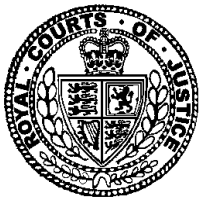

Neutral Citation Number: [2025] EWHC 1987 (Ch)

Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 30 July 2025

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

JSC 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

Robert Anderson KC, Andrew Hunter KC, James Willan KC, Tim Akkouh KC, Christopher Lloyd, Catherine Jung, Conor McLaughlin and **David Baker** (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Mark Howard KC, Michael Bools KC, Alec Haydon KC, Alexander Milner KC, Geoffrey Kuehne and **Jagoda Klimowicz** (instructed by **Fieldfisher LLP**) for the **First Defendant**
Clare Montgomery KC, Nathaniel Bird and **Alyssa Stansbury** (instructed by **Enyo Law LLP**) for the **Second Defendant**
Thomas Plewman KC and Marc Delehanty (instructed by **Pinsent Masons LLP**) for the **Third to Eighth Defendants**

Hearing dates: 12, 13, 14, 15, 16, 19, 20, 21, 22, 26, 27, 28 and 29 June 2023; 3, 4, 5, 6, 20, 24, 25, 26 and 27 July 2023; 2, 3, 4, 5, 9, 10, 11, 12, 16, 17, 18, 19, 30 and 31 October 2023; 1, 2, 6, 7, 8, 9 and 10 November 2023

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

This judgment was handed down in court at 10.30am on 30 July 2025 and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Contents of the Judgment

Mr Justice Trower

Introduction to the claims

1. At the time of the events with which these proceedings are concerned, the claimant, JSC Commercial Bank Privatbank (the "Bank"), was Ukraine's largest bank. It was declared insolvent by the National Bank of Ukraine ("NBU") on 18 December 2016 and was nationalised over the course of the following days. These proceedings have been brought by the Bank against two of its founding shareholders, the first defendant, Igor Kolomoisky and the second defendant Gennadiy Bogolyubov (together the "Individual Defendants"), and six companies said to be owned or controlled by them (the third to eighth defendants (the "Corporate Defendants")) seeking compensation for harm caused by what the Bank alleges to have been their participation in a fraudulent scheme carried out prior to nationalisation.

2. The Bank also seeks relief against the Corporate Defendants in unjust enrichment. The third to fifth defendants, Teamtrend Limited ("Teamtrend"), Trade Point Agro Limited ("Trade Point Agro") and Collyer Limited ("Collyer") (together the "English Defendants") are English companies, while the sixth to eighth defendants, Rossyn Investing Corp ("Rossyn"), Milbert Ventures Inc ("Milbert") and ZAO Ukrtransitservice Ltd ("Ukrtransitservice") (together the "BVI Defendants") are incorporated in the British Virgin Islands.

3. It is common ground that, between 2010 and nationalisation, the Individual Defendants owned a controlling stake in the Bank, although each of them held less than 50% of the shares and the nature and extent of the control they in fact exercised was an issue at the trial. In particular, one of the issues which I shall have to decide is the extent to which (and the period for which) Mr Bogolyubov exercised an influence over the Bank's affairs which was commensurate with the extent of his shareholding. It is his case that, by the time of the relevant events, he was taking a back seat role in the Bank's affairs and was exercising his shareholder rights on the instructions of Mr Kolomoisky.

4. Until nationalisation, the Individual Defendants were also members of the Bank's supervisory board (the "Supervisory Board"). Prior to 30 April 2015, there was one other member of the Supervisory Board and Mr Bogolyubov was its chairman, a position which he had held since shortly after the Bank's transformation into a PJSC on 6 July 2000. After 30 April 2015, there were three other members of the Supervisory Board, one of whom was its chairman.

5. The claim made by the Bank is that more than US$1.9 billion was extracted from its assets at the behest of and for the ultimate benefit of the Individual Defendants, using a complex network of vehicles owned and/or controlled by them through a large number of nominees, many of whom were employees either of Prydniprovskyi Business Centre LLC, formerly Privat Business Centre LLC ("PBC") or Primecap Cyprus Limited ("Primecap"), both entities which featured prominently in the proceedings. These vehicles included the Corporate Defendants. The extraction was said to have been done in the course of what was described in some of the Bank's internal records as a currency

contracts project. It is the Bank's case that a number of senior employees, including in particular certain members of its management board (the "Management Board") participated in this project at the direction of the Individual Defendants. It is also the Bank's case that, notwithstanding the fact that compliance with those instructions was obviously contrary to Ukrainian law and the Bank's interests, they did so because they wanted to keep their jobs.

6. Throughout its submissions, the Bank referred to the totality of what occurred as the "Misappropriation". This language is used because it is alleged that the Bank was procured by the Individual Defendants to advance loans (the "Relevant Loans") to 50 borrowers (the "Borrowers") with no business activity and no genuine credit or trading history. 47 of the Borrowers were incorporated in Ukraine (the "Ukrainian Borrowers") and three were incorporated in Cyprus: Celastrina Trading Co Ltd ("Celastrina"), Fiastra Trading Ltd ("Fiastra") and Densitron Enterprises Ltd ("Densitron") (together "the Cypriot Borrowers"). When these proceedings were commenced, the Bank's case was based on Relevant Loans to 46 of the Ukrainian Borrowers. The Relevant Loans to the Cypriot Borrowers and one of the Ukrainian Borrowers, Prominmet LLC ("Prominmet"), were only added to these proceedings by amendment with effect from the issue of a protective claim form on 14 July 2020, by which time it is said by the Defendants that the limitation period had expired. I shall return to whether that is the case at the end of this judgment.

7. The Bank's case is that each of the Borrowers was owned and/or controlled by one or both of the Individual Defendants. Sums were drawn down under the Relevant Loans in both Ukrainian hryvnia ("UAH") and US dollars ("US$"); in the case of UAH drawdowns they were then converted into US$. Amounts were then transferred, either directly or indirectly after one or more intermediate recycling transactions, to the Corporate Defendants' accounts at the Bank's Cyprus branch as prepayments under 54 sham supply agreements (the "Relevant Supply Agreements" or "RSAs"). It is the Bank's case that the RSAs were executed simply to provide the Borrowers with a pretext for moving foreign currency out of Ukraine.

8. I shall explain what happened in more detail later in this judgment but, until September 2014, prepayments to suppliers under the scheme of which the Misappropriation is said to have formed part were recycled by being repaid to the relevant borrower, which then used that amount to fund another prepayment under another supply agreement. It is the Bank's case that the drawdowns stopped in September 2014 when what it called the active stage of the Misappropriation came to an end.

9. When and after that had occurred, the net position was that 82 prepayments, which had been made to the Corporate Defendants under the RSAs, and which were said by the Bank to have been funded by 270 drawdowns totalling US$2,335,943,519 ("Relevant Drawdowns") made under the Relevant Loans, were not returned to the Borrowers. In these proceedings, these prepayments to the Corporate Defendants which were not returned were referred to as the "Unreturned Prepayments". The gross value of the Unreturned Prepayments was US$1,997,835,585 but, of that amount, four of the Borrowers made partial repayments of US$85,958,200. It follows that the net figure for Unreturned Prepayments totalled US$1,911,877,385.

10. As to the Relevant Drawdowns, some (totalling US$384,214,201 on the Bank's methodology) were recorded in the Bank's books as being used in part to repay other

Relevant Drawdowns by the same or another Borrower. To avoid double counting, the Bank's claim gives credit for those instances. The net total is therefore US$1,951,729,318, which is approximately US$40 million more than the amount of the Unreturned Prepayments, but the Bank limits its claim to the lower figure.

11. The Bank's internal records indicated that it had security for the Relevant Loans in the form of pledges over the Borrowers' contractual rights under the RSAs and over a further set of supply agreements, called the "Loan File Supply Agreements" or the "LFSAs". It is the Bank's case that the security over the RSAs (the "RSA Pledges") was worthless and that they and both the LFSAs and the security granted over the LFSAs (the "LFSA Pledges") were shams executed to make it appear from the Bank's files that its lending was adequately secured.

12. It is the Individual Defendants' case that, apart from the pledges over the RSAs and the LFSAs, repayment of the amounts outstanding under the Relevant Loans was fully secured by 50 pledges granted by 40 pledgors (the "Share Pledgors") over shares in 25 companies other than the Borrowers (the "Share Pledges"). The Individual Defendants admitted that 22 of the Share Pledgors and 20 of the companies whose shares had been pledged (together the "Share Pledge companies") were owned and/or controlled by one or both of them, although they said that they did not know that their assets had been used in this way. The Share Pledges were released shortly before nationalisation but, even if they had not been, the Bank contends that they would have been woefully inadequate security for the Relevant Loans.

13. Between September and November 2014, 46 of the 50 Borrowers commenced 51 claims in the Economic Court of Dnepropetrovsk and three sets of arbitration proceedings against a Corporate Defendant claiming repayment of the funds which it had prepaid to that Corporate Defendant under an RSA (the "2014 Ukrainian Proceedings"). In those of the 2014 Ukrainian Proceedings which were before the court, judgment against the relevant Corporate Defendant to repay the prepayment it had received was given on various dates between 7 October 2014 and 24 December 2014. In those of the 2014 Ukrainian Proceedings which were pursued by way of arbitration, awards requiring Trade Point Agro and Collyer to repay the funds they were prepaid by three of the Borrowers were made in February and April 2015.

14. None of the judgments given or awards made in the 2014 Ukrainian Proceedings was enforced. The Bank contends that the 2014 Ukrainian Proceedings were an artificial construct procured and pursued in collusion between, amongst others, the Borrowers and the Corporate Defendants. They were not designed to secure genuine recovery for the Borrowers or the Bank but were intended to avoid currency control penalties and furnish the Bank with evidence (capable of being supplied to the NBU as its regulator) to explain why the Relevant Loans had not been repaid.

15. The Bank claims to have lost more than US$1.9 billion as a result of the Misappropriation, although it accepts that it must give credit for the true value of certain assets (the "Transferred Assets") it received from or on behalf of the Individual Defendants as part of what was called the "Asset Transfers". This figure is the same as the amount of the Unreturned Prepayments. One of the principal issues is whether, notwithstanding the Unreturned Prepayments, the amounts advanced under the 270 Relevant Drawdowns were in fact repaid, and, if so, whether the Bank can establish

that it nonetheless suffered compensable harm from the Misappropriation in the sums claimed.

16. All parties agree that the issue of whether the Defendants are liable to compensate the Bank for the loss it claims to have sustained by reason of the Misappropriation is governed by Ukrainian law. The Bank's claim against the Individual Defendants is made in tort pursuant to Article 1166(1) of the Ukrainian Civil Code ("Article 1166" and the "Civil Code" respectively), which applies where harm to a person's property has been caused by an unlawful decision, act or omission. That person then becomes entitled to full compensation from the person who caused the harm. Article 1166 provides as follows:

> "Property harm caused by unlawful decisions, actions or omissions to the personal non-property rights of a natural or legal person, as well as harm caused to the property of a natural or legal person, shall be compensated in full by the person who caused the harm."

17. The Bank submitted that it is self-evident that the orchestration of the Misappropriation by the Individual Defendants, and/or their participation in it, amounted to unlawful conduct by them of a character contemplated by Article 1166.

18. The Bank also has claims in tort and unjust enrichment against the Corporate Defendants. The claim in tort is based on the same Ukrainian law principles as are applicable to the claim against the Individual Defendants and arises out of their participation in the acts causing harm to the Bank. There is a dispute as to whether its claim in unjust enrichment is governed by Ukrainian law (for which the Bank contends) or the law of Cyprus (for which the Corporate Defendants contend).

19. The Bank contends that the Corporate Defendants' liability in unjust enrichment under Ukrainian law arises under Articles 1212(1) and 1213 of the Civil Code ("Article 1212" and "Article 1213" respectively), which provide that a person who has acquired or preserved property at the expense of another person without sufficient legal grounds is obliged to return that property to the injured party, either in kind or, where that is impossible, through compensation for its value. It also contends that if its claims in unjust enrichment are governed by Cypriot law the applicable provisions are sections 65 and 70 of the Cypriot Contract Law, Cap. 149 (the "Contract Law"), alternatively at common law.

