IN THE HIGH COURT OF JUSTICE Claim No. BL-2017-000665

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

B E T W E E N:

PJSC COMMERCIAL BANK PRIVATBANK

Claimant

and

(1) IGOR VALERYEVICH KOLOMOISKY
(2) GENNADIY BORISOVICH BOGOLYUBOV
(3) TEAMTREND LIMITED
(4) TRADE POINT AGRO LIMITED
(5) COLLYER LIMITED
(6) ROSSYN INVESTING CORP
(7) MILBERT VENTURES INC
(8) ZAO UKRTRANSITSERVICE LTD

Defendants

WRITTEN SUBMISSIONS OF THE CLAIMANT

for hearing on 25.7.18

Time estimate: 7 days

Pre-reading: 2 days

CONTENTS

A. INTRODUCTION

1. These are the written submissions of the Claimant (the "**Bank**") in connection with:

   (1) the substantive return date of its application to continue a freezing order granted without notice on 19.12.17 and continued on an interim basis on 15.1.18 (the "**WFO**");

   (2) two applications dated 16.2.18 brought by D3-D5 and D6-D8 challenging the Court's jurisdiction;

   (3) applications by all Ds pursuant to four application notices dated 2.3.18 and 9.3.18 seeking the discharge of the WFO; and

   (4) (to the extent it continues to remain in issue) the Bank's application dated 9.7.18 to rely upon the eighth and ninth witness statements of Richard Ian Lewis and the fifth expert report of Oleh Beketov. D1 and D3-D8 have consented to the admission of the material contained in Lewis 8 and Beketov 5.

2. Two further applications by the Bank against D1 and D2 respectively, seeking the disclosure of further information to enable the Bank to make the WFO more effective, are the subject of separate skeleton arguments for reasons of confidentiality. It has been agreed that they will also be determined at this hearing.

3. Finally, evidence has recently emerged that D1-D2 are refusing to accept service of this claim in Switzerland. The Bank has issued an application seeking an order for substituted service on D1-D2's solicitors, which it will invite the Court to consider at a convenient moment (time permitting).

4. Whilst the two jurisdiction challenges were initially fixed to be heard at a two-day hearing early in June, on 4.5.18 Roth J ruled that the first seven applications should be heard together at one expanded hearing (seven days' hearing, two days' pre-reading) towards the end of term (and if necessary run into the first two days of the Vacation).

5. Less than a week before the Bank was scheduled to serve its skeleton argument, all the Ds had dramatic changes of heart about their applications. Each has abandoned approximately half of the arguments it was scheduled to make, including all challenges to the Bank having established a good arguable case of fraud. Whilst we applaud the abandonment of challenges which the Bank has always maintained were unsustainable, we denigrate the lateness of the changes of stance. It came about only after: the exchange of voluminous evidence; 38 bundles for the hearing had been agreed, prepared and delivered; and the Bank's counsel had spent many days drafting a skeleton argument which addressed all the points arising on the first seven applications.

6. There was a clear opportunity for all the Ds to announce their revised stances at the hearing before Roth J on 4.5.18, but none did. Indeed quite the contrary: on that occasion the Judge was encouraged to believe that all arguments remained very much in play and he therefore gave directions to expand the time available for the hearing to 9 days (to include pre-reading). D1's Leading Counsel said as follows: *"It's not the case … that we're accepting they have a good case against us. I understand why, for forensic reasons,* [the Bank's counsel] *thinks that's a nice point to make. … He knows it's nonsense, and I think that should just be on the record."* **[A3/22/574/44:16-22]**.

Postscript

7. At 4pm and 4.15pm on Wednesday 18.7.18, at the same time as they served their skeleton arguments, D1 and D2 served application notices seeking to vary the WFO by replacing the words "US$2.6 billion" with the words "US$245.5 million". Reliance is placed on Lafferty 2 and Lafferty 3 in support of this application, *"and in particular on paragraphs 104 to 129"* of Lafferty 3. A time estimate of 2 hours is given by both application notices. This approach is, with respect, misconceived. Had D1 and D2 wanted to make a case that the WFO should be reduced in quantum by over $2 billion, that should have been spelled out clearly in their application notice and evidence of 9.3.18.

B. BACKGROUND

8. In its essentials, the factual backdrop to the proceedings is very similar to the backdrop in several other cases which have come before the English courts in recent years, not least **JSC BTA Bank v Ablyazov** and **JSC Mezhprombank v Pugachev**. Eastern European "oligarchs" with interests in many denationalised industries, owned and controlled a major bank; they arranged for most of the bank's corporate lending, running to billions of US Dollars, to be made on very favourable terms to companies which they secretly owned or controlled; but when the local banking industry was subjected to enhanced levels of regulation including substantial increases in the levels of reserves (in this case partly at the behest of the International Monetary Fund), the true nature of the lending was discovered, the loans were left unpaid without any worthwhile security being in place, and the oligarchs fled abroad complaining of victimisation and persecution.

9. The more detailed background to the current applications is to be found in the Bank's Particulars of Claim and the evidence given by Richard Ian Lewis, a partner at the Bank's solicitors, Hogan Lovells International LLP ("**HL**"). As that material forms part of the Court's pre-reading, we merely highlight here some salient points.

10. **First**, the Bank's allegations that the supply agreements at the heart of its claims were shams and that there was never any intention that the huge (and in many instances practically impossible) volumes of commodities which were purportedly purchased would ever be supplied, were not contested even before the Ds' recent volte face on their challenges to the merits of the Bank's claims. The supply agreements were therefore a deception: the enormous amount of money which was moved under them was moved for some other purpose than to purchase the commodities specified in the agreements. But no party, least of all the supply companies themselves (D3-D8), has even tried to explain what was really going on.

11. Mr Lafferty – the principal witness for D1 (and, in effect, D2), who gives his evidence on D1's instructions – acknowledges that the supply agreements were part of a "Scheme", but does not explain what the "Scheme" was and does not begin to demonstrate how it could have been legitimate. His stance actually supports the Bank's allegation that D1 and D2 – at

the time owners of more than 90% of the shares in the Bank and its controllers – were the brains behind the "Scheme".

12. As Mr Lewis noted in his evidence in response to Mr Lafferty, the "Scheme" Mr Lafferty describes – complete with money moving in *"cycles"*, through *"loops"*, via *"a series of conduits"*, notwithstanding *"break points"*, with the assistance of *"compensation payments"* and through *"chains"* that involve *"hundreds of transactions"* – bears the hallmarks of a money laundering exercise. No witness took issue with that description in reply.

13. If the supply agreements were shams, then the loans made by the Bank to the companies which borrowed the monies on the pretext of making payments to the supply companies cannot have been made for legitimate purposes, and the promised security for repayment was always an illusion. All those involved in the grant of the loans who knew that the supply agreements were shams – and anybody who bothered to enquire must have appreciated that they were – were necessarily involved in a fraud on the Bank.

14. **Secondly**, there can be little doubt that all Ds were aware of the fraud on the Bank. The Bank contends that D3-D8 were at all material times beneficially owned and/or controlled by D1 and/or D2. But irrespective of this, D3-D8 would plainly have known that they had no intention to supply the promised volumes of commodities. And the fact that D1 knew of his likely exposure to claims is plain from his concerted effort to create a competing litigation platform in Ukraine so that he could try to insist that any claims be brought against him there (where he appears to be able to manipulate at least some of the judiciary). Whatever D1 knew, D2 will also have known: they have been very close business partners for decades and D2 gives no relevant evidence on this application, preferring to rely on that given by D1.

15. Indeed, Mr Lafferty goes into considerable detail in an effort to explain that the Bank's claim on the facts is (fundamentally) mistaken, by attempting to demonstrate that, save for $245m,[1] the monies used by the borrowing companies to fund the payments under the supply agreements did not come from loans made to the borrowers by the Bank, but came from so-called *"independent sources"* (which (where identified), the Bank's evidence suggests are companies controlled by D1). This strongly suggests that D1 was closely involved in the

[1] All references to $ in this document are to United States Dollars.

transactions at the time, as Mr Lafferty does not identify any other individual from whom he has obtained the detailed (and complex) information he produces.

16. **Thirdly**, we draw attention to the artificiality of the argument that there are one or more *lis alibi pendens* in Ukraine:

(1) D1 acknowledges that the principal claim upon which he relies[2] – his defamation claim – was commenced not for the purpose of seeking reparation for injury suffered, but in an effort to seise a Ukrainian Court with jurisdiction and so oust the jurisdiction of this Court. Indeed, the artificiality of the exercise is demonstrated by the fact that that claim relies on a single sentence uttered by the Bank's then Chairman at a July 2017 press conference; a sentence the truth of which is not even denied.

(2) D3-D5's attempts – seemingly directed by D1 – to rely on defamation proceedings which they have not yet been permitted to bring in Ukraine is, if anything, more remarkable: their evidence to this Court is that they have no assets and only ever acted as agent, but they have on two occasions purported to seek to protect their "business reputation" in Ukraine, which they claim has been besmirched by online Ukrainian-language publications. Moreover, their proposed claim is based on the misconceived notion that the Bank has an obligation to correct false statements made by a third party about them.

(3) Other points are equally telling: the Bank's claims in these proceedings cannot be brought by way of counterclaim in the Ukrainian defamation proceedings. And, even if the defamation claims and this action are "related" – which we deny – it would be a serious injustice if the Bank's claims in these proceedings were effectively non-suited by the defamation claim.

17. **Fourthly**, D1 has briefed the Ukrainian press on at least one occasion that England is where the fraud claims will be tried. In his words: *"… the London court is the jurisdiction where the parties will have to openly show everything, tell how it was and what was not."* That, we suggest, displays a

2. This was his position throughout his evidence, although he now appears to have relegated its importance below a number of other sets of proceedings that were not previously focussed upon.

realistic appreciation that his machinations in Ukraine should not be allowed to derail these proceedings.

C. THE APPLICATIONS

Jurisdiction

18. When setting out below the particular challenges each D is now believed to be making in light of the letters from their respective solicitors on 11-13.07.18 [**G/144/29106-7, 29113-5**] and their written arguments served 48 hours ago, we have struck through those challenges which we understand to have been abandoned.

D1 and D2

19. D1 and D2 have not yet been formally served with the Bank's Claim Form in these proceedings, which they have insisted be served on them in Switzerland via Hague Convention channels. The Bank was recently granted an extension of time for service of the Claim Form and has applied for an order for service by alternative means. In the meantime, however, D1 and D2 both seek to set aside the WFO on the express basis that *"The English Court has no jurisdiction over these claims"* (Lafferty 2/¶7.1 [**B2/36**]). The Bank's position is that, having taken this point at this stage, it will not be open to D1 and D2 to take it again after service of the Claim Form if they are unsuccessful.

D3-D5[3]

20. In their Application Notice dated 16.2.18 [**A1/5**] D3-D5 take the following five points:

~~(1) the Court has no jurisdiction over them.~~

~~(2) the Court *"should not exercise its discretion to take jurisdiction"*.~~

(3) the Court should stay its proceedings pursuant to Article 34 of the Brussels Regulation (recast).

~~(4) the Bank has not demonstrated a real issue to be tried against D3-D5.~~

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3 McNeill 3/¶7.3 makes the point that determination of D3-D8's jurisdiction applications will only take a small amount of additional court time: *"… The evidence to be considered in relation to each application is broadly the same. Some additional legal submissions on behalf of the Corporate Defendants may be necessary, but these are likely to overlap largely with the submissions which* [D1-D2 will be making]." [**F1/138/28744**].

~~(5) the Bank is not entitled to invoke Article 4 of the Brussels 1 Regulation (recast) to seek to found jurisdiction against D3-D5 and/or the bringing of the proceedings against D3-D5 is an abuse or otherwise not permitted or *"inappropriate to permit"*.~~

D6-D8

21. In their Application Notice dated 16.2.18 [**A1/6**] D6-D8 take the following (somewhat duplicatory) eight points:

(1) the Court has no jurisdiction over them.

(2) the Court had no jurisdiction to grant permission to serve them out of the jurisdiction.

(3) the Court *"should not exercise its discretion to take jurisdiction"*.

(4) there were material non-disclosures by the Bank in its application for permission to serve out of the jurisdiction.[4]

(5) the English Court should stay the proceedings.

~~(6) the Bank has not demonstrated a real issue to be tried against D6-D8.~~

(7) this Court is not the natural or proper forum.

~~(8) the Bank is not entitled to invoke Article 4 of the Brussels 1 Regulation (recast) to seek to found jurisdiction against D3-D5 and/or the bringing of the proceedings against D3-D5 is an abuse or otherwise not permitted or *"inappropriate to permit"*.~~

Freezing Order

The Bank

22. The Bank has to demonstrate (a) that it has a good arguable case on the merits; (b) that there is a risk that the Ds may dissipate their assets; and (c) that the assets available to the Ds within the jurisdiction are insufficient to satisfy a judgment on the claims[5].

23. It has always been common ground that condition (c) is satisfied. Until their solicitors' letters of 11-13 July,[6] points (a) and (b) were very much in dispute. Indeed, as noted above, D1 had

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4 The three matters of which complaint was made were reduced to two by Pinsent Masons' letter of 13 July 2018 [**G/144/29113**]. Regrettably, three expert reports (including one obtained by the Bank from the former President of the Cypriot Supreme Court) had been produced in relation to the point that has been conceded.

5 See Derby & Co Ltd v Weldon [1990] Ch 48.

6 [**G/144/29107, 29115 and 29113**].

expressly confirmed at the hearing on 4.5.18 that he intended to argue at this hearing that the Bank had not demonstrated a good arguable case against him. Now, neither of the conditions is contested: it is agreed that the Bank has established a good arguable case against each D, and that there is a real risk that each D will dissipate his or its assets. The case, in other words, cries out for freezing relief.

24. What is, apparently, contested is the quantum of the Bank's claims. D1 (and D2 alongside him) complains that the Bank has overvalued its claims and that there should be a limit of $245m in the WFO; D1 and D2 have issued application notices to vary the WFO. The Bank disputes this. The Court will thus have to decide whether the Bank has a good arguable case on the quantum of its claim against D1 and D2.

25. In addition to its application to continue the WFO, the Bank also seeks orders against D1 and D2 to make the WFO more effective. These applications are addressed in short separate skeleton arguments because of the strictures of the confidentiality club.

D1

26. In his Application Notice D1 failed to identify the grounds upon which he relied for the relief which he was seeking on the application. In correspondence he later confirmed that the grounds are as set out in Lafferty 2/¶2 [**B2/36**]. And his stance on good arguable case was clarified at the May hearing. Before last week, therefore, D1 was taking the following points:

(1) ~~The Bank has no good arguable case.~~

(2) ~~There is *"no viable claim"* against D3-D5;~~ D3-D5 are *"being sued for the sole object of bringing proceedings in England"*; and since D1 is domiciled in Switzerland the English Court therefore has no jurisdiction.

(3) The proceedings should be stayed under Article 34 of the Brussels 1 Regulation (recast), Article 28 of the Lugano Convention and/or the Court's case management powers.

(4) ~~The proceedings were brought in breach of an injunction granted by a Ukrainian Court.~~

(5) ~~The application for the freezing order should not have been made without notice.~~

(6) The Bank made serious material non-disclosures and misrepresentations on the without notice application.[7]

~~(7) There is no real risk of dissipation.~~

D2

27. In his Application Notice D2 also failed to identify the grounds upon which he relied for the relief which he was seeking. He has however subsequently provided a document setting out those grounds [D8/82/18804-18807]. Although set out in a different order, they are identical to the grounds relied upon by D1. D2 has now followed D1's lead and abandoned the points struck through above (together with six out of the ten non-disclosure points).

D3-D5

28. In their Application Notice dated 2.3.18, D3-D5 take the following points:

~~(1) The Bank does not have a good arguable case against D3-D5.~~

(2) D3-D5 have no (or negligible) assets within the jurisdiction.

~~(3) There is *"no real risk"* of dissipation of assets by D3-D5.~~

(4) It is not just and convenient to continue the WFO.[8]

(5) The Bank was guilty of material non-disclosure and misleading of the Court on the without notice application.[9]

D6-D8

29. In their Application Notice dated 2.3.18, D6-D8 take the following points:

~~(1) The Bank does not have a good arguable case against D6-D8.~~

~~(2) There is *"no real risk"* of dissipation of assets by D6-D8.~~

(3) It is not just and convenient to continue the WFO.[10]

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7 The original ten heads of non-disclosure were reduced to four by the 11 July letter.

8 It is not clear that this point adds anything to the complaint of non-disclosure, so we shall ignore it.

9 As noted above, one of the three points initially taken has been abandoned.

10 See footnote 8

(4) The Bank was guilty of non-disclosure and misleading of the Court on the without notice application.[11]

30. Thus it can be seen that the hearing is now concerned with only the following seven points:

(1) Whether D3-D5 are being sued in England with the sole object of establishing jurisdiction in England rather than Switzerland,[12] and (if so), what is the consequence for these proceedings.

(2) Whether these proceedings can and should be stayed in favour of proceedings in Ukraine.

(3) Whether the Bank has a good arguable case that the "necessary or proper" party gateway to jurisdiction was available against D6-D8 and, if so, whether the Court was entitled to exercise its discretion to grant permission to serve the proceedings on D6-D8 out of the jurisdiction.

(4) Whether the Bank was guilty of material non-disclosure on the ex parte application.

(5) Whether the limit of the WFO should be reduced to $245m.

(6) Whether relief should be granted to the Bank to make the WFO more effective.

(7) Whether the Bank should be permitted to serve the Claim Form on D1-D2's solicitors.

<u>The Confidentiality Club</u>

31. On the application of D1 and D2, a very tightly drawn confidentiality club was imposed in respect of their disclosure of assets which they controlled and which are located in Ukraine and Russia, see [**A1/14.2/116.4-.9**]. D1 and D2 take the position that the club is so tightly drawn that not even D2 may see D1's disclosure, and vice versa, even though they own the vast majority of their assets together.

32. Additionally, D3-D8 contend that nobody else is entitled to see their disclosure of assets, even though they have not sought the imposition of a confidentiality club.

33. The Bank considers that the sensitivity of D3-D8 should not lead to discussions concerning their assets having to be conducted in private. But plainly discussion of the Ukrainian and

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11 As noted above, one of the three points initially taken has been abandoned.

12 No party has given any evidence that Switzerland is a suitable jurisdiction for the hearing of the Bank's claims.

Russian assets of D1 and D2 will have to be conducted in private. That being so, all references herein to the details disclosed by D1 and D2 in those respects will be made in confidential schedules which will be made available only to lawyers in the club and the respective solicitors and counsel for D1 and D2.

Submissions

34. We propose to address the relief claimed on the various applications in the order in which we have set it out above, but before we do we shall first mention one issue which was previously relied upon by all Ds (albeit developed principally by Mr Lafferty), namely that the Bank does not have a good claim on the merits against D1 (or any other defendant).

35. While the Ds have now accepted that the Bank has established a good arguable case against each of them on liability, the merits of the Bank's case were nevertheless given extensive coverage in the evidence filed on behalf of the Ds. Further, the merits of the Bank's case remain relevant for a number of reasons.

    (1) First, the Bank's case on the merits is not simply arguable, it is very strong. This, coupled with the egregious nature of the fraud perpetrated by the Ds, militates strongly in favour of the WFO being continued.

    (2) Secondly, the merits of the Bank's case, and in particular, the way in which it was put at the without notice hearing, are front and centre of D1's (entirely misconceived) complaints regarding the Bank's compliance with its duty of full and frank disclosure.

    (3) Thirdly, and as addressed further below, while D1 no longer disputes that the Bank has a good arguable case, he continues to take issue with the quantum of the claim put forward by the Bank. Some aspects of the merits of the Bank's case therefore continue to be relevant to the value of the WFO.

    (4) Finally, the nature and merits of the Bank's claims, particularly are important matters for the Court to consider on the Ds' challenges to the jurisdiction, which we turn to first below.

36. In those circumstances we have not jettisoned all the submissions on good arguable case (which were largely complete when the Ds' volte face on 11-13 July was notified), but have included the salient points in Part II and III of Section E2 below. Finally, we have included a glossary of defined terms at Schedule 1.

D. PRE-READING

37. In addition to the pre-reading suggested at paragraph 5 of D1's skeleton argument, the Bank respectfully invites the court to read:

(1) The Second Witness Statement of Richard Ian Lewis ("**Lewis 2**"), Sections 3, 6, 7, 8, 9 and 10 [**B1/29/778-790, 793-823**].

(2) Paragraphs 401-444 and 490-492 of Lewis 3 [**B2/30/935-948, 959**].

(3) The Eighth Witness Statement of Richard Ian Lewis ("**Lewis 8**") [**B2/30(2)**].

(4) The Ninth Witness Statement of Richard Ian Lewis ("**Lewis 9**").

(5) The Second Expert Report of Mr Beketov ("**Beketov 2**"), pages 3-9 [**C1/57/1491-1497**].

(6) The Third Expert Report of Mr Beketov ("**Beketov 3**"), pages 1-25 [**C1/58/1501-1525**].

(7) The Fourth Expert Report of Mr Beketov ("**Beketov 4**"), pages 23-31 [**C1/60/1580-1588**] and pages 37-40 [**C1/60/1594-1597**].

(8) The Fifth Expert Report of Mr Beketov ("**Beketov 5**") [**C1/60(1)**].

E. THE CHALLENGES TO JURISDICTION

38. All of the Ds take points on jurisdiction. In this section we address:

Article 6(1) The court's jurisdiction under Article 6 of the Lugano Convention ("**LC**") and D1 and D2's argument that the Court has no jurisdiction under Article 6 because the Bank has sued D3-D5 for the "sole object" of removing D1 and D2 from the jurisdiction of the Swiss courts.	Paras 39-131
Lis alibi pendens The proceedings in Ukraine and the various arguments (under Article 34 of the Recast Judgments Regulation ("**the Regulation**"), Article 28 of the LC and/or under the common law *forum non conveniens* principles) that the Court should stay the Bank's claims in England in favour of proceedings in Ukraine.	Paras 132-223
Forum non conveniens D6-D8's arguments that England is not the natural or proper forum for the dispute.	Paras 225-230

E1. ARTICLE 6(1) OF THE LUGANO CONVENTION

39. The English Court has jurisdiction in respect of the Bank's claims against D1 and D2 under Article 6 of the LC. It provides as follows:

> *"A person domiciled in a State bound by this Convention [Switzerland] may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled [England], provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ..."*

40. D1 and D2 do not contend (and neither does any other D any longer) that the above requirements are not fulfilled in this case (see Lafferty 2/¶¶127-8 [**B2/36**]). Instead, they argue that the Bank has sued D3-D5 for the "sole object" of establishing the English court's jurisdiction over D1 and D2 under Article 6(1), thereby ousting the jurisdiction of the Swiss courts, and that it is therefore an "abuse" of Article 6(1) for the Bank to seek to sue D1 and D2 in England.

41. The Bank disagrees:

(1) There is not a "sole object" test (i.e. in the sense that if it is established that a party has commenced proceedings with the sole object of establishing jurisdiction against parties domiciled abroad, those proceedings should be stayed or set aside). We address this point at paragraphs 42 to 51 below.

(2) In any event, if that is wrong, even adopting the most generous possible approach to the law, D1-D2 come nowhere near to meeting the "sole object test": see paragraph 42 to 51 below.

(3) D3-D5 are legitimate targets in their own right: as has now been accepted, the Bank has good arguable claims against them; and they have potentially valuable assets and substantial disclosure to give. Indeed, though we need not go this far, the evidence before the Court demonstrates that they were central to D1-D2's fraudulent Scheme. We address these points in paragraphs 52 to 67 below.

(4) Insofar as the European authorities require that it was foreseeable that the Bank would use D3-D5 as anchor defendants, this test is met (as D1's own evidence appears to accept). We address this point at paragraphs 68 to 69 below.

(5) There is and could be no suggestion of collusion between the Bank and D3-D5.

The history of "sole object"

42. The origins of the "sole object" test are as follows:

(1) Under the Brussels Convention and the original 1988 LC, Article 6(1) provided that "*a person domiciled in a Contracting State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled.*"

(2) It is important to note that Article 6(2) of these Conventions provided that "*a person domiciled in a Contracting State may also be sued (2) as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.*" So Article 6(2) expressly included a "sole object" caveat; whereas Article 6(1) did not.

(3) The **Jenard Report** noted that for the Article 6 (special jurisdiction) rule to apply, "*there must be a connection between the claims made against each of the defendants, as for example in the case of joint debtors. It follows that an action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled. Jurisdiction derived from the domicile of one of the defendants was adopted by the Committee because it makes it possible to obviate the handing down in the Contracting States of judgments which are irreconcilable with one another.*"

(4) The underlined wording must be read in context. Article 6(1) created an exception to the rule that a defendant must be sued in his state of domicile, but it did not impose any express restraints on the potentially wide wording of the rule (cp Article 6(2)). The authors of the Jenard Report thought there should be a "connection" between the claims against each of the defendants in order to found jurisdiction under Article 6(1).

(5) The point was picked up in **Kalfelis v Bankhaus Schroder** [1988] ECR 5565 – a case under the Brussels Convention: see [8]-[12]. The ECJ's response to the

potential abuse of Article 6(1) was not to impose a test of whether the claim against the anchor defendant had been brought for the "sole object" of ousting the jurisdiction of the courts of another defendant's domicile. Instead, the ECJ limited Article 6(1) to those cases in which "*it is expedient to hear and determine [the claims] together to avoid judgments which might be irreconcilable if the actions were determined separately.*"

(6) It is unsurprising that the ECJ did not adopt a "sole object" test. After all, the inclusion of such a test in Article 6(2) points away from such a test being appropriate under Article 6(1).[13]

43. We acknowledge that some later decisions of the ECJ have introduced some uncertainty into the law:

(1) The Judgments Regulation, introduced in 2001, did not adopt a "sole object" rider to Article 6(1). Instead, it adopted the limitation proposed in **Kalfelis**, viz., that the claims could be brought "*provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*" The same limitation was adopted in amendments to the LC in 2007.

(2) In **Reisch Montage v Keisel** [2007] ILPR 179, the claimant creditor brought proceedings in Austria against an Austrian debtor and his German guarantor. The debtor was bankrupt and so no judgment could be obtained against him. The question for the ECJ was whether the creditor could rely on Article 6(1) to found Austrian jurisdiction over the guarantor, even though he could not obtain judgment against the debtor. The ECJ held (1) that Article 6(1) could be relied upon even if the claim against the anchor defendant was inadmissible; (2) that Article 6(1) "*cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled*" (citing **Kalfelis** at [8] &

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13 See further **Briggs, "Civil Jurisdiction and Judgments"** at 2.231: "*The court in Kalfelis saw the requirement of a connection between the claims as a sufficient antidote to the prospect of misuse of what was then Article 6(1). It is wrong to infer from the judgment in Kalfelis a further limitation to the effect that the Article is unavailable if proceedings are brought for the purpose of removing a defendant from the court which would otherwise be competent in relation to him, for the judgment says the opposite. And anyway, if it really is expedient to try the claims together to avoid the possibility of irreconcilable judgments, it would be surprising for a court to be prevented from acting on that conclusion, and extraordinary that it be prevented by a principle which the legislator did not enact.*".

[9]); and (3) that the fact that proceedings against the anchor defendant were barred under Austrian law because the debtor was insolvent did not mean the proceedings against that defendant had been brought for the sole object of removing the German guarantor from German jurisdiction.

(3) **Reisch Montage** is the origin of the "sole purpose" or "sole object" test. As to this decision:

a. It is severely criticised by **Briggs** at 2.224 and 2.291 as a "*bad one which ought to be reviewed and reversed*" and as resulting from "*a mis-reading of the judgment in Kalfelis and a failure of judicial analysis.*"

b. It failed to take into account the context in which the court in **Kalfelis** had referred to a "sole object" caveat, and failed to appreciate that the limitation on Article 6(1) proposed in **Kalfelis** had been expressly written into the Judgments Regulation.

c. It failed to take into account the fact that Article 6(2) includes an express "sole object" limitation, while Article 6(1) does not.

d. To the extent it acknowledges the existence of a "sole object" test under Article 6(1), it is plainly a very narrow test: even (as in that case) if the proceedings against the anchor defendant cannot be pursued (eg because the anchor defendant is insolvent), that does not preclude reliance on Article 6(1).

(4) In **Freeport v Arnoldsson** [2008] QB 634 the ECJ expressly addressed the question whether "*it was a precondition for jurisdiction under article 6(1), in addition to the conditions expressly laid down therein, that the action against a defendant before the courts of the state where he is domiciled was not brought solely in order to have a claim against another defendant heard by a court other than that which would otherwise have had jurisdiction to hear the case?*" The court's answer was "no". Having explained the decision in **Kalfelis** and the re-drafting of Article 6(1) under the Judgments Regulation, the court held:

> "*54 ... article 6(1) of Regulation No 44/2001 applies ... without there being any further need to establish separately that the claims were not brought with the sole object*

of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled."

(5) That ought to have settled the matter. It is telling that the Advocate-General's Opinion in **Freeport** examined the decision in **Reisch Montage** in detail before proposing a "sole object" test (see para [68]). The court did not follow the Advocate General's advice.

44. Unfortunately, in two subsequent cases the ECJ resurrected the **Reisch Montage** heresy and said that Article 6(1) cannot be applied so as to allow an applicant to make a claim against a number of defendants with the "sole object" of ousting the jurisdiction of the courts of the State where one of those defendants is domiciled: **Painer v Standard Verlags** [2012] ECDR 6 at [78]; and **Solvay v Honeywell Fluorine** (2012) C-616/10 at [22]. Those cases (1) wrongly suggest that **Kalfelis** introduced a "sole object" limitation to Article 6(1); (2) fail to follow or even cite the reasoning in **Freeport** explaining why the "sole object" test does not apply; and (3) appear to recite the "sole object" limitation as if it is established law, when the ECJ has stated in **Freeport** that it is not.

45. In **Cartel Damages Claims v Akzo Nobel** [2015] QB 906 the claimant brought proceedings in Germany against a German company and five other (non-German) companies for damages. The claimant settled with the German defendant, and the five other defendants alleged collusion: they said that the claimant and the German defendant had delayed their settlement for just long enough to allow the claimant to use the German company as an anchor defendant. The ECJ considered **Reisch Montage** and **Freeport** and, without expressly disapproving either decision, sought to reconcile the obvious inconsistency:

> *27 According to settled case law, that rule cannot be interpreted as allowing an applicant to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the member state in which that defendant is domiciled: the* ***Reisch Montage case*** *[2006] ECR I-6827 , para 32, and in* ***Painer's case*** *[2011] ECR I-12533 , para 78.*
>
> *28 The court has nevertheless stated that, where claims brought against various defendants are connected within the meaning of article 6(1) of Regulation No 44/2001 when the proceedings are instituted, the rule of jurisdiction laid down in that provision is applicable without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the member state where one of the defendants is domiciled:* ***Freeport plc v Arnoldsson*** *[2008] QB 634 , para 54.*

29 It follows that where, when proceedings are instituted, claims are connected within the meaning of article 6(1) of Regulation No 44/2001, the court seised of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability.

46. So Article 6(1) would not apply if it had been fulfilled artificially by the claimant, ie by way of collusion between the claimant and the anchor defendant. To describe the test as a "sole object" test is, therefore, a misnomer: if there is such a test, it is in substance a rule to prevent fraudulent or collusive abuse of Article 6(1) and, even then, the burden is on the defendant to adduce *"firm evidence"* to that effect.

47. What have the **English courts** made of this?

(1) In **Sabbagh v Khoury** [2017] EWCA Civ 1120 the claimant brought proceedings in England against one individual domiciled in England and a number of other defendants domiciled in other Member States (and some outside Europe). The defendants applied to set aside service of proceedings on them in other Member States on the basis that the claimant could not establish a good arguable case against the anchor defendant in England (para [20]). The Court of Appeal held that the claimant did have a real prospect of success against the anchor defendant, and that disposed of the appeal. Nevertheless, the court also considered the jurisdictional test under Article 6. The court was split on the issue:

(2) The majority (Patten and Beatson LJJ) held that it is necessary for the claim against the anchor defendant to give rise to a serious issue to be tried. If the claim against the anchor defendant is hopeless on the merits then (1) it would not be "expedient" to hear the claims against the non-anchor defendants with the hopeless claim against the anchor defendant (para [44], [66]); (2) the decision in **Freeport** rejected the "sole object" test but did not determine the question whether it was necessary to establish a well-founded case against the anchor defendant in order to found Article 6(1) jurisdiction (para [49]); (3) a test which precluded the use of Article 6(1) only in cases where it was used fraudulently or collusively would set the threshold too high (para [67]); and (4) *"a claim against an anchor defendant that is hopeless or presents no serious issue to be tried should fall within the "sole purpose" or "sole object" exception identified in [32] of the judgment in Reisch Montage."* (para [68]).

(3) Gloster LJ disagreed. She held that (1) the ECJ case law clearly established that the only limitation on Article 6(1) is that it cannot be fraudulently abused, eg by collusion between the claimant and anchor defendant (paras [198]-[199]); (2) the principles underlying the Regulation and the ECJ case law establish that the national court is not required to assess the merits of the claim against the anchor defendant when determining whether the claims are "so closely connected" that it would be "expedient" to hear them together (paras [201]-[209]); (3) a claim against an anchor defendant which is liable to be struck out does not constitute a fraudulent abuse of Article 6(1); and (4) the Court of Appeal's decision in **Aeroflot v Berezovsky** [2013] 2 CLC 206 at [107]-[107] supports the view that Article 6(1) does not require an assessment of the merits of the claim against the anchor defendant.

48. The Bank submits that Gloster LJ's analysis of the ECJ case law and the purpose of Article 6(1) is to be preferred, for the reasons given in her judgment. In particular:

(1) As explained in detail above, a proper analysis of the ECJ's decisions shows that there is no "sole object" limitation under Article 6(1) (and certainly no requirement to establish a "good arguable case" against the anchor defendant).

(2) There is nothing in Article 6(1) which requires the imposition of such a gloss (cp the express wording in Article 6(2)). There is already a perfectly adequate limitation on the special jurisdiction provision, that the claims must be "so closely connected" that it is expedient to hear them together to avoid the risk of irreconcilable judgments. That limitation does not require the Court to assess the merits or purpose of the claims against either or both of the anchor and non-anchor defendants.

(3) If a "sole object" and/or "merits" test was read into Article 6(1) it would lead to far greater uncertainty in the determination of jurisdiction, which is the opposite of the intention of the Convention.

(4) If the Bank had conspired or colluded with D3-D5 to found jurisdiction in England against D1 and D2, that would make Article 6(1) inapplicable. But no such allegation could be made.

49. For those reasons, the Bank contends that there is no "sole object" test applicable under Article 6(1) and the Ds' submissions to the contrary are misconceived.

