are incoherent and make no sense,

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

27. Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case, where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides: *White Book* (2019) at paragraph 3.4.2, citing ***Harris v Bolt Burdon*** [2000] CP Rep 70.

28. A statement of case can be struck out on ground (b) if it is pointless and wasteful including when the costs of the litigation will be out of all proportion to the benefit to be achieved: *White Book* (2019) at paragraph 3.4.3.4, citing ***Jameel v Dow Jones and Co*** [2005] EWCA Civ 75, [2005] QB 946.

29. CPR 24.2 provides that the Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if:

"*(a) it considers that –*

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

30. The principles by reference to which a claim's prospects of success should be assessed at the strike out/summary judgment stage were summarised by Lewison J (as he then was) in ***Easyair Limited v Opal Telecom Limited*** [2009] EWHC 339 (Ch) at [15] (approved by the Court of Appeal in ***AC Ward & Sons Ltd v Catlin (Five) Ltd*** [2009] EWCA Civ 1098 at [24]). They are as follows:

"*i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 2 All ER 91.*

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8].

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman.

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10].

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550.

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.*

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it… .*"

Ground 1: the Conspiracy Claim insofar as it concerns the Primary Claim is self-defeating

31. The primary loss alleged in Mr Tsvetkov's (unamended) Conspiracy Claim against Mr Gaynulin is a sum equivalent to any liability that Mr Tsvetkov may be found to owe to Mr Magdeev by virtue of the Primary Claim. On behalf of Mr Gaynulin, Mr Robert Anderson QC submitted that insofar as Mr Tsvetkov's Conspiracy Claim relies on this head of loss, it is self-defeating. Assuming the truth of Mr Tsvetkov's factual allegations, as the Court must do in an application of this nature, he submitted that Mr Magdeev will not be able to obtain a valuable judgment against Mr Tsvetkov. This is because if the allegations underlying the Conspiracy Claim are established against Mr Magdeev, the Primary Claim will not succeed.

32. Mr Anderson QC put forward two reasons why the Primary Claim will fail, having decided not to press an argument which he had canvassed in his written submissions that, if the Conspiracy Claim is established against Mr Magdeev, Mr Magdeev's Primary Claim must fail for illegality:

(1) First, Mr Anderson QC submitted that, if Mr Tsvetkov's Conspiracy Claim against Mr Magdeev is successful, Mr Tsvetkov would have an absolute defence of set-off/circuity of action in response to the Primary Claim. As a result, Mr Tsvetkov will not have suffered any loss that he could seek to recover from Mr Gaynulin.

(2) Secondly, Mr Anderson QC submitted that, insofar as the loss alleged as part of the Conspiracy Claim consists of Mr Magdeev's claim against Mr Tsvetkov under the Second Agreement, then, if Mr Tsvetkov were able to establish the facts underlying the Conspiracy Claim, Mr Magdeev's claim based on the Second Agreement will fail by virtue of one or more of the other defences (besides the defence of set-off/circuity of action) relied upon by Mr Tsvetkov.

33. As I shall now come on to explain, I am satisfied that, insofar as the Conspiracy Claim against Mr Gaynulin relies on Mr Tsvetkov's liability under the Primary Claim as the relevant loss, it ought, indeed, to be struck out for either or both of these reasons.

Mr Tsvetkov has not suffered loss as the Primary Claim is barred by circuity/set-off

34. It was Mr Anderson QC's submission that, unless Mr Tsvetkov can show that he has a real prospect of establishing that he has suffered loss through his liability to Mr Magdeev by virtue of the Primary Claim, the Conspiracy Claim itself has no real prospect of success and, as such, should be struck out.

35. It is evident from Mr Tsvetkov's pleaded case that, leaving aside for the moment the three new heads of loss to which I have referred, the loss that he claims to have suffered as a result of the conspiracy is the amount of his liability to Mr Magdeev under the Primary Claim. Thus, in Mr Tsvetkov's Part 20 Claim Form against Mr Gaynulin, it is alleged, in terms, that (with my added emphasis):

"*The Defendant denies having any liability to the Claimant for the reasons set out in his Defence dated 28 February 2018. However, if and to the extent that the Defendant is found to have any liability to the Claimant, he will seek to recover* <u>*the amount of such liability*</u> *from the Additional Parties pursuant to the claims set out herein.*

As against the First Additional Party, the Defendant claims damages for conspiracy, on the basis that the First Additional Party has conspired with the Claimant to use unlawful means to injure the Defendant and/or with the predominant motive of injuring the Defendant, thereby causing his <u>*loss and damage in the form of his (alleged) liability*</u> *to the Claimant*."

36. The first paragraph unequivocally states that it is the amount of Mr Tsvetkov's liability pursuant to the Primary Claim (and not the mere existence of that liability) that constitutes the relevant loss for the purposes of Mr Tsvetkov's Conspiracy Claim against Mr Gaynulin. Similarly, although it is right to acknowledge that the second paragraph uses the expression "*loss and damage in the form of his (alleged) liability to the Claimant*", the claim is for damages (and so a monetary amount) to compensate Mr Tsvetkov for *"his loss and damage in the form"* of that liability and so in respect of whatever Mr Tsvetkov is liable to pay Mr Magdeev by virtue of the Primary Claim. That this is the nature of the claim brought by Mr Tsvetkov against Mr Gaynulin is underlined by Mr Tsvetkov's Particulars of Additional Claim characterising the relevant loss as being "*a sum equivalent to any liability that he is found to have to Mr Magdeev in these proceedings.*" Accordingly, if Mr Tsvetkov is under no liability to Mr Magdeev, it must follow that Mr Tsvetkov has not suffered any loss from Mr Gaynulin.

37. The point goes further, however, given that the second paragraph makes it abundantly clear that the Conspiracy Claim, inasmuch as it forms Mr Tsvetkov's claim against Mr Gaynulin, entails the allegation that Mr Gaynulin (*"the First Additional Party"*) *"has conspired with [Mr Magdeev] to use unlawful means to injure [Mr Tsvetkov] and/or with the predominant motive of injuring [Mr Tsvetkov]"*. Crucially, if that allegation is made out by Mr Tsvetkov as against Mr Magdeev, then, there will be no liability on his part to Mr Magdeev under the Primary Claim in the sense, at least, that he will not be under any obligation to pay Mr Magdeev anything. It follows that, in that event, there will be nothing payable, by way of substantive damages at least, by Mr Gaynulin to Mr Tsvetkov by dint of the Conspiracy Claim which Mr Tsvetkov has brought against Mr Gaynulin, Mr Magdeev's alleged co-conspirator.

38. On this basis, even if Mr Magdeev were successful in formally establishing Mr Tsvetkov's liability in respect of the Primary Claim, he would not be able to obtain a monetary judgment against Mr Tsvetkov. This is because, in respect of the Primary Claim, Mr Tsvetkov will be entitled to rely on an absolute defence of set-off/circuity of action by reason of Mr Tsvetkov's counterclaim against Mr Magdeev. This is, indeed, common ground between the parties. The consequence is that, as between Mr Magdeev and Mr Tsvetkov, the Primary Claim and Mr Tsvetkov's counterclaim will, in effect, cancel each other out such that, in overall terms, the quantum of Mr Tsvetkov's liability to Mr Magdeev would be nil. As Mr Anderson QC put it, under no circumstances will Mr Tsvetkov have to *"dip into his pockets"* to discharge any liability on his part to Mr Magdeev. This must mean that there is no loss in respect of which Mr Tsvetkov can seek to recover damages from Mr Gaynulin. It follows that Mr Tsvetkov has no real prospect of succeeding with the Conspiracy Claim (as against Mr Gaynulin).

39. Mr Charles Béar QC sought to meet Mr Anderson QC's submission with the argument that the fact that there are two equal and opposite claims between Mr Magdeev and Mr Tsvetkov does not mean that Mr Tsvetkov cannot himself be liable to Mr Magdeev. This was despite Mr Béar accepting that circuity/set-off will prevent Mr Magdeev from obtaining judgment against Mr Tsvetkov on the Primary Claim. Mr Béar suggested nonetheless that circuity of action is only a procedural mechanism and that, as such, it does not affect the substantive rights of parties. Mr Béar QC relied in this respect on authorities such as ***Goulandris Brothers Ltd v B Goldman & Sons Ltd*** [1958] QB 74 at page 106 (Pearson J), ***The Glenfruin*** (1885) 10 PD 103 at page 109 (Butt J) and ***Aktieselskabet Ocean v B Harding and Sons Ltd*** [1928] 2 KB 371 at pages 385 (Scrutton LJ) and 391 (Sankey LJ). However, even if that is right, it does not overcome the difficulty from Mr Tsvetkov's perspective that, on that basis still, Mr Tsvetkov has not suffered any loss that he would need to recover from Mr Gaynulin. As Mr Anderson QC pointed out, the key question, in the circumstances, is not whether Mr Tsvetkov is technically under a liability to Mr Magdeev, but whether, for the purposes of Mr Tsvetkov's Conspiracy Claim against Mr Gaynulin, Mr Tsvetkov has suffered loss through his liability to Mr Magdeev which entitles him to damages from Mr Gaynulin. As such, it is the financial consequence (if any) of Mr Tsvetkov being liable to Mr Magdeev which matters, not merely the existence of that liability. It is that financial consequence which dictates whether damages are properly payable by Mr Gaynulin to Mr Tsvetkov: if there is no financial consequence, there is nothing payable and so no realistic prospect of the Conspiracy Claim succeeding - even assuming, as I am prepared to assume, that (contrary to Mr Anderson QC's primary submission) the requirement that for a conspiracy to be actionable proof of loss is required is satisfied in the present case (see *Clerk & Lindsell On Torts* (22nd Ed., 2017) at paragraph 24-115).