20. Neither of the Individual Defendants has advanced any explanation as to how the Relevant Drawdowns can be said to have been made for legitimate commercial purposes and neither of them has made a positive case that the RSAs were genuine supply agreements. However, they do not accept that the making of the Relevant Loans to the Borrowers or the transfer of money from the Borrowers to the Corporate Defendants involved any misappropriation of the Bank's funds and they deny that the Bank has proved that they received any benefit from the monies said by the Bank to have been misapplied.

21. Mr Kolomoisky also denied that he caused the RSAs to be entered into and denies that he was aware of them or indeed the making of the Relevant Loans at the time they were made. It is part of his defence that he took no part in the lending decisions, all of which, were made by the chairman of the Management Board (Oleksandr (Alexander) Dubilet)

acting on the instructions of the Bank's credit committee (the "ECC"). This included the Relevant Loans, which (like the Relevant Drawdowns and the RSAs) he did not procure and of which he was unaware. In other words, he says that the Bank has not established that he was sufficiently involved in what occurred to render him liable for any losses it sustained as a result of the Misappropriation.

22. Mr Bogolyubov's position was expressed in similar terms. He denied that he had any executive role within the Bank and said that he was not responsible for and did not manage or exercise day-to-day control over its activities including its lending decisions. Like Mr Kolomoisky, he also pleaded in his Defence that he did not control any of the Borrowers and that, if they did enter into the various agreements alleged by the Bank, it was not with his knowledge or on his instructions. In particular, Mr Bogolyubov asserts that the court must be careful to ensure that it does not approach the evidence on the assumption that participation in what occurred by one of them (viz. Mr Kolomoisky) necessarily involved participation by the other (viz. Mr Bogolyubov).

23. One of the more significant (and curious) aspects of Mr Bogolyubov's case is his plea that in or about the beginning of July 2014, he made an oral agreement with Mr Kolomoisky to exercise the voting rights attached to his shares in the Bank and his duties as chairman of the Supervisory Board at the sole direction of Mr Kolomoisky. He said that later, in May and June 2015, this was reflected in formal documentation (the "Deeds of Waiver and Indemnity"). The Bank does not accept that what was said in the Deeds of Waiver and Indemnity reflected the truth of what was happening.

24. The very nature of what occurred meant that, unlike the Individual Defendants, the Corporate Defendants did not seek to say that they did not participate in what occurred. However, they deny that they were owned or controlled by the Individual Defendants or that they were party to the Misappropriation. They also deny that anything they may have done caused the Bank any harm and they therefore deny any liability to the Bank. In that context they made common cause with the Individual Defendants on the claims against them under Article 1166.

25. The Corporate Defendants advanced two main defences to the claims in unjust enrichment based on receipt of the Unreturned Prepayments. The first is that, whether Ukrainian or Cypriot law applies, there is no cause of action in unjust enrichment where the receipts were indirect, as they were said to be in the present case, because they passed through the hands of the Borrowers. The second is that the English Defendants received the Unreturned Prepayments (and indeed entered into the RSAs) as agents for undisclosed principals and, not being on notice of the Bank's claims before making onward transfers, are not liable for that reason. The Bank disputed this and, amongst other matters, contended that the relevant agency agreements (described later in this judgment and defined as the "English Agency Agreements") were shams and the counterparties to them were companies associated with the Individual Defendants.

26. There was therefore a slight difference in emphasis between the pleaded position of the English Defendants and the pleaded position of the BVI Defendants:

    i) The Corporate Defendants said that, although the English Defendants did not seek to verify the substance of the transactions, they had no knowledge of their commercial purpose. They said that the English Defendants executed the RSAs and received prepayments under them as agents for undisclosed principals (the

"ED Principals"). They did so in the good faith belief that they were genuine transactions and/or with the intention of performing them. They also said that any sums the English Defendants received under them were paid on immediately to the ED Principals or to third parties identified by the ED Principals.

ii) The Corporate Defendants contended that the RSAs into which the BVI Defendants entered were genuine, arm's length agreements, and they made onward payments of the sums received before having any notice of the Bank's claim. They accepted that the BVI Defendants did not supply any goods under those RSAs and therefore became (and remain) obliged to pay the counter-party Borrowers the amounts of the prepayments they received.

27. One of the more striking aspects of the way that the Individual Defendants chose to defend the case against them is that, although they both made and served witness statements for use at the trial, neither of them was called to give evidence. The Bank was therefore unable to test their pleaded cases with either of them in cross-examination. It was also unable to explore with them their role in what appeared on the face of it to have been unlawful conduct within and to the detriment of a major bank in which each of them had a very substantial ownership interest. Similarly, although Mr Kolomoisky served witness statements from a further four witnesses, none of them was called to give evidence and their witnesses statements were withdrawn. Neither Mr Bogolyubov nor the Corporate Defendants served any statements from third party witnesses of fact in support of their defences.

28. The decisions by the Individual Defendants not to give evidence, and not to call the witnesses whose statements had been served in support of their case on the facts, were made late in the process of preparing the case for trial and well after the date on which it was originally fixed to commence. While it was not suggested that circumstances beyond their control constrained them from giving oral evidence, both contended that the court should not draw adverse inferences from this course of events. It was said that there was no need for them to give evidence, because the way in which the cases against all of the Defendants in tort had been formulated were misconceived, and that the Bank could not prove its case on their participation in what occurred.

29. It had always been possible that either or both of the Individual Defendants would decide not to give evidence (see e.g., the judgment I delivered on their application for an adjournment of the trial in the light of the Russian invasion of Ukraine (*JSC Commercial Bank Privatbank v. Kolomoisky and others* [2022] EWHC 775 (Ch) at [19])). Nonetheless, I shall have to give careful consideration to the nature and extent of any inferences I should draw from the fact that both have chosen not to do so.

30. As I have already indicated, there was no real attempt by any of the Defendants to argue that the scheme was operated for legitimate banking purposes, although Mr Bogolyubov in particular argued that there was insufficient evidence of a misappropriation from which he himself benefitted. What occurred was said to be no more than one part of a loan recycling scheme driven by a desire to avoid Ukraine's currency control regime. In short, it was submitted that, even if the Bank established that it had suffered a loss to the extent of the Unreturned Prepayments, there was no evidence that the Bank's property to the extent of this loss was misappropriated for their benefit.

31. The fact that the Misappropriation on which the Bank sued was one, but only one part of a loan recycling scheme was at the heart of the Defendants' argument that the Bank has been driven to formulate its case in a manner which is misconceived. They all submitted that the Bank has taken into account only one part of a much bigger picture and ignored what occurred both earlier and later in the working through of the scheme. The Defendants said that the reason the Bank took the course that it did was that it had always wanted to sue them in England, in part to obtain the benefit of freezing orders and other interim relief. It was said that the only way in which the Bank could justify proceedings in England was to focus its claim on limited facts relating to Relevant Drawdowns, which funded Unreturned Prepayments advanced to the Corporate Defendants, including in particular the English Defendants. This was said to have been done for the purpose of providing a sufficient anchor to give this court jurisdiction pursuant to Article 6(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2007 (the "Lugano Convention"). If there had been no English anchor defendants, the Individual Defendants would have been entitled to be sued in Switzerland, which was (anyway at the commencement of these proceedings) their own place of domicile.

32. Arguments based on jurisdiction first featured on the Defendants' applications to challenge the making of a worldwide freezing order ("WFO") originally made by Nugee J on 19 December 2017 and for the proceedings to be struck out on grounds based on Article 6 of the Lugano Convention. These applications were successful before Fancourt J (*PJSC Commercial Bank Privatbank v. Kolomoisky and others* [2018] EWHC 1910 (Ch)) as recorded in an order made on 4 December 2018, but his decision was reversed by the Court of Appeal on 15 October 2019 (*JSC Commercial Bank Privatbank v. Kolomoisky and others* [2019] EWCA Civ 1708, [2020] Ch 783). They continued to feature throughout the case and were at the heart of the Defendants' closing submissions at the trial because they submitted that the court should have no sympathy for the Bank if it were to conclude that there was an insufficient nexus between the Misappropriation on which it had sued and the compensation which it claimed, arising out of the operation of the loan recycling scheme. This would simply be the result of a self-imposed straitjacket, which the Bank was required to wear by reason of the forum shopping in which it had chosen to engage.

33. The Defendants then submitted that this forum shopping has given rise to an irremediable difficulty for the Bank because, whatever may have been the position in relation to the scheme more generally, the advances made under the Relevant Drawdowns were repaid by a number of means, including further advances, thereby discharging not just the Borrowers' liability under them, but also any claims in tort and any claims in restitution against the Corporate Defendants. This was called the "Repayment Defence", an expression which I shall adopt in this judgment.

34. The first of the means by which the Relevant Drawdowns were said to have been repaid were one of the two categories described as repayments by cash (the "Cash Repayments"), a phrase which for convenience I shall use in this judgment. It is not suggested that any actual cash was used, because what occurred was that the proceeds of one or more loans were used to repay other loans by way of accounting entry in the Bank's books. Cash Repayments falling into this first category were themselves funded by drawdowns on loans (the "Intermediary Loans") entered into by 34 further borrowers, which were not also Borrowers under the Relevant Loans (the "Intermediary

Borrowers"). As with the Borrowers, it is the Bank's case that each of the Intermediary Borrowers was owned and/or controlled by one or both of the Individual Defendants.

35. The Bank's answer is that, although these repayments were recorded as such in the Bank's books, they should not be treated as such for the purposes of their claim in tort against the Defendants, because the Bank received no or no significant value as a result of those repayments. They simply amounted to a further layer of sham lending to companies owned and/or controlled by the Individual Defendants and did not constitute a genuine source of recovery for the Bank. In short, such ledger entries as were made were funded by further fraudulent borrowing and therefore did not serve to extinguish or reduce the Bank's loss.

36. The Defendants also submitted that the Bank's losses were reduced by the Asset Transfers, which were used to reduce the outstanding balances on the Relevant Loans. It was invariably the case that the Transferred Assets were not held in the name of the Individual Defendants, but it was the Bank's case that, whatever the identity of the entity (the "Asset Transferor") by which the Transferred Assets were held prior to the relevant Asset Transfer, they were in fact held by or on behalf of one or both of the Individual Defendants. The Bank accepted that, if and to the extent that there was a genuine transfer of the Transferred Assets, credit can be given for their true value so long as that value was applied in reduction of the outstanding amounts drawn down under the Relevant Loan. However, there is a significant dispute between the parties as to the true values of the Transferred Assets (which the Bank said were significantly and deliberately inflated by the Individual Defendants) and therefore as to the amounts for which the Bank is required to give credit in reduction of the full compensation to which it is entitled under Article 1166.

37. The third aspect of the Repayment Defence arose out of what the Defendants claim to have been a second category of Cash Repayments in the form of a series of new loans totalling c.US$5.7 billion (the "New Loans") made by the Bank to 36 companies (the "New Borrowers") in the period 20 October 2016 to 18 November 2016, which was shortly before the Bank's nationalisation. The New Borrowers, which were also said by the Bank to have been owned and/or controlled by the Individual Defendants, used those funds to repay old loans, including sums outstanding under the Relevant Loans and the Intermediary Loans, in a process referred to as the "Transformation". It was said that, to the extent that the Bank suffered any loss, that was caused either by the Bank's conduct of the Transformation on the orders of the NBU, or by the release of collateral (including the Share Pledges) before the assets owned by the companies whose shares had been pledged could be used to secure the New Loans. It was the Bank's case that the New Loans were designed to disguise earlier illegitimate lending and denies that the Share Pledges were adequate or valuable security for the old loans.

38. One of the important aspects of the Repayment Defence is the Ukrainian law consequence of whether the Relevant Loans were valid or void. It is not in issue that, if they were valid, a valid repayment would not just discharge the debt but also extinguish any loss sustained by the lender to the extent of the original advance. The position is more complex if the Relevant Loan was void (as the Banks contends to be the case). The Defendants now seek to advance a case that the Bank will have suffered no loss in respect of the Relevant Loans if and to the extent that it chose to accept payments as discharging the Borrowers' liabilities to return the sums drawn down under the Relevant Loans, as opposed to other liabilities in respect of later loans, a choice

which it is said that the Bank self-evidently made. Particular reliance was placed on the choices made by the Bank after nationalisation when it was no longer owned or controlled by the Individual Defendants.