50. Even if that is wrong, however, and the analysis of the majority in **Sabbagh** is to be preferred, the Bank still succeeds in founding jurisdiction under Article 6(1). The majority go no further than to conclude that the Article cannot be satisfied if the claim against the anchor defendant *"is totally without merit"*.[14] But here, all of the Ds, even the anchor defendants themselves, accept that there is a good arguable case of fraud against them.

51. D1, in his skeleton argument, proposes a different test that requires the Court to consider a claimant's subjective motives: did *"C sue .. an anchor defendant (which it otherwise has no good reason to sue) only to give the impression that it is expedient to hear ... that claim together with the claim against the true target defendant ..."*? (D1 Skel/¶32) As to this:

(1) No authority is cited in support of this proposition. There is none.

(2) The proposition is contrary to one of the principal aims of the Regulation and LC, viz. the promotion of legal certainty. *"The Judgments Regulation contains rules of jurisdiction which are designed to promote legal certainty by allowing prospective litigants, whether claimants or defendants, to foresee with sufficient certainty which court will have jurisdiction."* **AMT Futures v Marillier** [2017] 2 WLR 853, [11] (Lord Hodge). See, to similar effect, D1 Skel/¶138.

(3) The proposition can only be supported by the making of the following allegation: *"D3-D5 were not 'central to the fraud', although the claim had been formulated to give the false impression that they were."* (D1 Skel/¶40(1)). See, to similar effect, ¶53. These allegations appear to be made, so far as we are aware for the first time, against the Bank's lawyers. They are ill-founded, unsupported by evidence, and should be withdrawn.

(4) In any event, the Court should reject the allegation.

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14 Sabbagh v Khoury, at [44]

D3-D5 are legitimate targets in their own right

52. In this section we explain why, contrary to D1 and D2's submission, D3-D5 are legitimate targets in their own right and have not been sued for the sole object of removing D1 and D2 from the jurisdiction of the Swiss courts (even if that is a relevant test, which, for the reasons given above, it is not).

D3-D5's assets and disclosure

53. First, if, as the Bank alleges, D3-D5 have been involved in a widescale fraud, then it is very likely that:

(1) **Their directors breached their duties of care and skill and/or fiduciary duties.** As the Bank's leading counsel explained at the without notice hearing, *"English companies can't just dissipate their assets for no return"* (Transcript/5:25-6:1 **[A1/17/124]**). If they do so, the directors involved are likely to be liable to pay compensation for their breaches of at least one of the duties imposed by ss. 171-177 of the Companies Act 2006 (**"the 2006 Act"**).

(2) **Their shadow directors breached their duties of care and skill and/or fiduciary duties.** The general duties imposed by the 2006 Act apply to shadow directors: see s. 170(5). Here it is quite likely that there are a number of shadow directors.[15] This is because **(i)** the de jure directors of D3-D8 are appointees of offshore corporate services providers who **(ii)** appear to have minimal knowledge of the business and affairs of D3-D8. [redacted]

(3) **D3-D5 will have rights under the agency agreements (assuming that they are valid).** Even if it is correct, as D3-D5 claim, that their role in the Scheme was undertaken as undisclosed agents, the agency agreements relied upon (the "**Agency Agreements**") demonstrate that they have good claims for

[15] Ie persons in accordance with whose directions or instructions the directors of a company are accustomed to act: see s. 251(1) of the 2006 Act.

compensation from their supposed principals in the event that D3-D5 are found liable to the Bank. Clause 7 of each Agency Agreement is headed 'Indemnity' and provides as follows: *'The Principal shall have the obligation to indemnify and keep the Agent harmless at all times and for the purposes whereof shall sign the Letter of Indemnity as set out in Schedule A hereto ....'* **[D16/103/25398, 25405-6, 25414]**

54. D1 has chosen to interpret the Bank's position as being that it may have claims in unjust enrichment to recover the funds that were paid away: see D1 Skel/¶130. This is not, as Lewis 3 makes clear, the Bank's position at all. As is explained at Lewis 3/¶292: *"... if the Bank is successful in its claim,* [D3-D5] *are likely to have further substantial assets in the form of their own claims against, for example, their directors, shadow directors, purported beneficial owners and/or actual beneficial owners."* **[B2/30]**.

55. Those entities include: (1) the four directors of D3-D5; (2) the three different corporate services providers they work for; (3) [redacted]; (4) agents who acted for D3-D5; and (5) D3-D5's shadow directors. The Bank, of course, has limited information as to categories (4) and (5) as things stand. But that will be in the disclosure that D3-D5 will be able to give.

56. Secondly, D3-D5 will have important disclosure to give in relation to the claim. This is disputed in D1 Skel/¶144(7): *'There is no 'important disclosure' which D3-D5 might give, and C has not identified any (even by broad description)"*. This overlooks the evidence given at Lewis 2/¶190 **[B1/29]**, where the following classes of document are set out:

(1) **Relevant and Loan File Supply Agreements**: documents and evidence relating to the rationale, negotiation, drafting, execution and non-performance of these agreements. Are there drafts of these agreements? Were they negotiated with D3-D5's counterparties? Were instructions given to prepare them individually and in advance (or were they backdated with instructions being given in batches)? Who gave the instructions? How? (We observe that in the JSC BTA Bank case instructions to Cypriot corporate services providers were provided by email and proved to be very telling evidence indeed.[16])

16 See JSC BTA Bank v Ablyazov (No 8) [2013] 1 WLR 1331, [54] (Rix LJ).

(2) **Alleged agency agreements:** documents and evidence relating to the rationale, negotiation, drafting, execution and non-performance of the Agency Agreements that D3-D5 contend that they were operating under. If the Agency Agreements were "valid and binding" as alleged, then D3-D5 will hold a great deal of material in relation to their performance under these agreements. See:

a. Clauses 1, 4.3, 5.1 and 5.4 of the Agency Agreements which require that written instructions be provided to D3-D5 before certain action can be taken (eg paying monies to a third party) **[D16/103/25395-7, 25402-5, 25410-13]**.

b. Article 10 of D3 and D5's Agency Agreements, which requires them to keep proper books and records evidencing any transactions performed qua agent. That Article provides as follows: *"Each Party hereto shall be obliged to keep proper books and records concerning any Business Activity performed under this Agreement and grant access to the books and records of another Party upon its first written request. The Parties hereto shall have the obligation to verify their books and records and fix the balances hereunder, whether financial or of inventories, goods and services, after the end of every three-month period..."* **[D16/103/25405, 25414]**.

c. The fact that D3 and D5's English accountant has given evidence in support of their claim that he was provided with documentation in connection with their alleged performance of their obligations under the Agency Agreements: *"... on 9 November 2015, to assist me with preparing* [D3] *and* [D5's] *accounts, I received ... versions of the Agency agreements"* **[B3/53/1405/¶6]**. The accountant does not say that he holds no other documents for D3 and D5. To the contrary, his evidence suggests that he may well do so: the *"accountancy services"* he provided *"included assistance in preparing and filing their statutory accounts"* [ibid/¶2].

(3) **Beneficial ownership and administration of D3-D5:** [redacted] documents and evidence relating to the reasons for their incorporation and commercial rationale; documents and evidence relating to how they were administered in practice. For instance, how were instructions given for transfers of monies from

D3-D5's bank accounts? Who were they given by? Were they given individually or in batches? Or were monies moved from D3-D5's accounts by algorithm?

57. For these reasons, we disagree with D1 Skel/¶135 that it is *"highly improbable"* that D3-D5 will have important documents to disclose. Indeed, it is noteworthy that the directors of D3-D5 have not said the same thing. Instead, they limit their evidence to the assertion that each company *"Does not keep, and has never kept, any documents in England which would be relevant to the substance of the dispute"* (emphasis added) **[B3/45/1363/¶4(b)] [B3/46/1367/¶4(b)] [B3/47/1371/¶4(b)]**. This is, presumably, because they are mindful of their obligation under s. 386 of the Companies Act 2006 to maintain records that are sufficient to *"show and explain the company's transactions."*

D3-D5's role in the fraud

58. D3-D5 were in fact central to the fraud, though of course this is no part of any relevant legal test. We make this submission good by reference to the first to fifth points below.

59. First, the Supply Agreements are key: they provided the purported justification for the lending to the Borrowers; they were the basis on which payments were made to D3-D5; and they were used as purported security for Relevant Loans. Taking these points in sequence:

(1) The Relevant Loans provide as follows at clause A.5: *"Performance of the obligation by the Borrower is guaranteed by: a pledge agreement."* **[D2/68/2175]**

(2) The grant of security over *"property rights to goods under contract"* (ie over the rights created by Supply Agreements) or over specific Supply Agreements is referred to in so-called *"Expert Analys*[e]*s"* carried out before the grant of the Relevant Loans **[D2/68/2216] [D2/68/2218]**.

(3) When the Borrowers transferred $1.9 billion in funds to D3-D8, the justification given for the transfers was that prepayments were being made under Supply Agreements. For instance, the transfer of $40.25 million by Agroprom (a Borrower) to D5 (POC/Schedule 3/row 38) **[A1/2/52]** was accompanied by the following payment reference:

"FOR COLLYER LIMITED [ADDRESS AND REFERENCE NUMBER GIVEN] *FOR PREPAYMENTS ACCORDING TO THE CONTRACT NO3007A-3 DD 30.07.2014 FOR AUSTRALIAN MANGANESE ORE LUMP"* (Lewis 3/¶116) **[B1/30]**.

(4) Security was purportedly put in place over the Supply Agreements in support of the Relevant Loans. It is at this stage important to have regard to the distinction between two types of Supply Agreements:

a. The first, the Relevant Supply Agreements, provide for prepayments for commodities/equipment to be made (ie money to pass before the goods were provided); it was these agreements that were referenced when funds were transferred from the Borrowers to D3-D8.

b. The second, the Loan File Supply Agreements, provide for payment to be made only after the Borrowers had received the commodities/equipment in question (which would, if real, have been (slightly) more commercially explicable). It is these agreements, which otherwise suffer from many of the same defects as the Relevant Supply Agreements, that were used as purported security in support of the Relevant Loans: see POC/¶¶27-31 **[A1/2]**. It was presumably thought that they would be a more credible source of security than the Relevant Supply Agreements if and when security documents had to be shown to the Bank's auditors and/or regulator.[17]

c. As was explained in one of the deleted documents that the Bank has been able to recover, the Loan File Supply Agreements were to be *"collateral for the NBU* [the National Bank of Ukraine, the banking regulator]*"* **[D3/68/2376-2382]** (ie purported security to stop the regulator asking too many questions).

60. Secondly, Lafferty 3 says that *"Of the 35 Suppliers, 24 received money directly from a Borrower which they then paid away. On any proper view, those 24 Suppliers were all equally implicated in the Scheme"* **[B3/39/1243/¶89(a)]**. This is quite wrong. As is explained in Lewis 1/¶270 **[B1/24]**:

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[17] Although the Loan File Supply Agreements could only have been intended as a papering exercise: they could not disguise the fact that the money had been transferred and nothing delivered.

> *"… during a period of almost six years, using loans advanced by the Bank, tens to hundreds of millions of US Dollars at a time were moved repeatedly between the accounts of the Borrowers and the Suppliers. In total, just under US$13.2 billion was transferred from the accounts of the Borrowers to the accounts of 35 Suppliers during this period, and just over US$11.2 billion in total was returned to the same Borrowers' accounts. In June 2014, the prepayments stopped being returned, however, and a total of around US$1.91 billion remained in the accounts of the* [six] *Defendant Suppliers* [of which 95% went to D3-D5]."

61. The point can be put in another way: if the Bank had sued the 29 other Suppliers (it is said at D1 Skel/¶306(5) that *"There was no rational reason for C to sue D3-D5 and not… The 32 other Suppliers"*), they would have said (1) yes, we received monies under (non-relevant) Supply Agreements, but (2) we paid those monies back to our counterparties when we didn't comply with our delivery obligations, so why have you joined us to your claim?

62. Thirdly, and as explained at Lewis 1/¶¶275-8 **[B1/24]**, the Borrowers instituted proceedings against D3-D8 in Ukraine in late 2014 when they failed to comply with their delivery obligations under the Relevant Supply Agreements (not because they were trying to make recoveries from D3-D5, but seemingly because they wanted to avoid being penalised for breaching exchange control obligations). In many cases, D3-D8 wrote to the Ukrainian courts to explain that (1) they had not delivered the goods, and (2) that they had not returned the Relevant Prepayments to the Borrower. Those admissions are recorded in the 2014 Judgments (in proceedings to which the Bank was party).[18] None of the other Suppliers was sued – unsurprisingly given that they had returned the prepayments to the Borrowers.

63. Moreover, the Borrowers' claims are entirely consistent with the Bank's case. Indeed, at least 16 of the Borrowers told the Ukrainian Court that the Relevant Loan Agreements were amongst the contracts entered into:

(1) *"to make payment for the goods under"* the Relevant Supply Agreements;[19] or

(2) *"to pay for products under"* the Relevant Supply Agreements;[20] or

(3) *"to pay for the goods under"* the Relevant Supply Agreements.[21]

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18 See, for example **[D2/68/2300]** (Judgment in Agroprom's claim against D5): *"[D5] states to have failed to return the sum of prepayments from [Agroprom] under [the Relevant Supply Agreement], for which reasons [D5] owes [Agroprom]."*

19 **[D/11673, 11774]**

20 **[D/11713, 11806, 12043]**

21 **[D/11721, 11731, 11759, 11795, 11881, 11888, 11900, 11954, 11968, 11986, 11993, 12029]**

64. Fourthly, D1's suggestion that D3-D5 were not central to the fraud is undermined by his repeated attempts to tie D3-D5 into proceedings in Ukraine with a view to stymying proceedings in England. He took no such steps with the other 29 Suppliers other than D6-D8. If D3-D5 were really so peripheral, why did D1:

(1) Add them as the "second", "third" and "fifth" interveners to his defamation claim[22] **[D7/81/18468]**? As we explain below, D1 has referred to his defamation claim as the *"most crucial"* of all of the Ukrainian proceedings: Lafferty 2/¶139 **[B2/36]**; Lafferty 3/¶144 **[B3/39]**.

(2) Cause D3-D5 to seek to bring their own defamation claims on two occasions (see paragraphs 69(4), 134 and 166 below)? If 43 of the Ukrainian Borrowers and D6-D8 were every bit as central to the fraud, then why didn't D1 cause them to seek to institute their own defamation claims too? They are all named in the allegedly defamatory articles.

(3) Procure them to be added as three of the 15 interveners to proceedings which were instigated at his behest by the Ukrainian General Prosecutors' Office in the name of the Bank (respectively, **"the GPO Claims"** and **"the GPO"**) **[D7/81/18561]**? As is explained in Lewis 2/¶57 **[B1/29]**, there were other companies who were far more obvious candidates to be joined.

65. The answer is that D1 knew that D3-D5 were key participants in the fraudulent extraction of c.$1.8bn from the Bank, and he was desperate to avoid them being sued in England in proceedings to which he would inevitably be joined.

66. Fifthly, the use of English (as opposed to BVI, Belizean, Bahamian, Nevisian and Cypriot) companies in 2014 appears to have been quite deliberate:

(1) By June 2014 there had been a number of actual and planned changes to Ukrainian banking legislation that would result in transactions with offshore companies being subjected to increased scrutiny: Beketov 4/¶¶121-125 **[C1/60]**.

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22. D2 was the "first" intervener and D6-D8 were the fourth, sixth and seventh interveners.

(2) This evidence goes unanswered in Marchenko 2.

(3) D4 started using its English head office account with the Bank (and not its Cypriot branch) to receive prepayments on 27 August 2014: this was the same day as the NBU met executives of 40 major Ukrainian banks as part of a crackdown on bad faith transactions, including fictitious import and export transactions (Lewis 8/¶¶33-4 [**B2/30.2**]).

67. Finally, Lafferty 3 goes on to say *"... If the Bank has a good claim against any of the Suppliers, then it ex hypothesi also has a claim against any of the Companies involved in* [the Scheme]. *The total number of those companies is 125, of which only 3 were incorporated in England."* [**B3/39/1244/¶90**] (although Lafferty 2 puts the number of companies involved in the Scheme at *"over 200"* [**B2/36/1127/¶111**]). On analysis, this is a point in the Bank's favour:

(1) All Ds accept that the Bank has a good arguable case against D3-D5.

(2) None of the Ds has explained the commercial purpose behind what is described in Lafferty 2 as the "Scheme".

(3) What D1-D2 appear to be saying is that they have perpetrated a fraud of byzantine complexity using hundreds of companies, including three English companies, but that the Bank should not be allowed to bring a claim in England, even though he (and the English companies) accept that it is a good arguable claim.

(4) It does not lie in their mouths to rely on the complexity of their fraud (much of which was unknown to the Bank when proceedings started) to seek to oust the English Court's jurisdiction. D1-D2's case seems to be that:

a. The fraud involved money moving in *"cycles"*, through *"loops"*, via *"a series of conduits"*, notwithstanding *"break points"*, with the assistance of *"compensation payments"*, and through *"chains"* that involve *"hundreds of transactions"*: Lafferty 2/¶¶27.1.2, 46, 47.1, 47.2, 47.3, 69, 70, 71 and 102 [**B2/36**]). (For their part, D3-D8 prefer to describe the fraud as involving a *"... wider and ... complex programme of money being cyclically advanced by the Bank."*: D3-D8 Skel/¶18)

b. Aspects of the Scheme involved *"... a 'Break Point' in the Chain – that is a gap in the chain between origin and destination, such that it is not immediately apparent how the chain connects, and the final money repaid to the Bank appears to originate from somewhere else. In such cases, the effect is achieved by splitting the Payment Chain into two legs ... connected by a 'Compensation' payment ...."* (Lafferty 2/¶70 [**B2/36**], emphasis supplied)[23]

c. The fraud was so complicated that when D1 was served with the WFO he had to establish *"teams of people"*—including *"former employees of the Bank"* who were *"aware of transaction patterns"*—to engage in a *"process of reconstruction"* based on the *"generic way the Scheme operated"*: Lafferty 2/¶9, 20, 24 [**B2/36**].

d. Even with this team in place for c.10 weeks, it was not possible to produce **(1)** diagrams depicting payment chains for more than three Borrowers or **(2)** a *"fully worked example"* of D1's double-counting complaint: Lafferty 2/¶¶31, 47.1 [**B2/36**].

e. To give some examples, and focussing on a single Borrower called Ribotto LLC ("**Ribotto**"):

   i. On 6.2.14, $20,537,300 was received by Ribotto which the same day moved between 50 companies pursuant to 68 different transfers [**D14/92/24768**].

   ii. On 20.2.14, $12,359,000 was received by Ribotto which the same day moved between 28 companies pursuant to 49 different transfers [**D14/92/24768-9**].

   iii. On 25.2.14, $5,922,700 was received by Ribotto which the same day moved between 22 companies pursuant to 34 different transfers [**D14/92/24769**].

   iv. On 27.2.14, two transfers of $5,641,000 and $5,539,700 were received by Ribotto, and further transfers of $1.86 and $15 million were received by

[23] The Spreadsheets found at ANL2 identify compensation payments and/or break points in relation to 17 of the 46 Borrowers: [**D13/92/24620, 24628, 24632, 24636, 24644, 24667, 24673, 24678, 24696, 24701-2, 24708**] and [**D14/92/24714, 24736, 24757, 24775, 24813, 24834**].

"Empire" and Intorno, which the same day moved between 45 companies pursuant to 68 different transfers [**D14/92/24769-70**].

f. The fraud was carried into effect using so many money transfers that the experts considering the Bank's transactional data have formed the view that they were directed by algorithm: Lewis 1/¶19 [**B1/24**]. D1 has not denied this in his extensive evidence.

(5) Adopting the language of the Court of Appeal in respect of a similar submission in **Tatneft**, it would be *"grotesque"* if this submission were to be accepted: [2018] 4 WLR 14, [26].[24]

a. In that case, D1-D2 made the point that, if they had not committed the fraud that was alleged against them, they would have committed some other fraud. The Court of Appeal observed that *"... it would be grotesque if the defendants could evade liability for their fraud by saying they would have committed another wrong by ensuring non-payment. If that really is their case, they can tell the court that in the course of their defence."*

b. Here, D1-D2 are saying that the fraud was so complicated that the Bank has focussed on but one element of it. If that really is their case, they can explain the overall fraud in their defence and why they say that that case means the Bank has suffered no loss on its pleaded allegations.

Foreseeable that D1 and D2 might be sued in England

68. In **Reisch Montage v Keisel**, the ECJ held that Article 6(1) will apply *"in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued"* ([25]).

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[24] In that case, Tatneft alleged that D1 and D2 (there the Second and First Defendants respectively) had wrongfully procured that the payment due in relation to oil supplied to a company called S-K from UTN be wrongfully diverted to companies called Taiz and Technoprogress and thereafter siphoned to offshore companies. The Judge held that Tatneft had no real prospect of success on the facts and that its claim, in any event, failed as a matter of causation. The Court of Appeal (Longmore, David Richards and Hamblen LJJ) emphatically disagreed.

69. It was eminently foreseeable that D1 and D2 might be sued in England:

(1) It is well known that parties can be added as defendants to fraud claims based on Article 6(1). Indeed, D1's own evidence is that this is well known to him (and has been since at least 2004): as his solicitor says, he is *"... well aware of the concept of an 'anchor defendant' as a result of previous litigation he has been involved in. ..."* (Lafferty 2/¶120.5 **[B2/36]**).

(2) At the times the fraudulent scheme was carried out D2 was domiciled in England and Wales (Lewis 1/¶401-6 **[B1/24]**; Bogolyubov 2/¶¶12-13 **[B3/43]**), and so it must have been plain that he might be sued here.

(3) D1 and D2 appear to have made a deliberate decision to use English companies in the fraudulent scheme, seemingly in order to limit scrutiny of the fund transfers: see above. If a fraudster chooses to use English companies in his fraudulent scheme, he cannot profess surprise when he and his English companies are sued in the English courts.

(4) Indeed, not only was it foreseeable that D1-D2 would be sued in England, but (1) D1 did foresee it; (2) having foreseen it, D1 started his own set of defamation proceedings in Ukraine for the purpose of giving rise to *lis alibi pendens* arguments; (3) for good measure, D1 procured D3-D5 (twice) to seek to commence their own sets of defamation proceedings for the same reason; and (4) just to make sure, D1 procured the institution of a number of other sets of proceedings in Ukraine. We address these quite remarkable claims in section D3 below.

E2. OTHER POINTS TAKEN BY D1 UNDER THE "SOLE OBJECT" HEADING

(I) D1'S CRITIQUE OF THE BANK'S CASE

70. Despite the good arguable case concession, a large number of the passages contained in D1's outline argument seek to attack the cogency of the Bank's claim. We therefore address that claim in this section of these submissions[25] before turning to D1's criticisms of the Bank's case on loss.

71. The essential nature of the Bank's case is that:

(1) D1 and D2 controlled the Bank at all material times.

(2) Between April 2013 and August 2014, D1 and D2 procured the Bank to grant c. $2 billion+ of fraudulent loans to 46 Ukrainian borrowers (the "**Borrowers**" and the "**Relevant Loans**"). In return, the Borrowers agreed to provide security in support of their obligations, initially in the form of pledges over contractual rights to purchase vast quantities of commodities (eg manganese ore; PET; apple juice concentrate) or industrial equipment (eg excavators and cranes) (the "**Supply Agreements**").

(3) D1 and D2 owned and/or controlled the Borrowers at all material times.

(4) The Supply Agreements, which include 54 agreements entered into by the Borrowers and D3-D8, were also fraudulent in nature. None of the parties to the agreements, nor D1 and D2, intended that any commodities or equipment were going to be supplied and none ever was. The Supply Agreements were instead produced as a façade to enable (1) c. $1.91 billion to be paid to D3-D8 by the Borrowers and (2) purported security to be granted over the rights arising under the Supply Agreements in support of the Relevant Loans.

(5) D1 and D2 owned and/or controlled D3-D8 at all material times.

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25 We invite the Court to skim-read sections II and III below.

(6) By reason of the Ds' involvement in this scheme (the "**Misappropriation**"), the Bank has suffered loss and damage of $1.91 billion.

72. The remainder of this section is organised as follows:

II	Points (1) to (5) in paragraph 71 above	Paragraphs 73 to 88
III	Recent corroboration of Points (1) to (5)	Paragraphs 89 to 93
IV	Point (6): Loss	Paragraphs 94 to 95.
V	D1's Criticisms of the Bank's Case on Loss	Paragraphs 96 to 97
VI	The Bank's Responses to D1's Criticisms	Paragraphs 98 to 131

(II) POINTS (1) TO (5)

73. Point (1) relates to D1 and D2's control over the Bank and is addressed in detail at Lewis 1/¶¶32-3, 50-91 [**B1/24**] and POC/¶¶3-5, 14-15 [**A1/2**]. We limit ourselves here to three points:

(1) The Bank was founded, and obtained a banking licence, in 1992 and thereafter became Ukraine's largest bank: POC/¶1. To give an idea of scale, by 2016 it had 30 regional offices and 2,445 high street branches in Ukraine and was used on a regular basis by c. 20 million Ukrainians (about half of the population): POC/¶1 and Lewis 1/¶34.

(2) D1 and D2 were amongst the Bank's founders in 1992: Lewis 1/¶41. By 2003/04, D1 sat on and D2 chaired the Bank's supervisory board: Lewis 1/¶33; POC/¶4. And between 2006 and 2016, D1 and D2's aggregate direct and indirect shareholding in the Bank fluctuated between c. 80-100%: Lewis 1/¶32.

(3) But D1 and D2 did not merely use their formal positions and shareholdings to control the Bank. Instead, they **(1)** used their reputations as aggressive businessmen to procure that their instructions were carried into effect by the Bank's employees; **(2)** appointed loyal lieutenants to key positions within the Bank; and **(3)** even created departments within the Bank that were dedicated to servicing their own companies. See Lewis1/¶39-91; POC/¶¶14-15.

74. Neither D1 nor D2 has disputed the Bank's case that they exercised unfettered control over the Bank during the relevant period.

75. Point (2) concerns the nature of the Relevant Loans. This is addressed at Lewis 1/¶¶153-249 [**B1/24**] and POC/¶¶16-19 [**A1/2**]. We draw attention to the following five points:

(1) The Relevant Loans were made to the Borrowers. There were over 120 Relevant Loans in all. They were denominated in both UAH and $ and were made for amounts of between (using $ conversions for the UAH loans) $3.7 and $57 million. In each case, the purpose of lending was said to be the financing of the Borrower's "current activities". See POC/¶¶16-17 and Schedule 1 [**A1/2**].

(2) The Borrowers patently lacked substance. For instance, their account opening documentation: **(1)** indicated (in all but three cases) that they had no credit history; **(2)** indicated that they had no sales history to report; **(3)** stated that they each had one employee (save for one Borrower, which had two); and **(4)** (in relation to 39 of the 46 Borrowers) either gave no information about their business or stated that they carried on "unspecialised wholesale trade" (Lewis 1/¶104) [**B1/24**]. In short, the Borrowers were unpropitious candidates for the grant of $2 billion+ of lending.

(3) The position in relation to the seven Borrowers who purported to provide information about their business is even more remarkable: the information they gave is flatly inconsistent with the nature of the Supply Agreements they entered into in the following months: POC/¶¶18(a)(v), 25(b)(v)-(vi), 25(c)(iii)-(v) [**A1/2**]. Specifically:

Relevant Borrower	**Nature of business (per account opening documentation)**	**Goods purportedly purchased pursuant to Supply Agreements**
Foksar	Business and Management Consultancy	Australian Manganese Ore
Investgroup	Business and Management Consultancy	Excavators and Wheel Loaders
Gardera	Wholesale trade of fuel and lubricants	Australian Manganese Ore

Inkom	Manufacture of rubber tyres; field of sports	Cranes, Concrete Pumps and Excavators
Karinda	Wholesale trade of gaseous fuels and similar products	Excavators
Nautis	Retail trade in fuel	PET
Transmoloko	Dairy processing production of butter and cheese	Apple juice concentrate

(4) Over 65% of the Relevant Loans were granted within two business days of a loan application being made; of the remainder, all but one was approved within seven business days of application. These periods were manifestly inadequate for any or any proper due diligence to take place in accordance with the Bank's internal requirements: Lewis 1/¶71-3 **[B1/24]**; POC/¶19(c) **[A1/2]**.

(5) As their account opening documentation demonstrated, the Borrowers could not service their loans. But if the rotten nature of the "lending" was recorded in the Bank's accounts, the regulator would get suspicious and capital ratios would be violated. The dates for payment of interest under each of the Relevant Loans were accordingly extended on between one and seven occasions (in relation to one loan the date moved from 25.8.14 to 31.8.14 to 25.9.14 to 30.1.15 to 25.3.15 to 25.6.15 to 25.1.16 to 25.9.16) and interest payments in relation to at least three quarters of the Relevant Loans were purportedly discharged by the grant by the Bank of further purported lending: Lewis 1/¶¶223-249 **[B1/24]**.

76. None of the Ds has even tried to answer the Bank's criticisms of the improper manner in which the Relevant Loans were approved and granted.

77. Point (3) concerns D1-D2's ownership/control of the Borrowers. This is, to a large extent, established by the nature of the Relevant Loans: it is difficult to conceive that businessmen such as D1 and D2 would have let their bank lend $2 billion+ to companies of this kind if they did not own and control them.

78. However, the Bank does not rely on this fact alone. We draw attention to an email sent on 31 March 2015 by the Bank's head office director of compliance, Dmitry Luchaninov, to a

number of senior executives within the Bank (the "**Luchaninov Email**"): [**D1/68/1990-1999**]. It has the following features:

(1) It was sent in reaction to an *"unplanned audit* [being conducted] *by the National Bank of Ukraine"*. [**D1/68/1990**]

(2) That audit focused on 42 borrowers who *"made advance payments under international contracts* [sc the Supply Agreements]." [**D1/68/1990**]

(3) Mr Luchaninov was concerned. He had identified ways in which 24 companies, all of which are Borrowers, could be connected with D1 and D2 (referred to by Mr Luchaninov as *"the Bank's shareholders"*, *"KIV"* (ie Kolomoisky Igor Valeryevich, D1), and *"BGB"* (ie Bogolyubov Gennadiy Borisovich, D2)) [**D1/68/1993**].

(4) This was a serious problem because, as Mr Luchaninov explained, D1 and D2's connections with those companies *"are not included in the quarterly* [related party disclosure] *lists* [prepared by the Bank to comply with Ukrainian banking regulations] *due to risk-relevant relations and violation of ratios"* [**D1/68/1991**].

(5) Rather than make a belated related-party disclosure, Mr Luchaninov made detailed proposals to the Bank's most senior executives, Messrs Pikush, Yatsenko and Novikov, for the continued concealment of D1 and D2's interests. [**D1/68/1991**] In particular, the proposals for the *"removal of … connections"* involved either the replacement of directors of the 24 Borrowers or the replacement of directors of other companies with which the 24 Borrowers could be connected. [**D1/68/1991**]

(6) This, accordingly, is a smoking gun: it shows senior management of the Bank taking deliberate steps to conceal D1 and D2's connections with 24 of the 46 Borrowers from the Ukrainian banking regulator.

79. In those circumstances, it is particularly notable that neither D1 nor D2 has denied that they controlled the Borrowers at the relevant time. Nor have they sought to explain the Luchaninov Email.

80. **Point (4)** concerns the Supply Agreements. They are addressed at Lewis 1/¶¶250-269 **[B1/24]** and POC/¶¶20-31 **[A1/2]**. As explained above, they include 54 agreements entered into between the Borrowers and D3-D8 pursuant to which the Borrowers would acquire and D3-D8 would sell large quantities of commodities and industrial equipment (the "**Relevant Supply Agreements**").

81. By way of example, on 7 August 2014, D5 entered into a Relevant Supply Agreement with Vialint LLC pursuant to which it would sell and Vialint would buy 156,250 metric tons of Australian manganese ore at $320 per ton. This gave a contract price of $50 million. Importantly, the contract (as with all Relevant Supply Agreements) provided for the contract price to be paid to one of D3-D8 before delivery of the ore: see POC/Schedule 2/row 41 **[A1/2/47]**. The $50 million was paid on 13 and 14 August 2014 (by payments of $35 million and $15 million respectively) **[D6/73/18279]**.

82. The Relevant Supply Agreements are remarkable for a number of reasons. We give four:

(1) None of D3-D8 had any website, offices, staff, warehouses, workforce or any other public presence which might reasonably suggest that it was capable of fulfilling multi-million dollar supply contracts: POC/¶24(b) **[A1/2]**.

(2) Seven of the Borrowers contracted to buy vast quantities of commodities/equipment that was completely unrelated to the business activity that they had declared to the Bank months earlier: see para 75(3) above.

(3) The terms of the Supply Agreements are commercially inexplicable:

a. most are for round-number sums (eg 61% are for sums of $X or $X.5 million), something which is extremely unusual in international commodities agreements of this nature: POC/¶25(a)(ii) **[A1/2]** and Lewis 1/¶264 **[B1/24]**;

b. the agreements all provide for huge sums to be "pre-paid" to D3-D8 without the provision of any security whatsoever, eschewing the customary international trade payment mechanisms such as the grant of an UCP documentary credit: POC/¶25(a)(i) **[A1/2]**; and

c. many of the agreements provide for improbably long delivery periods (eg crude oil was to be paid for within 30 days, but could be delivered at any point in the next 17 months): POC/¶¶25(a) and (e) [**A1/2**] and Lewis 1/¶¶261-2 [**B1/24**].

(4) The quantities of commodities/equipment to be supplied were impossibly large. Specifically:[26]

Defendant Supplier	Quantity contracted to be sold	Problems with that quantity
D5	2.3 million tons of Australian Iron Ore (by contracts dated May to August 2014); delivery to Odessa seaport by December 2014.	(1) Ukraine only imported 87,417 tons of manganese products from Australia over the whole of 2014. (2) Australia's total manganese ore production for 2014 was 7.7 million: Collyer could never have delivered 30% of this output in Q3-Q4 of 2014. Lewis 1/¶¶255-7 [**B1/24**]
D4	287,000 tons of PET (by contracts dated June to August 2014); delivery to Dnepropetrovsk within one year.	Only 137,000 tons of PET were imported into Ukraine over the whole of 2014 Lewis 1/¶260 [**B1/24**]
D4	42,000 tons of apple juice concentrate (by contracts dated June and August 2014); delivery to Dnepropetrovsk by 21 August 2015.	Ukraine produced c.70-90,000 tons of apple juice concentrate in 2014 and imported just 343 tons. Lewis 1/¶259 [**B1/24**]

83. Unsurprisingly in these circumstances, none of D3-D8 in fact supplied any goods pursuant to the Relevant Supply Agreements. Nor were any of the prepayments that they received returned to the Borrowers.[27]

84. The Supply Agreements are key to the Misappropriation for the reasons we give in paragraph 59 above.

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26 See POC/¶¶25(b)(ii) and (iii) and 25(d)(ii) and (iii) [**A1/2**]

27 In many cases, D3-D8 admitted as much in their letters to the courts referred to at para **Error! Reference ource not found.** above.