40. Mr Béar QC sought also to argue that it would be anomalous for the Court to conclude that Mr Tsvetkov has suffered loss as against Mr Magdeev but that he has suffered no loss as against Mr Gaynulin given that Mr Tsvetkov's case is that both Mr Magdeev and Mr Gaynulin conspired together. I do not, however, recognise that anomaly. A conclusion that Mr Tsvetkov has not suffered any loss that he can recover from Mr Gaynulin would simply follow from the fact that Mr Tsvetkov has succeeded in resisting the Primary Claim through establishing the conspiracy alleged as against Mr Magdeev by way of defence/counterclaim. It does not follow that Mr Tsvetkov

would not also have been able to make good that same conspiracy case as against Mr Gaynulin – subject only to the need also to establish loss. This is, of course, why it is open to Mr Gaynulin to say that Mr Tsvetkov has not suffered loss but not open to Mr Magdeev to make the same point. Mr Magdeev cannot argue that Mr Tsvetkov has not suffered a loss for the purposes of his conspiracy claim against him since that would obviously involve an impermissible (indeed, double) circularity. However, the position is not at all the same as far as Mr Gaynulin is concerned since he need only point to the fact that what Mr Tsvetkov seeks from him depends on Mr Tsvetkov being under a liability to Mr Magdeev which, on Mr Tsvetkov's own case as against Mr Gaynulin, could never give rise to Mr Tsvetkov suffering the loss which he seeks through the Conspiracy Claim to recover from Mr Gaynulin.

41. Mr Béar QC went on to make the point that Mr Magdeev has not accepted that his Primary Claim against Mr Tsvetkov would fail by reason of circuity/set-off. There is a risk in such circumstances, he submitted, that Mr Magdeev might not accept this outcome and would maintain the Primary Claim. I agree with Mr Anderson QC, however, that whether Mr Magdeev has accepted this outcome is not what matters for present purposes since the Court must proceed on the basis that Mr Tsvetkov will be able to establish the factual allegations underlying his Conspiracy Claim at trial and, on that supposition, it is difficult to see how the Conspiracy Claim could succeed against Mr Gaynulin but fail against his alleged co-conspirator, Mr Magdeev.

42. Mr Béar QC next made the submission that, irrespective of the possibility of recovering loss, there are other reasons why the Conspiracy Claim against Mr Gaynulin ought to be permitted to continue. He relied on three main reasons: (a) continuing the claim against Mr Gaynulin would enhance the prospects of proving the conspiracy; (b) Mr Tsvetkov would have another party from whom he could recover costs if he is successful; and (c) if successful, it would provide vindication to Mr Tsvetkov.

43. As to the first of these points, Mr Béar QC raised the possibility of obtaining disclosure against Mr Gaynulin, together with the opportunity to cross-examine him. It is clear, however, that these are not sound reasons. As far as the possibility of obtaining disclosure against Mr Gaynulin is concerned, the Court of Appeal considered this issue in ***Unilever plc v Chefaro Proprietaries Ltd*** [1994] FSR 135. Although that was a dispute that arose in the context of patent infringement, the principle articulated by Glidewell LJ (at page 139) is relevant here also:

"*Mr. Floyd, for Akzo, does not argue that if it can be shown that there is a good arguable case against his client, that it was party to the alleged infringement of the patent, the fact that the principal reason for joining Akzo is to obtain discovery is of itself a reason to set aside service on that company. However, a person or body not shown to be arguably liable in any action may not be made a party to proceedings simply in order to obtain discovery*."

It follows that, having concluded that the Conspiracy Claim against Mr Gaynulin does not have a real prospect of success for the reasons stated above, it would be inappropriate for the claim to be permitted to continue merely so that Mr Tsvetkov can seek to obtain disclosure from Mr Gaynulin. I am clear, for the same reason, that it would be equally inappropriate to allow the claim to continue in order to afford Mr Tsvetkov an opportunity to cross-examine Mr Gaynulin since joining a party simply

in order to enable there to be cross-examination is, in substance, no different from joining a party for the purposes of obtaining disclosure. Both purposes are ancillary consequences of joinder; they cannot, in and of themselves, serve as justification for the naming of parties as defendants who would not otherwise be joined to the proceedings.

44. I also reject Mr Béar QC's contention that the claim should be allowed to continue in order to enable Mr Tsvetkov, if successful, to recover costs from Mr Gaynulin. I see no justification for allowing the claim to be maintained simply for this reason, not least because it is far from clear whether Mr Tsvetkov would ever be entitled to recover costs from Mr Gaynulin given that, as Mr Béar accepts, if Mr Tsvetkov were to succeed as against Mr Gaynulin, he would be entitled to no more than nominal damages. Although the issue of costs is a matter for the Court's discretion, the authorities suggest that Mr Tsvetkov may not be considered a 'successful party' in circumstances where he is only awarded nominal damages. As Leggatt J (as he then was) put it in ***Marathon Asset Management LLP v Seddon*** [2017] 2 Costs LR 255 at [3]:

"*In a commercial case such as this a judgment for only nominal damages is a defeat.*"

Leggatt J cited in this context ***Hyde Park Residence Ltd v Yelland*** [1999] RPC 655, in which Jacob J (as he then was) said this at page 670:

"It seems to me that the whole question of nominal damages is at the end of this century far too legalistic. A plaintiff who recovers only nominal damages has in reality lost and in reality the defendant has established a complete defence."

45. Mr Béar QC sought, more generally, to suggest that Mr Tsvetkov has an interest in being vindicated and so the claim should be allowed to continue. In this context, I was referred to ***Jameel (Yousef) v Dow Jones & Co Inc*** [2005] EWCA Civ 75. That was a case in which a foreign claimant had issued defamation proceedings in England against the publisher of a US newspaper in respect of an article posted on an Internet website in the USA. The claimant alleged that the article implied that he was involved in funding a terrorist organisation. In response, the defendant did not assert that the claimant had in fact contributed to funding the terrorist organisation. The defendant was not prepared to publish a statement that he had not done so either. The defence asserted was qualified privilege, on the basis that the defendant could publish, without adopting, the comments made by the United States authorities regarding the claimant's position. It was common ground between the parties that there had been minimal publication in England. In that context, Lord Phillips MR stated as follows at [67] and [69]:

"*The presumption of falsity does not however leave the judge in a position to make a declaration to all the world that the allegation was false. In the present case, where the matter will not even be explored at the trial, the judge could not possibly be expected to declare, with confidence, that the claimant never provided funding to Osama bin Laden. There may well in due course be a finding in relation to this in the Burnett action, where the question will be directly in issue.*

…

If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick."

46. Mr Béar QC suggested that ***Jameel*** was a very different case when compared with the present case since the level of damages suffered by the claimant in that case was minimal. More importantly, he submitted that ***Jameel*** was a case in which the underlying facts were not going to be explored at trial. As a result, he pointed out, the damage and level of vindication were both minimal. In the present case in contrast, Mr Béar QC submitted, Mr Tsvetkov has a perfectly legitimate interest in seeking vindication. I am not persuaded by these submissions, however, since, even if the claim against Mr Gaynulin were struck out, the Conspiracy Claim is still going to be tried against Mr Magdeev, in any event. It follows that, if Mr Tsvetkov were able to establish the conspiracy as against Mr Magdeev at trial, he would necessarily have obtained his vindication irrespective of whether Mr Gaynulin is also a defendant in the proceedings. The fact that Mr Gaynulin is no longer a party to the proceedings by that stage will not mean that the conspiracy has not been made out, formally as against Mr Magdeev but, in practice, also as against Mr Gaynulin since it will, no doubt and in any event, remain open to Mr Gaynulin, if he chooses, to attend to give evidence at trial denying the alleged conspiracy even if the Conspiracy Claim against him is struck out.

Mr Tsvetkov's claim under the Second Agreement will fail due to other defences

47. Mr Anderson QC advanced an additional reason why, insofar as Mr Tsvetkov relies on his liability to Mr Magdeev under the Second Agreement as part of the loss he seeks to recover from Mr Gaynulin, the Conspiracy Claim should be struck out. This was that, if the facts underlying the Conspiracy Claim were to be established at trial, Mr Magdeev's claim under the Second Agreement would necessarily fail on account of one or more of the other defences advanced by Mr Tsvetkov in response to the claim against him.

48. Mr Anderson QC's focus in this respect was on Mr Tsvetkov's defence that it was a condition precedent to his liability under the Second Agreement that Mr Magdeev would not do anything to impede the performance of the Second Agreement. Mr Tsvetkov alleges that Mr Magdeev did so by obstructing EKLG's sale of the Diamond. Specifically, in paragraph 43 of Mr Tsvetkov's Defence, it is alleged that:

"*It was an implied term of the Second Agreement, which by its nature was a condition precedent to Mr Tsvetkov's liability to repay the loan, that Mr Magdeev would not do anything to impede the performance of the Second Agreement, and in particular to prevent or obstruct the sale of the Diamond by EKLG … .*"

Paragraph 44 alleges breach as follows:

"In breach of the above implied term, Mr Magdeev has taken steps to prevent EKLG from selling the Diamond and/or returning the proceeds of sale to Mr Magdeev and Mr Tsvetkov. In particular:

(1) On or around 8 July 2017, Mr Magdeev procured the creation of a charge over the Diamond by way of security for debts allegedly owed to him by EKLG.

(2) On or around 27 July 2017, Mr Magdeev physically removed the Diamond from the Graff boutique, together with a number of other items, and sent them to Geneva Freeport. To the best of Mr Tsvetkov's knowledge, the Diamond and the other items which Mr Magdeev removed are still being stored at Geneva Freeport."

Paragraph 45, then, states:

"*In the circumstances, a condition precedent to Mr Tsvetkov's liability under the Second Agreement has not been fulfilled, and Mr Magdeev is therefore not entitled to repayment of the loan*."

49. As Mr Anderson QC pointed out, there is a close parallel between the factual allegations underlying the condition precedent defence (pleaded at paragraphs 44(1) and (2)) and the particulars of the Conspiracy Claim asserted by Mr Tsvetkov against Mr Gaynulin as formulated at paragraphs 56(6) and (7) of his Particulars of Additional Claim. Those sub-paragraphs read as follows:

"*(6) Immediately after the meeting referred to in paragraphs 56(5)(b) above, fixed charges were executed and registered in Cyprus over the jewellery stock of EKLG. The stock was divided into two lists, one for each of Mr Magdeev and Mr Gaynulin. Accordingly, taking the charges at face value, the effect of the fixed charges was at least to ensure that the company would not be able to obtain the benefit of any sale of the charged assets.*

(7) On 27 July 2017, Mr Magdeev purported to offset stock against the amount which EKLG owed him as an investor. Mr Magdeev physically took possession of US$21 million of stock representing the share of the company's assets which he had agreed with Mr Gaynulin, removed that stock from Limassol and flew it to the Geneva Freeport."