39. The Bank said that the way in which the Defendants sought to advance their case on choice in their closing submissions was not open to them on the pleadings, was unheralded until the service of closing submissions and was not adequately explored in the evidence. Whether that is a complete answer to the point is one to which I will revert later in this judgment.

40. The Defendants also advanced a defence that the Bank suffered no loss to the extent that funds advanced under the Relevant Loans were transferred back to the Bank. This involved an argument that any liabilities arising out of the making of the Relevant Drawdowns were discharged by using those funds to discharge separate liabilities arising out of Relevant Loans or other loans. This was called the "Use of Funds Defence", but was said by the Bank to be unsustainable for the reasons explained by Bryan J when rejecting the similar "Circular Credit point" in *National Bank Trust v. Yurov* [2020] EWHC 100 (Comm) ("*Yurov*") at [1197ff].

41. The Defendants' arguments as to the means by which the claims arising out of the Misappropriation were discharged (and in particular how that occurred on what were said to be repayments of what were said to be loans) have developed during the course of the trial. However, the overarching argument is that, whatever loss the Bank may have sustained from the operation of the loan recycling scheme as a whole, the Bank has not established that any shortfall arising from the Unreturned Prepayments, or indeed any other alleged loss, is properly payable as compensation for the Misappropriation on which the Bank sues.

42. Although Mr Kolomoisky continued to deny that he was in any way responsible for the unlawful conduct alleged by the Bank, the Repayment Defence (combined as it was with the Bank's arguments on loss) was one of the two principal matters on which he concentrated in his closing submissions. He did not shrink from the fact that it relies on a single-minded focus on precisely how the Bank has formulated its case. He submitted that it was important for the court not to be distracted by looking at the losses which might have flowed from the operation of the scheme as a whole rather than the losses which flowed from the specific misappropriations on which the Bank has chosen to sue, driven as it was by its desire to litigate in this jurisdiction through the anchor of the English Defendants' presence here. He said that, in the light of the Bank's own expert evidence, the Repayment Defence was a complete answer to its claim and, in some respects, everything else was subsidiary to his case on this point. I shall deal with it in detail later in this judgment.

43. The Defendants also pleaded defences that the Bank's claims are time-barred (the "Limitation Defence") and the Individual Defendants also pleaded that the Bank is precluded from pursuing its claims by operation of the doctrine of *venire contra factum proprium* (a prohibition against inconsistent conduct) as it is applied under Ukrainian law. I shall come back to limitation in more detail later in this judgment, but it is worth identifying the parameters of the dispute at this stage, not least because, by the close of the trial, it had come to play a much more significant role in the Defendants' defence than had been apparent when the case was opened and was the second of the two main

matters on which Mr Mark Howard KC concentrated in his closing submissions on behalf of Mr Kolomoisky.

44. Articles 257 and 261(1) of the Civil Code ("Article 257" and "Article 261" respectively) provide for a limitation period of three years from the date when the claimant became, or could have become aware of the violation of its right or the person who violated such right. There is no dispute that the Relevant Loans, the Relevant Drawdowns, the RSAs and the Unreturned Prepayments were all executed or made in or before September 2014. This was more than three years before 21 December 2017, the date on which the Bank issued these proceedings. However, the Bank contended that this defence is no answer to its claim, because it did not have the necessary actual or constructive knowledge for more than the requisite three-year period. It also contended that the limitation period should be disapplied in accordance with the provisions of Article 267(5) of the Civil Code ("Article 267(5)"), which provides that any violated right shall be protected if a court finds any reasons for missing the limitation period to be valid.

45. As to *venire contra factum proprium*, this defence bears some similarity to the English law principle that a person may not approbate and reprobate. It is said to preclude the Bank from contending that any of the Relevant, Intermediary or New Loans is void or voidable because the Bank has treated them as valid in other Ukrainian proceedings. The Bank contends that this doctrine does not give the Defendants a defence, both because it never acted in bad faith in the other proceedings it commenced in Ukraine, and because the Individual Defendants did not act to their detriment in reliance on what was said to be the Bank's preclusively inconsistent conduct. However, in his written and oral closing submissions, Mr Kolomoisky said that he no longer needed to rely on the defence of *venire contra factum proprium*. It was no longer necessary because of the argument he made in closing to the effect that the Bank was bound by its choice to treat the Borrowers as having repaid their liabilities in respect of the Relevant Loans.

The nature of the evidence: legal principles

46. I now turn to explain the nature of the evidence with which the court was faced at the trial and the approach which the court should adopt to making the necessary findings of fact in a case of this sort. I do so in circumstances in which there are many aspects of what occurred on which there is no direct documentary or oral evidence. In part, this is because the documentary record was demonstrably deficient in a number of highly material respects, and it is clear that much documentation which did exist has either been destroyed or suppressed. It was also because there was a dearth of witnesses; many who could have given evidence on issues central to the Bank's claim were not called to do so. Circumstantial evidence therefore forms an important part of the Bank's case.

47. There was no dispute at the trial that the general approach to proving a case in fraud was comprehensively summarised by Bryan J in *JSC BM Bank v. Kekhman* [2018] EWHC 791 (Comm) ("*Kekhman*") at [41] - [92] and *Yurov* at [50]. For present purposes, it is not necessary to recite those passages in full. The following headline points suffice:

i) Fraud or dishonesty must be distinctly alleged and distinctly proved; it must be sufficiently particularised, and it is not sufficiently particularised if the facts pleaded are consistent with innocence or negligence.

ii) As in an ordinary civil claim, the burden of proof is on the claimant and the fact that fraud is alleged does not change the standard of proof from being the balance of probability. When assessing the probabilities, the court will have in mind, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established.

iii) Inherent probabilities can be weighed alongside or against specific evidence from a particular case. But care must be taken in working out what in a particular case is inherently probable or improbable. It is generally correct that absent other information, the more serious the wrongdoing, the less likely it is that it was carried out, because most people are not serious wrongdoers. The standard of proof remains the same, but more cogent evidence is required to prove fraud than to prove negligence or innocence because the evidence has to outweigh the countervailing inherent improbability.

iv) Memories are fallible, people can convince themselves of the veracity of false recollections of events and retain confidence in their false recollection, and a judge's ability to evaluate honesty and reliability merely from a witness's demeanour is also fallible. Therefore, where possible, a court should rely on documentary evidence and any other objectively provable facts.

v) The nature of circumstantial evidence is that its effect is cumulative, and the essence of a successful case based on circumstantial evidence is that the whole is stronger than individual parts.

vi) Hearsay evidence of a witness who has not been cross-examined is generally given less weight than the evidence of a witness who has been called and cross-examined and had their evidence tested in cross-examination.

48. These principles are all well known, but of particular significance in the present case is Bryan J's comment about circumstantial evidence, which was derived from what Rix LJ had to say in *JSC BTA Bank v. Ablyazov & Others* [2012] EWCA Civ 1411, [2013] 1 WLR 1331 ("*Ablyazov*") at [52]:

> "It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case".

49. *Ablyazov* was a case where the standard of proof was beyond all reasonable doubt, but in *Kekhman* at [79], Bryan J noted that the points made by Rix LJ were equally apt in the context of civil fraud, while in *Lakatamia Shipping Co Ltd v. Su* [2021] EWHC 1907 ("*Lakatamia*") at [64], he explained that they are of general application. In *Lakatamia* at [65], drawing on the decision of the Court of Appeal in *Bank St*

Petersburg PJSC v. Arkhangelsky [2020] EWCA Civ 408, [2020] 4 WLR 55 at [70], he then summarised the position as follows:

> "In this regard, and consistently with Rix LJ's observations, in evaluating the evidence it is best to avoid compartmentalising particular points relied upon, or treating points in "silos", or adopting a piecemeal approach to evidence relied upon; rather it is appropriate to take account of "previous findings in considering the likelihood of the later facts having occurred" or, in other words, to "stand … back and consider … the effects of the implications of the facts … found in the round"."

50. It is also highly relevant, as was submitted by Ms Clare Montgomery KC on behalf of Mr Bogolyubov, that the Ukrainian context is part of the background against which the inherent probabilities of the Bank's case fall to be evaluated (a point made in *Avonwick Holdings Ltd v. Azitio Holdings Ltd* [2020] EWHC 1844 (Comm) [104]-[105] by Picken J). The need for the court to adopt a cautious approach in such a context has been emphasised in many other judgments: see e.g. *Berezovsky v. Abramovich* [2012] EWHC 2463 (Comm) at [38] and *Filatona Trading Ltd v. Navigator Equities Ltd* [2019] EWHC 173 (Comm) at [12]. What is inherently probable in a secure banking sector, governed by the UK regulators, is not necessarily inherently probable in the conditions that prevailed in the Ukrainian banking sector between 2000 and 2016.

51. It was submitted on behalf of Mr Bogolyubov that the relevant back-story in the present case is one in which related party lending and problems about bank capitalisation were not a source of any particular concern in Ukraine prior to 2014. It was said that they were therefore not the subject of any significant scrutiny. It was also said that Ukraine was a jurisdiction in which "businessmen habitually held their assets in byzantine structures designed to defy penetration". In that regard, the NBU's 2014 annual report observed that it was not until the Russian invasion of Crimea in 2014 that there was any effort by the NBU to impose modern and transparent procedures for monitoring and reporting related party lending or for disclosing the identity of a bank's owners.

52. I accept that all of these considerations must be given weight when seeking to determine the appropriate inferences to draw as to what the Individual Defendants are likely to have known and approved. The same considerations are also important when seeking to assess whether conduct is or is not commercially acceptable for the purposes of determining the likelihood that it did in fact occur. But it is important to recognise that this point goes both ways. It is of course the case that it is appropriate to assess the probability of Mr Bogolyubov having a particular state of mind or knowledge against the background of what was said to be "the *laissez faire* economic context evident in states like Ukraine emerging from the breakup of the Soviet Union". But it is also appropriate to recognise that a less regulated system may be more vulnerable to abusive conduct by powerful and influential businessmen conditioned to treat the assets of companies which they control (and even companies as large as the Bank) as if they were their own.

53. However, another important aspect of the evidence is the inferences the court is invited to draw from (a) the decision of the Individual Defendants not to give evidence (which in the case of Mr Kolomoisky was only conveyed shortly before the start of the trial), (b) the decision of Mr Kolomoisky (again conveyed at the last minute) not to call the witnesses of fact whose evidence had been foreshadowed by the service of statements, (c) the decisions made by the Individual Defendants not to adduce evidence from a

number of witnesses who had relevant evidence to give, whose position appeared to be sympathetic to the Individual Defendants and who were available to do so and (d) deficiencies in the disclosure of documents throughout the very lengthy period between the commencement of these proceedings and the trial.

54. The court's approach to the drawing of adverse inferences from the absence of a witness is explained in the judgment of Lord Leggatt JSC in *Efobi v. Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863, which is now the leading authority on the point. He said at [41]:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria …. … I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

55. In the present case, most of the considerations identified by Lord Leggatt are indeed intimately inter-related. I have reached the clear conclusion that the Defendants' decision not to call any witnesses was made, anyway in part, because of a well-founded fear that their own roles in the Misappropriation would be more likely to be exposed during the course of any cross-examination were they to do so. But similar considerations may also be material to the evidence called by the Bank, in any event insofar as it related to the Limitation Defence. Having regard to that, I will deal first with the Bank's witnesses and the impressions I formed of them in the witness box. I will then consider the significance of the Defendants' decisions not to call any evidence in support of their respective cases. I will defer dealing with the Defendants' submissions on the failure of the Bank to call a number of witnesses on issues relating to the Limitation Defence until later in the judgment.

The witnesses of fact called by the Bank

56. The Bank called ten witnesses of fact, six of whom were cross-examined, but four of whom were not. It was regrettable that the Defendants' decision not to cross-examine three of the four was made very late in the day because they had already made the difficult journey from Ukraine by the time that decision was communicated to the Bank and the court. In the event, the cross-examination that was carried out focused, albeit not exclusively, on limitation issues. I will first explain my impression of the witnesses who attended for cross-examination and then give a short summary of the issues to

which the evidence of the four witnesses who were not called for cross-examination relates.