85. No D (not even D3-D8, who were parties to them) has tried to justify the Relevant Supply Agreements or the Loan File Supply Agreements, nor to suggest that they are not the shams that the Bank's evidence clearly shows them to be.

86. That leads on to point (5), D1 and D2's ownership and/or control over D3-D8. Again, this is to a large extent established by the thoroughly uncommercial agreements that D3-D8 entered into with the Borrowers, the only plausible explanation for which is that the Borrowers and D3-D8 were in common beneficial ownership.

87. The Bank also has a number of other points:

(1) [redacted]

(2) In English litigation in 2004 it was alleged that D1 had improperly acquired a majority interest in D3: POC/¶26(b) [**A1/2**].

(3) The former alleged ultimate beneficial owner of D5, Mr Ivan Kolesnyk, was referred to as one of the Bank's "insiders" (ie persons connected with D1 and D2) in the Luchaninov Email: see POC/¶26(d) [**A1/2**].

(4) Press articles link D1 with D7: Lewis 1/¶148 [**B1/24**].

(5) There are numerous links between D3-D8, which suggest that they are in common beneficial ownership: POC/¶26(g) [**A1/2**].

88. D1 and D2 do not deny control over D3-D8 and no D has engaged with the Bank's evidence on the issue.

(III) CORROBORATION OF POINTS (1) TO (5)

89. Events since the without notice hearing have strengthened the Bank's case on points (1) to (5). For present purposes, we need only rely on four matters: the first two concern the true nature of the relevant agreements; the last two the true ownership of the Borrowers and D3-D8.

90. First, the fraudulent nature of the Relevant Loan Agreements and Relevant Supply Agreements is confirmed by the evidence adduced by D1:

(1) That evidence seeks to provide an explanation of the way in which c. $3.4 billion was circulated between about 200 companies, including the Borrowers and D3-D8, between April 2013 and September 2014: Lafferty 2/¶¶101, 111 **[B2/36]**. The aim is to show that the Bank has suffered no loss, or less than the loss claimed (an argument we address below). For present purposes, however, the evidence is important for both what it does and what it doesn't say.

(2) What it does say:

a. Following service of the WFO, D1 and a *"team put together by him"* have sought to carry out a *"very substantial exercise indeed"* for the purposes of tracing funds using the Bank's *"transactional data"*: Lafferty 2/¶¶17, 18 **[B2/36]**.[28]

b. The conclusions from this *"process of reconstruction"*, carried out by (*inter alias*) former Bank employees who were *"aware of transaction patterns"* (Lafferty 2/¶¶20, 24 **[B2/36]**), include the following:

> *"In many cases, money was sent by a Borrower to a Supplier, then to another Borrower, and then to another Supplier (often themselves by a series of chains). In other words, the same money circulated through 'loops' several times. …"* (Lafferty 2/¶27.1.2 **[B2/36]**)

> *"… [as] the relevant chains … could be tens or even hundreds of transactions long, it has not been possible in the time available … to … produce a fully-worked example. However, to give a sense of scale, … one example the teams have identified involves the same sum of US$35 million being cycled through these loops at least 10 times …."* (Lafferty 2/¶47.1 and 47.2 **[B2/36]**)

> *'In some cases, the relevant Chains are unbroken – the money simply passes from its origin to destination through a series of conduits. However, in other cases there is a 'Break Point' in the Chain – that is, there is a gap … between origin and destination, such that it is not immediately apparent how the chain connects, and the final money repaid to the Bank appears to originate from somewhere else."* (Lafferty 2/¶70 **[B2/36]**)

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28 This evidence was contradicted in Lafferty 3, which said that the exercise had been carried out using *"the bank statements of the companies involved"* (¶¶53(c) **[B3/39]**). The explanation belatedly provided in correspondence is that there was no contradiction because *"the Bank statements self-evidently contain the Bank's transactional data"*. We say this is plainly an *ex post facto* justification that is not borne out by the terms of Lafferty 2.

(3) What it doesn't say:

a. What the legitimate commercial reason was for this remarkable set of transactions.

b. This point bears emphasis. The Bank's evidence in answer explained that the money circulation scheme described by Mr Lafferty *"... bear[s] all the hallmarks of a money laundering operation"* and that *"The 'scheme' that Mr Lafferty acknowledges and describes ... cries out for an explanation of its nature and purpose ... but none is provided"* (Lewis 3/¶¶142, 145 [**B2/30**])

c. Yet the Court will search the 167 paragraphs of D1's evidence in reply to Lewis 3 in vain for the missing rationale. Instead, it is asserted in Lafferty 3/¶16 that *'Mr Kolomoisky vigorously denies the allegations of fraud made against him. The loans to the Ukrainian Borrowers were adequately secured and, in any event, they have been repaid."* [**B3/39**]

91. Secondly, none of the Ds challenges the fraudulent nature of the Relevant Loans or the Supply Agreements:

(1) If there was to be an explanation as to why the Supply Agreements are genuine, that it really was intended that goods would be delivered thereunder, and that the Bank had got the wrong end of the stick, it might have been expected from D3-D8.

(2) But nothing of this sort has been forthcoming. Instead, D3-D5 focus on their contention that they acted as undisclosed agents when entering into the Supply Agreements. We address the difficulties with this evidence at paragraphs 281 to 282 below.

(3) For their part, D1 and D2 do not (despite contesting good arguable case until a week ago) even try to address the Bank's points on the operation of the Bank and the nature of the Relevant Loans and Supply Agreements. Why, for instance, were the Bank's employees routinely fabricating or backdating loan documentation? Why was the Bank granting loans to the likes of the Borrowers? How might it

have been thought that the Relevant Supply Agreements were genuine commercial contracts? And why were the Loan File Supply Agreements produced if not in an attempt to disguise the Misappropriation?

92. Thirdly, recent events confirm that D1 and D2 are the ultimate owners and/or controllers of the Borrowers and D3-D8:

(1) [redacted]

(2) [redacted][29]

(3) On his own case, D1 has access to the entirety of the Borrowers' bank statements: the Bank requested them pursuant to CPR r. 31.14(1)(b) on 19.6.18 [**G/29088**] and 39 boxes containing over 100,000 pages were provided a week later. It is, we suggest, inherently unlikely that 46 independently owned and controlled companies would each have been happy to accede to requests made by D1 for the provision of thousands of pages of their banking records. The far more likely conclusion is that the Borrowers' bank statements were always within D1/D2's control because they are D1/D2's companies.

(4) D1 relies on the fact that the Bank had failed to appreciate that there are two companies called ZAO Ukrtransitservice Limited, both of which received

[29] [redacted]

payments under Supply Agreements: D8 (incorporated in the BVI) and a Nevis-incorporated entity: Lafferty 2/¶51 [B2/36]. The point takes D1 nowhere because it is accepted that transactions with the Nevis entity have no effect on the quantum of the Bank's claim as it did not receive any Unreturned Prepayments. In fact, it is an own goal: the Nevis entity told the Bank during its KYC process that it was beneficially owned by D1 and D2 themselves (Lewis 3/¶123 [B1/30]). It is, therefore, clear beyond doubt that D1 and D2 controlled at least one of the Suppliers, providing further support for the Bank's case that they control all of them.

93. Fourthly, the Bank relies upon the matters contained in Confidential Annexes A and B under this head.

(IV) POINT (6): LOSS

94. The Bank's case on loss is simple:

(1) D1-D2 procured the grant of fraudulent lending from the Bank in the amount of at least $1,911,877,385.

(2) That lending has not been repaid.

(3) D3-D8 assisted in the fraud perpetrated by D1-D2, for the reasons set out in paragraphs 58 to 67 above, and are jointly and severally liable for the losses that have been caused by it.

95. In addition, and though it is not necessary for the Bank to show as much, the Bank can also demonstrate that the drawdowns of the Relevant Loans and the transfers to D3-D8 are transactionally linked. In most cases, there are five stages to this analysis:

(4) Steps 1 and 2: When funds were drawn down pursuant to the Relevant Loan Agreements (Step 1), they were immediately paid away by the Borrowers pursuant to (non-relevant) Supply Agreements (Step 2). For instance, in relation to a Borrower called Agroprom:

a. Loan drawdowns were made under two Relevant Loans[30] between 8.5.14 and 21.5.14 in the cumulative amount of $40.25 million [**D13/92/24617-8**]; and

b. In each case, the same amount (or virtually the same amount) was paid to D5 pursuant to a (non-relevant) Supply Agreement under the following narrative: *"FOR COLLYER LIMITED* [address and reference number then given] *for Prepayments according to the Contract No0605A-2 dd 06.05.2014 for Australian manganese ore lumps."* [**D13/92/24617-8**]

(5) Step 3: The Suppliers under those (non-relevant) Supply Agreements returned the prepayments that had been made about 90 days later, presumably due to Ukrainian currency control regulations (Lewis 1/¶272) [**B1/24**]. To continue the Agroprom example, the payment narrative for the return of the $40.25 million stated as follows: *"AGROPROMTEHNOLOGYA TOV RETURN REPMNT PER CNTR.0605A-2 DD06.05.2014 FOR AUSTRALIAN MANGANESE ORE LUMPS FROM COLLYER…"* (Lewis 3/¶116 [**B1/30**])

(6) Step 4: The Relevant Borrower then paid the funds returned at Step 3 to one of D3-D8 pursuant to a Relevant Supply Agreement. Here, and again using the Agroprom example, the payment narrative read as follows: *"FOR COLLYER LIMITED … FOR PREPAYMENTS ACCORDING TO THE CONTRACT NO3007A-3 DD 30.7.2014 FOR AUSTRALIAN MANGANESE ORE LUMP"*. (Lewis 3/¶116 [**B1/30**])

(7) Step 5: But D3-D8 failed to comply with their obligations under these Relevant Supply Agreements and the Borrowers did not repay the Relevant Loans using any legitimate source.

(V) D1's Criticisms of the Bank's Case on Loss

96. D1 makes a number of complaints in relation to the Bank's case on loss. Some of them have evolved between Lafferty 2 and 3. These points, as we now understand them to be, are as follows:

30 Loan 4A14127I dated 19.2.14 and Loan 4A14147I dated 20.2.14

(1) The Bank did not properly analyse its case on loss before the without notice hearing (the "**Analysis Point**"). This point is not developed in D1's outline argument and so we address it only briefly.

(2) The Unreturned Prepayments were not made using monies borrowed under the Relevant Loans (the "**Non-Relevant Money Point**"). This point is developed at ¶¶68-83 of D1's outline argument.

(3) The Bank has double-counted the same money in various respects (the "**Double-Counting Point**"). This point is not developed in D1's outline argument, and so we address it only briefly.

(4) The Bank did not appreciate that there were two ZAO Ukrtransitservices (the "**Ukrtransitservice Point**"). This point is not developed in D1's outline argument, and so we address it only briefly.

(5) The Bank did not appreciate that various payments relied upon related to so-called clearing transactions (the "**Clearing Transactions Point**"). This point is developed at ¶¶84 to 93 of D1's outline argument.

(6) The monies which "*passed through the Defendant Suppliers*" were paid back to the Bank in discharge of other indebtedness (the "**Lafferty 2 Repayment Point**"). This point is developed at ¶¶100 to 111 of D1's outline argument.

(7) A significant proportion of the monies advanced by the Bank under the Relevant Loans was paid back to the Bank in discharge of the Relevant Loans (the "**Lafferty 3 Repayment Point**"). This point is made at ¶293 of D1's outline argument.

(8) The Bank's case on loss is 'selective' and 'artificial' (the "**Artificiality Point**"). This point is developed at ¶¶112-123 of D1's outline argument.

97. We address these points in turn below.

(VI) THE BANK'S RESPONSES TO D1'S CRITICISMS

1. The Analysis Point

98. Relevance: unclear (it does not now appear to found an allegation of material non-disclosure as it is not addressed in D1's outline argument).

99. Summary of the Bank's answer: the Analysis Point is mistaken: the I2 Charts demonstrate the extensive analysis undertaken before the without notice hearing.

100. More specifically:

(1) Lafferty 2 complains that *"... no attempt appears to have been made at any stage to* [1] *set out the actual sums advanced to each borrower (and none was presented to the Court at the ex parte hearing) ....* [or] [2] *link a drawdown made by a Borrower to a payment to a Supplier. ... The Bank appears, without having said so in express terms, to have advanced a purely inferential case about the connection between the money borrowed from it and the prepayments made by the Borrowers to the Suppliers. ..."* **[B2/36/1112/¶35.1]** See, to similar effect, Lafferty 2/¶36 **[B2/36]**: the Bank's failure to link drawdowns and prepayments is *"surprising"*.

(2) The allegedly missing information is, in fact, contained in Schedule 6 to Lewis 1 **[D6/76]**. That Schedule:

a. identifies the actual sums advanced to each Relevant Borrower. For instance, in relation to Agroprom it identifies the eight relevant drawdowns, their dates and their precise amounts **[D6/76/18290]**; and

b. identifies how those drawdowns are linked with the prepayment made under the Relevant Supply Agreement. For instance, and again in relation to Agroprom, it explains that $40.25 million was paid and returned under a (non-relevant) Supply Agreement and then paid out to D5 pursuant to a Relevant Supply Agreement **[D6/76/18290]**. In both cases the date and number of the Supply Agreements are identified.

2. The Non-Relevant Money Point

101. Relevance: loss

Summary of Ds' position	Summary of the Bank's answer
Of the $1.91 billion received by D3-D8 of which complaint is made by the Bank, only $366 million (per Lafferty 2) or $327 million (per Lafferty 3) was funded from Bank funds: the remainder came from "independent funds". (Lafferty 2/¶¶27.1.1, 103 [B2/36]; Lafferty 3, ¶¶25, 26(a) and 46(a)) [B3/39]).	• The Non-Relevant Money Point is wrong as a matter of analysis: the Bank is not making a proprietary claim. • The Non-Relevant Money Point is also wrong as a matter of fact.

Non-Relevant Money Point wrong as a matter of analysis

102. The Bank's essential case on loss is set out in paragraph 94 above.

103. In light of the points taken in Lafferty 2 and 3, and though D1 has failed to file any expert evidence on this issue, it is tackled head-on in Beketov 5 [**C1/60.1**]. At paragraph 12 he says this:

> *"Even if the Defendant Suppliers received prepayments under the Supply Agreements that, from a tracing standpoint, consisted of monies that were not extracted from the Bank via the Relevant Loans, this would not change my ... analysis. It would still remain the case that (i) each Defendant Supplier participated in the misappropriation of the Bank's monies via the Relevant Loans and (ii) the Defendant Supplier's failure to perform the Supply Agreement after receiving prepayment thereunder, by either providing the relevant goods to the Borrower or returning the prepayment, deprived the Bank of the value of its collateral under the pledge agreements and the ability to pursue the Borrower for return of the loaned funds, thereby assisting and facilitating in the misappropriation of its property."*

104. The correctness of this analysis is demonstrated by the following example:

(1) A bank employee (E) and his brother (B) conspire to steal £1,000 from E's employer (X Bank). E steals the £1,000 when his manager's back is turned and gives it to his wife for safekeeping, as he isn't due to see B for a few weeks. She puts it into her bank account, where it mixes with monies already there, and

withdraws £1,000 to give to E a fortnight later. E duly meets up with B and gives him the £1,000. B hides it in an offshore company that he has incorporated for himself and E.

(2) The result is that E and B are jointly and severally liable to pay compensation of £1,000. The fact that E's wife was involved in the process is entirely irrelevant to that conclusion, as is the fact that she has not returned precisely the same £1,000 to E.

(3) It would be equally irrelevant if E's wife had (1) an overdraft with X Bank which was extinguished when she deposited the £1,000 and/or (2) gave £1,000 to E from an account maintained with another bank.

105. Even if the Bank was advancing a proprietary claim, which it is not and never has (see Bank's POC [**A1/2**], Lewis 3/¶492 [**B2/30**] and Lewis 8/¶24 [**B2/30.2**]), the analysis in Lafferty 3 would be nothing to the point:

(1) Take the following example: £1 million is paid from the Bank in breach of fiduciary duty; it is received into a bank account maintained by A (taking the balance from £0 to £1 million); A then pays the money to B pursuant to a loan agreement; B receives the money, passes it on to C, who passes it to D, who repays its own indebtedness to the Bank.

(2) If the Bank wanted to pursue a tracing claim, it would not be required to trace the money from itself, to A, to B, to C, to D and back to itself. It could instead trace the money from itself to A and then from money sitting in A's bank account into the proceeds of that money, viz. A's contractual rights against B and any proceeds of those contractual rights.

(3) That is an entirely orthodox approach. As Lord Millett explained in Foskett v McKeown [2001] 1 AC 102, 127: "*... Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances. ...*" (Emphasis added) (See, to similar effect, 134.)

Non-Relevant Money Point wrong in fact

106. But, in any event, the Non-Relevant Money Point is wrong in fact. As is explained in Lewis 3:

(1) 97.6% of the Unreturned Prepayments were funded using the Relevant Loans. Of the remaining $46 million, $17.3 million was financed by loans to another Borrower and the source of the remaining $28.7 million could not be traced due to funds becoming mixed in an account at the Bank's Cyprus branch: Lewis 3/¶67 **[B1/30]**.

(2) In essence, the analysis in Lafferty 2 ignores Steps 2 and 3 in the Bank's transactional analysis: Lewis 3/¶72 **[B1/30]**. More specifically, Lafferty 2 ignores that:

a. the Relevant Loans were used to make prepayments under (non-relevant) Supply Agreements (Step 2), which were

b. then returned to the Relevant Borrower pursuant to a payment advice that said: *" RETURN REPMNT PER* [the number of the (non-relevant) Supply Agreement is then given]" (Step 3), which were

c. then used to make payments under the Relevant Supply Agreements (Step 4).

(3) Lewis 3 then goes on to give a line-by-line explanation as to how the above conclusions have been reached, giving four examples:

a. Agroprom: Lewis 3/¶¶74-80 **[B1/30]**;
b. AEF: Lewis 3/¶¶81-91 **[B1/30]**;
c. Tekhspet: Lewis 3/¶¶92-99 **[B1/30]**; and
d. Intorno: Lewis 3/¶¶100-104 **[B1/30]**.

107. Lafferty 3 launches into an extensive analysis designed to demonstrate that Lewis 3's analysis is incorrect. The essential complaint is that the I2 Charts are produced *"by reference only to the*

Bank's records of the purpose for particular transfers of funds between the Ukrainian Borrowers and its Suppliers." **[B3/39/1227/¶34]** However, that account is in various respects incomplete, irrelevant and plain wrong:

(1) The reference to the *"Bank's records of the purpose for particular transfers"* is incomplete. It is true that the information relied upon is contained in the Bank's records, but it was provided to the Bank by the Borrowers and the Suppliers: see Lewis 8/¶20 **[B2/30.2]**. Given that the parties to the relevant transactions regarded the prepayments made under (non-relevant) Supply Agreements as having been repaid, the Bank is correct in adopting this analysis.

(2) Mr Lafferty seeks to conduct a proprietary claim tracing exercise, to show that the monies drawn down under the Relevant Loans were returned to the Bank in discharge of various extant liabilities. However, this exercise takes D1 nowhere, as we explain above.

(3) For present purposes, it is important to note that the contention in Lafferty 3 that *"money passes through a series of near-empty bank accounts, all on the same day, and has no possible alternative source"* (¶49(a)) is demonstrably incorrect. This can be seen by reference to the example provided at Lafferty 3/¶¶56-67 **[B3/39]** and the spreadsheet found at **[D13/92/24689-90]** (the **"Intorno Example"**):

a. The point of the analysis at ¶¶56-67 is to establish that there is a closed money loop around which $15 million paid by Intorno to a supplier called Faberge circulated. $15 million certainly seems to have passed from Faberge to Valenza, then to Ravenscroft and then to Albroath.

b. But the $15 million received by Albroath on 27.2.14 was mixed with a further $13.0407 million **[D13/92/24689]**. The mixture was then transferred by Albroath to an entity described as "Clendon", which then passed the entirety of the sum (less $19.96) to Kalten Trade SA **[D13/92/24689]**.

c. Kalten Trade SA then paid the money in two tranches (less $480.04) to companies called Brimmilton Ltd and Halefield Holdings Ltd **[D13/92/24689]**.

d. The entirety of the $28.04 million was then split up and transferred in a series of a further 54 transfers involving 39 further companies, before being transferred to the Bank **[D13/92/24689-90]**.

e. Two points emerge from this analysis:

i. The $15 million did not pass through a series of *"near empty"* bank accounts. It had $13.0407 million added to it and so had a very substantial *"possible alternative source"*.

ii. More generally, this example underscores the Bank's observations about money laundering. The two pages found at **[D13/92/24689-90]** demonstrate the movement – on a single day – of over $28 million between 44 companies via 72 different transfers.

(4) Lafferty 3 also introduces the notion that $1.6 billion of the transfers complained about by the Bank *"was funded not by Bank funds but by independent funds"* **[B3/39/1226/¶26(a)]**. But, as is explained in paragraph 59 to 63 above, this is not how the Borrowers saw the situation.

(5) D1's case also ignores the payment descriptions provided by the parties to the transactions at the time (see above), and so has all the hallmarks of an *ex post facto* justification.

108. Accordingly, the Non-Relevant Money Point does not withstand scrutiny on the facts, though it does serve to buttress the Bank's points about money laundering.

3. The Double-Counting Point

109. Relevance: none.

110. The Bank's answer: This is a non-point. Lafferty 2 is unable to produce a *"fully worked example"* of this complaint (¶47.1 **[B2/36]**) and ultimately concludes that it does not impact on the Bank's case in any event (¶47.3 **[B2/36]**).

4. The Ukrtransitservice Point

111. Relevance: none – see Lafferty 2/¶51 **[B2/36]** (*"As those transactions were not alleged by the Bank to be the cause of any loss this has no effect on the quantum of the claim"*).

112. Summary of Bank's answer: as we explain in paragraph 92(4) above, the Ukrtransitservice Point actually supports the Bank's case because it links D8 with D1-D2.

5. Clearing Transactions

113. Relevance: none – see Lafferty 3/¶81 **[B3/39]** (*"Mr Lewis says that clearing transactions "make no difference to the quantum of the Bank's case"... I agree."*)

114. Summary of Bank's answer: the Bank's transactional data does not suggest clearing transactions took place as D1 suggests.

115. Lafferty 2 introduces his clearing transaction point in the following way (at ¶¶48.1-48.2):

> *"... Clearing was a facility offered by the Bank from 2010 ....* [It] *allowed two customers of the Bank to resolve mutual indebtedness without either having sufficient funds in their account to transfer to the other...."* **[B2/36]**

116. Taking Agroprom as an example, he says that (¶50.3):

> *"... The Return of Prepayment in Line 11* [of Schedule 3 to Lewis 1, **[D6/73/18277]**] *has, however, been treated as returning all the prepayments in Lines 3-10, which is incorrect. Prima facie, the Bank should have made the same allegations in respect of those Prepayments as it in fact makes in respect of that in Line 12."* **[B2/36]**

117. The Bank rejects this analysis:

(1) The prepayments referred to in Lines 3-10 of Schedule 3 to Lewis 1 were made in relation to Supply Agreement 0605A-2 dated 6.5.14 **[D6/73/18277]**. They amounted to $40.25 million.

(2) Those prepayments were returned to Agroprom's account with the Bank on 7.8.14. The payment advice relating to this repayment is quoted in paragraph 95(5) above. It refers to the fact that prepayments made under Supply Agreement 0605A-2 are being repaid. See Lewis 3/¶116.

(3) The payment in Line 12 of Schedule 3 to Lewis 1 is then made on 7.8.14. The payment advice relating to this prepayment is quoted in paragraph 95(6) above. It refers to the fact that the prepayment is being made under Supply Agreement 3007A-3 dated 30.7.14. See Lewis 3/¶116 **[B1/30]**.

118. In any event, and as noted above, Lafferty 2 accepts (at ¶50) *"... for each misidentified clearing transaction ... other transactions by the same borrower have been treated as returned when in fact they had not been."* **[B2/36]**

119. Lafferty 3 takes the position no further. He accepts that clearing transactions make no difference to the quantum of the Bank's claim (¶81) **[B3/39]**. He also exhibits documents which corroborate the Bank's position as to the repayment of previous prepayments and the making of new prepayments under Relevant Supply Agreements. In the case of Agroprom, the example used above, the relevant extracts provide as follows **[D14/95/24983-4]**

Payer	Payee	Amount	Payment reference
Collyer Limited	Agroprom [...]	40,250,000	Return of prepayment [for] the contract No 0605A-2 dd 06.05.2014 for the Australian manganese ore lumps.
Agroprom [...]	Collyer Ltd	40,250,000	Prepayment [for] the contract No 3007A-3 dd 30.07.2014 for the Australian manganese ore lumps

120. Finally, we note that D3-D8 were themselves unaware of the fact that they had entered into clearing transactions until D1 suggested as much. As is explained at D1 Skel/fn 95: their solicitor *"initially identified a much larger number of immediate repayments to Borrowers ... but* [now] *correctly identifies that many of these may in fact have been clearing transactions."*

6. The Lafferty 2 Repayment Point

121. Relevance: quantum of the Bank's loss.

122. Summary of Bank's answer: the fact that the monies passing through the Defendant Suppliers may have subsequently been paid to the Bank in satisfaction of other indebtedness makes no difference to the quantum of the Bank's loss.

123. The point made under this head is summarised in Lafferty 2 thus: *"... the relevant money was repaid to the Bank in satisfaction of other indebtedness ...."* (¶27.2 [**B2/36**]). We answer it in two ways:

(1) First, by reference to Beketov 5/¶13 [C1/60.1], where the Bank's Ukrainian law expert explains as follows:

> *"Even if part of the exact same monies that the Borrowers received from the Bank under the Relevant Loans was circulated back to the Bank for the purpose of discharging earlier loans (in whole or in part), the misappropriation of funds from the Bank via the Relevant Loans (and associated agreements) would remain unremedied and the Defendants' unlawful actions in relation to those agreements ... would remain actionable under Article 1166 of the Civil Code."*

(2) Second, by reference to the following example: assume that a fraudster extracts £1 million from a bank that he controls under cover of a fraudulent loan to his wife in year 1; that he then extracts a further £1 million from the bank under cover of a fraudulent loan to his brother in year 2; and that in year 3 his wife repays loan 1 using the funds extracted in year 2. We suggest that the following consequences follow:

a. If the bank is content to treat loan 1 as having been repaid, then the fraudster can hardly complain about this result: this is the very result that he has sought to achieve by causing his wife to repay loan 1 in year 3. Indeed if he sought to rely upon the loan 1 fraud to contend that the real loss arose in year 1 he would be relying on his own wrong.

b. It is, similarly, no answer to say: the wife would never have repaid her loan and so there has been no loss. This is because, when loan 1 is repaid and the bank

accepts that repayment and decides not to complain about loan 1, the bank gives up its rights as against both the wife and the fraudster. The result is that the bank remains £1 million out of pocket; it has no complaints in relation to loan 1; and so it must be able to claim in relation to the loan 2 wrongdoing.

c. This conclusion is entirely consistent with public policy, as we explain in paragraph 131(6) below. Indeed, it is a well-known rule of English law that if a debtor pays money to a creditor to whom he owes multiple debts without specifying which he is repaying, the creditor is able to apportion the payment to whichever debt he chooses: see ***Chitty***, para 21—061ff. Here the position is *a fortiori*: the wife and the fraudster have themselves decided to apportion the payment to the year 1 loan and the victim of the fraud is content with that decision.

d. If, notwithstanding these points, the fraudster wants to contend that the true loss arose by reason of his fraudulent conduct in year 1, it is for him to plead and prove this point. As we explain above, this is something that the English Court of Appeal has already explained to D1 and D2 in no uncertain terms.

7. The Lafferty 3 Repayment Point

124. Relevance: quantum of the Bank's Claim.

125. Summary of Bank's answer: D1's analysis is wrong as a matter of fact (it ignores the use of Intermediary Loans).

126. Lafferty 3/¶123 [**B3/39**] says, for the first time, that a significant proportion of the monies advanced to the Borrowers under the Relevant Loans have been used to repay either the same or another Borrower's Relevant Loans[31] (although Mr Lafferty also suggests here that some of the monies were used to repay other loans, that argument is no different in nature

[31] This is said to be D1's *"alternative"* case (Lafferty 3/¶120 [**B3/39**]). D1's primary case is made at ¶109: *"In due course, should this case proceed to a Defence being filed, Mr Kolomoisky's case will be that [the Relevant Loans were repaid by intermediary loans, asset transfers and the transformation scheme]"*. D1 has not filed any evidence to contradict the evidence adduced in Lewis 1 regarding Intermediary Loans, the asset transfers and the transformation scheme: see Lewis 1/¶¶290-323 [**B1/24**]. As it does not appear that this point is being relied upon for the purposes of the return date hearing, we say no more about it.

to the Lafferty 2 Repayment point and so is addressed above). The result is that the Bank's loss should be $1,483,172,511 (rather than the $1,911,877,385 claimed).[32]

127. We give two answers.

(1) First, there is no explanation whatsoever as to how the figures of $799,179,627 and $213,033,737 have been calculated. In particular, it is not explained (1) which Relevant Loans it is said have been repaid, (2) what sums were repaid, and (3) when the repayments were made. As such, it is impossible for the Bank to provide a detailed rebuttal. Indeed, this is hardly something for the return date.

(2) Second, the likely explanation for these figures is the use of Intermediary Loans (see Lewis 1/¶¶307) [**B1/24**]. Using AEF LLC ("**AEF**") as an example [**D13/92/24622-3**]:

a. On 7.10.13:

i. $33 million was drawn down by AEF under an Intermediary Loan with loan number 4A13579.

ii. $12 million was drawn down by AEF under an Intermediary Loan with loan number 4A13196.

iii. $45 million was paid by AEF to Kalten Trade SA ("**Kalten**") under a Supply Agreement numbered ST/01/65.

b. On 27.12.13:

i. $11 million was drawn down by AEF under Relevant Loan 4A13197.

ii. $34 million was drawn down by AEF under Relevant Loan 4A13578.

iii. $45 million was paid by AEF to Kalten under Supply Agreement number ST/01/77.

c. Also on 27.12.13:

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32 This conclusion is reached by reducing the amounts due under the Relevant Loans from $2,495,385,875 by the aggregate of $799,179,627 (described as "Repayments of a Ukrainian Borrower's own Relevant Loans") and $213,033,737 (described as "Repayment of another Ukrainian Borrower's Relevant Loans"): see Lafferty 3/¶¶121-123 [B3/39].

i. $45 million was repaid by Kalten under the same Supply Agreement in (3)(a)(iii) above, ie that numbered ST/01/65.

ii. $11 million was purportedly repaid under Relevant Loan 4A13197.

iii. $9.249 million was purportedly repaid under Relevant Loan 4A13578.

d. This analysis – which is based upon the contemporaneous information provided by the companies making the payments – demonstrates that the purported Relevant Loan repayments were made using funds advanced under the Intermediary Loans, not under the Relevant Loans. Because the purported repayments of $11 million and $9.249 million emanated from (earlier) improper lending to AEF under the Intermediary Loans, these repayments are illegitimate and have been disregarded. This has always been the Bank's position, as clearly shown on the I2 Chart for the AEF lending found at page 1 of Schedule 6 to Lewis 1 **[D6/76]**. If D1 was going to take issue with it, he should have done so expressly and in detail in Lafferty 2 (his evidence in support of his application to discharge), not by way of high-level assertion in Lafferty 3 (his reply evidence).

8. The Artificiality Point

128. Relevance: sole object.

129. Summary of Bank's answer: the Bank does not claim in relation to the entirety of an *"8-year scheme"* and there is nothing artificial about its approach.

130. Lafferty 3 takes another point, under the heading: *"The Selective Nature of the Bank's Claim"* **[B3/39/1244-6/¶¶91-102]**. It is developed as follows:

> *"The Bank in these proceedings advances a claim which is, for no obvious reason, focussed on an 18-month period in the middle of what is, on its case, an 8-year scheme. To do so, it is required to take an artificial position that (a) All repayments of lending prior to 1 April 2013 are proper, valid repayments notwithstanding that they were done with (on the Bank's case) fraudulently borrowed funds. (b) However, all repayments after 1 September 2014 are void as improper on that basis."* (¶101)

131. This is no answer at all:

(1) First, the Bank's case is the case set out in its Particulars of Claim. It relates to the Relevant Loan Agreements, the Relevant Supply Agreements and the Loan File Supply Agreements. It does not claim in relation to an *"8-year scheme"*. If D1 or the other Ds want to contend that the Bank's pleaded case does not give rise to any loss because the loss had already been sustained by their prior fraudulent conduct, then it is for them to do so. We refer the Court, in this regard, to the decision of the Court of Appeal in **Tatneft v Bogolyubov** [2018] 4 WLR 14, cited below.

(2) Secondly, it does not lie in D1's mouth to criticise the Bank for artificiality: he devised the Scheme; and his solicitor has given evidence relating to fiendishly complicated money movements—complete with *'cycles'*, *'chains'*, *'loops'*, *'conduits'* and *'break-points'*—for which no commercial rationale is provided. This has all the hallmarks of money laundering – see the unanswered evidence at Lewis 3/¶¶142-5 **[B2/30]**.

(3) Thirdly, in fact there is absolutely nothing artificial about the way that the Bank formulated its claim. We cite Lewis 1/¶270 **[B1/24]** in paragraph 60 above and rely upon it here also.

(4) Fourthly, the Bank suspects that—whatever loans it picked on—it would be met with the objection that either:

a. they were too early and had been repaid by subsequent lending (*"In due course … [D1's] case will be that the full amount of the … debts were repaid"*: Lafferty 3/¶109 **[B3/39]**); or

b. they were too late and that the real loss had arisen earlier (*"Insofar as the Relevant Loans were used to repay existing debts … the Bank is no worse off as a result of making the Relevant Loans"*: Lafferty 3/¶125 **[B3/39]**).

(5) And, again, if the Ds want to plead that there was legitimate subsequent lending that discharged the Relevant Loans, or that the loss was caused by prior fraudulent lending, then they can do so.