50. In the circumstances, it was Mr Anderson QC's submission that, if the facts alleged at paragraphs 56(6) and (7) are established, then, it is difficult to see how the defence pleaded at paragraphs 43 to 45 could fail. I agree.

51. In truth, Mr Béar QC had no answer to the point. He submitted that there would, in any event, be a dispute at trial about whether, as a matter of law, the Second Agreement contains the implied term pleaded at paragraph 43 of Mr Tsvetkov's Defence. He pointed in this regard to paragraph 39 of Mr Magdeev's Reply, which states:

"*Paragraph 43 is denied. The Second Agreement was a loan by Mr Magdeev to Mr Tsvetkov, to enable Mr Tsvetkov to invest in EKLG. It was not connected with the purchase of any particular diamond. Accordingly, it is not affected by the re-sale of any particular diamond. The alleged implied term was not a term of the Second Agreement*".

Mr Béar QC referred also to paragraph 45 of the agreed Case Memorandum which reads as follows:

"*Mr Magdeev denies that his loan under the August 2015 Agreement was in any way connected with the purchase of any particular diamond, and thus denies any term or condition precedent of the sort alleged…*"

It should be noted, however, that in neither of these passages is there a denial of the existence of the implied term as a matter of law. Properly understood, all that they contain is a contention that the implied term does not arise since the Second Agreement was not connected with the purchase of the Diamond. Whether that was the case is a question of fact, not law. Indeed, as highlighted above, the factual allegation that the Second Agreement was part of a wider transaction pursuant to which EKLG would acquire the Diamond is part of Mr Tsvetkov's Conspiracy Claim. It follows that, for present purposes, I must assume that fact in Mr Tsvetkov's favour.

52. For these various reasons, therefore, I have concluded that, insofar as Mr Tsvetkov's Conspiracy Claim against Mr Gaynulin relies on his liability under the Primary Claim as being the relevant loss, that claim ought to be struck out, alternatively that there should be summary judgment dismissing that claim.

Ground 2: Reflective loss

53. The second ground put forward by Mr Gaynulin in support of his strike out/summary judgment applications is that the losses which Mr Tsvetkov seeks to recover pursuant to the Conspiracy Claim are barred by the principle of reflective loss.

54. In the light of the conclusions which I have already reached in relation to Ground 1, the question whether Mr Tsvetkov's loss consisting of his liability pursuant to the Primary Claim is barred by the reflective loss rule does not, strictly speaking, arise for determination. Mr Béar QC nonetheless recognised that, in the light of the Court of Appeal's decision in ***Marex Financial Ltd v Sevilleja*** [2018] EWCA Civ 1468 and subject to the outcome of an appeal to the Supreme Court which was heard only a few days after the hearing before me, this is a loss which is barred by reason of the rule against reflective loss. This is because, as Mr Anderson QC submitted, it follows from Mr Tsvetkov's case that: if EK Diamonds were to bring a claim to replenish its loss, it could pay the sums due and owing to Mr Magdeev under the First Agreement (or repay Mr Tsvetkov any sums paid over by him); and, if EKLG brought a claim to recover the allegedly misappropriated assets, it could pay the sums owing under the Second Agreement by way of redemption of preference shares.

55. In such circumstances, my primary focus in what follows when dealing with Ground 2 is, therefore, on the three new proposed heads of loss which Mr Anderson QC characterised as having been designed to *"sidestep"* Mr Tsvetkov's reflective loss difficulties: namely the Employment Loss, the Turetskiy Loss and the Investigation Loss. It is convenient to address the latter separately since particular considerations arise in relation to it.

The law on reflective loss

56. It is common ground that, as matters presently stand, the law on reflective loss is as set out by the Court of Appeal in ***Marex***.

57. That case arose out of a dispute between Mr Sevilleja and his two companies (Creative Finance Ltd and Coxmorex Ltd) on the one hand and Marex Financial Ltd ('Marex'), a foreign exchange broker, on the other. Following a trial in the Commercial Court of the dispute between Marex and Mr Sevilleja's companies, Field J had released a draft judgment finding that the two companies were liable to Marex in a sum in excess of US$5 million. Marex alleged that, following the release of Field J's draft judgment, Mr Sevilleja wrongfully asset-stripped his companies. As a consequence, it was alleged, the companies were unable to pay the judgment debt that they owed Marex. Marex claimed the judgment debt as damages against Mr Sevilleja in addition to interest and costs.

58. Against this factual backdrop, two questions of law arose for consideration before the Court of Appeal, namely:

    (1) whether the rule against recovery of reflective loss applies to claims by creditors of a company who are not its shareholders; and

    (2) as to the scope of the exception to the reflective loss principle recognised by the Court of Appeal in ***Giles v Rhind*** [2003] Ch 618.

59. On the first issue, Flaux LJ (with whom Lindblom LJ and Lewison LJ agreed) concluded that the reflective loss rule was applicable to creditors who were not shareholders of the company. He had this to say at [33]:

    "*Once it is recognised that the justification for the rule is wider, it is difficult to draw a principled distinction between a claim by a shareholder qua creditor (in relation to which, as Mr Choo Choy accepted, Johnson v Gore Wood & Co [2002] 2 AC 1 and Gardner v Parker [2004] 2 BCLC 554 are binding authority that the claim is barred by the rule) and a claim by any other creditor who is not a shareholder. As a matter of logic and principle, it is difficult to see why a claim by a creditor who has one share in a company should be barred by the rule against reflective loss whereas a claim by a creditor who is not a shareholder is not. That point is well illustrated by the example of a creditor who owns shares in the company, whose claim is initially barred by the rule, but, on this hypothesis, if he sells the shares, the rule no longer bars his claim. That makes no logical or legal sense at all.*"

60. In reaching these conclusions, Flaux LJ relied on certain observations made by Lord Millett in ***Johnson v Gore Wood & Co*** [2002] 2 AC 1 and certain other observations made by Neuberger LJ (as he then was) in ***Gardner v Parker*** [2004] 2 BCLC 554.

61. In ***Johnson***, Lord Millett considered that the rule against reflective loss should apply to claims brought by shareholders even when the claim is brought by a shareholder *qua* employee. As Lord Millett put it (at pages 66-67):

    "Reflective loss extends beyond the diminution of the value of the shares; it extends to the loss of dividends (specifically mentioned in Prudential Assurance Co Ltd v

Newman Industries Ltd (No 2) [1982] Ch 204) and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds ... .

The same applies to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder and even if he would have had a legal claim to be paid. His loss is still an indirect and reflective loss which is included in the company's claim. The plaintiff's primary claim lies against the company, and the existence of the liability does not increase the total recoverable by the company, for this already includes the amount necessary to enable the company to meet it."

62. Earlier in the same case, at pages 35-36, Lord Bingham had explained the rule against reflective loss in these terms:

"Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss."

63. Drawing upon these observations, in ***Gardner***, Neuberger LJ stated as follows at [71] (with my emphasis added):

"*There are observations, which I have quoted, in the speech of Lord Millett in Johnson which appear to me strongly to reinforce the conclusion that the rule against reflective loss does indeed bar BDC's claim against Mr Parker insofar as it is based on the loan. Thus, in the passage from his speech I have quoted at para. 30 above, Lord Millett does not merely refer to 'shareholders' but also to 'creditors'. Secondly, in the passage cited in para.31 above, Lord Millett emphasised that reflective loss does not only extend to 'diminution of the value of the shares' and 'loss of dividends', but also to 'all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds'. Similarly, at p.862H; 67B, he said in terms that the fact that Mr Johnson was claiming, as it were, qua employee, rather than qua shareholder, made no difference. <u>I can see no basis whatever in logic or principle as to why, if a claim qua employee is barred by the rule, a claim made qua creditor is not similarly so barred</u>. In most cases where an employee's claim is barred by the rule against reflective loss, the employee will be a creditor of the company. It is hard to see why a creditor who is an employee should be treated differently from any other creditor of the company when it comes to applying the rule against reflective loss*."

64. Coming back to ***Marex***, at [35] Flaux LJ recorded a submission made by Mr Choo Choy QC *"that the law had effectively taken a wrong turn when the Courts had extended the rule beyond the original justification for the rule ... that a shareholder cannot recover for a loss which is on analysis the company's loss, such as the diminution of the value of its shares"* and *"that this Court should make a start in putting the law back on what he submitted was the right course, by refusing to extend*

the rule against reflective loss beyond shareholders to creditors who are not shareholders”. He was unimpressed by that submission, saying this at [36]:

“The fundamental difficulty with that submission is that, at least in this Court, it would perpetuate the illogical and unprincipled distinction to which I have drawn attention between the shareholder with one share who is a creditor, whose claim is barred by the rule against reflective loss on the current state of the authorities and the creditor with no shares or who has sold his shares, whose claim is not barred. Furthermore, I agree with Mr Lewis QC that the answer to Mr Choo Choy QC's example of the creditor of an individual is that the non-shareholder creditor of a company is closer to the shareholder creditor of the company than to the creditor of an individual, the common thread being the company and the fact that the various considerations justifying the rule against reflective loss then come into play, as identified above, double recovery, causation, conflict of interests and avoiding prejudice to other creditors.”

He, then, had this to say at [37]:

“In my judgment, the last consideration applies with particular force to any creditor of a company, whether a shareholder or not. If the creditor were able to pursue a claim in relation to the asset stripping of the company such as in the present case, that would bypass and subvert the pari passu principle, applicable to the unsecured creditors of the company in the event of liquidation, that the assets of the company be distributed rateably. On this hypothesis, if a creditor were able to pursue a claim for reflective loss, it could make a full recovery of its debt against the wrongdoer to the prejudice of the other creditors, whereas if the liquidator were to pursue the company's claim against the wrongdoer and thereby replenish its assets, they would be available for distribution to the general body of creditors.”