57. The first to give oral evidence for the Bank was Kateryna Rozhkova. She joined the NBU in June 2015 as director of its banking supervision unit and is now its First Deputy Governor (having first been appointed its acting Deputy Governor in January 2016). She therefore held, and continues to hold, a senior position in an important Ukrainian state institution. She is responsible for maintaining financial stability, as well as the regulation of Ukraine's banking sector. Her evidence covered the purpose and effect of Ukraine's banking reforms between 2014 and 2016, the NBU's regulation of the Bank during that period and her experiences of dealing with the Individual Defendants. Her evidence, much of which was unchallenged, was also directed at disputing Mr Kolomoisky's abandoned case that the Bank was nationalised as a result of a political campaign directed against him.

58. In their cross-examinations of Ms Rozhkova, Mr Howard concentrated on questions that went to the Limitation Defence, while Ms Montgomery concentrated on what Ms Rozhkova knew about her client's involvement in the affairs of the Bank. In his closing submissions, it was said by Mr Howard that Ms Rozhkova was not a straightforward witness and Ms Montgomery said that she was combative and unwilling to accept obvious propositions. It was said that she would often respond to questions by answering a different one, or by resorting to formulaic responses about what should have been done and that she obviously had an agenda and prepared mantra, attempting to protect the Bank's position as best she could.

59. While there is some substance to the Defendants' criticisms of Ms Rozhkova, I do not think that overall it is a fair summary of the way in which she gave her evidence. Although many of her answers wandered off the point, there were a number of occasions on which I was not convinced that she fully understood the questions she had been asked. However, I agree that she was a witness who tried to anticipate where the questioning was going and I was also left with the impression that there were occasions on which she did not want to answer the question that was put to her. Nonetheless, and having regard to the fact that her English was not perfect and she sometimes struggled for that reason, I agree with the Bank's submission that in all material respects her evidence was truthful and of assistance to the court.

60. I should also record that I agree with the Bank's submission that Ms Rozhkova demonstrated considerable courage in giving evidence for the Bank in circumstances in which Mr Kolomoisky had in the past made serious threats against her. The unchallenged evidence established that this conduct included (i) threats in 2016 to release her private phone records and messages into the public domain; (ii) threats in October 2016, which was shortly before the Bank's nationalisation, that he could find her anywhere and comparing himself to "a hungry tiger in a cage", after which she refused to carry on meeting him; and (iii) as late as December 2019 (i.e., shortly after the Court of Appeal had determined that this court has jurisdiction to try the Bank's claim and that the WFO against the Individual Defendants should continue until trial), organising a threatening protest outside her home whilst her eight-year-old daughter was also in the house, requiring her to take a police escort to work, a protest which he then recorded in a congratulatory exchange with Mr Bogolyubov over WhatsApp.

61. These threats are consistent with other conduct by Mr Kolomoisky, which cannot simply be brushed aside as the conduct of a businessman accustomed to getting his own way. The culture within the Bank was submissive and unquestioning to instruction given by those senior in the hierarchy, at the head of which were Mr Kolomoisky himself and (albeit to a much less pronounced extent) Mr Bogolyubov. In particular, these threats and this culture, are of relevance to the Bank's case on limitation, and more especially that it is unrealistic to think that any employee of the Bank would or could have caused the Bank to initiate legal proceedings against the Individual Defendants in 2014 when aspects of the Misappropriation were first made public. I will revert to them in that context.

62. I should also record that Ms Rozhkova gave evidence about a number of other very unpleasant threats made against her (and indeed against the NBU's former governor, Valeriya Gontareva). There is no direct evidence that Mr Kolomoisky was responsible for making them, although she believes that he was, and she frankly accepted that, given her role in cleaning up the Ukrainian banking sector, there are a lot of people who might bear a grudge against her. Nonetheless, whatever their provenance, the fact that they have been made supports the opinion I have expressed as to the courage she has shown in giving the evidence she gave.

63. The second witness who gave oral evidence was Dmitri Luchaninov, a Ukrainian lawyer and the Bank's head of compliance since July 2012. He reported to Yuriy Pikush, general deputy chair of the Management Board. He also reported to Mr Dubilet and would take instructions from Timur Novikov, head of the Bank's Investment Business and in charge of Primecap. He gave evidence in person with the assistance of an interpreter. One of the responsibilities of the compliance department was to maintain the Bank's list of related parties. Another responsibility was to be the Bank's point of contact for the NBU and to coordinate the collection of information in response to requests from the NBU and other regulators. In his witness statement, he explained the instructions he was given by Mr Dubilet, Vladimir Yatsenko (a first deputy chair of the Management Board pre-nationalisation and head of the Bank's corporate VIP business department), Mr Novikov and Tatiana Gurieva (head of the Bank's strategic client or customer service business department known as BOK) to hide related-party affiliations and the steps he took to implement those instructions.

64. Ms Montgomery established in cross-examination that the evidence he gave as to the assumptions he had made about the role which Mr Bogolyubov played in the management of the Bank was not underpinned by any personal observation. He was criticised for not making clear in his witness statement that this was the case, and indeed it was said that this information should never have been included at all. Although tempered by the fact that Mr Luchaninov was always open that this part of his statement was based on assumption, there is some force in this criticism because the assumptions were not matters of fact based on material of which he had personal knowledge.

65. Nonetheless, I have reached the view that, while what Mr Luchaninov had to say about the relationship between Mr Bogolyubov and Ms Gurieva and Mr Novikov should not have been included in his witness statement in the form that it was, that failing did not have a material effect on the quality of the remaining parts of his evidence. In general I consider that, when he understood the question (which was not always the case), he was doing his best to assist the court. His evidence overall was straightforward, credible and truthful.

66. The third witness who gave oral evidence was Marina Lozytska. Throughout the relevant period until nationalisation she worked in the Bank's head office in Dnipro as deputy head of the client banking service division of the client operations accounting department of BOK. One of her duties was to update the Bank's related party lists for BOK clients. She continues to work at the Bank as head of the department for record-keeping of client operations also known as NURA, based in Dnipro. She travelled to London to give her evidence in person via an interpreter.

67. In her evidence she explained that the documentation for which she was responsible included material relating to a client's registration as a legal entity, its corporate ownership structure and information on individuals with the right to act on its behalf. She was responsible for the regular updating of the list of BOK clients which showed signs of being related to the Bank. Her general understanding was that many of BOK's clients were companies and other entities falling within the industry sectors in which the Individual Defendants held business interests, particularly in the oil, metallurgy, mining and transport industries. Her assumption at the time was that many of them were companies which were ultimately beneficially owned by the Individual Defendants.

68. She gave evidence about the close relationship that she assumed existed between Mr Dubilet, Ms Gurieva, Mr Novikov, Mr Yatsenko and Lyubov Chmona (head of the Bank's budgeting department), on the one hand, and the Individual Defendants, on the other. It was said on behalf of Mr Bogolyubov in closing that her cross-examination revealed that what were called her "carefully crafted assumptions" about his supposed relationships with the Bank's management were not based on her personal knowledge. Whether or not it is correct to characterise her assumptions as carefully crafted, I agree they were of limited evidential value, based as they were on assumptions derived from the structure of the Bank's management committees and the Supervisory Board. She also gave first-hand evidence about the role of PBC and Sergei Melnyk, its head, in managing the affairs of BOK's customers.

69. In Mr Bogolyubov's closing submissions, it was also said that Ms Lozytska was a difficult and evasive witness. In my view she was certainly forceful in the way that she gave her evidence and clear in her perspective as to what was going on. However, although I agree that she was inclined to jump to conclusions based on what she understood the position to be, rather than concentrating only on matters within her own direct personal knowledge, I do not think that she was evasive.

70. The fourth witness who gave oral evidence was Sergiy Oleksiyenko. He has been a member of the Supervisory Board since the Bank's nationalisation in December 2016. He described how his "entry into the process which was done behind the scenes was through the Ministry of Finance". He gave his evidence in English. His evidence explained, from the perspective of the Supervisory Board, the many pressures faced by the Bank in the first half of 2017 immediately after nationalisation. He explained why potential claims against the Individual Defendants were investigated seriously from August 2017 and how the decision to institute the present proceedings was taken, together with the need for extra security to prevent the leakage of information. His evidence was therefore primarily concerned with issues which went only to the Limitation Defence.

71. Mr Oleksiyenko was subjected to a forceful cross-examination over a period of more than one day. His evidence was criticised in Mr Kolomoisky's closing submissions as having originally omitted a number of important facts and matters and some of his concessions were characterised as reluctant or forced upon him. It was also said that he misled the court by pretending that some of the language he used in his witness statement was his own, when it was said to be obvious that words had been put into his mouth. I agree with some of the criticisms levelled at Mr Oleksiyenko because it was plain from his cross-examination that his witness statement did not always give a rounded description of what he and his colleagues in the new management team knew and learnt both at and shortly after they were appointed at the time the Bank was nationalised.

72. However, I do not accept many of the criticisms made of Mr Oleksiyenko in Mr Kolomoisky's closing submissions. In my view, he was a clear and precise witness. He was often accused of not answering questions in circumstances in which the accusation was not justified. Despite that he kept his composure and was prepared to make concessions, whether or not such concessions might have been thought to damage the Bank's case, and I do not think it is right to characterise those concessions as reluctant. There were occasions on which he was criticised for not being full in his answers but more often than not this was driven by his desire to ensure that the answers he gave were precise. I think that he was an honest witness who gave clear evidence and did his best to assist the court.

73. The fifth witness who gave oral evidence was Irina Hryn. She was an in-house lawyer at the Bank between 2011 and 2022. She gave her evidence in Ukrainian via video link from Kyiv. Her evidence related to a number of claims against the New Borrowers which were filed in the name of the Bank in late 2017. She explained that her signature was forged on the papers, evidence on which she was cross-examined, but which in the event was not challenged by Mr Kolomoisky in closing. She also gave more general evidence in relation to the Bank's debt collection procedures more particularly where the amount outstanding was greater than UAH 200,000.

74. Although there were occasions on which Ms Hryn had difficulty in describing structures within the Bank's claims and legal department, Mr Kolomoisky did not criticise her veracity in his closing submissions and Mr Bogolyubov accepted that she was generally a straightforward witness. I agree that she gave evidence in a straightforward manner and I accept the substance of what she had to say.

75. The sixth witness, and the last one to attend for cross-examination, was Galyna Pakhachuk, who was working for the Ministry of Finance prior to the Bank's nationalisation. She gave evidence in person through an interpreter. She was appointed to the Management Board five days after nationalisation and remained in post until 31 August 2021. Initially, she was deputy chair of the Management Board but was appointed acting chair on 25 July 2017 when the chairman (Oleksandr Shlapak) resigned. She continued to occupy the position of acting chair until the appointment of a new chairman in January 2018. At the time she made her witness statement, Ms Pakhachuk was acting as an advisor to the chairman of the Management Board.

76. The main thrust of Ms Pakhachuk's evidence was the complexity and difficulty of the role required to be performed by the Bank's new management team in the period after nationalisation. These difficulties included the need to avoid a run on the Bank,

overcoming the lack of important documentation, building a new organisational structure and dealing with employees who appeared to remain loyal to the Individual Defendants. Her evidence was to the effect that the Bank's claim in these proceedings was instituted as soon as reasonably practicable, and to that extent went to the Limitation Defence.

77. In closing submissions, Mr Kolomoisky did not make specific criticism of the way in which Ms Pakhachuk gave her evidence, although he relied on a number of aspects of her evidence in which he said that she made concessions on which he relied. However, Mr Bogolyubov was more critical. He submitted that Ms Pakhachuk was a combative witness who would not accept obvious points. He also submitted that it was apparent from the cross-examination that her witness statement was replete with exaggeration, in particular where it dealt with matters relating to the loyalty which Bank employees had to Mr Bogolyubov.

78. In my view, Ms Pakhachuk was quite defensive in the way she responded to parts of her cross-examination. She was inclined to give speeches about issues on which she felt strongly, rather than concentrating on the questions she was asked and there were occasions in which, having been riled by the cross-examiner, she allowed her frustration to show. Nonetheless, I do not think that she intended to mislead the court in any of the evidence that she gave, and I accept the truth of what she had to say.