(6) Fifthly, public policy militates in favour of giving a party who has been defrauded the widest possible range of remedies. See, in addition to the Court of Appeal's observations in **Tatneft**:

a. Lord Steyn in **Smith New Court v Citibank** [1997] A.C. 254, 280C-D:

"For more than 100 years at least English law has adopted a policy of imposing more extensive liability on intentional wrongdoers than on merely careless defendants."

b. Nourse LJ in **Jyske Bank (Gibraltar) v Spjeldnaes** (CA, unrep, 29.7.99):

"... it requires a spacious imagination to suppose that it could be thought fair and equitable in all the circumstances that the Bank should be debarred from obtaining relief in respect of any of these transactions. Indeed, the suggestion that a bank, which, suspecting or even knowing that its moneys have, with the connivance of the borrower, been fraudulently misapplied in the guise of a loan, calls it in or takes steps to preserve or enforce its security, thereby curtails its rights to recover its moneys, is absurd. It is entitled, without risk of nonsuiting itself, to take every step available to it in order to achieve that end."

c. Etherton C in **National Crime Agency v Robb** [2015] Ch 520, [50]-[51]:

"Whatever may be the position in other cases, fraud is special. As Lord Bingham said in HIH Casualty & General Assurance Ltd v Chase Manhattan Bank [2003] 1 All ER (Comm) 349, para 15: 'fraud is a thing apart. This is not a mere slogan. ...' I consider that there are good policy reasons for enabling a victim of fraud, which supervenes in a transaction, to set aside the transaction so as to pursue a proprietary claim even though that will have priority over other unsecured creditors of the fraudster or of any other person who has received traceable proceeds."

(7) Finally, it is submitted that the Court should step back and consider this "defence" in context: essentially it amounts to D1 and D2 saying that, because they ran a massive fraud and money-laundering scheme for eight years, the Bank should not be able to recover any of the loss occasioned by any part of that scheme without unpicking it altogether (with the attendant time and cost). Such an outcome would simply serve to encourage fraudsters to commit ever more complex and wide-ranging frauds and cannot, we say, be the correct approach.

E3. *LIS ALIBI PENDENS* AND PROCEEDINGS IN UKRAINE

(I) Overview

132. Since the Bank's nationalisation in December 2016, the Bank and D1 have been involved in a plethora of legal proceedings in Ukraine, Cyprus and England. D1's evidence puts the number of potentially relevant Ukrainian proceedings at *"over 600"*: Lafferty 2/¶140 [**B2/36**]. Until receipt of D1's skeleton argument, two sets of Ukrainian proceedings were said by the Ds to be of particular significance for the purposes of the *lis alibi pendens* debate.

133. First, a defamation claim filed by D1 on 1.11.17 to protect his "*honour, dignity and reputation*" by seeking the retraction of various allegedly defamatory statements published by an online magazine on 6.10.17 and 24.10.17 (the "**D1 Defamation Claim**"). D1 (and therefore D2) refers to this as the "*most crucial*" Ukrainian claim.[33] It is addressed in detail below. But we highlight at this stage that D1 accepts that the D1 Defamation Claim was *"commenced in order to seise the Ukrainian courts of these issues"*: Lafferty 2/¶266.6.2 [**B3/36**]. For good measure, D2-D8 have been joined by D1 as third parties to the D1 Defamation Claim.

134. Secondly, an attempt by D3-D5 to bring their own defamation claims in Ukraine (the "**D3-D5 Defamation Claims**"). They are plainly brought at the behest of D1-D2 to seek to oust the jurisdiction of the English court. Why else would English companies with no public profile—and who say they have no assets and that they only ever acted qua agent—be so quick to litigate to defend their "business reputation"?

135. In his evidence, Mr Lafferty stated that "*it is principally these [defamation] proceedings that underlie [D1] and [D3-D5's] positions that the proceedings ought to be stayed (and in favour of which they ought to be stayed).*"[34] It now appears that D1's focus (but not D3-D8's) has shifted away from his Defamation Claim, and significant reliance is now placed on proceedings brought in relation to loans granted to new borrowers in late 2016 as part of the so-called transformation scheme (the "**2016 Loans**" and the "**New Borrowers**"). D1 says that, as part of his defence in these proceedings, he will contend that the 2016 Loans were used to repay the sums outstanding under the Relevant Loans.

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33 Lafferty 2/¶139 [**B2/36**], Lafferty 3/¶144 [**B3/39**].

34 [**B3/39/1252/¶146**]. D1's Defamation Claim occupies seven pages of Lafferty 2 [**B2/36/1139-1146**] and the six of the seven questions put to Mr Marchenko [**C2/61/1607-9**] (the seventh question concerned the Kiev Injunction. He was not asked about the New Borrowers' claims).

136. There are over 440 separate sets of proceedings in Ukraine involving the Bank and one or more of the New Borrowers, including the New Borrower Proceedings. We note that:

(1) D1 has not filed any Ukrainian law evidence in relation to the New Borrower Proceedings;

(2) Lafferty 2/¶¶168-178[35] is in a section of evidence entitled "*proceedings brought by PrivatBank against the current Ukrainian borrowers*". All but one paragraph dedicated to a discussion of the Fraudulent Loan Enforcement Claims (referred to below but reliance on which is now expressly disavowed by D1 (D1 Skel/¶204(1)), with other proceedings brought by the New Borrowers occupy two sub-paragraphs at the end of the section;[36]

(3) D1 has not exhibited any documents in relation to the New Borrower Proceedings;

(4) D1 has not even bothered to obtain translations of one statement of claim on which he purports to rely, and which he has had since the WFO was served on 20.12.17 (see D1's skeleton p.69, footnote 180); and

(5) D1 is not himself a party to any of the New Borrower Proceedings.

137. We also draw attention to the following sets of Ukrainian proceedings upon which the Ds previously relied:

138. First, between 22.11.17 and 13.12.17, 30 claims were issued in the Bank's name against the majority of the 36 New Borrowers under the 2016 Loans (the "**Fraudulent Loan Claims**"). These claims:

(1) Were not authorised by the Bank, were issued using draft statements of claim that had been leaked or stolen from the Bank, and bore the forged signature of a member of the Bank's legal department.

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35 [B2/36/1146-1149]

36 Notably, D1's JR Claim and SPA Claim occupy far more of Lafferty 2 (c.5 pages) than the ¼ of a page dedicated to the New Borrower Proceedings. D1 no longer relies on his JR Claim or SPA Claim (see below).

(2) Were, again, instigated by D1. All but two of the 30 have been brought to an end by the Bank: see Lewis 1/Appendix 2/¶2 **[D6/70]**; Lewis 3/¶¶352-6 **[B2/30]**.

139. Second, the GPO Claims were instituted against five of the New Borrowers by the GPO in December 2017. Those claims also seek to enforce the 2016 Loans: Lewis 1/Appendix 2/¶3 **[D6/70]**. They:

(1) Were also instigated by D1, having been instituted shortly after D1's meeting with the General Prosecutor himself in a coffee shop in Amsterdam on 25.11.17 (as explained below).

(2) Name D3-D5 as third parties for no obvious reason.

(3) Were never in the Bank's interests, as the Bank made clear to each of the Judges hearing the GPO Claims: Lewis 2/¶62 **[B1/29]**; **[D7/81/18580-18595]**.

(4) Have all been sought to be withdrawn by the GPO (one case has been formally withdrawn, in three others the GPO's application to withdraw the case is pending) or, in one case, dismissed on the merits (Lewis 8/¶46 **[B2/30.2]**).

140. The Bank's position in relation to all of the above proceedings, in outline, is as follows:

(1) None of the proceedings relied on by the Defendants is sufficiently closely related to the Bank's fraud claims in these proceedings (the "**Bank's Claim**") to satisfy the precondition to the possible application of Article 34 of the Regulation.

(2) It is not "expedient" to hear and determine the instant claim and any other claim together to avoid the risk of irreconcilable judgments: **(1)** as a matter of Ukrainian procedural law, the Bank's Claim cannot be brought by way of counterclaim in the D1 Defamation Claim; **(2)** there is no prospect of the many hundreds of other allegedly related proceedings being heard together with the Bank's Claim; and so **(3)** there is already an inherent and unavoidable risk of irreconcilable judgments in different proceedings. For these reasons, the Article 34(1)(a) condition is not met.

(3) Enforcement of any Ukrainian judgment obtained by the Bank will be fought tooth and nail by D1 on the basis that it was obtained by improper political influence.

(4) It is plainly not *"necessary"* to stay these proceedings for the proper administration of justice, as is required by Article 34(1)(c). To the contrary, a stay would be inimical to the interests of justice:

a. D1 does not trust the Ukrainian court system: he has twice accused the Kiev Court of Appeal of bias (Lewis 3/¶431, 436) **[B2/30]** and has filed evidence asserting that decisions against the interests of his close associates have been improperly procured by the President (Kolomoisky 1/¶¶54-62 **[B2/43]**. For its part, the Bank is concerned that D1 can manipulate judges in Ukraine. For instance, on 15.12.17 D1 obtained an injunction against the Bank and HL from the Kiev court in highly questionable circumstances that are now under investigation by the relevant authorities in Ukraine.

b. The Bank needs an English judgment for the purposes of enforcement. An English judgment will be enforceable under the relevant European treaties and pursuant to simplified procedures in a large number of Commonwealth jurisdictions. By contrast, if the Bank were to obtain judgment against D1-D8 in Ukraine it is near inevitable that enforcement would be resisted on the basis that that judgment was procured by improper political pressure. D1 has already said in no uncertain terms that he regards this claim as being part of a campaign of political "persecution" and as being "politically motivated" (Kolomoisky 1/¶4 **[B2/32]**; Lafferty 2/¶269 **[B3/36]**).

c. D1 has made a concerted effort to manufacture an entirely artificial *lis alibi pendens* defence by instituting or procuring the institution of the defamation proceedings, Fraudulent Loan Claims, GPO Claims and New Borrower Proceedings described above.

d. The procedures of the English court are far preferable to those adopted in Ukraine for the resolution of a fraud dispute of this magnitude and complexity.

141. Indeed, D1 apparently agrees that this claim should be litigated in London. He has told the press the following: "*... I believe that the London court is the jurisdiction where the parties will have to openly show everything, tell how it was and what was not.*" Lewis 3/¶400 [**B2/30**]

142. In this section we address:

(1) Section II: The law on *lis alibi pendens* and related proceedings (paras 143 to 165).

(2) Section III: The relevant chronology: (paras 166).

(3) Section IV: The D1 Defamation Claim: (paras 167 to 192).

(4) Section V: The D3-D5 Defamation Claims: (paras 193 to 202).

(5) Section VI: The New Borrower Proceedings: (paras 203 to 223)

(6) Section VII: Other Ukrainian proceedings: (paras 224)

(II) Lis alibi pendens and related proceedings: the law

143. The question of whether the Ukrainian proceedings are a basis on which the English court should stay or dismiss the English proceedings on grounds of *lis alibi pendens* is governed **(1)** in relation to D3-D5, by Article 34 of the Regulation; **(2)** in relation to D1 and D2, by Article 28 of the LC and/or CPR 3.1(2)(f); and **(3)** in relation to the BVI Suppliers, by the *forum non conveniens* rules. We take each in turn below.

(i) Article 34 of the Regulation

144. Article 34 provides:

> "*Where ... an action is pending before a court of a third State* [ie Ukraine] *at a time when a court in a Member State* [ie England & Wales] *is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:*
>
> *(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;*
>
> *(b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and*
>
> *(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.*"

145. The Recitals to the Regulation provide the following guidance:

"(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.

(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give judgment within a reasonable time. That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction." (emphasis supplied)

146. Article 34 accordingly raises five questions:

(1) Was the foreign claim "pending" within the meaning of Article 34 when the English court became "seised"?

(2) Is the foreign claim related to the English claim?

(3) Is it expedient to hear the foreign and the English claims together to avoid the risk of irreconcilable judgments?

(4) Will the foreign proceedings give rise to a judgment capable of recognition and enforcement in England?

(5) Is the stay necessary for the proper administration of justice?

147. **"Pending" and "seised"**: as this issue is only relevant to the D3-D5 Defamation Claims, we address it in that context at paragraphs 193 to 202 below.

148. **"Related actions"**: the structure of Article 34 requires the court to determine as a preliminary matter that the two actions are "related" before it can consider whether to stay proceedings. The following principles apply:

(1) First, the question is whether the Ukrainian *"action"* is related to the English *"action"*. That involves consideration of the content of each set of proceedings (claims, defences, counterclaims etc.): **Research in Motion v Vista** [2008] EWCA Civ 153 at [36].

(2) Second, the question whether proceedings are "*related*" is to be judged at the date of the hearing of the application: **Lehman Brothers v CMA** [2013] EWHC 171 (Comm) at [70(5)]; **The Alexandros T** [2013] UKSC 70 at [75].

(3) Third, consideration of whether actions are related will require the court to consider the matters raised in Art 34(1)(a)-(c), viz., (a) expediency and risk of irreconcilable judgments; (b) enforceability of the third state's judgment; and (c) all the circumstances of the case and interests of administration of justice: see, by way of analogy, Art 30(3).[37]

(4) Fourth, while the court will take a "*broad common-sense approach*" to the question of whether actions are related for the purpose of Article 30 (ie, actions in two Member States),[38] we submit that if an action is proceeding in a non-Member State, a narrower approach should be adopted, because: (1) there is no assumption that the non-Member State's courts provide the same quality of justice as those of the Member State; (2) there are no default recognition and enforcement mechanisms for any judgment obtained in the non-Member State; and accordingly (3) the underlying policy of the Regulation – to avoid irreconcilable judgments within the Member States – does not apply.

(5) Fifth, while the court should take into account the potential risk of irreconcilable judgments, it is not any such risk which renders two actions "related". As under Article 30, "*it [is] open to a court to acknowledge a connection, or a risk of irreconcilable judgments, but to say that the connection is not sufficiently close, or the risk not sufficiently great, to make the actions related for the purposes of the Article...*": **Research in Motion v Vista**, supra, at [38]-[39].

(6) Sixth, proceedings may be "*related*" as a result of overlaps in questions of fact as well as questions of law, although the overlap "*would have to be points which would or*

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37 This provides as follows: "*For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*"

38 See **Sarrio v Kuwait Investment** [1999] 1 AC 32 at 40-41 (on Article 22 of the LC). The broad approach is justified if the proceedings are in two Member States. In that case the Regulation deems that actions are related "*where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments*" (Art 30(3)), and any judgment obtained in one action will be recognised and enforced in the other Member State under the Regulation.

might form an essential part of the basis of the judgments, effectively part of their res judicata effect, absent which they would not be irreconcilable": Re Zavarco [2016] Ch. 128 at [35].

(7) Seventh, if one party creates a risk of irreconcilable judgments (for example, by refusing to agree to have both actions heard together and insisting on proceeding in the foreign court) it is not open to that party to say that the English proceedings should be stayed as a result: Television Autonomica v Imagina Contenidos [2013] EWHC 160 (Ch) at [66].

(8) Finally, if one set of proceedings is hopeless, then Article 34 should not apply: "*if a stay is sought on the basis of proceedings in another jurisdiction and the court is able to conclude that such proceedings are preposterous, to the point of being unarguable, that is a matter which the court is entitled to take into account.*" EasyGroup v Easy Rent a Car (unrep, 12.10.17).

149. We note that, in a number of cases, the mere fact that two sets of proceedings arise from the same background facts and/or relationship between the parties has not led to a stay being granted under Article 30[39] (or its predecessor): see Research in Motion v Vista at [37]-[39]; Trademark Licensing v Leofilis [2009] EWHC 3285 (Ch) at [38]-[48]; WMS Gaming v B Plus [2011] EWHC 2620 (Comm) at [46], [52]-[57].

150. "Expediency": Article 34(1)(a) requires the court to consider (1) whether there is a risk of irreconcilable judgments resulting from separate proceedings; (2) if so, whether it is even possible to hear and determine the related actions together; and (3) if so, whether it would be expedient to do so:

(1) Whether there is a risk of irreconcilable judgments is likely to form part of the assessment of whether the actions are "related" (see above). Under Article 30 it was only necessary to show a risk of "*conflicting decisions*" and no "*mutually exclusive legal consequences*": see The Tatry [1999] QB 515 at [58] (ECJ); Sarrio v Kuwait, supra; Dicey at 12-073). Thus the court would consider whether a decision on an issue of fact or law in one action may conflict with a decision on the same issue of

[39] Providing for a stay of proceedings in one Member State if there are related proceedings pending in another Member State. Proceedings are deemed to be related under Article 30(3) if "*they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*"

fact or law in the other action, even if the issue was not central to the cause of action.

(2) However:

a. The "broad" analysis of whether there is a risk of irreconcilable judgments which applies under Article 30 should not be applied to cases under Article 34. The ECJ's purpose in construing Art 30 so broadly in **The Tatry** was to ensure consistent judgments throughout the EU (see [32], [49]-[53]).

b. But the same reasoning does not necessarily apply to Article 34, because third states are outside the mutual recognition provisions of the Regulation. In **Re Zavarco**, supra, (one of the few reported cases under Art 34), the Judge held that Art 34(1)(a) would only apply if the overlap was one which concerned issues which "*would or might form an essential part of the basis of the judgments, effectively part of their res judicata effect, absent which they would not be irreconcilable.*" That is a stricter, and more appropriate, test than that laid down for cases under Article 30.

c. Even if the "broad" approach is adopted, the fact that there is "a" risk of irreconcilable judgments does not automatically lead to a stay.

(3) One of the crucial questions in deciding whether to grant a stay is whether it is possible to hear and determine the related actions together. Under Article 30 (ie, related actions in Member States) the second court may decline jurisdiction in order that the two actions can be consolidated in the first court (see Art 30(2)). Where, however, the position is that the action within the third state cannot be consolidated in the courts of that state, there is a risk of irreconcilable judgments in that state irrespective of whether a stay is granted by the Member State court or not.

151. **Consolidation and "heard together"**: Ds contend that the ability to consolidate related proceedings is not a prerequisite to a stay under Article 28 LC[40] or Article 34 of the

40 D1's skeleton para 209

Regulation.[41] They rely on the decisions in **Nomura International v Banca Monte Dei Paschi** [2014] 1 WLR 1584 and **Re Zavarco**, supra, for the counterintuitive proposition that the court can grant a stay on the basis that "*it is expedient to hear and determine [the actions] together to avoid the risk of irreconcilable judgments resulting from separate proceedings*"[42] even if it is not in fact possible to hear and determine the actions together. For the reasons set out below, that is wrong.

(1) The wording of Article 34(1)(a) and Article 28(3) is clear that, in order to fulfil the criteria laid down in those paragraphs, it must be possible to hear and determine the actions together. It does not say "*it would have been expedient to hear and determine them together*" (as suggested in **Re Zavarco** at [38]) or that it is "desirable", even if not possible, to hear and determine them together (Eder J in **Nomura** at [57]).

(2) Eder J in **Nomura** considered that "*it does not necessarily follow from the fact that it may not be capable of hearing the actions together in the court first seised...that it would not, in principle, be expedient to do so.*" But the Regulation and the LC are concerned with reality, not hypotheticals. The fact that two actions would in theory be capable of being joined does not answer the question whether it would be expedient for one action to be stayed in favour of the other. Whereas if one action could be consolidated with the other, and heard and determined together, the position would be different.

(3) Eder J was wrong, in **Nomura**, to distinguish or refuse to follow at least two decisions in which the courts held that it was necessary for the related actions to be capable of being heard together before a stay could be granted under Article 28 of the Regulation.

a. In **JP Morgan v Primacom AG** [2005] 1 CLC 493 at [57]-[58] Cooke J held that the three actions "*could not be heard together...because they proceed on a different footing and it would plainly be inexpedient for the [English] proceedings in this jurisdiction to be conjoined in any way with the German actions...*"

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41 D3-D8's skeleton para 33.

42 ie, the criteria in Article 28(3) LC and Article 34(1)(a) of the Regulation.

b. That decision was cited and followed in by Arnold J in **Television Automica Valenciana v Imagina Contenidos Audiovisuales** [2013] ILPr 445 at [60]: *"the Spanish Proceedings and the English Proceedings are not "related" with the meaning of art.28(3). As a result of Imagina's stance, there is no possibility of Imagina's action and TVV's action being heard and determined together: cf. J.P. Morgan Europe Ltd v Primacom AG [2005] EWHC 508 (Comm), [2005] 1 CLC 493 at [57]."*[43]

(4) David Donaldson QC justified his conclusion in **Zavarco** by postulating that, if there are already parallel proceedings in a Member State and non-Member State, *"it is hard to see how the actions could in practice ever be heard and determined together."* But that is wrong. The courts of third states may have rules for the consolidation of related proceedings (so that the claim which is stayed in the Member State can be brought in the related proceedings in the foreign court). But if there are no such rules in the foreign court, and the English action cannot be heard together with the action in the foreign court, then it is not possible to hear and determine the claims together and the criteria in Article 34(1)(a) are not satisfied.

152. In any event, we note that Eder J's comment at [45] that the *"fact that it may not be capable or possible to hear the actions together in the court first seised may provide an unanswerable or at least compelling argument in favour of the court second seised exercising the discretion under article 28(1) to refuse a stay."* If the inability to consolidate proceedings is not a threshold issue, it is, we submit, a very strong reason against the grant of a stay. The risk of conflicting judgment remains even if a stay is granted. Furthermore, there is no justification for the Bank's claims (on which interest runs at $569,634 per day)[44] to be stayed to await the outcome of other proceedings in Ukraine.

153. **Recognition and enforcement**: Article 34(1)(b) requires the judgment of the courts in the third party state to be capable of recognition and enforcement in the Member State. A Ukrainian judgment may be enforced in England under the common law rules (see **Briggs** pp.758, 761). Similarly, at common law a Ukrainian judgment is capable of recognition in England if the Ukrainian court has jurisdiction and its judgment is final and conclusive. A Ukrainian judgment would not be recognised or enforced in England if, *inter alia*, it was

43 It does not appear that Eder J was addressed on the principle in **Colchester Estates v Carlton** [1986] Ch. 80 at 85, and his reasons for distinguishing the two cases were unconvincing.

44 [A1/2/30/¶64(a)]

obtained by fraud; enforcement was contrary to public policy; or the Ukrainian proceedings were contrary to natural justice: see **Dicey**, 14R—020(2), 14—030 to 14—044, 14R-137, 14R-152, 14R-162.

154. Given the types of Ukrainian proceedings relied on by Ds, the only conceivable way those proceedings might be recognised in England is by way of estoppel. The question whether an issue estoppel arises in English proceedings from a foreign judgment is governed by English law: *"[issue] estoppel is a matter for the lex fori"* **Carl Zeiss Stiftung v Rayner & Keeler** [1967] 1 AC 853 per Lord Reid (with whom the majority agreed). As a matter of English law, an issue estoppel may arise if the judgment in an earlier claim was (1) of a court of a competent jurisdiction, final and conclusive, and on the merits; (2) between the same parties or privies; and (3) the issue in the later claim, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier claim.[45]

(1) The question whether the judgment was "final and conclusive" and "on the merits", and what issues the foreign judgment decided, are question to be determined by the foreign law.[46]

(2) The parties (or privies) in the earlier claim relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The question whether there is a "privity of interest" between the parties to the first and second claim requires an assessment of "*(a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.*" A shared commercial interest in the outcome of the first set of proceedings is not enough; equally, the court must respect the separate corporate personality of corporate litigants, who are not necessarily privies of their shareholders.[47]

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45 **The Sennar** [1985] 1 WLR 490 at 499.

46 **Carl Zeiss** at 919C per Lord Reid: "*it seems to me to verge on absurdity that we should regard as conclusive* [in England] *something in the German judgment which the German courts would not regard as conclusive*".

47 **Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania** [2016] 1 CLC 750 at [31]-[33].

(3) Any judgment given in foreign proceedings does not necessarily give rise to an issue estoppel. As Lord Reid explained in **Carl Zeiss** at 918, there are "*practical difficulties [for] a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him.*"

(4) Equally, even if the criteria for an issue estoppel are otherwise fulfilled, a claim may not be barred on the basis that "*there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings…being material which could not by reasonable diligence have been adduced in those proceedings.*"[48]

155. **Administration of justice**: Article 34(1)(c) requires that any stay of proceedings in a Member State be in the interests of the proper administration of justice. That requires the court to consider "*all the circumstances of the case*" (Recital 24) including (i) the stage reached in both sets of proceedings and the likelihood of a judgment in the third state within a reasonable time; (ii) the proximity of the courts to the subject matter of the case[49]; and (iii) the "*standards of procedural fairness*" in the third state's courts.

156. In relation to the last of these points, Briggs' commentary is as follows:

> "*… It seems likely that a court may be permitted to make some sort of assessment of whether the foreign court is one whose procedure seems likely to measure up to standards of procedural fairness and general suitability to serve as the substitute for an adjudication by the courts of a Member State. No doubt there are sensitivities here, and a list of countries whose courts are not to be trusted will need to be found elsewhere; but the issue is whether a court with jurisdiction under Chapter II should decline to exercise it. It should not do if it has doubts about the quality of the adjudication liable to result from the exercise of this declinatory order.*'[50] (emphasis supplied)

(ii) Article 28 of the LC

157. The LC contains no equivalent to Article 34 of the Regulation governing the circumstances in which the English courts may stay proceedings in favour of proceedings in a non-Convention state. It does, however, contain provisions which provide for the courts of a

48 **Spencer Bower & Handley, Res Judicata** (4th Ed) at 8.33, 17.21ff.
49 See **Seven Licensing v FFG Platinum** [2012] LLPr 7 at [34]-[41], per Gloster J.
50 **Briggs**, para 2.293 (page 345).

Convention state to stay "*related actions*" in favour of proceedings in another Convention state under Article 28:

> "*1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.*
>
> *2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*
>
> *3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*"

158. For the purposes of the *ex parte* hearing the Bank noted that there was authority that suggested that Article 28 LC could be applied "reflexively" to related proceedings in a non-Convention State (whilst reserving its position on the return date). The better view is that Article 28 cannot be applied "reflexively" in that way.

159. First, the LC contains no equivalent to Article 34 of the Regulation which provides for the courts in a Member State to stay proceedings in favour of the courts of a non-Member State. It is, of course, open to the Convention states to introduce such a provision into the LC (using Article 34 of the Regulation as a model), but they have not done so. The LC should not be construed as conferring a power to stay proceedings in favour of non-Convention States which it plainly – and deliberately – does not include.

160. Second in **Owusu v Jackson** [2005] ILPr 25 the ECJ held that if jurisdiction was established on grounds of domicile under (then) Article 2 of the Brussels Convention, there was no scope to stay proceedings on *forum non conveniens* grounds. The Advocate-General expressed the view that even if related proceedings were pending in Jamaica before the English court was seised, Article 22 (now Article 28 LC) "*does not in principle fall to be applied*" (para 254).

161. Third, despite some confusion, the better view of the English cases is that Article 28 LC cannot be applied as if Ukraine is a Convention State when it is not.[51]

(1) In **Catalyst Investment Group v Lewisohn** [2010] Ch. 218 Barling J held that the court could not stay English proceedings in favour of proceedings in Utah on

[51] All of the cases are under the Regulation, not the LC.

the basis that Article 27 of the Regulation applied "reflexively". The Judge did accept that he retained a discretion to stay proceedings "*which are vexatious or oppressive or otherwise an abuse of process.*" (para [100]).

(2) In **JKN v JCN (Divorce: Forum)** [2010] EWHC 843 (Fam) Miss Theis QC (sitting as a Deputy Judge) held that it was open to the court to stay English divorce proceedings in favour of US divorce proceedings. She held that if there was not such a power it would lead to a risk of irreconcilable judgments in the two jurisdictions and an "*undesirable lacuna in the law, as there will be no mechanism in place for resolving this situation with the consequence of both proceedings continuing…*" (para [149]). As to that decision:

a. If there is a "*lacuna*" in the LC, it is deliberate one. The Convention States could have adopted an amendment to the LC in line with Article 34 of the Recast Regulation, but have not done so.

b. The Deputy Judge did not apply Article 27 or 28 "*reflexively*" (ie, as if the US was a Member State). Instead, she considered whether she should exercise a discretion to stay the English proceedings in accordance with ordinary *forum non conveniens* rules (see paras [154]-[156]). That approach was directly contrary to the rule in **Owusu**.

(3) In **Ferrexpo v Gilson Investments** [2012] EWHC 721 (Comm) the claimant brought proceedings in England to resolve a dispute as to the ownership of shares in a Ukrainian company following a share sale agreement with the defendants in 2002. The defendants meanwhile had brought proceedings in Ukraine seeking their restoration to the share register in Ukraine (to which the claimant was a "third party"). We note the following:

a. Andrew Smith J explained his understanding of the doctrine of "reflexive effect" as follows (at [127]) "*The argument that the law does require a reflexive application of these articles of the Brussels Regulation (rather than the law should do so) does not, as I see it, suppose that the Brussels Regulation itself confers on the court the power to decline jurisdiction or stay proceedings. The Regulation allows the court to exercise the powers available to it under its national law here the CPR include a power to 'stay the whole or part of any proceedings or*

judgment either generally or until a specific date or event' (CPR 3.1(2)(f))... Its proper exercise is not unfettered, in that the court must not order a stay that is contrary to the letter or purpose of the Brussels Regulation. The argument for giving some articles reflexive effect is that this is required in order to give effect to the purpose (albeit not the letter) of the Regulation. If the court accepts this argument and therefore decides not to accept jurisdiction, to my mind... the proper form of order is to stay the proceedings."

b. However, instead of considering the question whether he should stay proceedings under the Court's inherent jurisdiction or CPR 3.1(2)(f), he went on to address the question "*whether article 28 would apply if Ukraine were a member state.*" (para [167]). That was, on his own reasoning, the wrong question: the right question was whether the English court could stay proceedings under CPR 3.1(2)(f) without contravening the letter or purpose of the Regulation.

c. In any event, the decision is strictly *obiter* on the reflexive effect of Article 28 LC, because Andrew Smith decided the case primarily on the basis of the reflexive effect of Article 22. Following his reason at sub-para (i) above, it appears that he granted a stay under CPR 3.1(2)(f) (see paras [154]-[155]), although he later contrasted the power under CPR 3.1(2)(f) with the "reflexive effect" of the Regulation (para [199]-[200]).

(4) In **Law Debenture Trust v Plaza** [2015] EWHC 43 (Ch) Proudman J considered (obiter) that "*it may be open to me to apply Article 28 of the Regulation reflexively*" (para [90]) but she made it clear that she was not deciding the point: "*it seems to me that the question of the nature of lis alibi pendens (that is to say, whether it is merely a constituent factor of forum non conveniens and, if so, the effect of Owusu) is one that merits full argument. While I tend to agree with Andrew Smith J in Ferrexpo that the Court is not bound by Owusu to reject the lis alibi pendens argument, I can and do limit my decision to the fact that the Deed of Settlement contains an exclusive jurisdiction clause...*" (para [117]).

162. Accordingly, we submit that:

(1) Article 28 LC cannot be applied "reflexively";

(2) the decision in **Catalyst** is to be preferred to that in **JKN**; and

(3) if the English court has jurisdiction under the LC, the English court retains a discretion (under its inherent powers and/or CPR 3.1(2)(f)) to stay English proceedings in favour of proceedings in a non-Convention State, but it should only exercise such a power if (i) the English proceedings are oppressive or an abuse of process; or (ii) there are other compelling circumstances which justify a stay (see **Catalyst** at [100]; **Ferrexpo** at [199]-[200]).

163. We accordingly disagree with paras 154(1)-(2) of D1's skeleton; agree that the court has a power to stay proceedings under CPR 3.1(2)(f) as set out in para 164 below; and agree with the points made at paras 154(3) and (5).

(iii) CPR 3.1(2)(f) / inherent jurisdiction

164. The court has a general case management power to stay proceedings pending the resolution of a claim in another forum, albeit the power is to be exercised "*only…in rare and compelling circumstances*".[52] If no stay is available under Article 34 of the Regulation or Article 28 of the LC, we submit that no stay should be granted under CPR 3.1(2)(f) or under any inherent jurisdiction.

(iv) Forum non conveniens

165. The court will, in relation to D6-D8 only,[53] take into account the existence of proceedings in another jurisdiction: **Dicey** at 12-043. But there is no presumption – even where a claimant brings overlapping proceedings against the same defendant in different jurisdictions – that the existence of related proceedings overseas will lead to a stay: see **JSC BTA Bank v Khrapunov** [2017] EWHC 2702 (Comm), [48]ff.

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52 The power to stay proceedings on case management grounds must not be exercised so at to circumvent the decision in **Owusu v Jackson** [2005] QB 801 that no such stay can be granted on *forum non conveniens* grounds if the court has jurisdiction under the Regulation. It is not permitted to "*achieve by the back door a result against which the Court of Justice has locked the front door*". See **Plaza BV v Law Debenture** at [81], [123]-[130]; **Ferrexpo** at [199]-[200].

53 See **Owusu v Jackson** [2005] QB 801 at [46].

(III) The Relevant Chronology

166. We set out below the chronology relating to the D1 Defamation Claim (black ink), D3-D5 Defamation Claims (blue ink), Fraudulent Loan Claims (orange ink) and GPO Claims (green ink):

6.10.17 and **24.10.17**	The website of "Law and Business" magazine published a two-part article by a journalist called Mr Miroshynk **[D11/92/24050-1, 24056-8]**: • The first article focuses on the extent of related party lending at the Bank and reports, based on statements made by the National Bank of Ukraine ("**NBU**"), that the majority of loans were granted to "shell" companies associated with D1-D2 with inadequate security. It says that old loans were repaid using "new borrowed funds" such that the 2016 restructuring proposed by the NBU was frustrated. • It also refers to a single sentence uttered by Mr Shlapak (the Bank's then chairman) at a press conference on 4.7.17 at which he explained that 97% of the Bank's pre-nationalisation loan portfolio was to related parties. • The second article reports that UAH 18.9bn[54] was loaned to 43 companies who in turn transferred those sums to D3-D8 as "prepayments" for goods which were never delivered. Then, in 2016, the Bank loaned UAH 132bn to 36 borrowers, who immediately "repaid" the loans of 193 companies. The Bank is described variously as a "financial pyramid" and a "vacuum cleaner" which operated to "siphon" funds abroad for D1 and D2. This article does not refer to the Bank as a source of information.
27.10.17	D3-D5 file defamation claims in the Pechersky District Court of Kiev, the purpose of which is said to be the "*defence of business reputation*" **[D7/81/18449-18454]**.
30.10.17	D5's claim is left without consideration because it failed to pay the correct court fee and did not remedy this defect: Lewis 2/¶31 **[B1/29]**

[54] Probably mistranslated, and more likely to be UAH 189bn.