65. Flaux LJ went on to analyse the second issue in ***Marex*** (the scope of the ***Giles v Rhind*** exception). In doing so, he cited with approval the following passage in the judgment of Males J (as he then was) in ***St Vincent European General Partner Ltd v Robinson*** [2018] EWHC 1230 (Comm) at [94] (again with my emphasis added):

“*Although Giles v Rhind [2002] EWCA Civ 1428, [2003] Ch 618 has not been followed in Hong Kong (see Waddington v Chan Chun Hoo [2008] HKCFAR 370), it is binding on courts in this jurisdiction short of the Supreme Court, as the Court of Appeal held in Webster v Sandersons Solicitors [2009] EWCA Civ 830, [2009] 2 BCLC 542 at [36]. Lord Clarke MR affirmed the summary by Neuberger LJ in Gardner v Parker at [37] and noted at [38] that ‘the critical point in Giles v Rhind was ... that the company was disabled from bringing the claim by the very wrongdoing which the defendant had by contract promised him, as a shareholder, and the company that he would not carry out’. In contrast, there was nothing equivalent on the facts of Webster. Other cases have emphasised <u>the limited scope of the exception and the demanding nature of the test of impossibility</u> caused by the wrongdoing which a shareholder claimant must meet (Towler v Mills [2010] EWHC 1209 (Comm) at [25], Norcross v Georgallides [2015] EWHC 1290 (Comm) at [65], and Kazakhstan Kagazy Plc v Arip [2014] EWCA Civ 381, [2014] 1 CLC 451 at [33]).*”

66. Flaux LJ went on to say this at [57] (once again with my emphasis added):

"*The exception is a narrow one, only applicable where as a consequence of the actions of the wrongdoer, the company no longer has a cause of action and it is impossible for it to bring a claim or for a claim to be brought in its name by a third party such as Marex in the present case. Contrary to Mr Choo Choy's submissions, I consider the impossibility or disability must be a legal one and what might be described as factual impossibility is insufficient. Although, in the passage at para 79 of his judgment in Giles v Rhind which I have quoted at para 47 above, Chadwick LJ referred to '[the company] being forced to abandon by reason of impecuniosity attributable to the wrong which has been done to it', he cannot have intended that every case where the impecuniosity of a company is attributable to the wrongdoing would fall within the exception. If that were what Chadwick LJ was saying, given that, in many cases where the rule against reflective loss is in play, the company's assets have been abstracted by the wrongdoer, so that without an injection of funds, for example from a shareholder or creditor, it is not possible for the company to bring a claim, the exception would risk becoming the rule.*"

The Employment Loss and the Turetskiy Loss

67. In the light of the Court of Appeal's decision in ***Marex*** and subject to the outcome of the Supreme Court appeal, it is clear that Mr Tsvetkov has no realistic prospect of making good his case concerning the Employment Loss or the Turetskiy Loss. Mr Béar QC did not, indeed, take issue that this is the position until, during the course of his oral submissions, he sought to suggest that the Employment Loss might not constitute reflective loss after all.

68. The Employment Loss is formulated in Mr Tsvetkov's Particulars of Additional Claim at paragraph 58(3) in the following way:

"*… Mr Tsvetkov has been unable to earn salary or other income (such as a share of profit from sales of jewellery) from his employment or role within the Graff Business and EKLG which has, among other things, hindered him from effecting repayment under the First and Second Agreements*."

69. The Turetskiy Loss is described as follows in paragraph 58(6):

"*… Mr Tsvetkov has not been paid and has lost the chance to be paid the sum of €4 million owed to him by EKLG pursuant to (i) Mr Tsvetkov's assumption, in or around February 2016, of EKLG's obligation to repay Mr Mikhail Turetstkiy, then an investor in EKLG, the sum of €4 million and (ii) a letter addressed to the then director of EKLG, Mr Anastasiou, dated 15 February 2016 and signed by Mr Magdeev and Mr Gaynulin which acknowledged the debt due to Mr Tsvetkov arising from the matters in (i) above and instructed Mr Anastasiou to pay €4 million from EKLG to Mr Tsvetkov ('the Repayment Letter'). Accordingly, the Repayment Letter constituted or evidenced a liability of €4 million to Mr Tsvetkov from EKLG. Alternatively, Mr Tsvetkov has procured payment to Mr Turetskiy of €2 million and is liable to (sic) reimbursed by EKLG in that amount … .*"

70. There was a dispute between Mr Anderson QC and Mr Béar QC as to whether this latter loss (the Turetskiy Loss) entails a claim by Mr Tsvetkov in his capacity as a shareholder or as a creditor of EKLG. Mr Anderson QC suggested the former is the position given that the loss described in paragraph 58(6) entails loss suffered by Mr

Tsvetkov as the legal holder of preference shares in EKLG pursuant to which he would have received, by way of dividend, the proceeds of sale of the Diamond which sums would have been used to discharge his liability to Mr Magdeev. Mr Béar QC insisted, on the other hand, that the anticipated redemption of the preference shares amounted to no more than a mechanism by which Mr Magdeev's loan would be satisfied and that, as such, it would be wrong to view Mr Tsvetkov's loss as being a loss suffered *qua* shareholder as opposed to *qua* creditor.

71. It may be that Mr Béar QC is right about this. In any event, it seems to me that, on a strike out/summary judgment application such as the present, it is appropriate to assume in Mr Béar QC's favour that that is the case. However, even making that assumption and noting, furthermore, that Mr Tsvetkov is not now a shareholder of EKLG, the fact remains that he did previously hold shares in EKLG. This seems to me to put him into the shareholder category for reflective loss purposes. Perhaps recognising this, Mr Béar QC's main focus in this respect entailed the submission, rather, that Mr Tsvetkov ought not to be regarded in relation to the Employment Loss and the Turetskiy Loss as being a creditor of EKLG in the same way that the claimant (a judgment creditor - strictly speaking, an unsecured judgment creditor) was in ***Marex***. I cannot agree with him about that. Mr Tsvetkov is, quite obviously, as it seems to me, a contingent creditor. As such, I struggle to see why it should matter that, unlike the claimant in ***Marex***, he is not a judgment creditor. A contingent creditor is merely a different type of creditor. Like a judgment creditor, a contingent creditor is nonetheless a creditor. It follows that, for the purpose of the reflective loss principle, Mr Tsvetkov's claims to recover the Employment Loss and the Turetskiy Loss are appropriately to be regarded as being brought by a shareholder, or one-time shareholder, in his capacity as an employee or creditor of EKLG. As such, it is clear that the reflective loss rule will bar Mr Tsvetkov's claim to recover the Employment Loss and the Turetskiy Loss.

72. It should, furthermore and in any event, be emphasised that ***Marex*** was *not* a case in which the claimant was a *shareholder*; on the contrary, it was the defendant, Mr Sevilleja, rather than the claimant, Marex, who was the shareholder in the two companies – hence the claim made by Marex concerning Mr Sevilleja's actions in relation to his companies post-judgment. It follows that, based on the context in which the issue in ***Marex*** arises, the question before the Supreme Court, in the appeal which took place soon after the hearing before me, is *not* whether the reflective loss principle applies to *shareholders* suing in their capacity as creditors or employees of a company, but is instead whether the reflective loss rule applies to claimants who are *not shareholders*.

73. As far as the Supreme Court's determination of that question is concerned, there are two possibilities. The Supreme Court might uphold the Court of Appeal's decision, in which case the Employment Loss and the Turetskiy Loss have no realistic prospect of success for the reasons stated previously. Alternatively, the Supreme Court might depart from the Court of Appeal's conclusion to hold that the reflective loss principle does not apply to claimants who are not shareholders of the company. Even if the Supreme Court were to adopt the latter course, it would not necessarily need to depart from the authorities (apart from ***Marex***) that stand for the proposition that shareholders' claims in their capacity as creditors or employees are barred by the reflective loss rule: ***Johnson*** at pages 66-67 (Lord Millett) and ***Gardner*** at [71]

(Neuberger LJ). Thus, it is only if the Supreme Court departs from the reasoning of the Court of Appeal and it does so on a basis that is wider than is necessary to decide the ***Marex*** appeal that the law would have changed in a way that assists Mr Tsvetkov. I note in this respect that, although Mr George Bompas QC's Grounds of Appeal invite the Supreme Court to depart from the Court of Appeal on the broader point and decide that the reflective loss principle only applies to claims brought by shareholders *qua* shareholders, it does not follow that the Supreme Court will be persuaded to take up that invitation.

74. It remains for me to consider whether Mr Tsvetkov has a realistic prospect of establishing that his claim falls within the ***Giles v Rhind*** exception. It is common ground that the law as it stands now, as described by the Court of Appeal in ***Marex***, requires Mr Tsvetkov to prove that it is legally impossible for EK Diamonds and/or EKLG to bring a claim. As previously observed, Flaux LJ made it clear in ***Marex*** at [57] that the relevant "*impossibility or disability must be a legal one and what might be described as factual impossibility is insufficient*". It is accepted by both parties that Mr Tsvetkov cannot meet this standard. Mr Béar QC submitted, however, that the Supreme Court might replace the standard of legal impossibility with factual impossibility or inability. If the Supreme Court were to do so, he argued, Mr Tsvetkov has a reasonable prospect of bringing himself within the ***Giles v Rhind*** exception. In support of his contention that Mr Tsvetkov may be able to meet the requirement of factual impossibility, Mr Béar QC put forward four main reasons why, as regards EKLG in particular, it is unable to replenish its assets by proceeding against Mr Magdeev and/or Mr Gaynulin itself:

(1) Mr Magdeev and Mr Gaynulin have stripped EKLG of all its assets such that it is not in a financial position to pursue these claims.

(2) EKLG is currently under the control of Mr Magdeev. Mr Magdeev and his son are EKLG's sole shareholders and its sole director works for Mr Magdeev.

(3) Mr Tsvetkov cannot bring a derivative claim because he is no longer a shareholder of EKLG.

(4) Mr Tsvetkov cannot petition to wind up EKLG under Cypriot law because, as under English law, a winding up order will not be made when a debt is disputed.

75. Even if the Supreme Court were to replace the test of legal impossibility with factual impossibility, a possibility which remains uncertain at best, I am not satisfied that Mr Tsvetkov has a realistic prospect of establishing that it is factually impossible for EKLG to bring proceedings. As highlighted earlier, even before the decision of the Court of Appeal in ***Marex***, the authorities had emphasised the exacting nature of the test of impossibility that the ***Giles v Rhind*** exception requires. In view of that demanding standard, I am not persuaded that the route identified in Mr Béar QC's fourth reason meets the threshold of factual impossibility.