The Bank's other evidence of fact

79. The first of the four witnesses whose evidence was admitted without cross-examination was Olena Pogorelaya. Prior to nationalisation, she worked as one of five deputy heads of the Bank's corporate VIP business loan department. She explained that her work involved assisting the Bank's Cyprus branch in the finalisation of loan documentation, which was often to be backdated, and explained that Mr Yatsenko's secretary was also involved in arranging for execution both by the Bank and by the purported counterparty. She said that the culture within the Bank was such that employees did not question or refuse to comply with instructions given by their superiors and that she was sure that she would have lost her job if she had refused to perform a task she had been asked to carry out and that she could not afford to take that risk. I have no doubt that she was right about that.

80. Ms Pogorelaya also gave evidence of her experience of the way in which nominees were put in place for the Bank's clients. Thus, she was paid to act as a director of one of the Bank's clients and acted as a shareholder for other clients although she did not attend or vote at any shareholders' meetings in that capacity. She gave evidence that many of the shareholders of clients serviced through her department were employees of the Bank and was confident that none of her colleagues had any real interest of their own in the companies concerned.

81. The second of the four witnesses whose evidence was admitted without cross-examination was Ruslana Domashenko. She was appointed curator of the Bank in February 2015 in succession to Olena Zarutska who had been appointed by the NBU on 11 September 2014. Her main function was to monitor the Bank's compliance and

to report to the NBU's oversight department with daily information. It was not her role to instruct or direct the Bank on how to conduct its operations and she did not do so.

82. Ms Domashenko's main point of contact within the Bank was Mr Luchaninov. She understood that her role was to be the ears and eyes of the NBU, but she had no role in instructing or directing the Bank in the conduct of its operations and only limited access to the Bank's documents and electronic systems. She did not attend Supervisory Board or Management Board meetings and did not recall attending any ECC meetings. In particular she denied that she supervised or controlled the implementation of the Transformation as had been alleged in Mr Kolomoisky's Defence, although she did have what she described as a very limited role in monitoring its implementation.

83. The third of the Bank's witnesses whose evidence was admitted without cross-examination was Mykhailo Shekmar. He is a senior member of the NBU's bank inspection team and, at the time of his witness statement, was the deputy head of one of the four directorates within the NBU's inspections department. The head of the inspections department of the NBU reports to the Deputy Governor for Banking Supervision; in 2016 this was Ms Rozhkova. He carried out a scheduled inspection of the Bank between 8 February 2016 and 1 July 2016 and an unscheduled inspection of the Bank between 17 October 2016 and 31 December 2016.

84. His evidence was concerned with the role of the inspection team. He also explained why Mr Kolomoisky was wrong to plead in his Defence that the purpose of the unscheduled inspection was to ensure that the NBU could procure the Bank's nationalisation before the Transformation was complete with the consequence that any losses caused to the Bank arising out of the New Loans was caused by the NBU, not by Mr Kolomoisky. He also gave evidence about the difficulties which the inspection team had in obtaining appropriate documentation and other information from the Bank in relation to matters relevant to the inspection.

85. The fourth of the Bank's witnesses who did not give oral evidence at the trial was Valerii Bondarenko. He is a senior lawyer in the Bank's legal department having joined the Bank in October 2013. He was working in the Bank's claims department in 2017 and gave evidence about the Bank's standard procedures for issuing claims against corporate borrowers who are in default. He was involved in the preparation and submission of claims against the New Borrowers in the latter part of 2017. He gave evidence that, although at some stage after October 2017 he had been instructed by the deputy head of the claims department not to file any further claims against New Borrowers, some claims were discovered which appeared to bear his signature. He confirmed that his signatures on some of the relevant documentation were forged.

Witnesses not called by the Bank

86. In the closing submissions prepared on his behalf, Mr Kolomoisky said that it was striking that, despite what he called "the *prima facie* expiry" of the limitation period in respect of many of its claims before the issue of these proceedings, the Bank chose not to tender evidence from anyone to explain what the Bank did and did not know about the violation of its rights before 21 December 2014. In particular, he said that it was noticeable that the Bank did not call evidence from a number of witnesses who were

better informed about what was being done in relation to the preparation of the 2014 Ukrainian Proceedings (an issue which is relevant to the Limitation Defence) than either Mr Oleksiyenko or Ms Pakhachuk. He also criticised the Bank for its failure to call evidence from anyone at the NBU who was able to speak to what it (and the Bank) knew throughout the period from the time of the making of Relevant Loans in 2014 until 2017. It was suggested that Ms Domashenko and Ms Rozhkova were only able to give evidence about the period from 2015. It was said that this, together with the absence of disclosure by the NBU of any relevant documentation, should lead to an inference that the NBU's documentary record would not support the case formulated by the Bank in these proceedings.

87. On the issue of disclosure, Mr Kolomoisky relied on the fact that at an earlier stage in the proceedings there was a dispute as to whether the Bank should be ordered to treat a number of the NBU's employees as custodians for the purposes of its disclosure exercise. I was not addressed on the outcome of that dispute, in which issues as to banking confidentiality as between the Bank and the NBU seem to have been raised, but the court was never asked to resolve the question of whether documents in the physical possession of the NBU relating to the Bank were disclosable by the Bank in these proceedings (on the grounds that they were in the Bank's control), nor was there any evidence as to whether the Defendants could have sought evidence-gathering relief in Ukraine against the NBU in aid of these proceedings.

88. In large part, these considerations related to the Limitation Defence and, as will appear, I have had regard to them both in evaluating the inferences which it is appropriate for me to draw and in the ultimate conclusions that I have reached. I have also had regard to the fact that the NBU's witnesses gave their evidence in support of the Bank's case without compulsion and, to that extent, the NBU was cooperating with the Bank throughout these proceedings. However, I do not accept that it would be right to conclude that the absence of documentary material from the NBU should of itself lead to an inference that documents held by the NBU would not support the Bank's case. As will appear, any such conclusion would be an over-simplified response. I will revert to the question of documentary evidence more generally a little later in this judgment.

Absence of oral evidence from the Individual Defendants

89. It is plain that both Mr Kolomoisky and Mr Bogolyubov had highly relevant evidence to give on many of the issues which were always bound to arise at the trial. They ranged from the disputed extent of their control of the Bank and what the Bank called (in a phrase which I shall adopt) the "Relevant Entities", i.e., the Borrowers, the Intermediary Borrowers, the New Borrowers, the Corporate Defendants and the ED Principals, to their knowledge of and involvement in the making of the Relevant Loans and the Misappropriation more generally. These points are all very significant in the context of the case as a whole and I think that the Bank was justified in submitting that, if the Individual Defendants had not been involved in what had occurred to the extent alleged by the Bank, they would have been anxious to give their side of the story in order to clear their names.

90. As to Mr Kolomoisky's own availability to give evidence, initially he applied for and was granted permission to do so by video link and subsequently made a witness

statement confirming his "willing[ness] to travel to the Fairmont Grand Hotel in Kyiv … to give my evidence at Trial". He made this statement on 11 April 2023, two months before the start of the trial, in response to a case management order seeking to regulate the taking of oral evidence at the trial. The order recited that nothing in it affected Mr Kolomoisky's right to choose not to give evidence at trial, and he reiterated that point in his statement, but from the way he expressed himself, he had not at that stage decided that he would not give evidence and there was no indication that there was any impediment to him doing so. He continued to maintain that position until less than three weeks before the start of trial when the court and the Bank were informed that he would not be giving evidence after all.

91. In Mr Kolomoisky's closing submissions, the explanation for his non-attendance (advanced only on instructions) was that, over the last year or so, he had been under increasing public scrutiny in Ukraine, that his home was searched on 1 February 2023 and that he had been arrested over the summer. The court was informed that Mr Kolomoisky remained detained in Ukraine at the time his closing submissions were filed and it was submitted that it is unsurprising that in such circumstances he should prefer to keep his powder dry, particularly where the claims in England can be shown to be misconceived without the need for him to give evidence.

92. This submission requires a little bit of unpacking because, even though it has been widely reported that Mr Kolomoisky is now in detention, there can be no suggestion that his decision not to give evidence was driven by unavailability. Although he made his decision not to give evidence at the last minute, it was made before there was any suggestion that he had been or might be detained and there is no evidence that a way could not have been found to enable him to give evidence by video-link, as was the original intention, if he had been prepared to do so.

93. What it does raise, however, is an argument that there were relevant, and Mr Kolomoisky would say powerful, reasons why he cannot be criticised for not giving evidence, one of which might be called the collateral impact on him of giving evidence in England. The reference to keeping his powder dry gives rise to the question of whether it is justifiable for Mr Kolomoisky to contend that he should not be exposed to cross-examination in English proceedings because his evidence on relevant matters might have an adverse effect on him elsewhere. The difficulty with that submission is that no details were given as to how or why that might be the case. In the absence of any particularisation from Mr Kolomoisky (let alone any evidence from him or anybody else) as to precisely how and why his appearance as a witness in English proceedings might have the effect of prejudicing his defence to the unparticularised charges with which he is or may be facing in Ukraine, I cannot accept that considerations of this type should have any material impact on the inferences which it is appropriate for me to draw.

94. The position is similar in relation to the suggestion that Mr Kolomoisky did not need to give evidence because the Bank's claim is misconceived. I cannot assess with any real accuracy the extent to which he might have had confidence in the merits of his own defence, but I am satisfied that he must have known that he was at serious risk of liability being established against him so long as the Bank was able to continue with these proceedings through to trial. This would have been apparent to him from the time at which the Court of Appeal confirmed in the context of the Defendants' jurisdiction challenges that the Bank had a good arguable case to recover the full US$1.9 billion

claimed arising out of his participation in a fraud on an epic scale (*JSC Commercial Bank Privatbank v. Kolomoisky and others* [2019] EWCA Civ 1708, [2020] Ch 783 at [211] and [256]).

95. Even if Mr Kolomoisky had thought that the structural deficiencies he says are manifest in the Bank's claim had become better-founded during the course of preparing the case for trial, or that he might prevail in the Limitation Defence, that does not explain his non-attendance. Nothing which occurred between the time at which he was expressing an intention to give evidence and the time at which he announced that he would not so do, can have affected the merits of the Repayment Defence and the Limitation Defence to such an extent that it can possibly have been thought that he did not still have relevant evidence to give on significant points for the case as a whole. In my judgment, a much more significant reason for his failure to give evidence was what he knew would be the enhanced likelihood that, if he did so, the extent of his involvement in the Misappropriation would be exposed. From long before the time at which he was still asserting that he intended to give evidence, the Bank had put together a compelling case that there was very significant wrongdoing in the conduct of the affairs of a major Ukrainian bank in which Mr Kolomoisky (together with Mr Bogolyubov) had a controlling interest and of which he was a member of the Supervisory Board until nationalisation. In my judgment, it is inconceivable that he would not have missed the opportunity to explain his role in what occurred if he did not have a great deal to hide.

96. As to Mr Bogolyubov, it has never been suggested that he was unavailable to give evidence either. He made public his decision not to do so at the pre-trial review held on 29 March 2023, but no explanation was proffered at that stage. This was a very surprising development, because of the way in which he had continued to represent through his solicitors that he intended to give evidence (albeit reserving his right to take a final view once the case against him at the trial had been closed). It was also surprising because one of the bases on which he had supported the successful joint application to adjourn the trial made at the time of the Russian invasion of Ukraine in early 2022 (*JSC Commercial Bank Privatbank v. Kolomoisky and others* [2022] EWHC 775 (Ch)) was that "he will be unable to prepare to give oral evidence at trial".

97. He later submitted that the Bank had failed to discharge the burden of establishing a *prima facie* case of wrongdoing by him and that the Bank could not rescue its claim by seeking adverse inferences from his non-attendance. It was also submitted in the closing submission made on his behalf that his election not to give evidence was made against the background of considerable uncertainty and turmoil in Ukraine and, in an echo of what was said on behalf of Mr Kolomoisky, that:

> "The Court can properly take the view, not least given developments over the summer concerning Mr Kolomoisky, that there may be a number of reasons unconnected with the prospect of being cross-examined by the Bank why Mr Bogolyubov elected not to give evidence at trial."