1.11.17	D1 files the D1 Defamation Claim in the Pechersky District Court of Kiev: • There are six named defendants, including the Bank, the NBU, Mr Miroshnyk (the journalist) and "Law and Business" LLC (the publisher). • The Bank is purportedly a defendant because it was responsible for Mr Shlapak's statement at his press conference, which was reported upon in the first article. • There are also 53 "*non-party interveners on the side of the Claimant*" including 43 of the 46 Borrowers, D2 and D3-D8 **[D11/92/23978-84]**.[55]
22.11.17	The Pechersky District Court refuses to accept D3 and D4's defamation claims because they have been filed in the wrong court: the commercial courts, not civil courts (like the Pechersky District Court), have jurisdiction to hear claims between legal entities **[D7/81/18459, 18463]**. D3 and D4 do not appeal.
22.11.17 to **13.12.17**	The 30 sets of Fraudulent Loan Claims are filed: Lewis 3/¶347(b) **[B2/30]**. The Bank had earlier decided to bring loan enforcement claims against the New Borrowers, but reversed this decision in October 2017 after filing only three claims. Despite this decision, the Fraudulent Loan Claims were then brought in the following circumstances: • The text of the claims closely follows the text of the drafts that had been produced within the Bank, suggesting that Bank employees leaked the same: Lewis 1/Appendix 2/¶2.2 **[D6/70]**; Lewis 3/¶¶356-368 **[B2/30]**. • The claims bear the forged signature of a Bank employee, Ms Iryna Hryn: Lewis 1/Appendix 2/¶2.3 **[D6/70]**; Lewis 8/¶48-50 **[B2/30.2]**. She was actually on sick leave when some of the claims were filed using her signature: Lewis 1/Appendix 2/¶2.4 **[D6/70]**; Lewis 3/¶354(b) **[B2/30]**. See also the report of Dr Audrey Giles, an English expert on handwriting analysis **[D10/86.1/21879.139ff]**. • The claims were posted from a post office not used by the Bank's legal department: Lewis 1/Appendix 2/¶2.3 **[D6/70]**. • The Bank has made a criminal complaint: Lewis 1/Appendix 2/¶¶2.4-2.6 **[D6/70]**.

55 Not, as alleged in footnote 187 of D1's skeleton, 35 Suppliers.

	• The 30 claims have been rejected by the court, dismissed without hearing and/or suspended: Lewis 3/¶352 [**B2/30**].
25.11.17	The General Prosecutor and D1 are photographed having coffee in a café in Amsterdam. This meeting has sparked considerable controversy: • In June 2017, the GPO instituted a criminal investigation relating to the misappropriation *"over 2008 through 2016 of especially large amounts of funds* [from the Bank] *by former officers …"* (Lewis 2/¶64(a) [**B1/29**]). But no charges have been brought: Lewis 2/¶64(a) [**B1/29**]. • On 21.12.17 the Financial Times quoted a respected economist as having stated that *"it is outrageous that the Ukrainian prosecutor general holds a secret, private meeting abroad with* [D1]." (Lewis 2/¶64(b) [**B1/29**]). • The Ukrainian Minister of Finance has accused the GPO of seeking to assist D1-D2 to *"evade financial responsibility for a bailout that has cost the state more than $5 bn."* (Lewis 2/¶64(e) [**B1/29**]).
1.12.17 and 13.12.17	D1's solicitors write to the Bank's solicitors. • They state (in their first letter) that matters relating to the management and affairs of the Bank are *"already the subject of a multitude of both civil and criminal proceedings before the Ukraine courts."* [**D4/68/2847**] • But they do not mention the D1 Defamation Claim, which they now assert is the *"most crucial"* of the Ukrainian proceedings. • D2's English solicitors write in similar terms on 6.12.17: see [**D5/68/2850-1**].
4.12.17	The Pechersky District Court opens proceedings in the D1 Defamation Claim [**D7/81/18539**].
6.12.17 to 8.12.17	The GPO files the GPO Claims: Lewis 2/¶52 [**B1/29**]. • The proceedings are brought against only five of the 36 New Borrowers, but these five were between them intended to "transform" the outstanding indebtedness of all but three of the 46 Borrowers: Lewis 3/¶347(c)/fn 132 [**B2/30**] • The proceedings seek termination of the New Borrowers' loan agreements with the Bank and recovery of the sums advanced thereunder: Lewis 2/¶54 [**B1/29**].

	• D3-D5 are joined to the GPO Claims for no obvious reason: Lewis 2/¶¶55-7 **[B1/29]**. • Even more remarkably, one of the New Borrower defendants to the GPO Claims – Dream Company – actually supported the GPO's appeal against an early procedural decision that the GPO had no authority to bring claims on the Bank's behalf: Lewis 2/¶60 **[B1/29]**. • The Bank does not consider the GPO Claims to be in its interests and makes this clear in statements to the judge hearing each claim: Lewis 2/¶62 **[B1/29]**; **[D7/81/18580-18595]**.
8.12.17	D3-D5, being amongst the dozens of third parties joined by D1 to the D1 Defamation Claim, seek to file independent third party defamation claims within the D1 Defamation Claim.[56] The D3-D5 Defamation Claims are identical to those filed on 27.10.17. They allege that the article published on 24.10.17 was false and defamatory. The basis of the claim against the Bank is that it "*should have reacted to dissipation of untrue information and should have disputed those statements, but … did not.*" **[E7/122/27604]**.
20.2.18	The Bank files a limited defence to the D1 Defamation Claim **[D8-9/82/19008-19063]**.
25.5.18	The GPO files applications to withdraw all five GPO Claims: Lewis 8/¶46 **[B2/30.2]**, **[D10/86.1/21879.41-.60]**
26.4.18	The Pechersky District Court refuses to accept the D3-D5 Defamation Claims: Beketov 5/¶29 **[C1/60.1]**. D3-D5 appeal.
21.6.18	The GPO is permitted to withdraw one of its five claims (Lewis 8/¶46 **[B2/30.2]**), **[D10/86.1/21879.61-.64]** (the GPO's application to withdraw remains pending in three other cases and should be determined later this year **[D10/86.1/21879.65-.116]**).
13.6.18	The Kiev Court of Appeal overturns the ruling of 26.4.18 refusing to accept the D3-D5 Defamation Claims and directs that the matter be resubmitted to the Pechersky District Court: Beketov 5/¶29 **[C1/60.1]**. No hearing has been listed

[56] The experts agree that it is generally open to a third party to proceedings to seek to file their own independent claim within those proceedings, provided that is done at an early stage, and a judge will then decide whether to open proceedings in the third party's claims: Beketov 3/¶¶26-32 **[C1/58]**, Nahnybida 1/¶¶1-42 **[C2/64]**.

	for this, or any other purpose, possibly because the District Court judge hearing the D1 Defamation Claim (in the context of which the D3-D5 Defamation Claims were filed) recently failed her qualification exam and may well be removed as a judge: Beketov 5/¶35 [**C1/60.1**].
26.6.18	The GPO Claim against Dream Company LLC is dismissed on the merits: Lewis 8/¶46 [**B2/30.2**], [**D10/86.1/21879.123-.126**].

(IV) The D1 Defamation Claim

167. We deal with the D1 Defamation Claim in detail in this section given that it was until recently relied upon as the *"most crucial"* set of Ukrainian proceedings. We explain (1) why it is insufficiently connected with the Bank's Claim to qualify as *"related"* for the purposes of Article 34 of the Regulation/Article 28 LC, (2) why it is not *"expedient"* (indeed not possible) for the Bank's Claim to be heard together with the D1 Defamation Claim, (3) why any enforcement of a Ukrainian judgment would be far more difficult for the Bank than enforcement of an English judgment, and (4) why a stay would be contrary to the *"proper administration of justice"* (and is certainly not *"necessary"* for such administration).

(1) The D1 Defamation Claim is not sufficiently related to the Bank's Claim

168. We rely on four points under this head.

169. First, the D1 Defamation Claim is a very different kind of claim seeking a very different kind of remedy to the Bank's Claim:

(1) It is a claim seeking to protect D1's "honour, dignity and reputation" and is not a claim in fraud.

(2) D1 does not seek damages for defamation. His prayer for relief instead seeks (1) an order that *"the false information spread in* [the press conference] *be recognised as damaging to* [D1's] *honour, dignity and business reputation"* and (2) an injunction requiring the Bank to retract and correct the false information [**D7/81/18499-18502**]. Compare the relief sought by the Bank in these proceedings, viz. c. $1.9 billion plus interest.

170. Secondly, D1's claim against the Bank in his defamation proceedings is very limited:

(1) The complaint is that Mr Shlapak, the Bank's former Chairman, said as follows at a press conference held on 4.7.17:

"… the actual amount of loans to related parties at Privatbank as of 1 January 2017 was 190 billion UAH, or 97% of the bank's total loan portfolio." [D7/81/18480]

(2) D1 does not even challenge the accuracy of that statement[57]: rather, he suggests that the figures were the product of (1) changes by the NBU to the definition of "related parties" (which went beyond IFRS definitions – a point acknowledged by Mr Shlapak), (2) changes in prudential ratios for lending; and (3) exchange rate changes: Lewis 3/¶¶321-5 [B2/30] [D11/92/23990/¶¶1.2.1, 1.2.6].

(3) As Mr Beketov points out, D1's claim *"does not plead the falsity of any of the facts mentioned in Shlapak's statement, but instead seeks to explain their underlying causes and context.…* [Accordingly, D1] *has failed to plead the necessary elements of a defamation claim against the Bank"* (Beketov 4/¶¶30-1 [C1/60]).[58]

171. Thirdly, D1's claims against other defendants are not sufficient to render the defamation proceedings "related":

(1) Those claims are not made against the Bank.

(2) The D1 Defamation Claim raises numerous issues which do not arise on the Bank's Claim, in particular in relation to the manner of the Bank's nationalisation: Lafferty 2/¶150.2, 150.10 [B2/36], the fraudulent extraction of UAH 12 billion days before nationalisation, the use of credit derivatives to artificially improve the Bank's results, and the manipulation of information given to PwC: Lafferty 2/¶¶150.9, .14, .16] [B2/36].

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57 The same 97% figure is set out in Lewis 1/¶17/fn 3 [B1/24]. D1 has not disputed the figure in these proceedings.

58 Although the court did not strike out D1's claim on this basis at a hearing on 26.04.18, the hearing was only 15 minutes long and it remains open to the court to strike out the claim as an abuse of process at a later stage: Beketov 5 [C1/60.1].

(3) Of those issues which do ostensibly overlap with the Bank's Claim, it is telling that D1 has all but accepted that: (1) loans were made by the Bank to the Borrowers who had no operational activities; (2) no goods were ever provided and no prepayments returned under the Relevant Supply Agreements; (3) the loans granted to the New Borrowers in 2016 involved "*the transfer of* [existing] *loan liabilities, involving a relatively straightforward book keeping exercise*" (Lafferty 2/¶169 [**B2/36**]); and (4) D1 and D2 orchestrated what Mr Lafferty calls "the Scheme" (hence D1's ability to give detailed evidence in relation to the fund flows which he clearly orchestrated): Marchenko 1/¶59(1)-(3), (6) [**C2/61**], Lafferty 2/¶¶150.3, .4, .5, .7, .13, .14, .16 [**B2/36**].

(4) The D1 Defamation Claim contends that none of the loans to the Borrowers or the transfers to D3-D8 was fraudulent, and that there was a "*commercial purpose*" for the repayment of old loans with new loans [**D11/92/24001/¶10.2**]. He also "*denies that there were any loans to companies where appropriate arrangements were not in place, together with adequate collateral for these loans.* [D1] *also denies that the loans were made in violation of banking legislation*" [**D11/92/23994/¶3.2**].

(5) However: (1) those are bare denials; (2) D1 does not explain the "*commercial purpose*" of the loans to the Borrowers or the involvement of D3-D8; and (3) the detailed account of money movements provided in Lafferty 2 and 3 is missing. It appears, therefore, that D1 is prepared to offer much greater detail of the "Scheme" in the English proceedings than in his own defamation claim.

(6) The journalist and his publisher may defend the claims on the basis that their statements that the "Scheme" was fraudulent were a legitimate value judgment (Beketov 4/¶37-41 [**C1/60**]). Given that there is no real dispute as to the underlying facts, but rather as to their characterisation (ie, whether what occurred was fraudulent or not), the journalist was entitled to express his "*subjective opinion*" based on his "*critical assessment of certain facts*" (Marchenko 2/¶34 [**C2/62**]).[59]

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59 Mr Marchenko suggests that an expression of opinion that an individual committed a fraud cannot amount to a value judgment because it violates the presumption of innocence: Marchenko 2/¶¶38-39 [C2/62]. The ECtHR disagrees: "such a statement, expressing a personal opinion of a legal nature, constitutes a value judgment and must be analysed as such. Accordingly, the applicant [journalist] could not be required to

(7) The journalist and publisher may also argue that the statements were made in good faith after a reasonable investigation of the facts (Beketov 4/¶¶37, 48-50 [C1/60]). In circumstances in which the factual basis of the "Scheme" is broadly accepted by D1 and D2, these protections provide a strong defence for Mr Miroshynk and "Law and Business" (cp Marchenko 2/¶¶43-46 [C2/62]). That is particularly so in circumstances in which D1 and D2, as public figures, are legitimate figures for public scrutiny and public comment of the type seen in Mr Miroshynk's articles.

(8) Although the journalist and publisher do not appear to have defended the D1 Defamation Claim to date (see below), Mr Beketov's evidence is that they may do so at any time before the final hearing and, moreover, that it would be open to the Court to decide itself that the claims against them should fail for either of the above reasons (Beketov 4/¶50 [C1/60]).

172. Finally, the scope of the defences that have been filed show that the issues in dispute are narrow:

(1) The journalist and the publisher do not appear to have filed any defence at all. Indeed, neither even attended the last hearing in the matter.[60]

(2) The Bank's defence is a focussed one [D8-9/82/19008-19063]. In particular, the Bank contends that:

a. D1 has submitted no evidence of damage to his business reputation as a result of Mr Shlapak's statements (para 1) [D9/82/19019];

b. D1 has not submitted any evidence to prove that Mr Shlapak's statements were false (para 2) esp. [D9/82/19023];

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demonstrate the accuracy of its assessment" (quoted at Beketov 4/¶38 [C1/60]). Mr Marchenko's attempts to distinguish the ECtHR's ruling is unconvincing: Marchenko 2/¶41 [C2/62].

60 Although Mr Marchenko refers to a "*written statement in defence*" having been filed by the publisher (Marchenko 2/¶46 [C2/62]), no such document has been put in evidence and the Bank has been unable to access the court file to determine if any such document was indeed filed and, if so, what is says.

c. Mr Shlapak used the press conference to relay the subject matter of criminal investigations (including in respect of D1's involvement in fraud), and stating the contents of a criminal investigation cannot amount to defamation (para 3.2) [**D9/82/19027-19029**];

d. D1 admitted that the Bank's loans needed to be restructured such that D1 has no basis to complain that Mr Shlapak's statement was false [**D9/82/19030**]; and

e. D1 is a public figure (one of the richest men in Ukraine; a former governor of Dnipropetrovsk; etc.) such that the criticism of his conduct leading to the collapse of the Bank is legitimate (para 3.3) [**D9/82/19031-3**].

173. In summary, the Bank's Claim is not sufficiently closely related to the D1 Defamation Claim for the two actions to be treated as "related" for the purposes of Article 34 (or Article 28 of the LC).

(2) It is not expedient to stay the Bank's Claim in favour of the D1 Defamation Claim to avoid the risk of irreconcilable judgments

174. We rely on two points under this head.

(A) The Bank's Claim cannot be brought by way of counterclaim in the defamation proceedings

175. As Mr Beketov explains, it would not be possible for the Bank to bring its fraud claims against D1-D8 in the existing defamation proceedings in Ukraine. That is because:

(1) the claims against D3-D8 are against legal entities and are subject to the commercial court's exclusive jurisdiction: this is the very basis on which the initial claims made by D3 and D4 were rejected on 22.11.17 (Beketov 3/¶17 [**C1/58**], Nahnybida 2/¶25 [**C2/66**]);

(2) the claims against D1 and D2 are for damages against individuals who were officers and founders of the Bank and are likewise subject to the commercial court's exclusive jurisdiction;[61]

(3) With one limited exception (see sub-paragraph (4)c below), there is no jurisdiction to join civil and commercial claims in Ukraine: "*it is not permitted to join in a single proceedings several claims that must be examined under the procedures of different court proceedings, unless otherwise prescribed by law*" (Art 173(4) CCivP; Article 188(4) CommP) (Beketov 3/¶12 [C1/58]).

(4) Mr Nahnybida suggests that "*in practice*" the courts may allow a third party to bring a claim in existing civil court proceedings which would otherwise be under the exclusive jurisdiction of the commercial courts (Nahnybida 2/¶15 [C2/66]), a position with which Mr Marchenko agrees (Marchenko 2/¶28 [C2/62]). However:

a. They do not suggest that the procedural rules allow for the joinder of such claims (which they do not, as Mr Beketov makes clear).

b. Their position relies upon six cases, listed at Marchenko 2/fn 22 [C2/62] (one of which also appears at Nahnybida 2/¶15 [C2/66][62]), which do not withstand Mr Beketov's scrutiny at Beketov 5/¶¶24-8 [C1/60.1]. Two of the cases simply offer no support for their view at all, whilst the other four appear to be anomalies, explainable by the court not having been referred to, or otherwise considering, the relevant jurisdictional rule.

c. Mr Beketov also draws attention to a recent judgment of Ukraine's Supreme Court (upon which neither Mr Nahnybida nor Mr Marchenko relied) permitting claims falling within different jurisdictions to be joined if they are "*inextricably linked with one another and the decision in one depends on the decision in another.*" (Beketov

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61 See Article 20(1)(12) of the Commercial Code of Procedure: "*Commercial courts shall hear cases in business related disputes…and other cases to the extent prescribed by law, in particular: …(12) cases in disputes between a legal entity and its officer (including that removed from office) in relation to damages caused to that legal entity by its officer's acts (omissions), based on a claim filed by that legal entity's owner (member or shareholder) actin on its behalf…*" [E2/114/26188-9]

62 Ruling of the Letychiv District Court of the Khmelnytsk Oblast in case no. 678/207.16-u dated 13.12.16 (case (d) in footnote 22 in Marchenko 2 [C2/62]).

5/¶29 [C1/60.1]).[63] But Mr Beketov explains that the Bank's claims in tort and unjust enrichment, which, being claims against legal entities and the Bank's founders and former officers, are within the jurisdiction of the commercial courts, could not be joined to the D1 Defamation Claim, which is before a civil court. The Bank's claims are not "*inextricably linked*" to the D1 Defamation Claim.

(5) In any event, the Bank cannot bring a claim/counterclaim against third parties who do not have their own independent claims (which includes, at a minimum D2 and D6-D8): Beketov 3/¶¶56-57 [C1/58].

176. Accordingly, a stay of the Bank's Claim would not avoid a risk of inconsistent judgments being given by (1) the Pechersky District Court hearing the D1 Defamation Claim and (2) a Ukrainian commercial court hearing the Bank's Claim.

(B) Staying the Bank's Claim will not eradicate the risk of irreconcilable judgments

177. In fact,[64] the risk of irreconcilable judgments already exists because of the multitude of existing proceedings in Ukraine and elsewhere:

Court	Description and brief overview of claim
Pechersky District Court	D1 Defamation Claim
Kiev District Administrative Court	D1's claim to judicially review the decision to nationalise the Bank (the "**JR Claim**"). In this claim, D1 alleges that: • The nationalisation was an unlawful expropriation of D1's assets: [D11/92/24105-6/¶1.1], [D11/92/24121/¶3.4]. See, to similar effect, the D1 Defamation Claim [D11/92/24009/¶14.8.3]; • The NBU wrongfully applied its own standards rather than IFRS standards in determining the value of collateral, identity of related

63 Such as when (as on the facts of that case) one claim is against a legal entity as borrower (commercial court jurisdiction) and the other is against an individual as guarantor of that borrower's obligations (civil court jurisdiction).

64 Assuming, as the Ds contends, that the relevant actions are related.

	parties, and capital ratios: JR Claim [**D11/92/24108-9/¶¶1.2.3-.4**]. See, to similar effect, D1 Defamation Claim [**D11/92/23990-2/¶¶1.2-1.3**] and [**D11/92/23994-6/¶¶5.2-5.3**]. • The Bank was declared insolvent on improper grounds: JR Claim [**D11/92/24117-8/¶3.3**]). See, to similar effect, D1 Defamation Claim [**D11/92/23992-3/¶¶2.1-2.4**].
Numerous Ukrainian Courts	The New Borrowers have brought c. 440 other claims against the Bank (ie the New Borrower Proceedings), discussed further below, which comprise: • c. 30 claims to invalidate addenda to their loan agreements which brought forward the date of repayment from a date in 2024-2026 to 2017. • c. 300 claims in which they seek delivery up of the original loan agreements between the Bank and the Borrowers and/or declaratory relief (effectively seeking subrogation to the Bank's position as against the Borrowers in respect of the purportedly repaid loans). • c. 110 claims seeking termination of the Surety Agreements (ie, security purportedly granted by the New Borrowers to the Bank) and, in two instances, termination of the relevant New Borrower's loan.
Various Ukrainian and Cypriot Courts	"*... many dozens of separate claims by which various claimants ... challenge the bail-in of their deposits and/or their status as related parties of the Bank ....*": Lewis 3/¶394(e) [**B2/30**]; Lafferty 2/¶¶204-6 [**B3/36**]

178. As Mr Beketov explains, there are hundreds of proceedings relied upon by D1 and it would be *"impossible"* to consolidate them all:

> *"leaving to one side the practical impossibility of such a suggestion, the proceedings to which Mr Lafferty refer[s] are before numerous different courts from each of the criminal, civil and commercial and administrative branches of Ukraine's judiciary. Claims that fall within the jurisdiction of the courts of one of these judicial branches cannot be joined to claims properly before the court in another branch"* (Beketov 4/¶¶143-4 [**C1/60**]).

(3) Enforcement of any Judgment obtained by the Bank in Ukraine

179. The Bank has good reason for wanting to obtain an English judgment against D1-D8. In particular:

(1) A judgment of the English court will be subject to the streamlined procedure for recognition and enforcement contained in (as applicable) Chapter III of the Regulation or LC. This will be of significant assistance to the Bank when seeking to enforce in Member or LC States. As Briggs puts it, there is a:

> *"... sharp and sharpening distinction ... between the enforcement of European civil and commercial judgments under the various European instruments, on the one hand, and under the common law, on the other. Under the European schemes, there will be straightforward, sometimes automatic and unquestioned, recognition and enforcement of judgments as between the States which it is hard, sometimes impossible to derail. In particular, it is generally no defence for the judgment debtor to assert that the adjudicating court was quite wrong in considering that it had jurisdiction or that it decided the case wrongly. ...."* (p 629)

(2) A judgment of the English court will also qualify for the streamlined enforcement procedure available in a number of Commonwealth jurisdictions (eg under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933).

(3) By contrast, a judgment of the Ukrainian court would have to be enforced in England (and other common law jurisdictions) under the common law enforcement rules. As is well-known, such enforcement is slower (potentially much slower) than enforcement under the European legislation (requiring an action to be brought on a judgment).

180. These are important considerations for two reasons. First, if it is *"expected"* that any hypothetical Ukrainian judgment obtained by the Bank (or, indeed, obtained by D1 on the Defamation Claim) would not be recognised in England, the court cannot grant a stay: see Article 34(1)(b). Secondly, even if these requirements are not satisfied, the enforceability of a Ukrainian judgment is highly relevant to the question of whether a stay is *"necessary"* for the proper administration of justice. As Briggs explains (in the context of Article 33) at p. 346:

"... Where stay is ordered, it means that the judgment creditor will not be able to obtain the recognition or enforcement of the eventual judgment in other Member States, because the decision to recognise a judgment from a non-Member State does not result in a 'judgment' for the purposes of Chapter III of the Regulation. As Article 33(3) means that there is no prospect of any form of judgment being given in the stayed cause of action before the Member State, the party who succeeds before the court of the non-Member State secures only a local victory. A judgment in his favour does not obtain a European passport. Whether it is effective in Member States other than the one in which a stay was ordered will be a matter for the laws of each Member State. This is a significant potential disadvantage. It must therefore be open to the claimant in the Member State proceedings to object that he wishes to obtain a judgment which can be recognised and enforced under Chapter III, and that if the Member State does not adjudicate in the action before it, he will be deprived of one of the significant aspects of adjudication in accordance with the jurisdictional principles of Chapter II."

181. This is a real and not merely theoretical disadvantage for the Bank.

(4) A Stay would be Contrary to the Proper Administration of Justice

(A) This is a case that cries out for determination by a tribunal that is, and is seen as being, independent

182. First, we take the perhaps obvious point that both D1 and the Bank consider that the English court should resolve this dispute.

183. D1, of course, does not say that in his or his solicitors' evidence to the court. But he has been more candid when speaking to the press. In particular, as reported by the Kiev Post on 17.4.18, Mr Kolomoisky has explained that:

"Litigation is litigation - we cannot know in advance how it will end, but I am very optimistic about it. I believe that the London court is the jurisdiction where the parties will have to openly show everything, tell how it was and what was not. I think we will get to this trial in the court, but it will not be soon and most likely it will happen under another government in Ukraine" (17.4.18 **[D9/82/19139]**).

184. This article was relied upon in Lewis 3; D1's evidence in reply does not dispute its accuracy.

185. Secondly, D1 plainly does not trust the Ukrainian Courts:

(1) He has twice accused the Kiev Court of Appeal of bias: see ¶140(4)a above.

(2) In his first witness statement in this action, he complained that a close associate of his was subject to improper decisions of the Dniprovsky District Court of Kiev at the behest of President Poroschenko; he added that *"both of the Ukrainian judges involved in the criminal proceedings … are currently under investigation in relation to bribery allegations"* (Kolomoisky 1/¶¶60(d), (e) and (h) [**B2/32**])

186. Thirdly, as set out in Lewis 3/Appendix 2 [**D10/86**], the European and English courts have repeatedly raised concerns as to the independence of the Ukrainian judiciary. D1 will no doubt rely upon such observations in the event that the Bank seeks to enforce a Ukrainian judgment against him. See, by way of example:

(1) **Merchant International Co Ltd v Naftogaz Ukrainy** [2012] 1 WLR 3036 (CA): *"On the other hand, MIC has not merely argued that the 2011 judgment* [defined to include judgments of the Kiev Commercial Court, Kiev Court of Appeal and Supreme Commercial Court of Ukraine] *was in breach of article 6 of the [ECHR], it has established that it was flagrantly so, supported by the decision of the Strasbourg court in Agrokompleks v Ukraine …."* (Lord Neuberger MR at [86]; see also [88]).

(2) David Steel J went further at first instance: *"Even on the assumption that the denial of rights must be 'flagrant' I would hold that the outcome in the Ukraine does indeed flow from a glaring shortfall from compliance with the principle. … The observations of the ECtHR in both Pravednaya and Lizanets call for the requirements of Article 6 to be approached with particular sensitivity where, as here, the outcome of the proceedings favoured a state-owned entity."* ([2011] 2 C.L.C. 71, [35]-[36])

187. Fourthly, the Bank has serious concerns as to the (in)ability of the Ukrainian courts fairly and properly to determine a dispute of this nature, size and complexity:

(1) We explain in detail in paragraph 267 below how D1 was able to obtain an injunction against the Bank and HL on 15.12.17, the day the Bank filed its without notice application. The injunction purported to prevent HL acting for, or being paid by, the Bank, the NBU and the Ministry of Finance. The decision to grant the injunction has already been the subject of scrutiny by the relevant judicial governing authority, the High Council of Justice, which concluded that it was issued in breach of procedural law and that the judge's violations cannot be

explained as a simple mistake. Unsurprisingly, in those circumstances, disciplinary proceedings have been opened against her (Lewis 8 ¶57 [**B2/30.2**]).

(2) Ukraine's Finance Minister has expressed his exasperation that the GPO is "*acting in cahoots with PrivatBank's former oligarch owners to evade financial responsibility for a bailout that has cost the state more than $5bn*" and that "*the unreformed courts had swiftly ruled in favour of PrivatBank's former owners while foot-dragging on legal cases against them.*" (Lewis 2/¶64(e)-(f) [**B1/29**], [**D7/81/18601**]).

(3) Indeed, D1's influence in Ukraine extends beyond the courts. In this regard, we rely upon the nature and timing of the GPO Claims, introduced above. We also rely upon one further aspect of those proceedings, viz. that one of the defendants to the GPO Claims – Dream Company LLC – actually supported the GPO's interlocutory appeal against a decision that the GPO had insufficient standing to bring the GPO Claims. As Mr Beketov puts it (Beketov 3/¶75(d) [**C1/58**]):

> *"The first instance decision was in Dream Company's favour in that it rejected the GPO's claim to recover approximately UAH3.8 billion from Dream Company. I do not know why Dream Company would support an appeal by the GPO in these circumstances."*

188. Finally, this case has real significance beyond the borders of Ukraine: the IMF, which has granted a $18.5 billion loan facility to Ukraine in response to the annexation of Crimea, has stressed the need for *"all available means"* and *"firm efforts"* to be used to recover the monies that were paid from the Bank to related parties controlled by D1-D2: Lewis 3/¶¶243-4 [**B2/30**].

(B) Enforcement

189. We rely upon the points made in paragraph 179*ff* above.

(C) Defamation proceedings not brought to vindicate D1's reputation but to stymie this claim

190. It is clear that the D1 Defamation Claim has been brought precisely for the purpose of seeking to prevent the Bank from bringing its fraud claims in England:

(1) Mr Lafferty freely admits that "*it is however correct that the proceedings* [in Ukraine] *were commenced in order to seise the Ukrainian courts of these issues.*" (Lafferty 2/¶266.6.2 **[B3/36]**).

(2) To put the point another way, there is no evidence that D1 brought the D1 Defamation Claim in relation to other publications critical of his conduct. We refer to articles dated:

5.2.15: "*last summer, Kolomoisky drew out USD1.8 billion abroad*" **[D11/92/23944]**.

20.8.15: allegations of "*siphoning*" of funds **[D11/92/23955]**.

12.7.16: "*how to siphon £1.6bn from PrivatBank and not get punished*" **[D14/92/24838]**.

(3) The same points apply to the D3-D5 Defamation Claims: the notion that these entities genuinely wish to protect a business reputation is absurd.

(4) Indeed, the same points also apply to the Fraudulent Loan and GPO Claims, which the Bank says were instituted at the instigation of D1. The facts set out in the chronology above are striking: the Fraudulent Loan Claims were instituted using stolen signatures and forged documentation in circumstances where the only realistic culprit is D1; and the GPO Claims – which the Bank considers were brought against its interests – were instituted shortly after D1's meeting with the General Prosecutor in Amsterdam.

(D) Other relevant matters

191. There are good additional reasons why the Bank's Claim should continue in England:

(1) Disclosure: there is no general rule for parties to give disclosure in Ukrainian proceedings, although the parties may make specific requests for certain documents and the court may then make an order for disclosure of those documents (Beketov 3/¶63-4 **[C1/58]**). That process compares unfavourably to the standard disclosure requirements in English litigation. And it compares particularly unfavourably to the train of enquiry (*Peruvian Guano*) disclosure that is

often appropriate in fraud cases (see **Hollander**, para 7-43). It would not be in the interests of the administration of justice for the Bank's fraud claims to be determined without proper disclosure from the parties. See the examples given above.

(2) Determination: Mr Beketov suggests that final hearings very rarely take longer than 2 days (Beketov 3/¶66 [**C1/58**]) and that the cross-examination of witnesses is only a procedural possibility (Beketov 3/¶65 [**C1/58**]). Again, the Bank's fraud allegations are highly unlikely to receive proper judicial scrutiny in a hearing of that length (as is demonstrated by the weight of material deployed by D1 for this hearing, for which his time estimate was 35 hours) and/or in a hearing at which an inappropriate length of time is set aside for the cross-examination of the Ds.

(3) Protective measures: the Ukrainian civil courts' power to grant interim attachment orders in favour of the Bank is limited to assets (i) in Ukraine, that (ii) are held directly in the Defendants' names (Beketov 1/¶214 [**C1/56**], Beketov 3/¶67 [**C1/58**]).

(4) Possible delays in Ukraine: Mr Marchenko suggested that D1's claim would be resolved in 6-9 months (Marchenko 1/¶34 [**C2/61**]). Mr Beketov was more circumspect about the likely duration of Ukrainian proceedings (Beketov 4/¶¶15-18 [**C1/60**]). Given that D1's claim was opened on 4.12.17 and has been pending for over 7 months already, it seems Mr Beketov's caution was warranted. Indeed, further delays appear likely as the existing judge in the proceedings, Judge Moskalenko, recently failed her qualification exam. The proceedings may have to be re-started *de novo* before a new judge: Beketov 5/¶35 [**C1/60.1**].

192. In short, the Court should not stay the Bank's Claim in favour of the D1 Defamation Claim: (**1**) the two claims—one seeking damages of $1.9 billion, the other a retraction—are quite different; (**2**) the aspects of the latter claim that concern the Bank are minor and not even disputed on the facts; (**3**) the two claims cannot be heard together and a stay in any event will not eradicate the irreconcilability risk; (**4**) a stay would substantially prejudice the Bank's ability to enforce any judgment it might obtain; (**5**) a stay would otherwise be contrary to the proper administration of justice; and (**6**) even D1 accepts—when speaking to the press, if

not the court—that London is the jurisdiction where the parties should *"openly show everything"*.

(V) The D3-D5 Defamation Claims

193. Here, we make the following submissions:

(1) The D3-D5 Defamation Claims are not pending or related, as is required by the introductory words to Article 34.

(2) It is not expedient to hear and determine the D3-D5 Defamation Claims together with the Bank's Claim in these proceedings (indeed, it is not possible).

(3) The submissions on enforcement and proper administration of justice made above apply equally in this context.

(1) The D3-D5 Defamation Claims are not Pending

194. We explain below why (1) an action is not pending for the purposes of Article 34 until it has been definitely commenced and (2) this is not the case with the D3-D5 Defamation Claims, in relation to which there has not yet been a ruling issued to *"open proceedings"*.

Pending: the law

195. Article 34 is only engaged if the action in the third state (ie Ukraine) was *"pending"* at the time the Member State (England) was *"seised"*. The definition of *"seised"* is provided by Article 32(1) – it makes it clear that the English court was seised with these proceedings on 21.12.17 when the claim form was issued.[65]

196. But the Regulation does not assist with the meaning of the word "pending". As Briggs explains: "…. *There is no formal definition of 'pending' in relation to the courts of a non-Member State. If a formal test is required it may be derived either from Article 32, applied by some form of analogy, or from the law which applied prior to the adoption of the uniform definition of the date of seisin, namely that one asks whether the proceedings are 'definitely pending' according to the law of the state in question.*"[66]

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65 See Dicey at 12-067.

66 Briggs, Civil Jurisdiction and Judgments, 6th Ed., at 2.292.

197. We submit that the court should prefer the latter possibility adumbrated by Briggs:

(1) The Regulation uses two words: *"seised"* and *"pending"*. The drafters must, therefore, have intended them to mean different things.

(2) The court should fall back on the pre-Regulation learning which asked when proceedings were "*definitively pending*" under the laws of the state in which the proceedings were issued: **Zelger v Salinitri (No 2)** [1985] 3 CMLR 366 at [15]-[16].