76. In support of the contention that Mr Tsvetkov is unable to bring a petition to wind up EKLG under Cypriot law, Mr Tsvetkov has produced a letter from his Cypriot lawyers. The import of that letter is that Cypriot Courts, just like English Courts, will not grant a petition for winding up if there is a *bona fide* dispute regarding the

underlying debt. However, it does not explain why Mr Tsvetkov cannot bring proceedings to establish the underlying debt first, for example to establish Mr Tsvetkov's claim that he is owed €4 million (or alternatively €2 million) pursuant to the allegations regarding the Turetskiy Loss, and then seek to appoint a liquidator over EKLG. Assuming, as I must do for the present purposes, the truth of Mr Tsvetkov's factual allegations, it is difficult to see why Mr Tsvetkov will have difficulty in obtaining judgment on the underlying debt. I accept that this route may not be as straightforward as Mr Tsvetkov would like it to be since it requires him to go through a round of litigation before a petition for winding up can be brought. Indeed, as Mr Tsvetkov puts it in his witness statement, it may even be "*very difficult*" to do so. As Mr Anderson QC pointed out, though, what is required is evidence of impossibility. I am not satisfied on the evidence before me that it would be impossible for Mr Tsvetkov to follow the route identified in Mr Béar QC's fourth reason.

77. This brings me to Mr Béar QC's central contention, which is that, since in ***Marex*** there is an appeal pending before the Supreme Court, it would be inappropriate to strike out Mr Tsvetkov's claim at this stage. In this respect, Mr Béar highlighted the fact that in Mr Bompas QC's Grounds of Appeal before the Supreme Court in ***Marex*** the application of the reflective loss principle to non-shareholders and the scope of the ***Giles v Rhind*** exception are put in issue. In those circumstances, he submitted, the relevant question is not what the law is now, but what it will be by the time that the trial in this action comes to take place early next year.

78. It is common ground between the parties that, in a situation such as this, the Court has a case management discretion to exercise in deciding whether to strike out the claim, permit the claim to continue, or stay the proceedings. The position is summarised in *The White Book* (2019) at paragraph 19-182 in the following way:

"*At trial a first instance judge is bound by the doctrine of precedent to apply the law as laid down in a decision of the Court of Appeal, even if there is a possibility that that decision may be reversed. But the same is not necessarily the case where a judge is dealing with an application to strike out a claim or to give summary judgment before a trial. Then the judge can take into account the possibility that the Court of Appeal's decision may be reversed on appeal and may dispose of the application by refusing to strike it out or to give summary judgment accordingly, especially where it is known that in other proceedings the Court of Appeal's decision is to be tested in a pending appeal to the House of Lords (Derby v Weldon (No 5) [1989] 1 WLR 1244). But in such circumstances it may be a more proportionate use of the parties' and the court's resources to stay the application pending the determination of the appeal instead of dismissing it (Green v Skandia Life Assurance Co Ltd, op. cit.).*"

79. In ***Derby v Weldon (No 5)*** [1989] 1 WLR 1244, Vinelott J exercised his discretion in refusing to strike out the claim in circumstances where an appeal to the Supreme Court was pending from the Court of Appeal's decision in ***Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*** [1989] 3 WLR 563. He said this at page 1250:

"*However, there is another situation where a judge is, as it seems to me, entitled and indeed bound to take into account the possibility that a decision of the Court of Appeal may be reversed by the House of Lords. That is where, as in this case, the court is asked to strike out a claim on the ground that the Court of Appeal has held*

that the facts alleged give rise to no cause of action, or to strike out a defence on the ground that the Court of Appeal has held that the facts alleged afford no defence".

He went on at page 1252 to say this:

"*I do not think, therefore, that the decision of the Court of Appeal, in Lonrho Plc. v. Fayed is a decision that in circumstances such as these the court has no alternative but to strike out the statement of claim ... I am, therefore, free to decide whether in these circumstances the court is bound to strike out the claims in conspiracy and to disallow amendments raising claims in conspiracy ... In my judgment, in the instant case there are overwhelming reasons for refusing to strike out the allegations of conspiracy and for allowing the amendments so far as they raise allegations of conspiracy*".

As Vinelott J made clear, however, this was a case in which there was a clear need *"for an authoritative exposition of the law by the House of Lords"*, specifically because there was an apparent inconsistency between two House of Lords decisions (***Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)*** [1982] AC 173 and ***Buttes Gas and Oil Co v Hammer*** [1982] AC 888), as well as a question as to whether in the ***Lonrho*** case the House of Lords impliedly overruled the decision of the Court of Appeal in ***Belmont Finance Corporation Ltd v Williams Furniture Ltd (No. 2)*** [1980] 1 All ER 393: see pages 1252H-1253F.

80. In ***Green v Skandia Life Assurance Company Ltd*** [2006] EWHC 1626 (Ch), in contrast, Mr Christopher Nugee QC (as he then was), sitting as a Deputy Judge of the High Court, considered that the appropriate course of action in the circumstances of that case was to stay the claims until the appeal was decided. He noted that there were significant practical problems associated with either course, i.e. striking out the claim or permitting the claim to continue. As he observed at [67]:

"*It seems to me to be wrong and not in accordance with the overriding objective to require Skandia Life to defend a complex claim at no doubt considerable expense and trouble when on the law as it stands I have held that the claim fails, simply on the basis that it is possible that the House of Lords might change the law. But on the other hand if I give judgment now against Mr Green, it would in effect force Mr Green to appeal in the hope that the House of Lords might have changed the law in his favour before any such appeal could be heard. Neither course seems a very proportionate use of the Court's, or the parties', resources. Nor do I think that I ought to try and predict what the House of Lords might do; the very fact that leave to appeal has been granted shows that the point is arguable and it would be invidious for me to express my own views on what the law is likely to turn out to be*."

81. In the present case, a stay does not hold the same attraction as it did in ***Green***. This is because proceedings between Mr Tsvetkov and Mr Magdeev will proceed to trial regardless of whether a stay is ordered in respect of Mr Tsvetkov's claims as against Mr Gaynulin, and there is also a certain unattractiveness about claims against alleged co-conspirators being tried separately. As an alternative, in the course of submissions, I raised the possibility of standing over the trial until the Supreme Court's decision on the ***Marex*** appeal becomes available. Neither party was enthusiastic about that option, if only because it is necessarily uncertain when the Supreme Court will give its judgment.

82. Despite a suggestion by Mr Anderson QC that another option would be to stand over any final order on this application until determination of the appeal in ***Marex***, this is not a practicable option in circumstances where, quite understandably, neither Mr Anderson QC nor Mr Béar QC was in any position to tell me when that would be and in circumstances where the trial in these proceedings is due to take place early next year and so the parties need to know what they must do by way of preparation for that trial.

83. The options, in such circumstances, are stark – or at least they would be if the Employment Loss and the Turetskiy Loss claims were already part of the pleaded case as against Mr Gaynulin: either to strike out and/or grant summary judgment dismissing the claim, on the basis that, as matters stand and on the basis of the law as it was described by the Court of Appeal in ***Marex***, the claims against Mr Gaynulin have no realistic prospect of success; or to allow the claims against Mr Gaynulin to proceed to trial (at least for now, pending the decision of the Supreme Court in ***Marex***), on the basis that it may turn out that the claims (or some of them) will be viable as a matter of law once the appeal in ***Marex*** has been determined by the Supreme Court.

84. I consider that, exercising my case management discretion, the more appropriate course would be the former, and so to strike out the Employment Loss and the Turetskiy Loss claims were they already part of the pleaded case as against Mr Gaynulin and grant summary judgment dismissing those claims.

85. It was Mr Béar QC's submission that there would be *"no utility (to put it mildly)"* from a case management perspective in striking out the Employment Loss and the Turetskiy Loss claims, only to reinstate them at a time when the proceedings are at a more advanced stage and with the trial currently due to be heard early next year. There are, however, a number of difficulties with that submission.

86. First, it is a submission which somewhat assumes that the Supreme Court in ***Marex*** will change the law in such a manner as to permit the Employment Loss and the Turetskity Loss claims to proceed notwithstanding that, on the basis of the Court of Appeal decision in that case, these are claims which are not legally sustainable. In my view, however, it is not sensible to make any such assumption. Since, as I have explained, a stay is not a realistic option, and not a course which either Mr Anderson QC or Mr Béar QC urged upon me, it seems to me that the better course is not to make such an assumption – and certainly not an assumption which entails the Supreme Court overturning not only the Court of Appeal decision in ***Marex*** itself but also the earlier House of Lords decision in ***Johnson***, together with the further decisions of the Court of Appeal in ***Gardner*** and ***Giles v Rhind***. Although Mr Béar QC was able to point to the fact that the Court of Appeal in ***Marex*** granted leave to appeal to the Supreme Court, in the same way as the Court of Appeal in ***Derby*** granted leave to appeal, the difference between ***Marex*** and ***Derby*** is that, as Vinelott J explained in ***Derby***, that was a case in which there was genuine uncertainty on the authorities whereas that is not the position on the reflective loss issue.

87. Secondly, and more importantly from a case management perspective, I consider that it would not be right to require Mr Gaynulin to incur further costs in defending claims which, unless they are struck out, he will be obliged to defend, if only given the seriousness of what is alleged against him. Those costs will necessarily be substantial

given that the trial is only months away. Unsurprisingly, costs tend to increase substantially as trials approach. These are costs which, depending on when the Supreme Court hands down judgment in ***Marex***, will potentially have been incurred wholly unnecessarily. Moreover, it is not only a matter of timing since it will only be if the Supreme Court were to decide to differ from what was decided by the Court of Appeal that the costs incurred by Mr Gaynulin in defending the claim will have been necessitated since, on the basis of the law as it currently stands, such costs ought not to have to be incurred by Mr Gaynulin.

88. Thirdly, although this point is related to the last, unless the Supreme Court were to hand down a judgment in advance of the trial in these proceedings which meant that the Employment Loss and the Turetskiy Loss claims could be maintained, these are costs which Mr Tsvetkov would very likely find himself having to bear. This would, of course, be in addition to his own costs relating to those claims. It follows that it is hardly to his benefit that those claims be allowed to continue, in effect, in the hope that the Supreme Court in ***Marex*** *might* decide something which assists him in putting them forward.