98. I shall come back to the question of whether there is any basis for the submission that the Bank's claim failed to establish a *prima facie* of wrongdoing, or that he might have thought that might be the case. However, the same factors which must have caused Mr Kolomoisky to appreciate that he was at serious risk of liability being established against him so long as the Bank was able to continue with these proceedings through to trial also applied to Mr Bogolyubov. The Court of Appeal's findings on good arguable

case were made against him as well. Furthermore, the fact that his decision not to give evidence was announced in March sits uneasily with any suggestion that what occurred in the summer might be relevant to his decision not to attend and there is no evidence that it was a factor. Arrangements for him to give evidence remotely if required could have been put in place (as was already anticipated at that stage for some of the Bank's witnesses), and I am satisfied that if he had chosen to do so he could have given evidence at the trial. I do not accept that such issues were a material factor in his decision not to do so.

99. In summary, the closing submissions for both of the Individual Defendants assert that what was happening in Ukraine (anyway in the summer of 2023) may have been relevant to their decisions not to attend the trial. However, neither of them points to any particular event which caused them to decide that it was no longer possible for them to do so and there is no actual evidence that any such considerations were in fact part of the reason why each of them chose not to attend. In reality, what is said in their closing submissions on this aspect of the inferences I am invited by the Bank to draw from their non-attendance is little more than speculation. The most that can be said is that Mr Kolomoisky might have wished to avoid exposing himself to cross-examination which might have had an adverse impact on his position in the legal difficulties in which he finds himself in Ukraine.

Other evidence of fact withdrawn by Mr Kolomoisky

100. There is also no evidence that matters of availability affected Mr Kolomoisky's decision not to call the three other witnesses from whom he had served witness statements in the latter part of 2021, i.e., 18 months or so before the start of the trial. These statements had been made by Mr Yatsenko, Oleksandr Zavadetskyi (head of the special monitoring unit at the NBU concerned with unwinding related party loans from June 2015) and Konstantin Medvedev (head of the asset management department of the Bank's Investment Business from 1999 until six months after nationalisation). At the time of the second pre-trial review in March 2023, it was still Mr Kolomoisky's intention to call these witnesses and it was said that, subject to obtaining visas, they were free to travel to the UK to do so. Even if they had not been able to obtain visas, there was no indication that they would not be available to give their evidence by video-link. Indeed, in his closing submissions, Mr Kolomoisky did not contend that the question of availability was part of the reason for his failure to call these witnesses. His case was simply that, in light of the burden of proof and the failure of the Bank to prove its allegations, it was not necessary for him to do so.

101. Of these three putative witnesses, Mr Yatsenko was the only one who was involved in decisions relating to the making of the Relevant Loans and subsequent events relating to the Misappropriation. Although Mr Zavadetskyi and Mr Medvedev had evidence of some relevance to give on the conduct of NBU during 2015 and the internal working of the Bank's Investment Business, their evidence was not in itself central to the claim or its defence. Taken alone, Mr Kolomoisky's failure to call them does not give rise to inferences adverse to any of the Defendants on the issues to which their evidence relates. The same cannot be said for Mr Yatsenko. The Bank submitted that he was one of the witnesses whose evidence would have been highly relevant to the issues in

the proceedings and that I should draw adverse inferences from Mr Kolomoisky's decisions to withdraw his statement shortly before the trial.

102. I agree with the Bank's submission. I am satisfied that Mr Yatsenko had highly relevant evidence to give in relation to many of the matters with which these proceedings are concerned. He continued to have a relationship with the Individual Defendants post-nationalisation and he would have been prepared to give evidence if he had been asked to do so. In particular, he played a significant part in approving the Relevant Loans and the surviving documentary material discloses that there were a number of other aspects of the Misappropriation in which he was involved. Thus, in March 2015, he was party to a discussion which led to a plan for eliminating the recording of any connections between the Individual Defendants and 42 of the Borrowers (all of which were clients of BOK), and which had been identified by the NBU as related parties. This was recorded in a document which came to be referred to in the proceedings as the Luchaninov e-mail. It was relied on heavily by the Bank as reflecting the extent to which it was clear that the Individual Defendants were both intimately related to entities which were part of the Misappropriation. He was also involved in the Asset Transfers and was responsible for sending various versions of the plan for the Transformation to the NBU, and for answering questions from the NBU's inspectors in relation to it.

103. He has continued to be in contact with the Individual Defendants (and in close contact with Mr Kolomoisky) since nationalisation. Thus, he was one of the members of a group, also including other members of the Management Board, who met with Mr Kolomoisky and Mr Bogolyubov in Geneva shortly after the commencement of these proceedings. Given the timing, which was between the commencement of these proceedings and the service of the Defendants' jurisdiction challenges, it is probable that the meetings related to this litigation. It is of course possible that they were merely an evidence-gathering exercise, but Mr Yatsenko's presence explained why he can properly be characterised by the Bank as one of the Individual Defendants' loyal lieutenants. In the absence of any evidence to the contrary from either of the Individual Defendants, it is right to infer that he has continued to be available to them in the conduct and defence of these proceedings.

104. That is more particularly the case so far as Mr Kolomoisky is concerned, because it is apparent from redactions to certain WhatsApp exchanges he has had with Mr Yatsenko since the commencement of these proceedings that he and Mr Kolomoisky have continued to communicate with each other, exchanging confidential information relating to the commercial affairs of unidentified companies. I infer from the explanation for these redactions that Mr Kolomoisky and Mr Yatsenko continue to have a close business relationship. In like manner, in September 2018, Mr Yatsenko was sent by Mr Kolomoisky copies of certain draft requests for mutual legal assistance in relation to an alleged fraud on the Bank which had been sent by the Ukrainian authorities to the Austrian, British, BVI, Cypriot and Luxembourgian authorities. As they were drafts, they must have come into the hands of Mr Kolomoisky illegitimately. In my view the Bank was entitled to submit that Mr Kolomoisky obviously trusted Mr Yatsenko not to reveal that he had obtained such material in this way.

105. There is also another aspect of the relationship between Mr Yatsenko and the Individual Defendants which was telling. It relates to a company called PJSC Ingosstrakh Insurance Company ("Ingosstrakh"), in which both Mr Kolomoisky and Mr Bogolyubov admitted to holding an interest. Ingosstrakh was a guarantor (with a

liability limited to UAH 10,000) of the Relevant Loan to Prominmet, the significance of which I shall deal with later in this judgment. In February 2021, a warrant was issued for the arrest of Mr Yatsenko in relation to a criminal investigation by the Ukrainian prosecuting authorities relating to a large transfer of funds from the Bank to Ingosstrakh just before nationalisation in December 2016. Mr Yatsenko received a tip-off and sought to flee Ukraine on a private jet bound for Vienna, but the prosecutor got wind of his plan, had the plane turned around in mid-air, and arrested him on the runway of Boryspil airport in Kyiv. Disclosed WhatsApp exchanges make clear that this development was of interest to both of the Individual Defendants, but of equal significance is the fact that his thwarted escape was on an aircraft operated by Windrose Airlines, a company which was owned or controlled by Mr Kolomoisky and which features in the Asset Transfers I shall describe later in this judgment.

Interlocutory witnesses not called by the Defendants

106. The Bank also drew attention to the fact that three former employees of the Bank gave evidence for Mr Kolomoisky earlier in these proceedings and at that stage were therefore available to give evidence to explain what occurred during the Misappropriation, the extent of the Individual Defendants' participation in it and the likelihood that they controlled the Relevant Entities. The evidence they gave at the interlocutory stage related (anyway in part) to how the Bank's records were kept and how BOK worked in practice.

107. The first of these individuals was Oleksiy (Alexey) Kazantsev. He worked for the Bank between 2002 and April 2018 and made a witness statement on 10 June 2018 in answer to the evidence adduced by the Bank on the Defendants' jurisdiction challenges. He had been the deputy head of client lending within BOK and had held the position of deputy head of the customer credit department. He maintained a document which has come to be called in these proceedings the "Kazantsev Spreadsheet". It tracks the recycling of prepayments back and forth between Borrowers, described on the spreadsheet as 'Resident' and the Corporate Defendants, described as 'Non-resident', and was found on his laptop. It is evidence of an important aspect of the Bank's evidence as to how the Misappropriation occurred.

108. The second of these individuals was Olga Koryak. She was employed by the Bank within BOK between 2003 and 2016 where she was head of its legal support department and responsible as coordinator for matters relating to inspections and inquiries. She also gave a witness statement (dated 9 March 2018) for Mr Kolomoisky in the context of the Defendants' jurisdiction challenges. It was primarily concerned with a dispute over document destruction in July 2017, which was not relied on at the trial, but was also concerned with BOK's general working practices. The Bank says that Mr Kolomoisky could have called Ms Koryak at the trial to give evidence as to how BOK worked in practice, and why the Relevant Loans were granted.

109. The third of these individuals was Maxim Pugach. He was employed at the Bank between 2001 and March 2017 and was the deputy head of IT from 2015, responsible for reporting systems and data administration. He also gave evidence at the same time as Ms Koryak in support of the Defendants' case seeking to rebut the Bank's allegations of document destruction. It is said by the Bank that he too could have assisted on the

Bank's case as to the Individual Defendants' ownership and control of the Bank and the Relevant Entities and their involvement in the Misappropriation.

110. Each of these three individuals had given evidence at an earlier stage in the proceedings, each of them plainly had relevant evidence to give on issues that related to the merits of the Bank's claim and there is no indication that any of them were no longer available or willing to give evidence at the trial. The Bank submitted that I should draw an inference that the Individual Defendants' failure to adduce evidence at the trial from Mr Kazantsev and Ms Koryak was because their evidence would have confirmed that the Individual Defendants controlled the Bank and owned and/or controlled all of the Relevant Entities.

111. To the extent that it was said by the Defendants that the Bank had not substantiated a case that the individuals concerned would give evidence if requested to do so by either of the Individual Defendants, I do not agree that that is the correct question. Nor do I agree with the effect of Mr Bogolyubov's submission in closing that there was a burden on the Bank to show that he had sufficient control over them to procure them to attend, which had not been discharged. Witness statements from them had already been served by Mr Kolomoisky, and the nature of the pre- and post-nationalisation relationship which they each had with the Individual Defendants (including instances in which they had given evidence at an earlier stage in these and other proceedings) was sufficiently close to mean that it was a matter for the Defendants to adduce admissible evidence as to why they had insufficient influence to call them as witnesses rather than the other way round.

Other available witness not called by the Defendants

112. The Bank also criticised the Defendants for not calling a number of individuals whom they said had highly relevant evidence to give, having been at the centre of the events described by the Bank as the Misappropriation. They included the individuals, whose role and relationship with the Individual Defendants I shall summarise in the next few paragraphs. In each instance, it was said by the Bank that the issues on which they had relevant evidence to give were central to the Bank's claim, that they continued to be available to give evidence on behalf of the Individual Defendants had they chosen to call them and that it was likely that the evidence they had to give would have had an adverse impact on the Defendant's case by exposing the extent of their knowledge of and participation in the making of the Relevant Loans and the Misappropriation more generally. None of the Defendants suggested that any of these individuals would have been willing to give evidence on behalf of the Bank, a submission which is supported by the nature of the relationship they have continued to have with the Defendants.

113. The most significant issue on which it is said that several of them would have been able to give important evidence is the extent to which the acts, omissions and decisions of the Management Board, of which the first three (Mr Dubilet, Mr Novikov and Ms Gurieva were members) were ultimately controlled by the Individual Defendants. The Bank submitted that I should infer from the fact that none of them were called that they would have confirmed that the Individual Defendants owned and controlled both the Bank and the Relevant Entities and that they used that control to procure and authorise the making of the Relevant Loans and the Misappropriation more generally.

114. The first is Mr Dubilet, the pre-nationalisation chairman of the Bank's Management Board, whose formal role in approving the Relevant Loans is summarised below. As will become apparent from a number of parts of this judgment, it is clear that Mr Dubilet had a central role in the events with which these proceedings are concerned. Furthermore, pre-nationalisation Mr Dubilet had, and continued up to the trial to have, a close relationship with both of the Individual Defendants, discussing significant matters with Mr Kolomoisky and being in regular communication with Mr Bogolyubov. I make more detailed findings on these pre-nationalisation relationships later in this judgment.