(3) There are good reasons to maintain a distinction between seisen and pendency for the purposes of Article 34. The Member State court must be "seised", and Article 32 provides a mechanism for determining that date. Article 32 is part of a system of mutual recognition which all Member States have agreed to. But the third state must have "pending" proceedings. There is no good reason to apply a deeming provision in a European regulation for the date of "seisen" to the date on which proceedings are pending in a third state. Instead, the date on which proceedings are pending in a third state should be referable to the law of that third state.

Pending: the facts

198. Proceedings cannot be characterised as "pending" (and certainly not "definitely pending") in Ukraine before an order opening proceedings. Mr Beketov makes the point explicitly: "*until the court issues such a rule, it cannot be said that there are any 'pending' proceedings*" (Beketov 4/¶¶11(a), 14 **[C1/60]**). Mr Marchenko does not address the question of when the proceedings are "pending" (as opposed to when the court is "seised").

199. We rely on the following points:

(1) The Ukrainian experts agree that there is a two stage process at the start of proceedings in Ukraine. First, the claimant files his Statement of Claim with the court. It will be dated and allocated a claim number at this stage. Second, the claim is considered by a judge. The judge may refuse to open proceedings; or open proceedings and make an order for the defendants to file their responses and list a preliminary hearing. The wording of Article 122(5) CCivP is clear: "*the court shall*

issue a ruling opening proceedings or refusing to open proceedings." See Beketov 3/¶¶23-24 [C1/58], Nahnybida 1/¶¶34-42 [C2/64], Marchenko 1/¶¶12-18 [C2/61]. The same two-stage process applies to third party claims in existing proceedings. It is only if the judge rules to open proceedings that the Statement of Claim will be served upon the defendant(s) by the court.

(2) There is a dispute between the experts as to whether the Ukrainian courts are seised with a claim at the first or second stage. Mr Beketov's view is that "a *Ukrainian court is seised only when it has decided that it has jurisdiction and has opened proceedings in relation to the claim*": Beketov 3/¶22 [C1/58], Beketov 4/¶¶8-14 [C1/60]. Messrs Nahynibida and Marchenko disagree and consider the Ukrainian court is 'seised' at the first stage: Marchenko 1/¶¶19, 37 [C2/61], Nahnybida 2/¶18 [C2/66], Marchenko 2/¶¶9-17 [C2/62].

(3) Mr Beketov's view is to be preferred:

a. First, the wording of Art. 122(5) is clear – the court issues a ruling to "*open proceedings*". We have two examples of how that rule operates. D3-D5's 27.10.17 defamation claims were filed with the court but the judge refused to open proceedings (in D5's case, because it had failed to pay the court fee; in D3 and D4's case, on jurisdictional grounds). By contrast, the D1 Defamation Claim was filed and then an order was made on 4.12.17 "*to open proceedings*" [D7/81/18539]. There is a bright line between the two cases: the court was seised in the latter case because the judge determined that it was appropriate to open proceedings.

b. Second, as Mr Beketov explains, until a ruling is given to open proceedings, "*no other court in Ukraine will be prevented from hearing the same claim under the lis alibi pendens rule*" (Beketov 4/¶11(a) [C1/60]). Article 186(1)(3) provides that a judge shall refuse to initiate proceedings if there is a case "*in a dispute between the same parties, on the same subject matter and for the same causes) pending before this court or another court*" [E2/114/26169]. The only way a judge could decide whether proceedings are

"pending" in the same court or elsewhere is if there is an extant order opening those other proceedings.[67]

c. Third, Mr Marchenko's contrary view relies on various other procedural rules which are designed to prevent a claimant from filing multiple identical claims in different courts (Marchenko 2/¶13 [C2/62]).[68] These provisions do not determine when the Ukrainian court is seised (cp Article 122(5), above) – they are intended to prevent abuse of process.

d. Fourth, Mr Marchenko suggests that administrative steps taken by the court (eg, assigning a claim number) are "*binding*" but would be "*rendered meaningless*" if the court was not seised until an order opening proceedings (Marchenko 2/¶14 [C2/62]). On the contrary, determination of jurisdiction clearly does not depend upon administrative processes within the court system.

e. Fifth, Mr Marchenko relies on provisions of Ukrainian law that provide for time to cease to run for limitation purposes from the date the claim is filed (Marchenko 1/¶¶18.2-18.3 [C2/61]). His view is that it would be "*unfair*" if a claimant filed his claim with one court (and had done everything necessary to stop time running) only to find another court seised because the latter had opened proceedings (Marchenko 2/¶15 [C2/62]). Mr Marchenko's assessment of what is "unfair" should not alter the analysis of when the Ukrainian courts are seised. As Mr Beketov points out, there is good reason to differentiate between the date on which time ceases to run for limitation purposes (which depends on action taken by the claimant in filing his claim) and the date on which a court is seised (which depends upon the court actually accepting the claim and opening proceedings): Beketov 4/¶10(b) [C1/60].

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67 Mr Marchenko may be right that this rule creates the possibility of one court being seised because it opens proceedings with greater speed than another, even though the claim was filed in the latter court first (Marchenko 2/¶12 [C2/62]). But that does not mean Mr Beketov is wrong (indeed, a similar interpretation of the rules of seisen prevailed under the Brussels Convention before the introduction of what is now Article 32): See **Briggs** at 2.268 – 2.269.

68 Art 44(2)(2) "*...the court may determine that actions contravening the task of civil justice are an abuse of process, namely: filing several claims against the same defendant(s) with the same subject matter and on the same grounds, or filing several claims with a similar subject matter and on similar grounds...*" and Art 175(3)(10) requiring a statement of claim to confirm that "*he did not file another claim (other claims) against the same defendant (defendants) with the same subject matter and on the same grounds.*" [E5/118/26930].

f. Finally, Mr Marchenko says that the date of seisen has "*nothing to do*" with service on the defendants (Marchenko 2/¶16 [C2/62]). The point made by Mr Beketov is that it is only after the court has made an order to open proceedings that they can be served. In Mr Marchenko's words, the court will not serve "*a defective claim.*" A defendant cannot be served with proceedings which are not even open before the court; it is only once the court is seised that the defendant may be served.

(2) The D3-D5 Defamation Claims are not sufficiently related to the Bank's Claim

200. The D3-D5 Defamation Claims are not sufficiently related to the Bank's Claim for the purposes of Article 34:

(1) The only relief sought by D3-D5 is a retraction by the Bank of statements made by a journalist, based on an alleged duty on the part of the Bank to refute false statements made in the press by unconnected third parties. As Mr Beketov says, the claim is hopeless as a matter of Ukrainian law: Beketov 3/¶¶35-45 [**C1/58**]. (Indeed, it also offends common sense.) Messrs Nahnybida and Marchenko have not challenged that evidence. The Bank's Claim in England cannot be considered to be "related" to hopeless actions in Ukraine (see **Easygroup**, above).

(2) As matters stand, there is barely an "action" ongoing in the D3-D5 Defamation Claims. The Ukrainian court has not ruled to accept the claims and open proceedings; they have not been served on the Bank; and there is a strong argument that the Pechersky District Court does not have jurisdiction in respect of claims between legal entities such as this (Beketov 3/¶¶19-21 [**C1/58**]). It is telling that the Pechersky District Court has already rejected the identical claims filed in October 2017 by D3-D4 on jurisdictional grounds.

(3) In any event, the potential overlap is very limited. D3-D5 complain about one passage in one article which alleges that they were parties to supply agreements under which no goods were delivered, so no collateral was provided for the corresponding loans, and that this caused loss to the Bank [**E7/122/27621**]. However:

a. In the Bank's Claim, D3-D5 have not disputed that (1) they entered into the Supply Agreements and received funds from the Borrowers in relation to those agreements; (2) no goods were supplied under the Supply Agreements so the collateral was never provided; and (3) the Supply Agreements had no commercial purpose. Accordingly, it is difficult to see how D3-D5 intend to dispute the substantive content of the article.[69]

b. The Ukrainian court may determine that the statements, made by a journalist and a newspaper, are value judgments protected by Ukrainian law; alternatively that the journalist and newspaper acted in good faith and exercised reasonable diligence by seeking to verify the accuracy of the information in the article: Beketov 4/¶¶37-41, 46-48, 50 [**C1/60**].

c. In the event the proceedings are opened and the Bank is served, the Bank may defend the claims on the straightforward basis that there is no obligation under Ukrainian law to refute statements made by a third party. If accepted, this would preclude the need for the court to determine whether the statement is false or not (the court could simply dismiss the claim against the Bank as bad in law).

(3) Not Expedient to stay Bank's Claim in favour of D3-D5 Defamation Claims

201. If the D3-D5 Defamation Claims are a related action, it would not be expedient to stay the Bank's Claim in England in order to avoid the risk of irreconcilable judgments.

(1) Risk of irreconcilable judgments too remote: As set out above, the D3-D5 Defamation Claims have barely got off the ground. It would be inexpedient to stay the Bank's Claim in favour of proceedings which have not even been opened or served in Ukraine.

(2) Bank's claims as potential counterclaims: The Bank's fraud claims could not be brought as counterclaims against D3-D5 in the D1 Defamation Claim before the Pechersky Court because that is a civil court. The commercial courts in Ukraine,

69. Mr Nahnybida appears to have overstated the issues which will arise in the Ukrainian proceedings: Nahnybida 1/¶55 [C2/64].

not the civil courts, would have exclusive jurisdiction for the Bank's claims against D3-D5: Beketov 3/¶17 **[C1/58]**, Nahnybida 2/¶25 **[C2/66]**. We have addressed at para 175 above Messrs Nahynbida and Marchenko's arguments that the Ukrainian courts "in practice" allow commercial claims to be joined to proceedings before the civil courts.

(3) Artificial claims: the D3-D5 Defamation Claims have plainly been filed for the purpose of attempting to create a *lis alibi pendens* defence to the Bank's Claim:

a. First, the timing of D3-D5's claims is remarkable. The first standalone set of claims were filed within three days of the article being published online in Ukrainian (24.10.17 – 27.10.17). Their lightning fast reactions must be seen in context: (1) D3-D5 did nothing about articles in November 2014, August 2015 and February 2017 which alleged they may have been involved in the fraud (McNeil2/¶5 **[B3/44]**), esp **[D16/103/25334-25352]**; (2) they have no employees; their only directors are Cypriot CSPs; (3)they state that "*all [D3-D5's] trading activity*" took place under agency agreements;[70] and (4) D3-D5's directors have hardly proved to be quick to react to issues in these proceedings.[71]

b. Second, D3-D5 describe their roles in the fraud as "*purely functional*" and say they have "*negligible assets*" (McNeil 2/¶3.1.5-.6 **[B3/44]**). They do not have any business, let alone "*business reputations*", let alone business reputations in Ukraine to defend. If they did, they might have been expected to issue claims in relation to the earlier articles.

c. Third, D3-D5's attempt to bring the Bank into their proceedings as a third party is obviously artificial. As Mr Beketov explains, and no other expert refutes, the assertion that the Bank had a duty to refute a journalist's statements is fundamentally misconceived.

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70 Korelidou 3/¶6 [B3/45], Tsitsekkos 3/¶6 **[B3/46]**, Savvidis 3/¶6 **[B3/47]**.

71 See for example the 5 week delay in responding to HL's letter to Pinsent Masons dated 26.4.18 (Pinsent's response was finally received on 8.6.18, having sent a holding response on 31.5.18): see **[D3-D8CB/211, 216, 217]**.

202. In short, the Court should not stay the Bank's Claim in favour of the D3-D5 Defamation Claims: (1) those claims are not even pending; (2) even if they are, those claims – which rely on the notion that the Bank has to refute false statements made by unconnected parties – is quite hopeless and/or not sufficiently related to the Bank's Claim; and (3) it would not be expedient or in accordance with the proper administration of justice for a stay to be imposed.

(VI) The New Borrower Proceedings

203. The New Borrowers have brought c.440 sets of proceedings against the Bank. D1 relies on these proceedings as a basis on which the English proceedings should be stayed. He does so without any real analysis of the claims which have been made in Ukraine, preferring instead to make high-level points as to the apparent connection between these proceedings and the Bank's claims in England. That is not the right approach. The Court should scrutinise the proceedings which are said to be related to determine whether or not they justify a stay. That is particularly so where the Court is being asked to stay a $1.9bn claim in respect of which D1 accepts that there is a good arguable case of fraud against him.

204. We make the following submissions, which apply in relation to all of the New Borrower Proceedings, before addressing the "relatedness" of each set of proceedings in turn below:

205. Expediency:

(1) none of the Ds is a party to the New Borrower Proceedings;

(2) as Mr Beketov explains, the New Borrower Proceedings will not give rise to an estoppel as a matter of Ukrainian law which would preclude the Bank pursuing its fraud claims;[72]

(3) similarly, the New Borrower Proceedings – between separate parties – would not give rise to an issue estoppel in these English proceedings as a matter of English law;[73]

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72 [C1/56/1477/¶188ff]

73 The requirement in English law for issue estoppel is that the earlier judgment is given in proceedings between the same parties or their privies. That is not the case here: The Sennar.

(4) the Bank's fraud claims cannot be consolidated with the hundreds of sets of proceedings in Ukraine;[74]

(5) there is a pre-existing and unavoidable risk of irreconcilable judgments, given the number of on-going proceedings in Ukraine relating to the New Borrowers' relationships with the Bank;

(6) D1 appears to accept that, if the Bank is forced to bring its claims in Ukraine, they will run in parallel with the New Borrower Proceedings: there is no reason why the Bank's claims should not run in parallel in England;

(7) it would be perverse to expect the Bank to allege and prove the fraud in each and every set of proceedings in Ukraine *(a fortiori* where the Ukrainian proceedings are "*trivial*"[75] in comparison to the Bank's claims in England);

(8) the Bank should not be penalised for resisting the New Borrowers' claims in Ukraine – importantly, the Bank is not seeking to claim under the 2016 loans so there is no risk of double recovery;[76]

(9) Lewis 1 alleged that "*the Bank suspects that the claims [by the New Borrowers] were brought solely for the tactical, and improper, objective of eliciting a responsive pleadings from the Bank, and eventual Ukrainian court judgments, that might arguably be said to have acknowledged or established the validity of those agreements, and which might therefore permit an estoppel or res judicata type defence to be made to any further challenge to those agreements.*"[77] That allegation is not rebutted or denied anywhere in D1's evidence. It would not be expedient to stay the English proceedings in favour of claims instigated by D1 and D2 for the purpose of muddying the waters in relation to the Bank's fraud claims.

206. Interests of justice: it would be contrary to the interests of justice to stay the Bank's claims in favour of the New Borrower Proceedings in Ukraine.

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74 **[C1/60/1601/¶¶143-144]**

75 Carl Zeiss at 918.

76 Even if the Bank was seeking to recover under the 2016 loans, that should not prevent the Bank also pursuing its tort and unjust enrichment claims (subject to giving credit for any sums recovered): ***Jyske Bank v Spjeldnaes*** (1999).

77 **[B1/24/712/¶444]**

207. Relatedness: We make three general points.

(1) **First,** D1 suggests that the Bank has acknowledged the relatedness of the New Borrower Proceedings in a letter to the GPO seeking the withdrawal of the GPO Proceedings[78]. That is not correct: the Bank recognised that D1 might run the argument he now advances and that such an argument would "*complicate*" the Bank's claims.

(2) **Second,** D1 asserts that "any" proceedings in Ukraine which raise the issue of either the repayment of the Relevant Loans or the status of the Borrowers as "related parties" must be "related actions".[79] But that is wrong and only serves to highlight D1's failure to conduct any proper analysis of the actions themselves.

(3) **Third,** D1's main bases for saying that the proceedings are "related" is that they concern the validity of the 2016 Loans and/or Relevant Loans – he says that, in his defence in these proceedings, he will contend that the loans are all valid. However: (i) D1 does not dispute that other agreements were shams (most notably the Supply Agreements); and (ii) until last week D1 vigorously asserted that the Bank did not have a good arguable case – a point he has now abandoned. The Court can have no confidence that D1 will run a case which depends on the validity of the 2016 Loans or the Relevant Loans.

208. We address each set of proceedings in turn below.

(1) New Borrowers' claims to prevent enforcement of their loans[80]

209. As noted above, the Bank had brought three sets of proceedings against three New Borrowers, but is in the process of withdrawing those claims. The three New Borrowers have brought what are effectively counter claims (albeit in separate proceedings) alleging that the Bank has no right to enforce the 2016 Loans against them.

78 D1's skeleton para 172.
79 D1's skeleton para 175, 181.
80 D1's skeleton para 169(1) and para 175(1).

210. The New Borrowers' complaint is that they have repaid debts of certain Borrowers and the Bank was then supposed to re-register certain security in their favour, but has failed to do so. Those allegations – and the relief sought – that the Bank is "*not entitled to recover* [the 2016 Loan from the New Borrower]"[81] are limited in scope. The best D1 can say is that these proceedings involve an "implicit" allegation that the 2016 Loans and the loans repaid by the New Borrower are valid. That does not mean the proceedings are related actions.

(2) New Borrowers' claims to invalidate addenda to the 2016 Loans[82]

211. There are 35 sets of proceedings in which New Borrowers seek orders invalidating addenda to the 2016 Loans on the basis that the relevant New Borrower's "*general meeting…has not taken any decision on concluding with the Bank the contested Addendum to the contested Agreement…*"[83] The addenda in question brought the date of repayment forward from 2024 or 2026 to 2017. These proceedings, which relate to a technical point as to the validity of the relevant addenda and the powers of the relevant New Borrower to enter into agreements, are not related, and certainly not sufficiently related, to the Bank's fraud claims.

212. Equally, there is no risk of irreconcilable judgments. As the existing judgment in these proceedings makes clear, the relevant point for determination in the proceedings is whether the New Borrower had power or authority to enter into the addendum to the 2016 Loan.[84] In that case, the judge was prepared to find that the addendum was void because the general meeting of the New Borrower had not approved entry into the addendum. In the event, however, he dismissed the claim because the addendum had not been put in evidence.

213. As a result of D1's last-minute decision to give the New Borrower Proceedings a prominence in his application which they formerly lacked, the Bank has not had time to obtain copies of any further judgments in these sets of proceedings. Nevertheless, as is apparent from the one judgment that is in evidence, any decision on the merits of these claims would not be irreconcilable with the Bank's claims in England.[85]

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81 [E/68/7121]
82 D1's skeleton para 169(2)
83 [E/68/7131], quoted at [D6/70/18256/¶4.5]
84 [E/68/7139] (final paragraph)
85 [E/68/7139]

(3) Two claims seeking orders terminating the 2016 Loans[86]

214. In the one claim which is in evidence the New Borrower (Gastel Group LLC) alleges that it used a 2016 Loan to repay the debts of six Borrowers but that, in breach of the relevant Surety Agreement, the Bank failed to deliver *"duly certified copies of documents confirming the obligations of* [the Borrowers under their loans]". Accordingly, Gastel Group seeks termination of its 2016 Loan. As at 16.12.17, the Bank had not filed a defence to the claim. A claim in which a New Borrower alleges a failure by the Bank to deliver documents to it is not related, and certainly not sufficiently related, to the Bank's claims in these proceedings.

215. In any event, the Court should reject the submission that the Bank's claim in England should be stayed in favour of a single claim in Ukraine in which one New Borrower seeks an order terminating its 2016 Loan with the Bank and to which no D is a party.

(4) Claims seeking orders terminating Surety Agreements[87]

216. There are c.110 claims in which the New Borrowers seek termination of the Surety Agreements. The bases of these claims is summarised in Lewis 1/appendix 2.[88] The New Borrowers ask that the Surety Agreements, by which they purported to repay the loans of the Borrowers, be terminated on the basis that the Bank failed to deliver up documents relating to the Borrowers' obligations to the Bank.[89] At the time of the Bank's *ex parte* evidence (i) the Bank had not filed a defence to any of the claims and (ii) one of those claims had been dismissed.[90]

217. The New Borrowers' claims (like other relief sought by the New Borrowers) rely on a limited breach of the Bank's alleged obligations, viz., the delivery of documents to the New Borrowers following repayment of the Borrowers' loans. Although the statements of claim proceed on the basis that the Surety Agreements, the loans to the Borrowers and the 2016 Loans, are valid, the issue of validity of those agreements does not arise. The issue – whether

86 D1's skeleton para 169(3).
87 D1's skeleton para 175(3).
88 [D6/70/18260/¶6.2]
89 [E/68/7199 at 7203]
90 [D6/70/18262/¶6.5], (two other similar cases have also been dismissed).

the Bank is obliged to hand over documents – is a narrow one. It is not related to the Banks' fraud claims.

(5) Claims seeking to affirm rights arising out of repayment of the Borrowers' loans[91]

218. Over 300 separate sets of proceedings have been brought against the Bank in which the New Borrower seeks delivery up of the original loan agreements between the Bank and the Borrower (which were purportedly repaid by the New Borrower) and declaratory relief, effectively seeking subrogation to the Bank's position as against the Borrower in respect of the purportedly repaid loans.[92] As explained in the Bank's evidence for the *ex parte* hearing, by 16.12.17 around 150 of the claims had proceeded to judgment and all had been dismissed and no appeal (as at that date) had succeeded.[93] Again, as a result of D1's last-minute decision to rely on these proceedings, the Bank has not filed evidence as to their current status.

219. These proceedings are not sufficiently related to the Bank's claim. The New Borrowers contend that they have repaid the loans of the Borrowers so that (i) the Bank is not entitled to seek to recover the loan from the Borrower and (ii) the Borrower is obliged to pay the New Borrower. As with other proceedings, there is no issue as to the validity of the relevant agreements, which arises at best implicitly from the relief sought by the New Borrowers.

220. There is no risk of irreconcilable judgments. That can be tested by looking at one of the judgments already given. The best that might be said is that the judgments delivered so far treat the agreements (the loans to the Borrowers, the 2016 Loans, the Surety Agreements) as if they are valid.[94] But that is unsurprising, in circumstances in which (i) the validity of those agreements was not in issue in the proceedings; (ii) at the time the Bank filed its defence it was still investigating the fraud claims; and (iii) the Bank's defence followed a pro-forma[95] used by the Bank's legal department. The judgment does not give rise to an estoppel in Ukrainian law (Beketov 1/¶¶192-194[96]) so the Bank would be free to pursue its fraud claims in Ukraine notwithstanding these judgments. Equally, these judgments – between different parties, in which the question of the validity of the agreements was not and could not reasonably have been raised – do not give rise to an estoppel in English law.

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91 D1's skeleton para 175(2).
92 See [D6/70/18256/¶5]
93 [D6/70/18259/¶¶5.15, 5.18]
94 See, e.g. [D6/70/18258/¶5.11]
95 A version of the pro-forma defence is at [E/68/7178]
96 [C1/56/1478/¶¶192-194].

(6) Fictitious / sham company allegations

221. In two sets of proceedings discussed at (5) above, a New Borrower called Business Prom Innovation LLC ("**Business Prom**") filed an "addendum" to its statement of claim alleging that the Bank refused to transfer rights against the Borrower to it because of "wrongful information" in the media about it being a "fictitious" enterprise.[97] The alleged media publications were not identified.

222. The Bank does not allege in these proceedings that Business Prom is a "fictitious" enterprise (whatever that may mean); nor did the Bank allege that in its defence in the proceedings; and the judgment on Business Prom's claim did not find that it was a "sham company".[98] That judgment is not irreconcilable with the Bank's claim in these proceedings – it is the status of the purported transactions entered into by the New Borrowers (not the New Borrowers' themselves) which are the focus of the Bank's claims.

(7) "related party" / bail-in proceedings[99]

223. As part of the nationalisation of the Bank, certain related party's loans were "bailed in" (the loans were exchanged for newly issued shares, which were immediately purchased by the Ministry of Finance). A large number of individuals and entities that were deemed to be related parties – and thus subject to the bail-in – have brought proceedings challenging their status as related parties: see Lewis 1/¶¶439-441 **[B1/24]**. One of the New Borrowers (Prom Garant Plus TOV) has brought such proceedings. Although D1 originally claimed to rely on all of the 'bail in' proceedings as a basis for a stay, he did not exhibit any statement(s) of claim or provide any detail of the proceedings: Lafferty 2/¶¶204-6 **[B3/36]**, Lewis 3/¶381-2 **[B2/30]**. Even now, despite identifying the Prom Grant Plus proceedings as a basis on which the Bank's fraud claims should be stayed, D1 has not sought to have the statement of claim translated (see D1's skeleton p.69 fn 180).

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97 [E/68/7155]

98 [E/68/7192 at 1797]

99 D1's skeleton para 181(2).

(VII) The other Ukrainian proceedings

224. The Bank's position is that other Ukrainian proceedings are not "related" and do not in any event justify a stay pursuant to Article 34 (or Article 28 LC) and/or *on forum non conveniens* grounds. It no longer appears that the Ds rely on these proceedings, so we address them only briefly below.

(1) Bank's (legitimate) claims against three New Borrowers: one of these has already been withdrawn and the other two are in the process of being withdrawn: see Lewis 3/¶350 **[B2/30]**; Lewis 8/¶47 **[B2/30.2]**. There is, accordingly, no risk of irreconcilability.

(2) GPO Claims and Fraudulent Loan Claims: each of these claims, brought at the behest of D1, has either been withdrawn, is in the process of being withdrawn, or has been dismissed: see Lewis 3/¶352 **[B2/30]**,[100] Lewis 8/¶46 **[B2/30.2]**.[101] There is, accordingly, no risk of irreconcilability and a stay in relation to these claims would be contrary to the interests of justice for the reasons given above.

(3) D1's SPA Claim:[102] It does not appear that D1 takes this claim particularly seriously: the statement of claim did not comply with the Ukrainian civil procedure code and, despite a warning, the deficiencies were not corrected. The statement of claim was duly returned by the court to D1: **[D9/82/19131, 19135]**. This was pointed out in Lewis 3 on 24.4.18 **[B2/30/928/¶372]** but no correction or clarification was given in Lafferty 3 filed on 11.6.18. This claim is no longer live and so can be disregarded.

(4) D1's Surety Claim: D1 says that he has brought proceedings to invalidate undertakings and guarantees given to the NBU, although he does not exhibit the

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100 Of the Fraudulent Loan Claims, 12 claims have been rejected by the court; 16 were accepted by the court and then dismissed without a hearing (although in 10 cases the New Borrower appealed against that decision, and in other cases a counterclaim against the Bank remains on foot); and two claims have been suspended pending resolution of separate proceedings involving the New Borrower and the Bank.

101 One of the GPO Claims has been withdrawn with the permission of the court on 21.6.18, the GPO's applications to withdraw the other three will be determined at a hearing later in the year. Dream Company's counter-intuitive appeal led to a dismissal of the GPO's claim on 26.6.18.

102 On 10.10.17 D1 issued a claim seeking a declaration that the agreement by which D1's shares in the Bank were sold to the Ministry of Finance for UAH 1 was invalid. He contends that the sale agreement amounted to unlawful "confiscation of property": [D12/92/24151, 24156]; Lafferty 2/¶191-7 **[B3/36]**. Note that D1 seeks substantially the same relief in his JR Claim (compare **[D11/92/24126]** and **[D12/92/24159]**).

statement(s) of claim: Lafferty 2/¶¶198-9 [**B3/36**] (again, this was pointed out in Lewis 3 [**B2/30/930/¶378**] but was not rectified in Lafferty 3). Lafferty 2 also refers to 47 other sets of proceedings filed by unidentified parties which are allegedly similar to D1's claim(s), but Mr Lafferty (**1**) does not exhibit any of the statement(s) of claim and (**2**) suggests that 38 of them have already concluded with judgments in favour of the claimant: [**B3/36/1153/¶¶199-201**]. Again, this provides no proper ground for a stay.

(5) Criminal proceedings: There are criminal investigations on-going in Ukraine which appear to concern the 2014 lending scheme and the New Borrowers' loans. They are explained in Lewis 1/Appendix 2/¶7 [**D6/70**]. Although they are purportedly relied on by D1 as a basis for a stay (Lafferty 2/¶¶139-207 [**B2-3/36**]), he provides no detail of the investigations. The Bank has not filed any civil claim in the criminal proceedings and does not intend to do so; and foreign criminal proceedings do not form the basis for the court to stay civil proceedings.

(6) D1's JR Claim:

a. These proceedings are not "related" to the Bank's fraud claims. They relate to the procedure by which the Bank was nationalised. D1 primarily challenges decisions by the NBU and Ministry of Finance (the Bank has been joined as a third party). The nationalisation process is not a feature of the Bank's claims.[103]

b. In any event, and as noted above, nationalisation is also raised in the Defamation and Surety Claims. That risk cannot be alleviated by having the claims all heard together: (**1**) the JR Claim has been brought in the administrative court; (**2**) the SPA and Surety Claims have been brought in the civil courts; (**3**) the Bank's fraud claims would have to be brought in the commercial courts; and (**4**) the actions could not be consolidated: see above and Beketov 4/¶144 [**C1/60**].

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103 Although D1 says he will challenge the nationalisation process as part of his defence to the Bank's claims in England, it is telling that (**1**) he has not sought to argue that the manner in which the Bank was nationalised means the Bank's claims should be struck out as an abuse of process (cp [Lafferty 2/¶¶190]); (**2**) he has given no indication of how that issue would be relevant to the Bank's claims in England; and (**3**) nationalisation decisions are a paradigm example of an act of state: see Dicey at 25R-001, 25-014.

c. In the circumstances, it would not be expedient to stay the Bank's Claim in order to have the claims heard together in Ukraine. It would also be contrary to the administration of justice.

E4. FORUM NON CONVENIENS / SERVICE OUT OF THE JURISDICTION

225. For the reasons given above, *forum non conveniens* is only relevant to D6-D8.

226. D6-D8 challenge service out of the jurisdiction on them. The test for service out requires the applicant to establish (1) a serious issue to be tried on the merits; (2) a good arguable case (meaning much the better of the argument) that the relevant jurisdictional threshold is satisfied; and (3) that England is "*clearly or distinctly the appropriate forum for trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction*": see **VTB Capital plc v Nutritek International Corp** [2012] EWCA Civ 808, [99]-[101] (Lloyd LJ).

227. Serious issue to be tried: this is now conceded, so we need say nothing more about it. We address the remaining two requirements below.

228. Jurisdictional gateway: The Bank relies on the "proper party" gateway under CPR 6 PD B para 3.1. In particular:

(1) The Bank has a good arguable case against D3-D5, the anchor defendants, which it would be reasonable for the English court to try: see paras 52 to 67 above.

(2) D6-D8 are proper parties to the claims against D3-D5:

a. D6-D8 and D3-D5 are joint tortfeasors as a matter of Ukrainian law and (together with D1 and D2) are jointly and severally liable to compensate the Bank for the entirety of its loss under Article 1190 of the Ukrainian Civil Code: see Beketov 1/¶¶49-53, 134 [**C1/56**].

b. If the question is asked "*supposing both* [D3-D5 and D6-D8] *had been within the jurisdiction would they have been proper parties to the action?*"[104] the answer is "yes". The claims against D3-D8 arise from the same factual matrix; are based on the same causes of action under Ukrainian law; the conduct all of the suppliers was orchestrated by the same individuals; and the claims against them will be subject to a "*common investigation*". There is no realistic basis to suggest that, if D3-D8 were all in England, the Bank would start separate actions against D3-D5 and D6-D8.

c. D6-D8 are also proper parties to the claims against D1-D2 for the same reasons.

229. Forum conveniens: if there is to be a trial of the claims against D1-D5 in England, it follows that England is (plainly) the *forum conveniens* for a claim against D6-D8. This is because the principal protagonists, documentation and factual and expert witnesses will be in this jurisdiction. Indeed, were the Bank required to sue D6-D8 separately (presumably in the BVI) there would be the risk of inconsistent judgments: see **JSC BTA Bank v Granton** [2010] EWHC 2577 (Comm), [17], [28].

230. Accordingly, the Bank submits that service out of the jurisdiction on D6-D8 should not be set aside on jurisdictional grounds; and the court should not stay proceedings on a *forum non conveniens* basis.

104 See **Altimo Holdings v Kyrgyz Mobil** [2012] 1 WLR 1804, [87] (Lord Collins).

F. ALLEGATIONS OF MATERIAL NON-DISCLOSURE

F1. ALLEGATIONS OF NON-DISCLOSURE MADE BY D1-D2

(I) Overview

231. On 11.7.18, over four months after D1's set-aside application was made, D1's solicitors wrote to the Bank's solicitors abandoning six of D1's ten original non-disclosure points. It is not difficult to see why this decision has been taken: several of those points support the Bank's case both on jurisdiction and on why the WFO should be maintained.

232. For instance, the saga regarding how D1 was able—on the very day the Bank lodged its without notice application—to obtain an injunction from the Ukrainian courts against HL. Disciplinary proceedings have since been opened against the relevant Judge, whose conduct has been described by Ukraine's judicial governance authority as amounting to a "*gross violation of the law*" [**B2/30.2/¶57**]. This demonstrates (1) that D1 was seeking to derail these proceedings by targeting the Bank's lawyers and (2) the unreliable nature of the Ukrainian judiciary.

233. The four remaining points are each described by D1's solicitors' letter as "*significant misrepresentations and/or non-disclosures*". Indeed, it is said that they all "*appear to have been deliberate*": [**G/144/29106-7**]. D1's evidence goes further. It is said that the "*... inference is inescapable that PrivatBank deliberately concealed the existence of the* [D1 Defamation Claim] *from its English lawyers and in turn from the Court*": see Lafferty 2/¶¶162 [**B2/36**] (although it is notable that this view is not shared by D3-D8 (D3-D8 Skel/¶110).

234. Even now, however, D1's case on material non-disclosure is far from clear. The four points that are said to be pursued in D1's solicitor's letter of 11.7.18 appear to have been reduced to three in D1's skeleton argument. For present purposes, however, and out of an abundance of caution, we will address all four of the points set out in the letter.

235. Each of these points is misconceived:

(1) The **first** complaint relates to "*the exercise said to have been conducted by (or ultimately for) the Bank to follow the money lent to the Ukrainian Borrowers*".[105] This complaint is misplaced: **(1)** the Bank is not making a tracing claim; **(2)** there are clear and compelling transactional links between the funds transferred to the Borrowers and the transfers they made to D3-D8; and **(3)** we are at a loss to understand how this can be described as deliberate non-disclosure or misrepresentation: the I2 Charts are both correct and clear depictions of a "Scheme" that D1 has described as involving "*loops*", "*cycles*", "*conduits*", "*break points*", and "*chains*" that are "*hundreds of transactions long*" – it was seemingly designed to be as difficult as possible to unpack.

(2) The **second** complaint relates to *"the alleged role of the Third to Fifth Defendants, their centrality to the alleged fraud, and the quantum of any claim against them."*[106] This is again misplaced: we have explained above the nature of the roles of D3-D5, *viz.* **(1)** a "*Scheme*" involving the transfer of c. $13 billion to and from Suppliers under cover of Supply Agreements was in operation for a number of years; **(2)** the money stopped being repaid in mid-2014; **(3)** the entities that failed to make 95% of the repayments then outstanding were D3-D5; and **(4)** the Supply Agreements were a very significant part of the fraud.