89. Fourthly, as previously explained, ancillary considerations such as wanting to obtain disclosure or cross-examine witnesses are not, in and of themselves, good reasons for allowing the proceedings to continue as against Mr Gaynulin at this stage. Nor, again as previously explained, is the wish for vindication in the particular circumstances of this case.

90. Fifthly and again looking at matters from Mr Tsvetkov's perspective, thereby weighing the balance of prejudice, if the Supreme Court's judgment in ***Marex*** were to become available before trial and if that were to change the law in any material respect, it would obviously be open to Mr Tsvetkov to seek to have the Employment Loss and the Turetskiy Loss claims reinstated. He should, therefore, have liberty to apply in this regard. Depending on when the Supreme Court's decision is made available, it may be that this can be achieved without the need for an adjournment of the trial. If an adjournment is necessary, that will nonetheless be preferable, as I see it, to requiring potentially unnecessary costs to be incurred dealing with those claims between now and when the Supreme Court pronounces on the appeal.

91. I need, then, lastly, to give consideration to the two further points which were somewhat belatedly made by Mr Béar QC in order to decide whether the discretion ought to be exercised differently.

92. The first of these points concerns the Employment Loss claim. On its face, paragraph 58(3) of Mr Tsvetkov's Particulars of Additional Claim suggests that Mr Tsvetkov's claim is for salary due by way of debt or for a share in EKLG's profits. That impression is re-inforced by the fact that, earlier, paragraph 6(1) describes the relevant claim as arising from EKLG's failure to "*repay outstanding <u>indebtedness</u> to Mr Tsvetkov*" (emphasis added). Nonetheless, in the course of his oral submissions, Mr Béar QC sought to re-characterise the nature of the Employment Loss, submitting that the language of paragraph 58(3) should be regarded as including a claim for consequential loss suffered by Mr Tsvetkov as a result of the termination of his employment by EKLG.

93. Although Mr Anderson QC ultimately accepted that, if reformulated in this way, it is at least arguable that the recharacterised Employment Loss is not barred by the reflective loss principle, he rightly pointed out, however, that there are other difficulties with Mr Béar QC's reformulation. First, the re-characterised claim has not been properly particularised. Not only does paragraph 58(3) not refer to any contract of employment, but nor is there anywhere set out how the alleged conspiracy is said to have caused the relevant termination of employment. Nor is there anywhere alleged what the quantum of loss allegedly suffered by Mr Tsvetkov might be, Mr Béar QC merely pointing in the course of his submissions to a passage in Mr Tsvetkov's witness statement where he stated that he drew a monthly salary of £20,000 as EKLG's *"Business Development Director"*. This was, however, concerned with something altogether different, namely that Mr Tsvetkov cannot have owed money under the Second Agreement since, if he had done so, Mr Magdeev would not have agreed to pay him a salary. The truth is that, as Mr Anderson QC submitted, the case as it was portrayed by Mr Béar QC at the hearing is not the case which had until then been put forward; indeed, as observed already, Mr Béar QC had previously accepted that the Employment Loss claim entailed reflective loss (at least on the law is it currently stands).

94. Secondly and in any event, even overlooking these difficulties, it is clear that this head of loss has no realistic prospect of success in circumstances where Clause 4 of Mr Tsvetkov's employment agreement with EKLG provides as follows:

"*The duration of the employment and, therefore, the validity of the present agreement shall be for one(one) (sic) year, commencing as from September 1st 2016. Based on the Employer's [i.e. EKLG's] discretion the agreement will renew automatically for another year without any special warning. The employment may be terminated be (sic) either party with a written notice of at least one (1) month or the period which was set in the Law (whichever is minimum).*"

Mr Tsvetkov's witness statement does not suggest that EKLG failed to pay him salary until the termination of his employment. Indeed, insofar as he touches on the issue in his witness statement, Mr Tsvetkov's evidence is that he *did* receive his salary (see paragraph 42.3.1). It follows that the Employment Loss, as re-formulated or explained by Mr Béar QC, can only relate to the salary that Mr Tsvetkov would have earned after 1 September 2017. Notably, however, clause 4 does not entitle Mr Tsvetkov to have his employment agreement renewed after that date. That is a matter that is expressly left to EKLG's discretion. In those circumstances, it is far from clear why Mr Tsvetkov should be entitled to claim as damages the salary that he would have earned if ELKG had not terminated his contract. This is especially so since, at the relevant time, EKLG was controlled by the alleged conspirators, Mr Magdeev and Mr Gaynulin. As such, they would hardly have been likely to have exercised their discretion in Mr Tsvetkov's favour. It follows that Mr Tsvetkov is in no position to demonstrate that he would have earned salary beyond the termination date and, as such, ought to receive an award of damages in an equivalent sum – even assuming that that is how the case has been put (which it was not until Mr Béar QC's somewhat rearguard recharacterization efforts at the hearing).

95. The second matter which needs to be considered arose not at the hearing but when Mr Béar QC sought permission to file supplemental written submissions addressing a point that was said to have arisen in the course of the hearing of the ***Marex*** appeal

before the Supreme Court. Specifically, Mr Béar QC highlighted an exchange between Lord Sales and Mr David Lewis QC on behalf of the respondent/defendant in the course of the appeal hearing before the Supreme Court. The question concerned the so-called 'cashbox' example described in ***Johnson*** at pages 62-63. Lord Sales asked whether, if the money in a company's cashbox was the means by which it intended to discharge a debt and the claimant was the guarantor of that debt, the claimant would be able to recover his loss from a wrongdoer who stole the cashbox. It is common ground between the parties that, on the law as it stands now, the answer to that question is in the negative. As Mr Lewis QC explained in his response to Lord Sales's question in the Supreme Court, that is the ratio of the decision of the Court of Appeal in ***Webster v Sandersons Solicitors*** [2009] PNLR 37. However, as an alternative contention, Mr Lewis QC suggested that it may be that guarantors suffer a separate and distinct loss such that, following Lord Bingham's third proposition in ***Johnson*** (at pages 35-36), they fall outside the scope of the reflective loss rule.

96. Mr Béar QC submitted, if not based upon then inspired by this exchange, more particularly Mr Lewis QC's alternative contention, that a guarantor is more than an ordinary creditor because, despite the company (i.e. the debtor) recovering an amount equal to the guarantee from the wrongdoer, the company may or may not repay the principal debt. Thus, Mr Béar QC suggested, a guarantor may remain liable notwithstanding the replenishment of the company's resources and, it follows, he went on to submit, that a guarantor's loss is separate and distinct from that of the company. Accordingly, Mr Béar QC contended, first, that loss suffered by Mr Tsvetkov as a guarantor of EK Diamonds' liability under the First Agreement is not barred by the reflective loss principle and, secondly, that Mr Tsvetkov's loss consisting of his liability as a borrower under the Second Agreement is not reflective loss either.

97. In his responsive note addressing this new submission, Mr Anderson QC was critical of the fact that it was only raised after the hearing and made the point, justifiably in my view, that the submission was one which could readily have been made independently since it is founded merely on a submission made by counsel in another case. I am clear, in any event, that Mr Béar QC's argument does not assist Tsvetkov's opposition to the present application for a number of reasons.

98. First, the point raised only concerns the application of the reflective loss principle to Mr Tsvetkov's loss consisting of his liability in respect of the Primary Claim. This is evident from paragraph 7 of Mr Béar QC's note which states that "*[t]his analysis would appear to apply to both DT [Mr Tsvetkov] as guarantor (so in respect of his exposure to the $10m primary claim) and to DT [Mr Tsvetkov] as borrower (in respect of his exposure to the €5m primary claim)*". It follows that, in the light of my conclusions on Ground 1, this point does not arise for determination.

99. Secondly, Mr Tsvetkov was acting as the guarantor of EK Diamonds' obligations *under the First Agreement*. In that context, it may be that Mr Lewis QC's alternative submission, and Mr Béar QC's exposition of it on this application, would operate in relation to Mr Tsvetkov's liability under the First Agreement. However, it is rather more difficult to see how it operates in relation to Mr Tsvetkov's liability *under the Second Agreement* given that, even on Mr Tsvetkov's own case, he was not a guarantor of EKLG's liability; indeed, paragraph 7 of Mr Béar QC's supplemental note seems to concede that Mr Tsvetkov was a borrower under the Second

Agreement, not a guarantor. As Mr Anderson QC pointed out, Mr Tsvetkov does not claim that he or, indeed, Mr Magdeev was entitled to receive sums from EKLG as creditor, but that he was entitled to receive the redemption value of preference shares for Mr Magdeev's benefit which, according to him, would have been worth €5m had EKLG not been deprived of the Diamond. Accordingly, if EKLG had recovered the Diamond, there would be no loss. Furthermore, any monies to be received by Mr Tsvetkov from EKLG would be received, even on his own case, in his capacity as a preference shareholder. As such, the claim would, on any view, be barred on conventional reflective loss principles which the appeal in ***Marex*** is unlikely to impact upon.

100. Thirdly and again in any event, since it is common ground that, as the law currently stands, Mr Tsvetkov does not have a realistic prospect of establishing that his loss falls outside the reflective loss principle by virtue of his position as a guarantor, I am far from satisfied, having regard to the discretionary factors which I have previously described, that it would be appropriate to decline to strike out on the basis of this further (and belated) argument. Mr Béar QC's contention must be that the Supreme Court may change the law such that guarantors fall outside the purview of the reflective loss rule by virtue of the fact that they suffer a separate and distinct loss. With respect, however, the fact that Lord Sales raised a question about this topic in the course of the appeal hearing is no indication at all that the Supreme Court will be persuaded to make such a change. This is all the more so since it is not necessary for the Supreme Court to determine the application of the reflective loss rule to guarantors in order to dispose of the appeal in ***Marex***.

101. It follows, therefore, that I remain of the view, notwithstanding these two further arguments, that the right course, in the exercise of the Court's discretion, is to strike out and grant summary judgment dismissing Mr Tsvetkov's Conspiracy Claim against Mr Gaynulin insofar as it seeks to recover not only in respect of the Primary Claim (a claim which I have already addressed within the ambit of Ground 1) but also the Employment Loss and the Turetskiy Loss – albeit that Mr Tsvetkov should have liberty to apply to vary the order striking out his claim.