115. These discussions and communications between the Individual Defendants and Mr Dubilet continued after nationalisation. Although the surviving documentation is patchy, taken in the round it raises a clear inference that Mr Dubilet continued to be available to both of the Individual Defendants for the purposes of giving evidence on their behalf at the trial and there is no reason to believe that he would have declined to give evidence on their behalf if either of them had considered it to be in their interests for him to do so. In the following paragraphs, I give some examples from the documents which have survived as to why I have reached the conclusion that he is likely to have remained available to them for that purpose.

116. On several occasions during the months after nationalisation, when he was replaced as chairman of the Management Board by Mr Shlapak, Mr Dubilet sent to Mr Kolomoisky confidential information relating to investigations being carried out post-nationalisation in relation to the Bank's affairs. This is likely to have been leaked to him by individuals loyal to Mr Kolomoisky who were still employed by the Bank and extended to material relating to the Bank's obligation to make disclosures to the Ukrainian prosecuting authorities. It also extended to communications relating to PwC's 2015 audit of the Bank and correspondence about the value of assets which were subject to the Asset Transfers.

117. Mr Dubilet was also involved in coordinating work for Mr Kolomoisky post-nationalisation carried out by individuals who had been employed by the Bank pre-nationalisation. There are a number of examples of this in WhatsApp communications both shortly after nationalisation and much later in 2019, which was well after the time at which many of the issues in these proceedings had become apparent. There is evidence that the closeness of the relationship was active as late as July 2019 when Mr Dubilet was involved in WhatsApp discussions with Mr Kolomoisky (which seem to have borne fruit), as to how to persuade the Ukrainian police to call in the Bank's then chairman, Peter Krumphanzl, for questioning about allegations that he had been involved in a "number of questionable contracts".

118. The closeness of the relationship which Mr Dubilet continued to have with Mr Kolomoisky after nationalisation was also illustrated by the fact that, in September 2019, the Individual Defendants exchanged correspondence about the receipt by Mr Dubilet of a National Anti-Corruption Bureau summons served in support of a US investigation into money laundering by the Individual Defendants. It is not surprising that a communication of this sort would have been of interest to both of the Individual Defendants but, in light of the history, the fact that Mr Kolomoisky had come into possession of it and was sharing it with Mr Bogolyubov demonstrates the continuing closeness of the relationship which Mr Kolomoisky had with Mr Dubilet. It is also clear that the relationship continued on a personal level as well, with examples in the

evidence of Mr Dubilet and his family being provided with holidays by Mr Kolomoisky, both in May 2017, between the time of nationalisation and the commencement of these proceedings, and as late as 2018 and 2019.

119. There is no evidence that the relationship between Mr Bogolyubov and Mr Dubilet was as close, although Mr Dubilet had an office in the Individual Defendants' shared offices in Geneva, and continued from time to time to work on obtaining and providing Mr Bogolyubov with information relating to the Bank (such as the Bank's related party list as at 1 December 2016 and a leaked draft of an Ernst & Young ("EY") report) during this period. There is also clear evidence that, as late as 2019, Mr Dubilet and Mr Bogolyubov continued to communicate with each other in relation to the Bank's affairs, including at least one meeting over lunch which was also attended by Mr Kolomoisky. Whether or not this particular meeting was concerned with the conduct of these proceedings (and it is likely that it was, anyway in part), there is no evidence that what had been a close relationship had deteriorated in any way or that Mr Dubilet would not be prepared to cooperate with the wishes of the Individual Defendants in relation to their defence of these proceedings, including in particular whether or not to give evidence on their behalf.

120. I have reached the conclusion that, despite the fact that it is now Mr Bogolyubov's case that the manner in which the Relevant Loans were granted was "clandestine and contrary to all principles of prudent banking", and that Mr Dubilet (and other members of the Management Board) were responsible for authorising the steps in the Misappropriation without the knowledge, approval and consent of the Individual Defendants, it is more likely than not that he would have been available to give evidence if asked. I have been unable to identify any material evidence that this has caused either of the Individual Defendants to distance themselves from Mr Dubilet, who was at the centre of the arrangements by which they were made. Indeed the contrary is the case, because the nature and tone of the communications which they had post-nationalisation, and such evidence as there is of their contact in that period, is wholly inconsistent with any form of belief by either of the Individual Defendants that the matters of which the Bank now complains were initiated or implemented by Mr Dubilet and/or other members of the Management Board without the consent and approval of the Individual Defendants.

121. I also accept the Bank's submission that the case which Mr Bogolyubov now seeks to advance is difficult to reconcile with what he had said in his withdrawn witness statement to the effect that Mr Dubilet was an experienced and talented banker who continued to grow and expand the Bank up until the time of nationalisation in 2016. Although I would have reached the same conclusion without this evidence, I agree that, if the making of the Relevant Loans had not been approved and authorised by the Individual Defendants, the impact which the events surrounding the Misappropriation had on the Bank's survival and the reasons for its nationalisation means that it is most improbable that the relationship between the three men would have continued as it undoubtedly did.

122. Mr Dubilet also continued in close contact with a number of other individuals employed by the Bank pre-nationalisation, who also featured in the evidence and who were in continuing contact with the Individual Defendants post-nationalisation. These included Oleg Gorokhovsky (a deputy chair of the Management Board from January 2014 until nationalisation and head of the Bank's credit card and salaries department), Lyudmila

Shmalchenko (a deputy chair of the Management Board pre-nationalisation and the Bank's Director of Treasury) and Mr Yatsenko, together with other former employees of the Bank, including Vadym Kovalyev who was appointed to the Management Board in April 2015.

123. In my judgment, Mr Dubilet had highly relevant evidence to give to the claims against all of the Defendants and there is every reason to believe that his relationship with all of them was such that he would have been prepared to do so if his evidence had assisted their case. However, I have reached the conclusion that, if he had been called, it is likely that his evidence would have undermined the case of both of the Individual Defendants that they did not know of or approve the Relevant Loans or the purposes for which they were advanced.

124. The second individual who was at the centre of the events with which these proceedings are concerned, and was available to give relevant evidence for the Individual Defendants, was Mr Novikov who was also a shareholder in Primecap. His formal role as a member of the Management Board who approved the Relevant Loans is described in paragraph 221 below. As with Mr Dubilet, Mr Novikov's role in approving the Relevant Loans is of itself reason to consider that he had relevant evidence to give both by explaining the real purpose for which they were advanced, and by identifying the extent to which the Individual Defendants participated in the decisions to make them. But his participation in events relating to the Misappropriation went well beyond that, as to which I make more detailed findings on his pre-nationalisation relationship with the Individual Defendants later in this judgment.

125. As to his availability to give evidence at the trial, there is compelling evidence that Mr Kolomoisky continued to communicate on a regular basis with Mr Novikov after the Bank's nationalisation and continued to be in regular contact with him after the commencement of these proceedings. It appears that Mr Kolomoisky avoided e-mail, but many hundreds of WhatsApp messages and log records (together with hundreds of attachments) amounting in average to at least two communications per day, were disclosed evidencing communications made during the course of the year after nationalisation and in the year or so after the commencement of these proceedings. It is clear from those messages that Mr Kolomoisky and Mr Novikov had a long-standing personal relationship, which extended beyond the affairs of the Bank to other aspects of Mr Kolomoisky's business activities including other business projects, the details of which were confidential and of no direct relevance to the issues in these proceedings and were therefore redacted.

126. As to Mr Novikov's post-nationalisation relationship with Mr Bogolyubov, there is documentary evidence which establishes that they continued to maintain a personal relationship (and Mr Novikov continued to work for Mr Bogolyubov) not just in the period between nationalisation and the commencement of these proceedings, but also for a considerable period thereafter. Thus in recent years, Mr Novikov has continued to exchange hundreds of WhatsApp messages with Mr Bogolyubov relating to his Ukrainian and other assets and has been assisting Mr Bogolyubov with the conduct of his defence to these proceedings. There is also evidence from WhatsApp exchanges that Mr Novikov continued to be in communication with Vyacheslav Anischenko subsequent to the Bank's nationalisation. Mr Anischenko had originally worked for the Bank between 2000 and 2008 when he became Mr Bogolyubov's personal assistant involved in the administration of some of his personal investments. Like Mr Dubilet,

he too was present in the Geneva office shared by the Individual Defendants and seems to have had his own office in the premises at least between the time of nationalisation and the middle of 2020.

127. In all the circumstances, I have concluded that Mr Novikov would have been able to give relevant evidence which would have cast light on the purpose of the Relevant Loans and the Individual Defendants' knowledge of, and participation in, the Misappropriation if either of the Individual Defendants had chosen to call him. Furthermore, his relationship with both of the Individual Defendants was such that it is to be expected that he would have been called if the Individual Defendants did not have countervailing reasons for not doing so. There is no evidence that, despite his direct involvement in many of the issues which have arisen in these proceedings, he was unavailable to be called by either of the Individual Defendants to give evidence on their behalf. In my judgment, if he had been called, it is likely that his evidence would have undermined the case of both of the Individual Defendants that they did not know of, or participate in, the Relevant Loans or the purposes for which they were advanced.

128. The Bank also submitted in its oral closing argument that Mr Anischenko could have been called to give evidence, not least because his willingness to do so on behalf of Mr Bogolyubov was apparent from what occurred in proceedings brought against both of the Individual Defendants by Vadim Shulman in May 2017 (the "Shulman Proceedings"). In particular, it was said with some force that, if there had been substance in Mr Bogolyubov's allegation that he had made an oral agreement with Mr Kolomoisky in early July 2014 to step away from the Bank, it is very likely that Mr Anischenko would have known about it and been able to corroborate what he understood to have been said. I infer that one of the reasons he was not called was that, as Mr Bogolyubov's personal assistant, his evidence might have undermined Mr Bogolyubov's pleaded case on the oral agreement which is said to have been formalised in the Deeds of Waiver and Indemnity; an issue to which I shall revert later in the judgment.

129. The third individual who was at the centre of the events with which these proceedings are concerned and could have given relevant evidence for the Individual Defendants is Ms Gurieva. Her formal role as a member of the Management Board and her participation in the approval of the Relevant Loans is described below. A spreadsheet, described during the course of the trial as the "Gurieva Spreadsheet", which (amongst other things) identifies the Unreturned Prepayments and links each of the original 46 Borrowers' indebtedness to the Bank to an Unreturned Prepayment, was found on her laptop.

130. Of equal significance for present purposes is Ms Gurieva's post-nationalisation contact with the Individual Defendants, which clearly demonstrated her preparedness to assist the Defendants in their defence to these proceedings. She headed a team of former employees of the Bank and Primecap who produced what have come to be called the Lafferty Spreadsheets (named after the partner in Fieldfisher to whose interlocutory evidence they were exhibited).

131. It is convenient to give a brief explanation of the Lafferty Spreadsheets and the work involved in their preparation at this stage. The work was carried out from the Geneva offices of the Individual Defendants in early 2018 (i.e. very shortly after the original grant of the WFO), at a time when both Mr Kolomoisky and Mr Bogolyubov were

living in Geneva. The Lafferty Spreadsheets were at the centre of the case presented by the Individual Defendants on their jurisdiction challenges and were described as the output of a tracing exercise, which was said to explain the true nature of what was called the scheme alleged against them. Although Mr Kolomoisky made the running on the jurisdiction challenge, Mr Bogolyubov said in evidence that he made his jurisdiction challenge on the same grounds as Mr Kolomoisky and referred to and relied on Mr Lafferty's evidence in support, including therefore the Lafferty Spreadsheets.

132. The exercise of their production involved an analysis of the bank statements of 214 separate companies (the "Lafferty Spreadsheets Companies") through whose hands monies drawn down by the Borrowers were said to have passed. They include all but one of the Borrowers and 13 of the Intermediary Borrowers. As the evidence then adduced made clear, they were put together by teams of people including former employees of the Bank, who were said to have been aware of both the transaction patterns described and the companies involved in the scheme, and that they had done so based on their understanding of the way in which that scheme had operated.