(3) The **third** complaint is said to concern *"The commercial value of any claim against any of the Third to Fifth Defendants … and the likelihood of any of them having important documents to disclose which were not already available to the Bank."*[107] Our submissions on these points are advanced above. In any event, we are at a loss to see how this can amount to non-disclosure (let alone deliberate non-disclosure) when the issue of D3-D5's assets was expressly addressed by counsel for the Bank at the without notice hearing: Transcript/5:4-7:13 **[A1/17/124]**).

(4) The **fourth** is that there was a *"deliberate"* decision not to disclose *"the range of relevant proceedings before the courts in Ukraine and the scope of the issues to be determined there."*[108] This is again rejected: **(1)** the Bank took extensive steps to disclose c.600 sets of proceedings taking place in Ukraine; **(2)** many of those proceedings were instituted—sometimes fraudulently—at the behest of D1 to seek to prevent the

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105 This point is not relied upon as a self-standing point in D1's skeleton argument.
106 See also D1 Skel/¶¶232-259
107 D1 Skel/¶¶260-265
108 D1 Skel/¶¶270-272

Bank from founding English jurisdiction; and (3) the D1 Defamation Claim was served on the Bank the day before it filed its papers for the WFO and was – entirely understandably – not immediately identified as being relevant to these proceedings and not passed on to the Bank's English lawyers until after the WFO had been granted.

236. Indeed, we note at the outset that D1's skeleton argument is unable to assert that the alleged non-disclosures are all deliberate. It tentatively states, at ¶13(4)(iii), that the non-disclosures were *"... at least in some cases, apparently deliberate"*. D3-D8, for their part, say as follows in relation to the D1 Defamation Claim: *"In the light of the disclosure of other proceedings, it cannot be said that the non-disclosure was deliberate. ..."* (D3-D8 Skel/¶110)

237. If, contrary to these submissions, the court considers that there is anything in the remaining allegations, there is a clear case for the continuation of the WFO:

(1) The Bank has a compelling case on the merits, as is underscored by the nature of the *"Scheme"* (the commercial rationale for which D1 has not explained) and the Ds' volte-face on challenging good arguable case.

(2) The Bank has a particularly strong case on risk of dissipation, as is again underscored by the nature of the *"Scheme"*, D1-D2's conduct in a variety of other contexts, and the way in which D1 and D2 hold their assets (see Confidential Annexes C and D). Again, the Ds' recent decision to shy away from challenging the Bank's case on risk of dissipation speaks volumes.

(3) It would involve manifest injustice and (as Males J has recently put it) a major loss of perspective were the WFO to be set aside.

238. The remainder of this section addresses **(II)** the law (paras 239 to 241), **(III)** the four points maintained by D1 and D2 (paras 242 to 263), **(IV)** the abandoned points and why they assist the Bank on this application (paras 264 to 273), and **(V)** why there is a clear case for the continuation of the WFO (paras 274 to 280).

(II) The Law

239. The principles relating to the duty to give full and frank disclosure are well-known: see the decision of the Court of Appeal in **Brink's Mat Ltd v Elcombe** [1988] 1 WLR 1350, at p.1356-1357. We refer also to the recent summary given by Males J in **National Bank Trust v Yurov** [2016] EWHC 1913 (Comm) at [18]:

> *"... the following points are particularly relevant in the present case:*
>
> *(a) A fact is material if it is one which the judge would need (or wish) to take into account when deciding whether to make a freezing order.*
> *(b) Failure to disclose a material fact will sometimes require immediate discharge of the order. This is likely to be the court's starting point, at least when the failure is substantial or deliberate.*
> *(c) Nevertheless the court has a discretion to continue the injunction (or to impose a fresh injunction) despite a failure to disclose; although it has been said that the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.*
> *(d) In considering where the interests of justice lie, it is necessary to take account of all the circumstances of the case including (without attempting an exhaustive list) (i) the importance of the fact not disclosed to the issues which the judge making the freezing order had to decide; (ii) the need to encourage proper compliance with the need for full and frank disclosure and to deter non-compliance; (iii) whether or to what extent the failure to disclose was culpable; and (iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts.*
> *(e) The interests of justice may sometimes require that a freezing order be continued, but that a failure of disclosure be marked in some other way, for example by a suitable order as to costs."*

240. We draw attention to two further principles. First, that of **proportionality.** Here, the leading authority is the decision of Touslon J in **Crown Resources v Vinogradsky** (unrep, 15.6.01). At pages 4 - 5, 6 and 22 of the official transcript, the Judge observed as follows (emphasis supplied):

> *"... issues of non-disclosure ... in relation to ... a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application ... is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for trial itself. ...*
>
> *Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. ...*
>
> ...

In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion."

241. Secondly, that it is dangerous—particularly in complex cases—to assess a claimant's conduct with the **benefit of hindsight**. We refer, in this regard, to:

(1) **Brink's Mat**, supra, (Slade LJ):

"Particularly in heavy commercial cases, the borderline between material facts and non-material facts may sometimes be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think that the application of the principle should be carried to extreme lengths. In one or two other ... cases ..., I have suspected signs of a growing tendency on the part of some litigants ... [to allege non-disclosure] *as a tabula in naufragio, ... on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience"* (1359C-E)

This, we submit, is a paradigm example of the kind of case Slade LJ had in mind.

(2) **Crown Resources**, supra, (Toulson J):

"In less serious cases, where there is no plausible ground for supposing that the matter would have made any difference or that there was any bad faith on the part of the applicant, to set aside 'pour encourages [sic] *les autres' may not only be unfair on balance between the parties, but may have the effect of encouraging 'les autres' in the unwelcome sense of encouraging applications to set aside by a defendant against whom there was ample ground for the making of an injunction and who has suffered no prejudice by some failure on the part of the applicant to present its application in a way which was as complete and accurate as with hindsight it should have been."* (p. 6)

"... the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. ..." (p. 7)

(3) **Millhouse Capital UK Ltd v Sibir Energy Plc** [2008] EWHC 2614 (Ch) (Christopher Clarke J):

"In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose." ([106])

(III) Points Upon Which D1 and D2 Continue to Rely

(1) Non-disclosure on loss

242. The first complaint made in D1's solicitors' letter of 11.7.18 (dealt with at D1 Skel/¶¶266-269) is as follows:

> *"The exercise said to have been conducted by (or ultimately for) the Bank to follow the money lent to the Ukrainian Borrowers (in particular, the failure of the Bank to consider its own statements of account with alleged recipients of the money – or to reveal the information provided by them – and the unsustainable inferences supporting the allegations as to how the money moved as depicted in the i2 charts in Schedule 6* [to Lewis 1]*)".* **[G/29107]**

243. We reject it for the following reasons.

244. First, the Bank disclosed all material facts and/or discharged its obligation to make all reasonable efforts to disclose matters relating to loss. We rely in this regard upon:

(1) The submissions made at Section E2 above as to why the Bank's case on loss is correct.

(2) The fact that the Spreadsheets which D1 relied upon were compiled by "teams" of people whom he engaged after service of the WFO, a number of whom had worked in the Bank and/or put the "Scheme" together: Lafferty 2/¶¶19-24 **[B2/36]**.

(3) Those teams—with their inside knowledge—were, in the c. 10 weeks before D1's evidence in support of his set-side application was filed, unable to produce (1) diagrams depicting payment chains for more than three Borrowers (Lafferty 2/¶31) or (2) a *"fully worked example"* of D1's double-counting complaint (Lafferty 2/¶47.1) **[B2/36]**.

(4) That is unsurprising: see D1's own description of the Scheme referred to above (schemes, loops, cycles, conduits etc) and in Lafferty 2/¶¶27.1.2, 46, 47.1, 47.2, 47.3, 69, 70, 71 and 102 **[B2/36]**. See also the Bank's uncontroverted evidence that payments were managed using algorithms: Lewis 1/¶19 **[B1/24]**.

(5) The complexity is demonstrated by, for instance, the following pages of D1's Spreadsheets [**D13/92/24619-24620, 24628, 24632, 24641, 24644, 24657, 24667, 24673, 24678, 24689-90, 24696, 24701-02, 24708**] and [**D14/24714, 24729-30, 24736, 24757-58, 24768-70, 24784, 24813, 24834-5**]. To give some further examples:

(a) On 12 December 2013, US $30,000,000 was received by Spircom Investments Ltd, which the same day had moved between 22 companies pursuant to 33 different transfers [**D13/92/24657**].

(b) On 25 February 2012, US $38,000,000 was received by Spircom Investments Ltd, which by the next day had moved between 21 companies pursuant to 37 different transfers [**D13/92/24708**].

(c) On 14 July 2014, US $6,000,000 was received by ZAO Ukrtransitservice Ltd, which by 18 July had moved between 17 companies pursuant to 65 different transfers [**D13/92/24696**].

(6) Indeed, in relation to 17 of the 46 Borrowers, there were so-called "break-points", viz. gaps in the tracing process which it is said has been carried out. The result is that the *"money repaid to the Bank appears to originate from somewhere else"*, an *"effect"* which is *"achieved"* by connecting *"legs"* with what have been dubbed *"compensation payments"*: Lafferty 2/¶70. The Scheme was obviously designed to be as difficult as possible for an outsider to understand.

(7) D1 will, of course, know the purpose underlying the "Scheme". Given that his "teams" were involved at the time, they will presumably know too. But he has not shared that information with the Bank or the Court. The Bank's advisors instead had to interrogate the material themselves.

(8) In these circumstances, the i2 Charts represented as detailed and rigorous an attempt at establishing the position as could reasonably have been expected. Lafferty 2 makes no mention of the same, having seemingly been produced in ignorance of their existence.

245. Secondly, the reasonableness of the Bank's efforts should, we submit, be assessed against the following backdrop:

(1) Many of the top echelons of the Bank's management have either left or been dismissed post-nationalisation: Lewis 1/¶51. Indeed, the job of understanding the way the Bank was run prior to nationalisation was especially challenging for the new management because some employees were reluctant to assist and/or remained loyal to D1-D2: Lewis 1/¶52.

(2) Efforts were also hampered by the destruction of documentation: Lewis 1/¶¶11, 78-91.

(3) There was legitimate urgency to the application. As Mr Lewis explained: "*... the Bank would have liked to take more time to investigate matters relating to this and other frauds allegedly carried out by the First and Second Defendants, but the repeated attempts to bring proceedings in Ukraine (in particular the recent fake claims purportedly brought by the Bank itself) and other matters (such as the recent leaking of information evidenced by the Fieldfisher and Skaddens letters), have meant that the Bank needs to act now.*" (Lewis 1/¶476).

(4) A large number of possible defences and other full and frank disclosure points were addressed by at Lewis 1/¶¶338-346 ('No loss', 'No breach of duty', 'Causation', 'Presumed Validity', 'Statute of Limitations') and 419-473 ('Limitations in the collection and review of potentially relevant documents', 'Foreign proceedings challenging the Bank's nationalisation', 'The role of PwC', 'Lis alibi pendens', 'Estoppel / res judicata', 'Proceedings between the Borrowers, Defendant Suppliers and Bank', 'Ukrainian Criminal proceedings', 'Tatneft injunction', 'The Borrowers' Assets', 'Restructuring negotiations' and 'Other matters raised in the Fieldfisher and Skaddens letters').

246. Thirdly, the Bank is not making a proprietary claim and so D1's complaint that the Bank failed to "follow" (we assume D1's solicitors mean "trace") is beside the point. As we explain above, the Bank's case is founded upon the clear and compelling transactional links between the monies paid out by the Borrowers and the monies received by D3-D8 and not on the basis of proprietary tracing principles.

247. Fourthly, if D1-D8 wish to challenge the Bank's case on loss by explaining the nature of the Scheme[109] and by saying that the loss was sustained pursuant to some other fraud, then they can plead a defence saying as much. This is what the Court of Appeal told D1-D2 in no uncertain terms in **Tatneft**.[110] Indeed, as Toulson J explained in **Crown Resources**, supra: *" ... it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application ... is liable to become a form of preliminary trial."*

248. Fifthly, it lies ill in the mouth of a defendant who has orchestrated such a *"Scheme"* to complain that a bank—which the defendant has accepted has a good arguable case of fraud – should not have the benefit of a freezing order because it had not been able fully to unpack the defendant's fraud at the without notice hearing. This is especially so given that Lewis 1 explained—in the context of Intermediary Loans – that the tracing process was extremely difficult: *"With every further layer of recycling, it becomes more difficult to trace with accuracy which drawdowns of Relevant Loans (or portions of such loans) are being 'repaid' at each stage. The purported repayment of the Relevant Loan drawdowns (i.e. those which were used to pay the Defendant Suppliers pursuant to the Lending Scheme) has been traced as far as possible in the time available to identify the source of funds."* **[B1/24/676/¶308]**.

(2) The alleged role of D3-D5, their centrality to the alleged fraud, and the quantum of any claim against them.

249. Again, rejected: no misrepresentation or non-disclosure.

250. We address this argument in other parts of this skeleton argument as follows:

(1) D3-D5's role and centrality to the fraud: paragraphs 58 to 67.

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109 It is not clear that this is something that falls within the first complaint as set out in D1's solicitors' letter, but it appears as a separate heading at D1 Skel/¶¶266-269, so it may be that it is considered by D1 to be part and parcel of the same complaint.

110 [2018] 4 WLR 14: *"... it would be grotesque if the defendants could evade liability for their fraud by saying they would have committed another wrong by ensuring non-payment. If that really is their case, they can tell the court that in the course of their defence."*

(2) The quantum of any claim against D3-D5: Section E2

251. We deal here with the additional complaints made at Lafferty 2/¶¶277-280 [**B3/36**].

(1) It is said that "*it ought to have been easy for the Bank and/or Kroll to establish where the money had gone (at least in the first stage) and as such that it was no longer under the English Companies' control*" (Lafferty 2/¶279 [**B3/36**])

(2) But the Bank did disclose that: "*... the money was split up and paid on quickly and to a significant number of further companies in such a way that it has not been possible to discover where it now resides ....*": Lewis 1/¶378/fn 82 [**B1/24**]

(3) Indeed, the Bank also disclosed the following points as to the substance of D3-D5:

a. D3: **(i)** it filed accounts under the small companies regime (Lewis 1/¶119); **(ii)** its most recent accounts showed net assets of $12,632 (Lewis 1/¶120); and **(iii)** it has "*no online presence and no website*" (Lewis 1/¶121) [**B1/24**].

b. D4: **(i)** it filed accounts under the small companies regime (Lewis 1/¶129); **(ii)** its accounts to 31.12.14 declared assets of $51,577 (Lewis 1/¶130); and **(iii)** it had "*no online presence or website*" (Lewis 1/¶134) [**B1/24**].

c. D5: **(i)** it filed accounts under the small companies regime (Lewis 1/¶137); **(ii)** its accounts for the year ended 31.1.15 declared assets of $116,981; and **(iii)** it had "*no online presence or website*" (Lewis 1/¶141) [**B1/24**].

252. It is difficult to pin down the points made at D1 Skel/¶¶232-259. We will develop the following points as necessary at the hearing:

(1) The Court was well aware of the fact that there were over 80 companies involved in the "Scheme". It was told as much by Lewis 1, which made express reference to:

a. The fact that there were 35 Suppliers in total, incorporated in a wide variety of jurisdictions: Lewis 1/¶93 [**B1/24**].

b. The fact that there were 46 Ukrainian Borrowers: Lewis 1/¶92 [**B1/24**].

c. The fact that there were 36 companies involved in the 2016 transformation scheme, of which five were potentially relevant: Lewis 1/¶295 [**B1/24**]. The names of those five borrowers—all LLCs—were given, and so the court would have appreciated that they were not English companies.

d. The fact that the Relevant Loans were purportedly repaid by Intermediary Loans or the purported grant of security (which was just more loan recycling): Lewis 1/¶¶307, 320 [**B1/24**].

(2) The i2 Charts produced to the Court were not unreadable: cp D1 Skel/¶237(3).

(3) The i2 Charts are not *"impossible"* to understand: cp D1 Skel/¶240. We refer the Court, in this regard, to Lewis 3/¶¶73-80 [**B1/30**], which describes the i2 Chart for Agroprom [**D6/76/18290**].

(4) It is understandable why, for forensic effect, D1 chooses to focus on AEF as an example. But, as is explained in Lewis 3/¶73(b), AEF *"involves one of the most complex sets of transactions"* [**B1/30**].

(3) The commercial value of any claim against any of D3-D5 and the likelihood of them having important documents to disclose

253. Not accepted.

254. Here, D1 places reliance on the following:

> *"The commercial value of any claim against any of* [D3-D5] *and in particular the existence of any valuable rights they might have against third parties (against whom the Bank might not otherwise have any claim) and which the Bank might seek to enforce by way of appointment of a receiver and the likelihood of any of them having important documents to disclose which were not already available to the Bank."* [**G/144/29106-7**]

255. We address the following points at the following places:

(1) The value of any claim against D3-D5: paragraphs 53 to 55.

(2) Documentation available to D3-D5: paragraphs 56 to 57.

(4) Ukrainian Defamation Proceedings

256. It is correct that the D1 Defamation Claim and the D3-D5 Defamation Claims were not brought to the court's attention at the ex parte hearing. But there was no material non-disclosure in this respect, still less substantial or deliberate non-disclosure (as D3-D8 expressly acknowledge and D1's skeleton argument seems to accept).

257. First, the Bank had no way of knowing anything about the substance of the D1 Defamation Claim until, at the earliest, 14.12.17 (just two clear days before its *ex parte* application was heard).

(1) D1 filed his defamation claim on 1.11.17; it was widely reported in the press that he had done so (some, but not all, articles reported that the Bank was a defendant **[D12/92/24348-56]**); and the Bank noted the claim on the Judiciary Portal[111] on 30.11.17.[112] However, at that point (1) the proceedings had not been opened and (2) the only information about the substantive claim was that it was "*on protection of honour, dignity and business reputation.*" **[E5/118/26979-90]**. The information available did not include the fact that D2-D8 had been named as third parties.

(2) On 5.12.17, the Bank's Ukrainian counsel attempted to access the court file to learn more about the claim, but was refused permission to do so because the court file had not yet been transferred to the court's administrative office (Lewis 2/¶201(e) **[B1/29]**).

(3) On 12.12.17 the order opening proceedings (made on 4.12.17) was made publicly available on the Unified State Register of Court Decisions: Marchenko 2/¶52 **[C2/62]**.

(4) Mr Lafferty boldy asserts that D1's statement of claim could have been obtained from the Court after 5.12.17 (Lafferty 3/¶159(e) **[B3/39]**). That statement is

111 Referred to in Marchenko 1/¶51 **[C2/61]**.

112 Lewis 3/¶201(e) **[B2/30]**

entirely unsupported and the evidence points the other way: the proceedings were opened by order on 4.12.17 but the statement of claim was not available on 5.12.17 – Mr Lafferty has no basis to suggest that it would have been available on 6.12.17 or thereafter.

(5) Accordingly, prior to delivery of the proceedings to the Bank on 14.12.17 there was no practical way for the Bank to know anything about the D1 Defamation Claim. Mr Lafferty is wrong to say the Bank was "*on notice for three weeks prior to the WFO Hearing of a potentially relevant claim brought by Mr Kolomoisky.*" (Lafferty 3/¶157 [**B3/39**]). The Bank was not required to tell the Court *"in addition to the hundreds of sets of Ukrainian proceedings we've told you about, D1 has also filed some defamation proceedings, but we don't know anything about them"*. What could the Court have done with that information other than ignore it? This is a classic example of an issue being identifiable only with the benefit of hindsight.

258. Second, in the absence of any information about the D1 Defamation Claim, the Bank's position that this was not a claim that needed to be brought to the court's attention was also informed by its prior consideration of a defamation claim filed by the Bank's former chairman, Oleksandr Dubilet on 30.10.17, ie the day before D1's claim (Lewis 2/¶201(a)-(f) [**B1/29**]). That claim had been served on the Bank.

(1) Mr Dubilet's claim, like D1's, is for protection of his "*honour, dignity and reputation*".

(2) Mr Dubilet's claim related to a statement made by Mr Shlapak at the press conference on 4.7.17 that Mr Dubilet had exceeded his powers as chairman of the Bank in approving the loans to the 36 New Borrowers [**D10/86.1/21879.210**]. Mr Dubilet contended that Mr Shlapak's statement was false because the loans to the New Borrowers were authorised by the NBU, and he acted at all times within his authority. That is not a claim which would be likely to form the basis of a stay of the English proceedings (Lewis 2/¶201(b) [**B1/29**].

(3) Mr Dubilet is a close associate of D1 (Lewis 1/¶¶31, 72, 417(c) [**B1/24**]). It was reasonable to infer that a claim filed by D1 on the day after Mr Dubilet's claim seeking similar relief as that sought by Mr Dubilet would be substantially similar in content to Mr Dubilet's claim.

259. Third, there was insufficient time between delivery of the proceedings to the Bank's offices and the without notice hearing for the proceedings to be brought to the Court's attention:

(1) The D1 Defamation Claim was received by the Bank's offices in Dnipro on Thursday 14.12.17 [**D10/89/23794**]. It was scanned and saved onto the Bank's systems on Saturday 16.12.17 and uploaded to the Bank's case management system on Monday 18.12.17 (Lewis 2/¶201(g) [**B1/29**]).

(2) In the meantime:

a. On Friday 15.12.17, at about 4pm, the Bank's evidence and skeleton argument in support of the application for the WFO were lodged with the Chancery Division in England.

b. Later that evening, D1 sent his injunction by email to the Bank (on 16.12.17 it was sent by Mr Lafferty to Mr Lewis by email [**D6/78/18364-5**]).

c. As D1 must have anticipated and intended, that put the cat among the pigeons. The Bank and its Ukrainian and English lawyers were heavily engaged over the following two days in dealing with the purported injunction. The Bank produced Lewis 2 and Beketov 2 in response to the injunction late on Monday 18.12.18. That was also the pre-reading day set aside for Nugee J. The Bank's counsel finalised a supplemental skeleton the next morning [**F1/136/28723**-28727].

d. On 19.12.17 the ex parte hearing took place before Nugee J.

(3) Accordingly, this is not a case involving any procedural or other irregularity in relation to the without notice hearing. Rather, it is a case in which – as happens from time to time – evidence which was not available to the court at the time of making the without notice decision has subsequently become available. See, for a recent example of such a case, **Khrapunov v JSC BTA Bank** [2018] EWCA Civ, [42] (Sales LJ).

260. Fourth, the Bank and HL made extensive efforts to give disclosure in relation to on-going Ukrainian proceedings:

(1) The Bank was alive to the fact that the Ds might seek to rely on proceedings in Ukraine as a basis on which the English Court should decline jurisdiction or stay proceedings. To that end, the Bank put before the Court information about c.600 sets of proceedings in Ukraine, see the 12 page Appendix 2 to Lewis 1 **[D6/70]**, Lewis 1/¶¶436-461**[B1/24]**, and 15 pages of the skeleton argument **[F1/135]**. Other proceedings – like Mr Dubilet's claim – were also considered, but on the basis of the available information they were determined to be immaterial for the purposes of the Bank's duty of full and frank disclosure (Lewis 2/¶201(a)-(b) **[B1/29]**).

(2) In other words, there was an extensive process by which Ukrainian proceedings were reviewed for possible lis alibi pendens/estoppel arguments. There was no attempt to shy away from the extant proceedings in Ukraine.

(3) As Mr Lewis explains, the substance of the Bank's claims was not communicated to the Bank until 19.12.17 to avoid tipping off D1 and D2: Lewis 1/¶ 478 **[B1/24]**, Lewis 3/¶202 **[B2/30]**. As we explain below, that was a reasonable position to take in light of the loyalty still owed by many of the Bank's staff to D1 and D2.

(4) Until 19.12.17 the Bank's internal legal department was in no position to assess the relevance of new Ukrainian proceedings to the Bank's English claims. The suggestion that someone within the Bank "*deliberately concealed the existence*" of the defamation claim from HL is absurd (Lafferty 2/¶263 **[B3/36]**). It is unsurprising that the statement of claim delivered on Thursday in Dnipro was not passed to HL by the following Tuesday morning. It was, as Mr Lewis explains, not treated as a priority because **(1)** it was not understood to be relevant to the Bank's application to this Court on 19.12.17 and **(2)** the first hearing in the D1 Defamation Claim was not until 20.2.18: Lewis 3/¶334 **[B2/30]**.

(5) Mr Lafferty suggests that the Bank should have put in place a mechanism for the D1 Defamation Claim to be passed on to HL without any risk of "tipping off" (Lafferty 3/¶160 **[B3/39]**). But **(1)** it is obvious that there was already a mechanism,

in place for proceedings to be passed to HL, which is what allowed HL to prepare extensive evidence on the other Ukrainian proceedings; and (2) Mr Lafferty's proposal assumes that the Bank ought to have known that the D1 Defamation Claim would be relevant or, in Mr Lafferty's words, the "*most important set of proceedings in relation to lis pendens arguments*".[113] There was nothing in the information available to the Bank to suggest that the D1 Defamation Claim would be relevant to the English claims.

(6) One only has to step back to see the incoherency of D1's position. His case has to be that the Bank, having carried out an extensive process to draw hundreds of sets of proceedings to the attention of this Court, deliberately decided to withhold information about one that it knew to be critical, even though, being D1's own claim, it was bound to come out in due course. That hypothesis, it is submitted, is entirely fanciful. Unsurprisingly, it finds no support in the evidence before the Court on this application.

261. Fifth, to the extent that any complaint is made about non-disclosure of the D3-D5 Defamation Claims, that too is unfounded. The claims filed on 27.10.17 were dismissed without proceedings being opened, and the claims filed on 8.12.17 (as third party intervenors in the D1 Defamation Claim), have still not been opened. No statements of claim or other documents had been served on the Bank at the time of the without notice hearing (nor have they been since); and the Bank's internal systems hold no records of either the October 2017 claims or the third party claims: Lewis 3/¶¶338-341 [**B2/30**].

262. Finally, it is telling that D1 did not even mention his defamation proceedings in Fieldfisher's letters to HL on 1.12.17 [**D4/2847**] and 13.12.17 [**D5/3015**].

(1) If he thought those proceedings were so important, he could have mentioned them in the context of letters contending that the English Court did not have jurisdiction in respect of any claims against him.

(2) Indeed, Mr Lafferty could have mentioned them when he notified HL on 16.12.17 of the purported injunction D1 had obtained against HL the day before, and went

[113] Lafferty 2/¶265.3 [**B3/36**]

on to assert that the Bank was *"not entitled"* to instruct HL and that HL had *"no authority"* to act for the Bank. We address this injunction in more detail in the next section of this skeleton argument.

(3) D1 now characterises the defamation proceedings as the "*most crucial*" of c. 600 sets of proceedings in Ukraine; complains about "*egregious non-disclosure*"[114]; and that it "*beggars belief*" that enquiries were not made in relation to his as-yet unserved defamation action.[115]

263. It is obvious what is going on. D1 has latched onto the one set of proceedings which the Bank did not disclose (because it could not reasonably have done so) and is seeking grossly to exaggerate its importance far beyond its objective relevance in a baseless attempt to discharge the WFO. This is, as Slade LJ observed in **Brink's Mat**, a paradigm example of a litigant alleging non-disclosure on a wholly untenable basis "*... as representing substantially the only hope of obtaining the discharge of [an] injunction ... where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.*"

(IV) Abandoned points that assist the Bank's case

264. D1 and D2 have abandoned a large number of full and frank disclosure points, as follows:

(1) "Hogan Lovells' General Approach to Full and Frank Disclosure": Lafferty 2/¶¶249-260 **[B3/36]** (4 pages); Lewis 3/¶¶ 476-485 **[B2/30]** (3 pages).

(2) The Bank's decision to proceed without notice: Lafferty 2/¶¶114-123 **[B2/36]** (7 pages); Lewis 3/¶¶221-233 **[B2/30]** (3 pages).

(3) Non-disclosure in relation to an injunction obtained by D1 from the Ukrainian Court on 15.12.17: Lafferty 2/¶¶215-249 **[B3/36]** (6 pages); Lewis 3/¶¶401-174 **[B2/30]** (21 pages).

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114 Lafferty 3/¶146 **[B3/39]**

115 Lafferty 3/¶158 **[B3/39]**

(4) President Poroschenko's interest in the litigation: Kolomoisky 1/¶¶16-98 **[B2/32]** (25 pages); Lafferty 2/¶¶269-275 **[B3/36]** (2 pages); Lewis 3/¶¶234-252 **[B2/30]** (6 pages).

(5) That there was "*acceptable*" collateral for the Relevant Loans: Lafferty 2/¶¶83-96 **[B2/36]** (2 pages); Lewis 3/¶¶146-220 **[B2/30]** (19 pages); Lafferty 3/¶¶130-142 **[B3/39]** (2 pages).

(6) That there was a "*culpable*" failure to give proper disclosure in respect of storage of documents and data: Koryak **[B3/38]** (8 pages); Pugach **[B3/37]** (8 pages); Lafferty 2/¶¶283-288 **[B3/36]** (2 pages); Lewis 3/¶¶495-531 **[B2/30]** (9 pages); Kazantsev **[B3/40]** (8 pages).

265. A great deal of time and therefore cost has been incurred in responding to these points, which should never have been raised. But the abandonment of some of these points does not render them irrelevant for the purposes of the July hearing. To the contrary, D1's outrageous conduct in relation to the Ukrainian Injunctions and the fact that a large number of Bank employees remained loyal to D1-D2 in December 2017, continue to be important factors in the context of D1-D8's (remaining) full and frank disclosure and jurisdictional complaints.

266. We address these matters below.

The Ukrainian Injunctions

267. The chronology of key events is as follows:

15.12.17 (c. 4pm)	Bank lodges papers in support of without notice application for WFO.
15.12.17 (7pm Ukraine time)	A senior executive of the Bank is notified of an injunction granted earlier that day by Judge Kizyun of the Solomyansky District Court of Kiev (the "**Kiev Injunction**") Lewis 2/¶7 **[B1/25]**; **[D6/78/18348-18353]**. The Kiev Injunction is made against (1) the NBU, (2) the Bank, (3) the Ukrainian Ministry of Finance, (4) HL and (5)

	certain of the Bank's other advisers. It prohibits the Bank and its advisers (including HL) from: • Performing the terms of any agreements that had been entered into which *"directly or indirectly concern and/or affect"* the rights and/or legal interests of D1. • Paying/receiving funds in relation to instructions or agreements which *"directly or indirectly concern and/or affect"* D1's rights and/or legal interests. • Using any of D1's personal data.
16.12.17 (c. 6pm)	• D1's English solicitors provide a copy of the Kiev Injunction to HL *"by way of notification"*. • D1's English solicitors state that the effect of the injunction is that the Bank, the NBU and the Ukrainian Ministry of Finance *"are not entitled to instruct you to act in any proceedings involving* [D1] *and you have no authority to act on their behalf in commencing proceedings against* [D1] *in the English court."* **[D6/78/18364]**
19.12.17 (6pm)	Nugee J grants the WFO. He observes during the course of argument that D1's application for the Kiev Injunction *"... looks like an attempt to derail these proceedings"* (Transcript/205:2-206:1 **[A1/17/174]**).
3.1.18 (6pm)	• The Kiev Injunction is discharged by Judge Kizyun at c. 6pm: Lewis 3/¶¶ 401, 425 **[B2/30]**. • D1 launches an appeal against that decision and pays the Court fee before 6pm the same day, even though his representatives did not attend the discharge hearing: the inference is that he was notified of the decision in advance (Lewis 3/¶434 **[B2/30]**).
4.1.18	• An injunction in like terms to the Kiev Injunction is granted by the Kyivskiy District Court of Odessa (the **"Odessa Injunction"**): Lewis 3/¶439 **[B2/30]**. • D1's statement of claim to the Odessa Court asserts that he *"has not filed any other claims(s) against the Respondents on the same subject matter and the same grounds which exist in this case."* (ibid.) • That was untrue: the Odessa proceedings are materially identical to proceedings before the Kiev Court.[116] The only difference is the addition of a defamation

116 See the prayers for relief at **[D9/82/19146-8]** and **[D/82/19261-2]** and **D1's summary of claim in Kiev proceedings:** *"I consider that [the NBU, PB and its advisers have entered into agreements] in breach of legislation on State (public) procurement which entailed their invalidity and also their subsequent performance without observance of the requirements of law on protection of the Claimant's personal data"* **[D9/82/19142]; D1's summary of claim in Odessa**

	claim against a broadcaster, not a party to the Kiev proceedings, which was necessary to give the Odessa Court territorial jurisdiction.
12.1.18	The Odessa Injunction is discharged: Lewis 3/¶444 [B2/30]
1.2.18	• D1 seeks to institute an appeal against the Kiev Injunction. He is out of time to do so. He therefore lies to the Ukrainian Court of Appeal. • Specifically, he asserts that he only learned about the grant of the Kiev Injunction when he read about it in the media on 20 January 2018: Lewis 8/¶¶54-5 [B2/30.2] and [D10/86.1/21879.179].
12 and 21.2.18	D1 accuses the panel of the Kiev Court of Appeal listed to hear appeals against the Kiev Injunction of bias: Lewis 3/¶431 [B2/30]. Those applications are rejected in short order, but delay the determination of the appeals: ibid and Lewis 3/¶436 [B2/30].
4.7.18	• The Ukrainian High Council of Justice (Ukraine's judicial governance authority) concludes that Judge Kizyun's violations when granting the Kiev Injunction were so *"gross and obvious"* that they went beyond a *"simple judge's mistake"* and amount to a *"gross violation of the law"* (Lewis 8/¶57 [B2/30.2]). • It directs that disciplinary action be taken against her [ibid]. • This is not the first time that Judge Kizyun's conduct has been called into serious question.[117]

268. The saga is instructive for two reasons. First, it shines an unflattering light on the suitability of the Ukrainian Courts to hear a dispute of this kind:

(1) Judge Kizyun's decision to grant the Kiev Injunction was so *"gross"* a violation that it has led to disciplinary proceedings. One obvious explanation for this is that her decision was procured by D1 by improper inducement and/or pressure.

(2) When HL were notified of the Kiev Injunction, D1 was seeking to frighten them off acting for the Bank. This can be seen from the fact that the notification—

proceedings: "*... the Claimant believes that ... the [NBU, PB and its advisers have entered into agreements] in violation of the state (public) procurement procedures, which have led to their invalidation and further performance in violation of the law on protection of the Claimant's personal data.*" [D9/82/19254]

117 For instance, a ruling she issued in June 2015 was found to contain "elements of oath-breaking" (Beketov 1/¶31(a) [C1/56]) and her financial disclosures have been repeatedly questioned (eg "the Candidate's lifestyle did not correspond to her income") (Beketov 1/¶¶31(b) and (c) [C1/56]]

asserting that they had *"no authority"*—was sent not only to Messrs Hardman and Lewis (the partners to whom previous correspondence had been addressed [**D4/2847**]) but also to HL's Washington-based CEO and Senior General Counsel, as well as to the firm's Regional Managing Partner (Lewis 3/¶422 [**B2/30**]).