The Investigation Loss

102. The third proposed head of loss is formulated in Mr Tsvetkov's Particulars of Additional Claim in the following way:

"*Further, Mr Tsvetkov has incurred costs and expenses in investigating the alleged conspiracy. In particular, he has paid the following amounts to law firms in England:*

a. PCB Litigation – approximately £45,000; and

b. Fladgate LLP – approximately £34,000."

103. Mr Anderson QC submitted that these losses are not recoverable as damages; they are simply the legal costs of the Conspiracy Claim.

104. He relied in this respect on ***ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)*** [2010] 1 All ER (Comm). That was a claim by the owners of a ship after they had withdrawn the ship from the charterers because of the charterers' failure to pay hire under the

charter. *Inter alia*, the court considered whether the owners were entitled to be compensated by way of damages for the expenses they incurred in providing and maintaining a bank guarantee to the charterers as security for their claim. In that context, Andrew Smith J said as follows at [65]:

"*I consider first the argument that the expenditure is recoverable as costs because, if it is so recoverable, the Owners have no claim for more than nominal damages. This is because, as is explained by Louise Merrett in her article 'Costs as Damages', (2009) 125 LQR 468, 'The basic rule of English law is that, unless the claimant can rely upon a separate cause of action, litigation costs can only be recoverable as costs, and not as damages'. This is so notwithstanding 'the costs of litigation would, if ordinary principles governing the recoverability of damages were applicable, represent recoverable damages': Seavision Investment SA v Evennett (The 'Tiburon'), [1992] 2 Lloyd's LR 26 at p.34 per Scott LJ. This principle can work in favour of the paying party: for example, if costs are to be assessed on a standard basis, the amount recoverable is limited by considerations of proportionality as well as reasonableness. Nevertheless, in this case the Owners argued that the expense incurred in providing and maintaining the RBS guarantee is recoverable as costs, and accept that, if this is so, it is not recoverable as damages even if some of it is disallowed upon an assessment. The Charterers dispute that the expense is recoverable as costs.*"

105. It was Mr Béar QC's submission, on the other hand, that the Investigation Loss is properly recoverable as damages. He relied for this purpose on ***British Motor Trade Association v Salvadori*** [1949] Ch 556, ***Lonrho v Fayed (No 5)*** [1993] 1 WLR 1489, ***R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA*** [2006] EWHC 42 (Comm) and ***Willers v Joyce*** [2018] AC 779.

106. In ***British Motor Trade Association***, the claimant was a trade association of all British car manufacturers and authorised dealers. The association required its members to enter into a covenant with the association that they would not resell new cars within a 12-month period. The defendants, a group of traders, had obtained some new cars in breach of the association's covenant. In that context, Roxburgh J held that the claimants were entitled to recover, as damages for conspiracy, the costs of maintaining a large investigation department for the purpose of unravelling the defendants' unlawful conduct. He had this to say at page 569:

"*To resist such a counter-attack and also counter-attacks from various other directions, the plaintiffs maintain, and must maintain, a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. Accordingly, the plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry accordingly.*"

107. The ***Lonrho*** case was concerned with a claim based on conspiracy. The claimants alleged that, by their conspiracy, the defendants had encouraged a third party to publish defamatory statements about them. Among other heads of loss, the claimants sought to recover the cost of managerial and staff time spent in investigating or

mitigating the consequences of the alleged conspiracy as damages. As to this, Dillon LJ observed at page 1497 that:

"*Subhead (d) claims the cost of managerial and staff time spent in investigating, or mitigating the consequences of, the conspiracy. There is also a claim for out of pocket expenses in respect of extra security guards, small in amount, but obviously related to aspects of the conspiracy. I would allow the subhead to be pleaded.*

... It is established that a party to a civil action cannot, in a separate action, recover against the other party to the first action costs of the first action which he was not awarded at the trial of that action: Quartz Hill Consolidated Gold Mining Co v Eyre (1883) 11 QBD 674, which, in Berry v British Transport Commission [1962] 1 QB 306 was held to be authority binding on this court, so far as civil proceedings are concerned."

108. A similar issue arose in ***R+V Versicherung AG***. The relevant question in that case was formulated by Gloster J (as she then was) in the following way:

"*…whether, as R+V contends, and Risk disputes, R+V is entitled to recover, as damages, internal management and staff time and internal overheads, except to the extent that R+V can prove that it has suffered a loss of profits due to the diversion of resources as a result of an actionable wrong.*"

109. As part of her review of the relevant authorities, in addition to ***British Motor Trade Association*** and ***Lonrho***, Gloster J also referred to ***Tate & Lyle Food and Distribution Ltd v Greater London Council*** [1982] 1 WLR 149, in which Forbes J had stated as follows at page 152:

"*The problem, it seems to me, resolves itself into two constituents: (a) Is there any warrant for suggesting that managerial time, which otherwise might have been engaged on the trading activities of the company, had to be deployed on the initiation and supervision of remedial work (excluding anything which might properly be regarded as preparation for litigation)? And (b) if so, could this reasonably have been the subject of evidence, or is it so diffcult to quantify that the application of some suitable rule of thumb is justified?*

I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern can properly form the subject matter of a head of special damage. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify."

110. Gloster J expressed her conclusion at [77] in the following terms:

"*In my judgment, as a matter of principle, such head of loss (i.e. the cost of wasted staff time spent on the investigation and/or mitigation of the tort) is recoverable, notwithstanding that no additional expenditure "loss", or loss of revenue or profit can be shown. However, this is subject to the proviso that it has to be demonstrated with sufficient certainty that the wasted time was indeed spent on investigating and/or mitigating the relevant tort; i.e. that the expenditure was directly attributable to the tort — see per Roxburgh LJ in British Motor Trades Association at 569. This is*

perhaps simply another way of putting what Potter LJ said in Standard Chartered*, namely that to be able to recover one has to show some significant disruption to the business; in other words that staff have been significantly diverted from their usual activities. Otherwise the alleged wasted expenditure on wages cannot be said to be 'directly attributable' to the tort. The quantification of such expenditure will, of course, have to be proved with sufficient particularity at the March 2006 hearing*."

111. Pausing there, the authorities appear to draw a distinction between the cost of wasted staff/managerial time spent in investigating and/or mitigating a tort (which are recoverable as damages) and litigation costs i.e., costs of "*anything which might properly be regarded as preparation for litigation*" (which are not recoverable as damages): see, in particular, ***ENE Kos 1 Ltd*** at [65] (Andrew Smith J) and ***Tate & Lyle Food and Distribution Ltd*** at page 152 (Forbes J).

112. I do not consider that the Supreme Court decision in ***Willers*** obliterates that distinction. The dispute in ***Willers*** was between Mr Gubay, a successful businessman and Mr Willers who was Mr Gubay's right hand man for over 20 years. Mr Gubay dismissed Mr Willers in 2009. Before his dismissal, Mr Willers had acted as the director of Langstone Leisure Ltd ('Langstone'), a company controlled by Mr Gubay. In 2010, Langstone sued Mr Willers for alleged breaches of contractual and fiduciary duties in causing it to incur costs in pursuing a piece of litigation. Mr Willers defended the action and issued a third party claim for an indemnity against Mr Gubay on the basis that, in pursuing that litigation, Mr Willers was acting under Mr Gubay's directions. Two weeks before trial, Langstone discontinued the action. Langstone was ordered to pay Mr Willers' costs on the standard basis. Subsequently, Mr Willers brought a claim against Mr Gubay for malicious prosecution. He alleged that Langstone's claim against him was part of a campaign by Mr Gubay to do him harm. The main issue before the Supreme Court was whether the tort of malicious prosecution includes the prosecution of civil proceedings. But Lord Toulson (with whom Baroness Hale, Lord Kerr, Lord Clarke and Lord Wilson agreed) also considered whether, insofar as Mr Willers had not been fully compensated by the costs order in the previous action, he could seek to recover excess costs as damages. Lord Toulson stated this at [58]:

"*Excess costs. Newey J's decision to award costs to Mr Willers on a standard basis is readily understandable. The action had been discontinued and the judge would not have been able to determine whether Mr Willers should recover indemnity costs without conducting what would have amounted to a trial of the present action. On the other hand, the notion that the costs order made has necessarily made good the injury caused by Mr Gubay's prosecution of the claim is almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they result in substantial injustice. A trial of Mr Willers's claim will of course take up further court time, but that is not a good reason for him to have to accept a loss which he puts at over £2m in legal expenses. Expenditure of court time is sometimes the public price of justice. If Langstone's action against Mr Willers had gone to a full trial, and if at the end the judge had refused an application for indemnity costs because he judged that the claim had not been conducted improperly, then to attempt to secure a more favourable costs outcome by bringing an action for malicious prosecution would itself have been objectionable as an abuse of the process of the court, because it would have amounted to a collateral attack on the judge's decision. But those are not the*

circumstances and I do not regard Mr Willers's claim to recover his excess costs as an abuse of process."

113. Mr Béar QC relied on this passage in support of an argument that legal costs are recoverable as damages. I am clear, however, that what Lord Toulson had to say does not provide such support since the decision to permit Mr Willers' claim to continue is explicable on a narrower basis. As Andrew Smith J's analysis in ***ENE Kos 1 Ltd***, at [65], shows there is a well-accepted exception to the general rule that legal costs are not recoverable as damages. That exception operates in cases where the claim to recover legal costs as damages is based on a 'separate cause of action', i.e. a cause of action distinct from that on which the main proceedings were/are based. In ***Willers***, the main proceedings were based on Mr Willers' alleged breaches of contractual and fiduciary duties whereas the claim to recover Mr Willers' costs was based on the tort of malicious prosecution. In contrast, in the present case, Mr Tsvetkov's claim to recover investigation losses is based on the tort of conspiracy i.e., the same cause of action that the main proceedings arise from. Thus, the key question for the present purposes is whether the Investigation Loss can properly be regarded as being part of Mr Tsvetkov's legal costs of pursuing the Conspiracy Claim. If that is the position, then, they cannot be recovered as damages.

114. The nature of the Investigation Loss and the reason these expenses were incurred are explained in Mr Tsvetkov's witness statement in this way:

"*In order to understand the nature and extent of the conspiracy, I have had to incur significant investigative costs, which costs I understand are recoverable in a claim for conspiracy.*

a. I initially instructed Fladgate LLP ('Fladgate') to represent me in the English proceedings. Fladgate undertook significant and detailed review of the documents and correspondence in my possession, to investigate and identify the actions between Mr Gaynulin and Mr Magdeev that formed the alleged conspiracy against me. This occurred both prior to and throughout the preparation of statements of case on my behalf. I provided my consent for Flagdate to provide a copy of their invoices to PCB Litigation LLP ('PCB'), who have reviewed them and advised me that Fladgate's fees in investigating the alleged conspiracy are approximately £45-50,000 (excluding Counsel's fees).

b. My current solicitors, PCB have also undertaken work investigating the alleged conspiracy. PCB have similarly had to review significant documentation in order to advise me on issues in relation to the conspiracy, particularly in light of the Defences filed by Mr Gaynulin and EK Diamonds. PCB have also provided assistance to my Cypriot lawyers, Scordis, in investigating the alleged conspiracy against me. I am advised by PCB that its fees in this respect amount to a total of approximately £34,000 (including Counsel's fees)."

115. Although it is not clear from these passages or elsewhere in Mr Tsvetkov's witness statement whether Fladgate LLP were acting as Mr Tsvetkov's solicitors on the record, during his oral submissions, Mr Béar QC informed me that they were. On that basis, it must follow that the Investigation Loss consists of costs and expenses incurred by Mr Tsvetkov in paying his solicitors on the record to carry out preparatory work in respect of pending English proceedings.

116. Moreover, it appears from the description in Mr Tsvetkov's witness statement that the tasks in respect of which these costs were incurred are those that solicitors would routinely undertake in preparing statements of case. They include reviewing Mr Tsvetkov's documents and correspondence, investigating actions between Mr Gaynulin and Mr Magdeev that may potentially form part of the alleged conspiracy and providing advice in the light of the other side's statements of case.

117. In these circumstances, I do not consider that Mr Tsvetkov has a realistic prospect of establishing that this head of loss consisted of anything other than costs incurred by his successive solicitors in preparing for litigation. On that basis, the Investigation Loss quite obviously cannot be recovered as damages in the Conspiracy Claim. It follows that, were the Investigation Loss already part of the pleaded case as against Mr Gaynulin (which is not the case since there has as yet been no application to amend), I would have struck that case out.

Ground 3: Incoherence

118. The third ground on which Mr Gaynulin seeks strike out/summary judgment is that, insofar as the Conspiracy Claim relies on Mr Tsvetkov's liability under the Second Agreement as the relevant loss, it is factually incoherent. The argument runs as follows. If the factual allegations made by Mr Tsvetkov as part of his Conspiracy Claim as to the 'true' character of the Second Agreement are established at trial, then it is inconceivable that Mr Tsvetkov will be held liable to repay the sums due under the Second Agreement. Mr Tsvetkov's case as to the circumstances in which the Second Agreement was entered into suggests that liability to repay sums under the agreement must fall on EKLG, not Mr Tsvetkov. Alternatively, on Mr Tsvetkov's account of the facts, he was acting as Mr Magdeev's fiduciary by holding the preference shares for Mr Magdeev's benefit and on his instructions. Consequently, Mr Tsvetkov cannot be held personally liable to repay the loan to Mr Magdeev. The only remedy that Mr Magdeev would be entitled to is an order requiring Mr Tsvetkov to deliver up the (now valueless) preference shares or an order requiring Mr Tsvetkov to account for any sums that he received pursuant to the redemption of those shares.

119. In the light of the conclusions that I have reached in relation to Grounds 1 and 2, this ground does not strictly arise for determination. However, I will state my conclusions on it briefly.

120. The principles by reference to which the Court will approach applications for strike out and summary judgment have previously been summarised. However, it is necessary to return to one aspect of those principles. That concerns the level of factual granularity that the Court will be willing to delve into in deciding applications for strike out/summary judgment. In that regard, Mr Béar QC has drawn my attention to the principles summarised by the Court of Appeal in ***Mentmore International Ltd v Abbey Healthcare*** [2010] EWCA Civ 761. In that case, Carnwath LJ (as he then was), with whom Arden LJ (as she then was) and Morgan LJ agreed, said this at [20]:

"*It is important to keep in mind the principles to be applied in deciding whether a case is suitable for disposal on a summary basis. The most authoritative up-to-date statement is that of Lord Hope in Three Rivers DC v Bank of England (No 3) [2001] 2 All ER 513:*

'In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents, without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, [2001] 1 All ER 91, at p. 95 that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.'"

He went on at [21] as follows:

"Another frequently cited passage on the same theme is the judgment of Colman J in De Molestina v Ponton [2002] 1 Lloyd's Rep 271, 280 para 3.5, speaking of the difficulty of basing summary judgment on inferences of fact in a complex case:

'…, as Three Rivers District Council shows, where the application in such complex cases relies on inferences of fact, the overriding objective may well require the claim to go to trial in the interest of a fair trial. That is because the relevant inference could not be safely drawn without further discovery and oral evidence at the trial. It is thus necessary, where such inferences are relevant, to guard against the temptation of drawing them as a matter of probability, because the achievement of the over-riding object requires a much higher degree of certitude. Where in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to trial.'"

He continued at [22]:

"To these familiar citations, Mr Reza adds the words of Potter LJ in ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 para 10:

'However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable … .'"

He concluded at [23]:

"If Mr Reza was hoping to find in those words some qualification of Lord Hope's approach, he will be disappointed. The Three Rivers case was specifically cited by Potter LJ. He was in my view intending no more than a summary of the same principles. Lord Hope had spoken of a statement contradicted by 'all the documents or other material on which it is based'. It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in my view important not to equate what may be very powerful cross-examination ammunition, with the kind of 'knock-out blow' which Lord Hope seems to have had in mind."

121. Having regard to these principles, I am not persuaded that, were the factual allegations underlying Mr Tsvetkov's Conspiracy Claim to be established, his liability under the Second Agreement would become, in Lord Hope's words, "*fanciful because it is entirely without substance*". There are three main reasons why the Court cannot conclude that the allegations underlying Mr Tsvetkov's Conspiracy Claim and his liability under the Second Agreement are necessarily factually inconsistent.

122. First, as Mr Béar QC emphasised, Mr Tsvetkov does not allege that the Second Agreement is, in its entirely, a sham in the sense that "*it did not create the legal rights and obligations which [it] gave the appearance of creating*": ***Snook v London and West Riding*** [1967] 2 QB 786. His contention is that the Second Agreement formed part of a wider transaction and that the rights and obligations created by the Second Agreement cannot be viewed independently of that background. That allegation is not necessarily inconsistent with Mr Tsvetkov's liability to Mr Magdeev under the Second Agreement.

123. Secondly, I am not persuaded that there is no realistic possibility of the trial judge making factual findings that render it possible for him to conclude, coherently, that irrespective of the wider circumstances surrounding the Second Agreement the parties intended that, at least in the first instance, Mr Tsvetkov should be liable to repay the sum advanced under the Second Agreement. For instance, as Mr Béar QC pointed out, the trial judge may find that Mr Tsvetkov is liable under the Second Agreement but that, pursuant to a separate agreement between Mr Tsvetkov, Mr Magdeev and EKLG, Mr Tsvetkov was entitled to discharge that liability using proceeds from the sale of the Diamond. I note, in particular, that in his Defence and his witness statement, Mr Tsvetkov does not deny the existence of a $5m loan from Mr Magdeev. On the contrary, the Defence alleges that:

"*… In order to more easily to satisfy BCV's requirements and maintain confidentiality as against Mr Gaynulin it was agreed that that (sic) Mr Magdeev would make his investment in the following way. Half of the loan monies would be paid by Magdeev and his son, Ernest Magdeev, directly to EKLG as a subscription for new preference shares, redeemable from April 2018. <u>The other half would be loaned to Mr Tsvetkov</u> and then paid by him and Ms Khayrova to EKLG, also as a subscription for preference shares which Mr Tsvetkov agreed to hold for the benefit of Mr Magdeev…*" (emphasis added)

In his witness statement, similarly, Mr Tsvetkov states at paragraph 31 that:

"*The structure of the agreement between myself and Mr Magdeev can be summarised as follows:*

31.1 Mr Magdeev would provide €10 million to EKLG to enable it to purchase the pear-shaped diamond….;

31.2 €5 million would be paid directly to EKLG (€2.5 million by Mr Magdeev himself, and €2.5 million by Ernest Magdeev on his behalf). The remaining €5m would be paid indirectly to EKLG through me (€2.5 directly from me, and €2.5 by Elsina on my behalf), with <u>Mr Magdeev providing these funds to me as a loan</u>." (emphasis added)

124. Thirdly, whether there existed a fiduciary relationship between Mr Tsvetkov and Mr Magdeev, the scope and nature of Mr Tsvetkov's obligations arising from that relationship and whether the existence of such a relationship is necessarily inconsistent with Mr Tsvetkov's status as Mr Magdeev's debtor are all complex questions of fact and law that are inappropriate for summary determination. It suffices to say that, on this application, I cannot safely conclude that there is no realistic prospect of Mr Tsvetkov being found to be personally liable under the Second Agreement as a result of his fiduciary relationship with Mr Magdeev.

125. For those reasons, had Ground 3 been considered in isolation, I would not have been persuaded that the Conspiracy Claim ought to be struck out on the basis that it is factually incoherent.

Conclusion

126. In conclusion, therefore, for the reasons which I have sought to explain:

(1) It is appropriate that Mr Tsvetkov's Conspiracy Claim against Mr Gaynulin insofar as it concerns the Primary Claim, and so as currently pleaded, should be struck out and that summary judgment should be given dismissing that claim.

(2) I am not persuaded that the three proposed heads of loss (the Employment Loss, the Turetskiy Loss and the Investigation Loss) have a realistic prospect of success. Accordingly, were these already part of the pleaded case as against Mr Gaynulin, they would similarly have been struck out with summary judgment being given dismissing those claims.

127. As to (2), however, but not (1), in order to cater for the possibility that the Supreme Court might hand down its judgment on the ***Marex*** appeal before the trial of this action and that judgment might change the law so as to mean that Mr Tsvetkov has a realistic prospect of establishing that the Employment Loss and the Turetskiy Loss are not barred by the reflective loss rule, Mr Tsvetkov should have liberty to apply to vary the order striking out his claim and giving summary judgment. At that stage, the Court may also need to revisit the issue of whether the trial timetable remains feasible.