(3) When the Kiev Injunction failed to have this effect, and Judge Kizyun set it aside on 3.1.18, D1 was given advance notice of that decision so that he could (1) launch an appeal the same day (and thereby argue that the injunction remained in force pending determination of the appeal: (Marchenko 1/¶86 [**C2/61**]) and (2) apply for the Odessa Injunction.

(4) D1 brazenly lied to the Odessa Court when he instituted his claim there: contrary to D1's pleading, that claim made identical allegations to those made in the Kiev Court.

(5) D1 equally brazenly lied to the Court of Appeal when he sought to appeal the Kiev Injunction out of time. The notion that he only learned of the grant of the Kiev Injunction by press report on 20.1.18 is absurd in light of Mr Lafferty's email to HL over a month earlier.

(6) D1 has accused the appeal courts of bias, seemingly for the purposes of delaying the appeal against the Ukrainian Injunctions.

269. Secondly, this conduct is of a piece with D1's wider abuse of the Ukrainian Courts. We rely in particular upon:

(1) The filing of the 30 Fraudulent Loan Claims: see the table at paragraph 166 above.

(2) D1's meeting with the Ukrainian General Prosecutor in Amsterdam on 25.11.17, which was followed by the institution of the GPO Claims.

Employees remaining loyal to D1-D2

270. As was explained at Lewis 1/¶¶13, 15 [**B1/24**]:

"...the Bank's new management is concerned that there are some people still working at the Bank who remain loyal to the First and Second Defendants and so may be willing to pass them confidential information regarding the new management's investigations; as I will explain below, recent events appear to have confirmed those fears are justified. In those circumstances (and without waiving privilege), it has been agreed that the Bank will only be told of the specifics of the claims that are the subject of these proceedings very shortly before the hearing of this application, and, even then, such specifics will only be disclosed to a limited number of people within the Bank whose consent is necessary to authorise the making of this application and the institution of proceedings.

...

In light of the matters set out above, my firm, acting on behalf of the Bank, accepts that it has not been possible to run every single point to ground, especially in the time available. For the avoidance of doubt, however, I confirm that I believe what follows to be a true and materially complete account of the relevant events..."

271. This approach was not questioned by the Court at the without notice hearing and, as noted above, D1's complaints as to "*Hogan Lovells' General Approach to Full and Frank Disclosure*" have rightly been abandoned. As we explain below, by reference to the events of 10.7.17, this approach was entirely justified.

272. The Bank's evidence as to the events of 10.7.17 is as follows:

(1) In summer 2017, the litigation support and forensic IT company Kroll carried out a document investigation and collection exercise at the Bank's offices. The account of the events of 10.7.17 comes from two senior members of the Kroll team. See Lewis 1/¶79 [**B1/24**].

(2) On 10.7.17, Kroll were due to take forensic images of the hard drives of a number of computers located at BOK's offices: Lewis 1/¶80 [**B1/24**].

(3) On arrival, Kroll were told that the offices were not empty, that employees were still working, that they should return later—when it would be quieter—and that they would be contacted in due course to let them know when they could return: Lewis 1/¶81 [**B1/24**].

(4) Kroll went away, did other work, had dinner and waited for the phone to ring. At 11pm they gave up waiting and returned to BOK's offices: Lewis 1/¶81 [**B1/24**].

(5) When they arrived they saw a group of 5/6 individuals, unknown to them, some of whom were *"physically tearing what appeared to be cardboard folders into pieces and putting those pieces into one of several boxes. As Kroll described it, both they and the individuals they encountered were surprised and did not know what do so; a period of silence ensued during which the individuals in the room, saying nothing, spent a few minutes finishing what they were doing then left"*: Lewis 1/¶82 **[B1/24]**.

(6) Subsequent examination of the torn-up material revealed that it related to at least one Borrower: Lewis 1/¶¶83-85 **[B1/24]**.

(7) Kroll asked a cleaning lady to leave the boxes where they were and asked a security guard to lock them in a separate room. But the boxes and torn-up material have not been seen since: Lewis 1/¶86 **[B1/24]**.

273. D1 relied on the evidence of Ms Koryak, who was one of the people doing the shredding. Ms Koryak seeks to explain the events of 10.7.17 away as being *"entirely innocuous"* **[B3/38/1204/¶5.2]**. But Ms Koryak's account does not withstand scrutiny.[118]

118

(1) Ms Koryak says that (1) she was informed on 7.17.17 that a court order had been granted in favour of the Anti-Corruption Bureau of Ukraine ("NABU") entitling them to search and seize certain documents from the Bank; and (2) NABU "… would in practice be likely to take all the documents they found in the office, not only those specifically mentioned or identified in the court order …." (Koryak/¶¶5.5, 5.9 [B3/38])

(2) Ms Koryak also says that she was told on 10.7.17 that the Bank's security department would be visiting on 11.7.17 to "… make an announcement. During my entire time working at PB, I had never received a telephone call like this …. It was unusual and I didn't know exactly what was going to happen next." (Koryak/¶5.7 [B3/38])

(3) Mr Koryak says her reaction to these events was to "… stay late on 10 July 2017 to clean the office up and remove all the rubbish and spare hard copies of documents that had gradually accumulated in the office …." (Koryak/¶5.9[B3/38])

(4) Ms Koryak's evidence therefore accepts that her involvement in the shredding exercise was precipitated by (1) a desire to keep documents away from NABU and (2) an important pending meeting called by the Bank's security department.

(5) We will never know for sure what was destroyed on 10.7.17, but it seems inherently unlikely against this backdrop—and the Bank's good arguable case of systemic fraud perpetrated from BOK's offices—that the late night exercise was an "entirely innocuous" as claimed.

(V) Continuation or re-grant of the WFO

274. If, contrary to the above points, there was any material non-disclosure then:

(1) It was within the margin of error afforded to applications (especially in the highly complicated and sensitive circumstances of this case), and certainly not substantial or deliberate; *alternatively*

(2) The WFO should not be discharged; *alternatively*

(3) The WFO should be re-granted.

275. We rely upon the following matters in support of these submissions.

276. First, though the essential mechanics of the Misappropriation are straightforward enough, the without notice application was one of enormous complexity:

(1) Information had to be collected, collated and translated in relation to each of the 100+ Relevant Loans to the 46 Borrowers and in relation to each of the Relevant and Loan File Supply Agreements.

(2) The compilation of the i2 Charts was an extremely demanding exercise.

(3) Information had to be obtained from the Bank without tipping off employees loyal to D1-D2 as to the nature of the Bank's proposed claims.

(4) The Misappropriation had to be pieced together in spite of the suppression or destruction of relevant documents: see above and Lewis 1/¶¶88-91 **[B1/24]**. Other information, for instance the important Gurieva Spreadsheet, had been deleted and had to be recovered: Lewis 1/¶228-9 **[B1/24]**.

(5) The Bank had to keep abreast of a vast number of Ukrainian proceedings. Many of them were instituted by D1 to seek to stymie the Bank's recovery efforts, including the Fraudulent Loan Claims and the GPO Proceedings.

(6) The Bank and its lawyers had to address the eleventh-hour Kiev Injunction.

(7) There were, as we explain above, a significant number of full and frank disclosure points that were made.

(8) For these reasons, we respectfully submit that the observations of Slade LJ and Toulson and Christopher Clarke JJ in the cases cited above are particularly apposite.

277. Secondly, it cannot credibly be asserted that any non-disclosure was other than entirely innocent.

278. Thirdly, this is a case in which the Bank has a very strong case on the merits. D1 has **(1)** given evidence that D1-D2 were involved in a money-movement scheme, using hundreds of companies and thousands of transfers seemingly directed by algorithm but **(2)** declined to provide any commercial rationale for the same. The Court is not bound to close its eyes to the obvious, even though this case is still at an interlocutory stage: for the purposes of this application it should proceed on the basis that D1-D2 were involved in thoroughly dishonest activity.[119]

279. Fourthly, quite aside from the dishonesty at the heart of the Bank's claim, D1-D2's conduct in other contexts demonstrates that they are not to be trusted. We refer to:

(1) D1's conduct in relation to the Ukrainian Injunctions.

(2) Barling J's conclusions in the **Shulman** proceedings that D2 *"was not being entirely candid"* with the Court in relation to his Swiss living arrangements and only *"came clean"* when he was *"caught out"* by Mr Shulman's solicitors: Lewis 3/¶¶538-9 **[B2/30]**.

(3) The conclusions of the Commercial Court and Court of Appeal in the **Tatneft** proceedings that there is a real risk that D1-D2 will dissipate assets unless restrained from so doing: eg, [2018] EWHC 1314 (Comm), [21].

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[119] Males J adopted this approach in similar circumstances in National Bank Trust v Yurov [2016] EWHC 1913 (Comm), [11].

(4) The nature of D1-D2's asset holding structures: see Confidential Annexes C and D hereto.

(5) The conclusions of the United States District Court for the West District of Virginia that a company owned and controlled by D1-D2, Felman Production Inc, had acted in *"bad faith"* and that its actions reflected *"... a disregard for its obligations of truthfulness and candour to this Court, and to the truth-seeking process that is central to the judicial system"*: (see Lewis 1/¶¶353-5) **[B1/24]**.

280. We respectfully submit that it would be thoroughly unjust and (as Males J observed in Yurov at [87]) involve a *"major loss of perspective"* were the WFO to be discharged.

F2. ALLEGATIONS OF NON-DISCLOSURE MADE BY D3-D8

(I) D3-D5 as agents

281. D3-D5 have served evidence asserting that, when they entered into the Relevant Loan Agreements, they acted as agents. We address that evidence below by reference to the position of D3, though the same points apply (*mutatis mutandis*) to D4 and D5. In particular:

(1) D3 entered into 13 Relevant Supply Agreements between June and August 2014, pursuant to which it agreed to deliver to two Ukrainian cities industrial equipment including 219 heavy excavators, 96 crawler cranes, 61 wheel loaders and 115 concrete pumps. Those Supply Agreements did not suggest that D3 was acting as agent. In return for supplying the equipment, D3 was to be paid $509 million: POC/Schedule 2 [**A1/2**]. Of this sum, it received prepayments of $474.7 million: POC/¶60(a) [**A1/2**]. And, as is explained above, it has not returned any of these prepayments or supplied anything at all.

(2) D3 now says that it entered into an agency agreement with a BVI company called Hangli International Holdings Ltd on 13.3.14 (**"Hangli"** and the **"Hangli Agreement"**) [**D16/103/25409-25416**]. Moreover, the evidence given on behalf of D3 and its directors is that the Hangli Agreement is *"valid and binding"* (McNeill 2/¶9.3 [**B3/44**]). This is, with respect, very difficult to accept:

a. Hangli? Beyond its name, place of incorporation and the assertion in the documents that Hangli *"wishes to carry on* [a] *worldwide export and import trading business"* [**D16/103/25410**] the Court is left in the dark. Does Hangli, for instance, have a website, telephone number, offices, warehouses, workforce, experience in acquiring excavators/cranes/loaders/pumps (or anything whatsoever), or the wherewithal to deliver such products to Ukraine? And who is Hangli's ultimate beneficial owner?

b. Why was D3 willing to assume personal liability on the 13 Relevant Supply Agreements? Those agreements do not begin to hint that D3 was entering into them as agent: Lewis 2/¶81 [**B1/29**]. It was, accordingly, personally liable in the event that Hangli failed to provide the requisite excavators, cranes, loaders and

pumps. So how might D3 have thought that this was a remotely sensible thing to do? We draw attention in this regard to:

i. Hangli's lack of financial (or any other) standing: see above.

ii. The absence of any security in D3's favour.

iii. The fact that D3 dissipated the $474.7 million of prepayments it received to third parties on the day of receipt—shouldn't this have been paid to Hangli so that the necessary industrial equipment could be bought?[120]

iv. D3's paltry $20,000 per quarter agreed remuneration.[121] Indeed, it is clear that this sum was not paid as provided for by the three purported agency agreements (the "**Agency Agreements**"). Between 2014 and 2016, and according to their own figures, D3 received $27,100, D4 received $45,642 and D5 received $5,200: McNeill 4/¶5.9 [**B3/50**].

c. Why did Hangli fail to deliver the excavators, cranes, loaders and pumps? Did they suffer financial hardship, a capsized ship, a strike at a manufacturing plant or an industrial equipment price spike? If so, this is the type of thing a company accused of involvement in a vast fraud might think it sensible to mention.

d. What did D3 do to make recoveries from Hangli? D3 was sued by the Borrowers in 2014.[122] But it failed to join Hangli to the proceedings and has seemingly taken no steps since to enforce its wide rights of indemnity against it.[123]

(3) In the absence of any answers to these simple questions, the Bank invites the Court to treat the Hangli Agreement (and the other like agreements) with caution.

(4) There is a further point in relation to D4's alleged agency agreement with Brimmilton Ltd ("**Brimmilton**") [**D16/103/25394-25400**]. Brimmilton's

120 Article 5.4 of the Hangli Agreement explains that D3 could only remit funds to a third party *"according to the written Instructions of Principal"* [D16/103/25413]. But no such instructions have been disclosed.

121 See Article 6.1 of the Hangli Agreement [D16/103/25413].

122 See Lewis 1/¶¶275-8 [B1/24]; Lewis 2/¶185 [ref]

123 See Lewis 2/¶¶110-1 [B1/29] and Article 7 of the Hangli Agreement: *"The Principal shall have the obligation to indemnify and keep the Agent harmless at all times ...."* [D16/103/25414].

beneficial owner is, according to KYC documents submitted to the Bank, a Julia Lykhachova (Lewis 2/¶150 **[B1/29]**). But Ms Lykhachova also acted as a director of two of the Borrowers and as the beneficial owner of a Supplier (Lewis 2/¶¶151-3 **[B1/29]**. Such a tangled web points towards D1-D2's common beneficial ownership.

282. It is on the basis of this profoundly unsatisfactory evidential foundation that D3-D5 seek to criticise the Bank for not telling the Court that they may have acted as agents (McNeill 2/¶3.2.6 **[B3/44]**). There is nothing in this point:

(1) The first criticism made is that there was *"some evidence"*, in the form of *"Fact Sheets"*, to suggest that the Bank was aware that D3-D5 were acting as agents when they entered into the Supply Agreements (McNeill 2/¶¶9.5-9.7 **[B3/44]**). As to this:

a. Taking the *"Fact Sheet"* for D3 as an example, this document:

i. states that *"Collyer Limited"* is *"acting as agent"* **[D16/103/25420]**. Collyer is, of course, D5 and not D3, something that Mr McNeill asserts is *"presumably a mistake"* (McNeill 2/¶9.5 **[B3/44]**);

ii. depicts Hangli as <u>buying</u> and not <u>selling</u> equipment **[D16/103/25419-20]** and states that Hangli is a *"main partner byers* [sic.]*"* of D3 **[D16/103/25417]** – but Hangli is said by D3 to be the undisclosed seller under the 13 Relevant Supply Agreements entered into by D3;

iii. does not mention Hangli at all under the description *"Main partners sellers"*. Instead a BVI and a Belizean company are mentioned, with whom it is said D3 engages in *"trading and agency activities"* **[D16/103/25417]**; and

iv. gives a diverse range of activities for D3: *"Agency activities, <u>trading with equipment</u> and other commodities"* (said to be its "Main Activity") and *"Consulting services, investment holding, Trading with shares"* (said to be its "Additional Activity") **[D16/103/254517]**, <u>emphasis supplied</u>.

b. We suggest that Mr Lewis is right to conclude that *"… it is hard to see that any firm conclusion could have been drawn from this document at all. Rather, as with many of the documents the Bank has examined …, the haphazard and contradictory way in which information is presented is indicative of an attempt to conceal the fraudulent scheme that the Bank alleges by fabricating documents to sit on the Bank's files."* (Lewis 2/¶93 **[B1/29]**).

c. A number of similar points can be made about the 'Fact Sheets' for D4 and D5 (see Lewis 2/¶¶95-103 **[B1/29]**).[124]

(2) It is then said that D3-D5's publicly available accounts *"are consistent with them acting as mere agents"*. True, but the nature of D3-D5's accounts was set out at Lewis 1/¶¶118-9, 129-130, 137 **[B1/24]**.

(3) Lewis 1 also mentions that D3-D5 had told Companies House that they carry on the business of *"a non-trading company"* (D3, **[B1/24/634/¶117]**), *"other service activities not elsewhere classified"* (D4, **[B1/24/637/¶131]**) and *"other business support service activities not elsewhere classified"* (D5, **[B1/24/638/¶136]**). Significantly, D3-D5 did not tell Companies House that they were agents.[125]

(4) In any event, the agency point leads nowhere. As has been conceded, the Bank will still have good claims against D3-D5 even if they did act as undisclosed agents.

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124 In particular:

(1) D4's Fact Sheet states that Brimmilton Ltd is its *"Main partner … seller …"*, but does not say that its relationship with Brimmilton is one of agency **[D16/103/25422]**.
(2) D5's Fact Sheet states that its "Main Activity" is not limited to the provision of agency services but extends to *"trading with iron ore and other commodities"* **[D17/103/25424]**.
(3) D5's Fact Sheet *"Main partners sellers"* include Brimmilton (ie D4's alleged principal).
(4) D5's Fact Sheet does not mention its alleged principal, Collard Securities Limited, at all **[D17/103/25424]**.
(5) D5's Fact Sheet suggests that it did not act as an agent for sellers at all **[D17/103/25427]**, contrary to its case on this application.
(6) [redacted]

125 This is despite there being a variety of SIC codes that they could have used. For instance: *"Agents involved in the sale of fuels, ores, metals and industrial chemicals"* (SIC code 46120, which would have been particularly apposite for D4), *"Agents specialised in the sale of other particular products"* (SIC code 46180) or *"Agents involved in the sale of a variety of goods"* (SIC code 46190). See further http://resources.companieshouse.gov.uk/sic/.

"I was only doing what I was told" is no defence to involvement in a fraud on an industrial scale.[126]

(II) The tracing exercise

283. The next set of points taken by D3-D8 concerns a so-called tracing exercise conducted using D3-D8's bank statements: see McNeill 2/¶¶10.1 to 10.27 **[B3/44]**. The main complaint seems to be that the Bank did not tell the Court that D3-D8 no longer had the money that was transferred to them. But that is incorrect:

(1) Lewis 1 said: '[T]*he Bank has attempted to discover what happened with the funds paid to* [D3-D8], *and has some information in that regard as the money was paid to them in PrivatBank Cyprus accounts. It appears, however, that the money was split up and paid on quickly and to a significant number of further companies in such a way that it has not been possible to discover where it now resides* ...' Lewis 1/¶378/fn 82 **[B1/24]**

(2) After debate with the Bank's counsel, the Court observed: "... *the mere fact they don't have assets under their control at the moment does not mean it's a waste of time suing them. ... And there will be directors of English companies and there are procedures, if you get a judgment against English companies, for finding out what's happened to their assets.*" (Transcript/5:21-23 **[A1/17/124]**).

284. The remaining points made by Mr McNeill can be dealt with briefly.

McNeill conclusion	Bank's response
"... *it is unlikely that anyone seeking to misappropriate a bank's funds would do so by arranging them to be transferred from one account held with that bank, to another account held with that bank, and then to a third account held with that bank ....*" (McNeill 2/¶10.24 **[B3/44]**)	• This is not at all unlikely if the perpetrators of the fraud own and control the bank in question. • Good arguable case has been conceded.

126 "*No one can escape liability for his fraud by saying: 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.*'": Standard Chartered Bank v Pakistan Shipping [2002] 1 AC 959 at [22], [40].

The Bank did not *"candidly disclose"* whether it had conducted a wider tracing exercise; *"if it did, it should present the results of that exercise; if it did not …, it should explain why it was unable to do so, or chose not to do so."* (McNeill 2/¶10.25 **[B3/44]**)	• The Bank did give the relevant disclosure: see above.[127] • In any event, the Bank does not bring a proprietary claim and so this complaint goes nowhere.
The Bank *"decided to present the evidence in such a way as suggested that the monies could not be traced any further than* [D3-D5]" (McNeill 2/¶10.26 **[B3/44]**)	• The Bank did not "decide" to present the evidence in a misleading fashion. Proper disclosure was given: see above.
D3-D5 *"… are no more 'central' than any of the other 200 companies involved in the offshore structure."* (McNeill 2/¶10.27 **[B3/44]**)	• This is not so: see paras 58 to 66 above.

(III) Summary

285. In summary, there is nothing in D3-D8's non-disclosure points: **(1)** the Fact Sheets are confused and confusing; **(2)** D3-D5's evidence of agency is on analysis supportive of the Bank's case; **(3)** the agency point goes nowhere because the Bank still has good claims even if D3-D5 acted as undisclosed agents; **(4)** the Bank disclosed that D3-D8 no longer held the Relevant Funds and the Court proceeded on this basis; and **(5)** there is nothing to the other miscellaneous complaints.

[127] In order to assist the Court, Lewis 2/¶163 **[B1/29]** provides further information as to the Bank's investigations in this regard.

G. CONTINUATION OF THE WFO

286. The only remaining point is put as follows in D1's solicitors' letter of 11.7.18:

> *"...you will also have noted from paragraphs 12 to 18 of Lafferty 3 that Mr Kolomoisky contends that your client has grossly exaggerated the claim against him and his co-defendants and that, in the unlikely event that the Bank persuades the Court that the WFO against him should be maintained or a new one granted in its place, the value of the WFO should be substantially reduced."* [G/144/29106-7, emphasis supplied]

287. The proposed alternative maximum sum was provided when D1 and D2 served application notices simultaneously with their skeleton arguments. Those notices seek an order that the maximum sum specified in the WFO be reduced from $2.6 billion to $245.5 million [**A1/10.2** and **10.3**]. They give a time estimate of 2 hours for their applications and rely on Lafferty 2 and Lafferty 3, and in particular Lafferty 3/¶¶104-129. As we explain above, we deprecate such a substantial eleventh hour change to the scope of the set-aside applications made by D1-D2 over four months ago.

288. The latest applications should be dismissed for the reasons which follow.

289. First, for the reasons advanced in Section E2, the Bank has a good arguable case for $1.91 billion plus interest. Indeed, there is a case that the maximum sum should be increased to account for interest that has fallen due since December 2017.

290. Secondly, the paragraphs of Lafferty 3 that are relied upon *"in particular"* do not withstand analysis:

(1) The first point, at Lafferty 3/¶106, seems to be that insofar as the monies advanced under the Relevant Loans have repaid other fraudulent lending then they have not caused the Bank loss. This is wrong:

a. As a matter of logic: if £X is lent under an early fraudulent loan and £X is lent under a later fraudulent loan, the Bank's loss after the later fraudulent loan is £2X; if the earlier loan is then discharged with the later loan monies, and such discharge is accepted by the Bank, the Bank's rights against both the prior borrower and those who procured the prior fraudulent lending (here D1-D2)

are brought to an end; but the Bank has still suffered loss of £X, which can only be referable to the later loan. See further Section E2 above.

b. As a matter of Ukrainian law: see the uncontroverted evidence of the Bank's Ukrainian law expert found at Beketov 5/¶¶13-15 **[C1/60(1)]**.

c. As a matter of fairness to the victim of a fraud: we refer, in this regard, to the observations of Lord Steyn, Nourse LJ and Etherton C at the end of Section E2 above.

(2) The next point is that *"in due course, should this case proceed to a Defence being filed,* [D1 will say that the Relevant Loans were repaid with legitimate lending]" (Lafferty 3/¶109). This may be D1's case in due course. But as things stand the Court has the Bank's un-contradicted evidence that the later purported repayments were illegitimate: see Lewis 1/¶¶290-323 **[B1/24]**.

(3) The third point concerns a spreadsheet which is referred to at Lafferty 3/¶112 but not exhibited. It was requested on 22.6.18 and not supplied for a further week. It is, frankly, pretty impenetrable, not least because it contains a good deal of foreign language (eg *"Saldo"*, *"Нефтебазы"*, *"Инвестгрупп ООО"* etc). That said, the rough and ready calculation—seemingly based on three currency exchange dates[128]—that the Relevant Borrowers had outstanding borrowings of c. $2 billion as of 10.9.14 is (subject to point (2) above) entirely consistent with the Bank's case. On these figures, it is suggested that c. $395 million of the Relevant Loans had been repaid by Intermediary Loans by 10.9.14. That is again consistent with the Bank's case. The remaining points at Lafferty 3/¶¶114-119 are again—on the rough figures (and again subject to point (2) above)—entirely consistent with the Bank's case on the use of Intermediary Loans, purported repayment via the use of security (which in reality was funded by further Intermediary Loans) and the 2016 transformation scheme.

(4) The next section of Lafferty 3, found at ¶¶120-129, addresses D1's *"alternative"* case. This also depends on the point that discharge of a prior fraudulent loan by

128. This is a more significant point than it might first appear: the Hryvnia devalued from c. 8 to the $ on 1.4.13 to c. 13 to the $ on 10.9.14 and then to c. 26 to the $ on 30.3.16.

a later fraudulent loan means that the Bank has suffered no loss. That is wrong—indeed would be a fraudster's charter—as we explain above. Furthermore:

a. Even on D1's analysis, the point only works if D1 accepts that the Relevant Loans together with loans to 150 other borrowers—all granted whilst he and D2 were in control of the Bank—were fraudulent (why else would loans be advanced to what D1 describes as *"worthless borrowers"*?). But there is no evidence from D1-D2 accepting as much. To the contrary, D1 *"... vigorously denies any allegations of fraud made against him."* [Lafferty 3/¶16] [B3/39]

b. The point seems to be made that Relevant Loans were discharged using monies advanced under other Relevant Loans. But this is not correct; as explained above, the Relevant Loans were in fact repaid using Intermediary Loans. In any event, this point is not properly particularised, so it is impossible to refute this point in detail.

c. Though a point of detail, D1 seeks to reduce the Bank's loss by $40.4 million to account for *"transaction costs, currency exchange costs and minor discrepancies"*. That is a bit rich: these were incurred because of D1-D2's fraudulent money circulation scheme, which routinely involved making scores of payments between scores of companies on the same day.

291. Thirdly, D1-D2 ran a somewhat similar point in the **Tatneft** proceedings. There they said: if we had not concocted the pleaded scheme, we would have found some other way to commit the fraud, so there is no loss. We refer once again to the observations of the Court of Appeal in **Tatneft** that are cited above. See also [62], where the Court of Appeal observed that *"Causation is essentially a factual matter and it requires a clear case for it to be determined summarily"*. Ditto here: if D1-D2 really want to say that the fraud the Bank complains of caused no loss because the loss had already been sustained pursuant to a prior fraud, they can tell the Court that in the course of their defence.

292. Fourthly, return dates should not become mini-trials. *A fortiori*, they should not become mini-trials of the highly complex money circulation schemes. The point is amply demonstrated by the fact that D1 cannot make up his mind as to the maximum loss that the Bank might have suffered. Compare:

(1) Lafferty 2/¶103: *"… at its highest, the Bank's claim could be for a maximum of US$366 million".*

(2) Lafferty 3/¶129: *"… USD245,530,884 was paid thorough the Corporate Defendants and therefore this must be the maximum net loss suffered by the Bank."*

293. It is also shown by the various inaccuracies and qualifications contained in, and omissions from, D1's own evidence:

(1) The rationale for the "Scheme".

(2) Lafferty 3/fn 4: *"In Lafferty 2, I had calculated this sum at USD 366 m. As explained in Annex D there were a small number of omissions in Schedule 3B which induce this error, but the true sum is USD 327 m – as reflected in an updated version of Schedules 3A and 3B"* **[B3/39/1226]**.

(3) As we explain in Section E3 (para 112(3)) above, the contention in Lafferty 3 that *"money passes through a series of near-empty bank accounts, all on the same day, and has no possible alternative source"* (¶49(a)) is gainsaid by the very example he gives a few paragraphs later.

(4) Lafferty 2/¶31: *"… In the time available, it has not been possible to produce such a diagram for every relevant transaction".*

(5) Lafferty 2/¶47.1: *"Given the complexity of this double-counting, and in particular that the relevant payment chains which demonstrate it could be tens or even hundreds of transactions long, it has not been possible in the time available comprehensively to identify all the double-counting, or produce a fully-worked example."*

(6) Lafferty 2/¶80: *"… in the time available, it is accepted that there are still some imperfections in the Spreadsheets. It is therefore entirely possible that the discrepancies can in fact be explained with sufficient time to conduct the relevant accounting exercise, which has simply not been possible yet.*

294. So even on D1's case, this is not a point that the court is in a position definitively to determine without further time being devoted to the exercise. It should therefore be left to trial and, in the meantime, the just and convenient approach is for the court to maintain the WFO at its current level.

295. Fifthly, when abandoning their client's challenge to good arguable case, D1's solicitors explained that D1 accepted that the evidence before the Court *"passes the (very low) threshold required to establish good arguable case"*. This is, presumably, a reference to Mustill J in **Ninemia Maritime v Trave** [1983] 2 Lloyd's Rep 600, 605: a good arguable case is one that is *"more than barely capable of serious argument, and yet not one which the judge believes to have a better than fifty per cent chance of success"*. For the reasons already given, the Bank's case on loss comfortably surmounts this threshold.

296. The WFO should, accordingly, be maintained at the level of $2.6 billion.

Stephen Smith QC
Tim Akkouh
Christopher Lloyd
Emma Williams

Erskine Chambers
20 July 2018

SCHEDULE 1: Glossary of terms

DEFINED TERM	DEFINITION
Agency Agreements	Purported agency agreements between (i) D3 and Hangli International Holdings Ltd (ii) D4 and Brimmilton Ltd and (iii) D5 and Collard Securities Limited.
Bank	The Claimant and Respondent.
BOK	The customer service business department of the Bank, from which the Relevant Loans appear to have originated. Headed by Ms Gurieva, a trusted confidant of D1 (Lewis 1/¶59-60)
Borrowers	46 Ukrainian companies who were advanced loans by the Bank which were used to make payments to the Suppliers.
D1 Defamation Claim	A defamation claim filed by D1 on 1.11.17 to protect his "*honour, dignity and reputation*" by seeking the retraction of various allegedly defamatory statements published by an online magazine on 6.10.17 and 24.10.17.
D3-5 Defamation Claims	Defamation claims brought by D3-D5 within the D1 Defamation Claim. The D3-D5 Defamation Claims are identical to the defamation claims previously filed by D3-D5 on 27.10.17.
Fraudulent Loan Claims	The 30 claims issued in the Bank's name between 22.11.17 and 13.12.17 against the majority of the New Borrowers, which were not authorised by the Bank and which bore the forged signature of a member of the Bank's legal department.
GPO	The Ukrainian General Prosecutor's Office.
GPO Claims	Proceedings instituted against five of the New Borrowers by the GPO in December 2017
Gurieva Spreadsheet	A spreadsheet found on the deleted hard drive of Ms Gurieva, the head of the BOK lending department, which lists all of the 46 Borrowers and the payments made to the Defendant Suppliers. (Lewis 1/¶228-231)
Hangli Agreement	The Agency Agreement between D3 and Hangli International Holdings Ltd dated 13.3.14
HL	Hogan Lovells International LLP, the Bank's solicitors.
I2 Charts	Charts depicting the use of relevant drawdowns under the Relevant Loans (ie how they were used to make the Unreturned Prepayments) and the purported (but illegitimate) repayment of those funds. (Lewis 3/¶¶55 and 69)

IMF	The International Monetary Fund.
Intermediary Loans	Funds drawn-down under loans issued to either the same Borrowers or to other borrowers of the Bank prior to the implementation of the Transformation Plan, which were purportedly used to repay certain of the Relevant Loans. (Lewis 1/¶307)
Kiev Injunction	An injunction obtained on 15.12.17 by D1 in the Solomyansky District Court of Kiev purportedly prohibiting the Bank and its advisors, including HL, from (inter alia) bringing, or acting for the Bank in, proceedings against D1 anywhere in the world.
Loan File Supply Agreements	Alternative versions of the Supply Agreements found on the Bank's loan files, which required delivery of goods prior to payment, and which appear to have been used by the Bank to try to make the security in support of the Relevant Loans appear more substantial than it was. (Lewis 1/¶253)
Luchaninov Email	An email dated 31.3.15 from Dmitry Luchaninov to Yuri Pikush requesting that directors of 24 of the Borrowers be removed to disguise the fact that such companies are related to D1 and D2 (Lewis 1/¶¶107-114). The Luchaninov email is at **[D1/68/1990-1999]**
Misappropriation	The fraudulent scheme by which the Ds misappropriated US$1.91 billion from the Bank.
NBU	National Bank of Ukraine.
New Borrowers	The 36 companies who received c. US$5 billion from the Bank between 20.10.16 and 16.11.16, which funds were used in purported repayment of loans outstanding to 193 companies as at the date of implementation of the Transformation Plan (including 42 of the Borrowers). (Lewis 1/¶293-297)
New Borrowers Proceedings	c. 440 claims brought by the New Borrowers against the Bank in the Ukrainian Courts (excluding the GPO Claims and Fraudulent Loan Claims) (Lewis 1/¶446(d) to (f))
Odessa Injunction	An injunction in like terms to the Kiev Injunction granted by the Kyivskiy District Court of Odessa on 4.1.18.
Relevant Loans	Loans advanced to the Borrowers, drawdowns under which were used to make Unreturned Prepayments to the Defendant Suppliers under the Supply Agreements. (Lewis 1/¶92-100)
Relevant Supply Agreement	The 54 Supply Agreements between the Borrowers and D3-8 by which the Unreturned Prepayments were made.
Suppliers	The 35 companies (including D3-8) that received payments from the Borrowers under the Supply Agreements. All of the Suppliers except D3-D8

	returned these payments to the Borrowers in full following non-delivery of goods under the Supply Agreements. (Lewis1/¶92-100)
Supply Agreements	The agreements (including the Relevant Supply Agreements) entered into between the Borrowers and Suppliers pursuant to which the Borrowers contracted to acquire and the Suppliers contracted to provide large quantities of commodities and industrial equipment.
Surety Agreements	Agreements between the New Borrowers and the Bank pursuant to which the New Borrowers agreed to repay the amounts outstanding under certain loan agreements with 193 borrowers (including 43 of the Borrowers). (Lewis1/¶301)
Unreturned Prepayments	Prepayments made by the Borrowers to D3-8 that were not returned, totalling approximately US$1.91 billion.
Ukrainian Injunctions	The Kiev Injunction and the Odessa Injunction.
WFO	A freezing order granted without notice by Mr Justice Nugee on 19.12.17 and continued on an interim basis by Mr Justice Roth on 15.1.18.

CONFIDENTIAL ANNEX A

CONFIDENTIAL ANNEX B

CONFIDENTIAL ANNEX C

CONFIDENTIAL ANNEX D