133. The Lafferty Spreadsheets consisted of approximately 6,000 rows of data setting out details of 926 payment chains, which were said to show the operation of a scheme by which money cycled through loops, with money moving through the Bank's branches in Ukraine, Cyprus and Latvia, which was said to end up being used to discharge outstanding liabilities under loans from the Bank either to the same Borrower or to another Borrower or to another client of the Bank. It was said that, subject to very limited exceptions, they demonstrated that all the money borrowed by the original 46 Borrowers, and which passed through the hands of the Corporate Defendants, was ultimately repaid to the Bank in discharge of some other liability to it. These payment chains included what was described as a break point / compensation structure, by which it was meant that there was a gap in the chain between origin and destination, such that it was not immediately apparent how the chain connects, and the final money repaid to the Bank appears to originate from somewhere else. Those who prepared them advanced a case that at least US$452 million of Relevant Drawdowns went via break points to repay loans of companies in which the Individual Defendants had admitted interests.

134. Although they were at the centre of the Individual Defendants' case for several years, the Bank's expert evidence was that they did not follow, or even purport to follow, a consistent methodology or approach and contained significant inaccuracies, inconsistencies and omissions. In the event, neither of the experts appointed by the Individual Defendants to give evidence on their behalf at the trial was able to support the analysis contained in the Lafferty Spreadsheets and they were abandoned in March 2022 shortly before the trial was originally due to start. Having done so, Mr Kolomoisky's case in relation to the scheme described in Mr Lafferty's evidence and the Lafferty Spreadsheets was then expressed as follows:

> "The term "Scheme" used in Mr Lafferty's Second Witness Statement was defined in paragraph 13 as follows "the scheme identified by the Bank … which it wrongly contends gives it a cause of action ("the Scheme")". The Scheme identified by the Bank was illustrated in a series of Charts referred to as the "i2 Charts" which themselves identified a large number of companies alleged to be involved in a Scheme to defraud the Bank and purported to map payments made by one to the other by reference to transactions. The Lafferty Spreadsheets attempted to trace the

> actual flow of funds from one bank account to another. The First Defendant no longer places any reliance on the Lafferty Spreadsheets. In none of his statements of case, nor in his evidence for trial does the First Defendant describe the features of, or advance any positive case of, the existence of any scheme. However, the Lafferty Spreadsheets and the tracing exercise conducted by Mr Davidson (the forensic accounting expert instructed by Mr Kolomoisky) demonstrate that a substantial part of the funds advanced by the Bank under the Relevant Loans came back to the Bank to repay other loans that would not otherwise have been repaid. If and insofar as that analysis identifies a "Scheme", it was not a scheme to defraud the Bank."

135. The Bank submitted in its opening submissions at the trial that this was a remarkable development given the Lafferty Spreadsheets were said to have been compiled by the team who were "aware of the transaction patterns described…and the companies involved in the scheme" and had by the time of their abandonment formed the central plank of Mr Kolomoisky's case for some four years.

136. The Lafferty Spreadsheets had been referred to at some length in the judgment of the Court of Appeal on the Defendants' jurisdiction challenges (see in particular [2019] EWCA Civ 1708, [2020] Ch 783 at [243] and [244]), which concluded that there was reason to believe that the exercise of preparing the Lafferty Spreadsheets "was undertaken by individuals who were themselves involved in the alleged fraud", and required to be approached with caution. In the absence of any evidence to the contrary, the documentation and circumstances surrounding the Lafferty Spreadsheets and their preparation demonstrated with clarity that the Relevant Drawdowns were part of what the Bank's forensic accounting expert accurately characterised as a money laundering exercise, which had no genuine or legitimate commercial purpose.

137. The Lafferty Spreadsheets Companies included all of the Borrowers, 14 of the Intermediary Borrowers, all six of the Corporate Defendants and more than 50 of the companies disclosed by the Individual Defendants as amongst their assets pursuant to their disclosure obligations under the WFO. The Lafferty Spreadsheets themselves were presented on the basis that they had been produced using the Bank's transactional data provided by former employees and clients of the Bank. When the Bank indicated that the provision of this data was likely to constitute a criminal offence under Ukrainian law, Mr Kolomoisky changed his position and asserted instead that the Lafferty Spreadsheets had been produced using the bank statements of the Lafferty Spreadsheets Companies, copies of which seem to have been available to Mr Kolomoisky on request.

138. This is one of the several elements of the evidence which has caused me to conclude that the Borrowers, the Intermediary Borrowers and the Corporate Defendants were all ultimately owned and controlled by one or both of the Individual Defendants. I should make clear at this stage, that when I use the word "own" in this context I mean the ownership of a beneficial interest in the entity concerned sufficient to control its affairs and when I use the word "control", the concept which I seek to capture is the ability by whatever means to procure the relevant entity to act (or not act) in accordance with the controller's wishes and instructions, either generally or unconditionally in the relevant context.

139. The Bank contends that, in the light of Ms Gurieva's involvement in this exercise, she would have been able to give evidence of what had originally been relied on both by

Mr Kolomoisky and Mr Bogolyubov as particulars of the mechanisms by which the sums returned to the Bank as part of the loan recycling scheme were said by them to have amounted to repayments of the Relevant Loans. I agree that it is highly likely that, as head of BOK and leader of the team which put together the Lafferty Spreadsheets, Ms Gurieva would have had valuable evidence to give on the purpose behind the transactions recorded in them and the extent to which either or both of the Individual Defendants had been aware of and participated in what had occurred.

140. Having provided this assistance to the Defendants in their defence of these proceedings, there is no suggestion and no evidence that her relationship with them deteriorated thereafter or that she had otherwise become unavailable to give evidence on their behalf. Indeed there is evidence that she continued to be in touch with Mr Kolomoisky throughout the period up to the end of 2019. There is no evidence that she was unavailable to be called by either of the Individual Defendants and it is likely that, if she had been called, her evidence would have undermined the case of both of the Individual Defendants that they did not know of or participate in the Relevant Loans or the purposes for which they were advanced.

141. The fourth individual, who was at the centre of the events with which these proceedings are concerned, and who is said by the Bank to have been available to give relevant evidence, is Mr Melnyk. He was head of PBC, an entity the significance of which I shall explain a little later in this judgment and was employed by Sunaltezza Consulting Ltd ("Sunaltezza") between November 2017 and January 2020. Sunaltezza was a company owned and controlled by Mr Bogolyubov. Mr Melnyk acted as a nominee for both of the Individual Defendants in respect of a number of their valuable assets, sometimes pursuant to oral agreements: Mr Kolomoisky disclosed seven oral agreements and Mr Bogolyubov disclosed five oral agreements to which Mr Melnyk was party. He was also a purported ultimate beneficial owner ("UBO") of 27 Borrowers and twelve Intermediary Borrowers and was recorded as having a beneficial ownership in the English Defendants.

142. Mr Melnyk also had a role in a number of events which related to the making of the Relevant Loans and the Misappropriation more generally. His participation included procuring the execution by nominees of contracts to which the Corporate Defendants were party, corresponding on and seeking loans in respect of the payment of fees relating to the 2014 Ukrainian Proceedings and liaising with BOK in relation to aspects of the Asset Transfers in July 2016 (viz. the valuation of some of the petrol stations which appeared on a document called the Topchy spreadsheet which I will refer to later in this judgment).

143. However, I was not shown any substantial evidence that Mr Melnyk was still in touch with Mr Kolomoisky after nationalisation. That is not to say that there was any evidence that he was not, and there was evidence that he had been in contact with Mr Bogolyubov as late as 2021. Furthermore, his employment by Sunaltezza until January 2020 demonstrates that he was available to assist Mr Bogolyubov in the defence of these proceedings up at least until then. There is no evidence that he did not continue to be available and there is no reason to believe that if he had been asked to give evidence on behalf of Mr Bogolyubov (and probably Mr Kolomoisky as well) he would have done so.

144. The final individual, said by the Bank to have been a witness that should have been called by the Individual Defendants and whose absence from the witness box supported an inference that she would have given evidence materially damaging to their case, was Marina Markova. She was an employee of the Bank's Cyprus branch, who transferred to Primecap two days after nationalisation. She was involved in the administration of the Individual Defendants' assets and was a party to WhatsApp exchanges which were disclosed very late in the preparation of the case for trial and which, on the Bank's case, revealed the extent of Mr Bogolyubov's active continued involvement with the Bank long after the time at which he said that he had taken a back seat in its affairs. In particular, her evidence would have related to (a) the circumstances surrounding the movement of former Bank employees to Primecap at the time of the Bank's nationalisation, and (b) correspondence in 2019 relating to the BVI Defendants, which made clear that their continued funding was being provided by two other entities (Sanderlyn Limited ("Sanderlyn") and Versala Limited ("Versala")) whose sole shareholders were Cypriot residents accustomed to acting as nominees for both of the Individual Defendants. This is what the Bank called compelling evidence of the Individual Defendants' ownership and/or control of Primecap and the Bank's case as to their ownership and control of the Relevant Entities.

145. I shall come back to this aspect of the case later, but for present purposes, I am satisfied that Ms Markova was available to give evidence on behalf of the Individual Defendants had they chosen to call her. Her availability was confirmed by the fact that, having transferred to Cyprus immediately after nationalisation, she was one of a number of former Bank employees who continued to receive payments for services from entities controlled by the Individual Defendants, including in particular Sunaltezza by whom it appears that she was then employed. I shall revert to Sunaltezza shortly, but the Bank relied heavily on the fact that the role of Sunaltezza as a custodian of documents in the control of Mr Bogolyubov only fully emerged in the course of late disclosure given during the course of the trial.

The documentary evidence

146. Although the court was faced with a vast amount of documentation, it is clear that relevant documents which may have been available in the past are now no longer available, and that many of the events which occurred were either never evidenced by disclosable documents or were evidenced in a form which has not survived. There are a number of aspects to this, all leading to the Bank making two overarching submissions. The first is that the court should draw adverse inferences against the Individual Defendants for their serious and culpable failure to give proper disclosure. The second is that their practised failure to create and retain relevant documentation means that the absence of documents giving direct support for the Bank's allegations against the Individual Defendants (and more particularly Mr Bogolyubov) does not detract from the Bank's case that it is most improbable that they did not know about and were not involved in the loan recycling or the Misappropriation.

147. It is the Bank's case that one of the principal reasons that the documentary record is incomplete is that the Individual Defendants have, throughout these proceedings, failed to make proper disclosure in accordance with their obligations. These obligations included making search-based Model E disclosure in relation to the allegations of

ownership and/or control of the Borrowers, the Intermediary Borrowers, the Share Pledgors, the Asset Transferors, the New Borrowers and the Lafferty Spreadsheets Companies. When dealing with the position of Mr Kolomoisky, the way in which Mr Robert Anderson KC for the Bank put the point in his oral submissions was that he had adopted a deliberate strategy to ensure that relevant documents have never seen the light of day.

148. Based on the way in which they complied with their disclosure obligations, it appeared that one of the differences between Mr Kolomoisky's and Mr Bogolyubov's working practices was that Mr Bogolyubov was accustomed to using e-mail: he had a Gmail account from which a limited number of e-mails were eventually produced. Mr Kolomoisky took a different approach. He had a general practice of deliberately avoiding the use of documentation relating to the conduct of his business affairs. Indeed, he said in his own disclosure certificate that, because he has been targeted by business and political rivals in Ukraine and by the Russian state and President Putin, he has for many years "sought to limit the risk of inadvertent and/or malicious disclosure of business or politically sensitive information by consciously and actively restricting the volume of documents he has created and handled, and by choosing to avoid the use of e-mail". This avoidance of the use of e-mail was reiterated in another statement in his disclosure certificate that he "does not use (and has never used) a personal e-mail account, whether for personal or business purposes. He does not consider e-mail to be a safe and reliable method of communication."

149. The Bank does not submit that what Mr Kolomoisky had to say about not using e-mail is wrong or untrue. However, it is able to point to this explanation as supportive of its submission that the absence of e-mails giving direct support for the Bank's allegations against Mr Kolomoisky does not detract from its case that he knew about and participated in the loan recycling or the Misappropriation.

150. The absence of other relevant documentation is said to be more telling. Thus, the Bank submitted that it is inherently incredible that neither Mr Kolomoisky nor his secretaries retained any records which kept track of where he was supposed to be, when he was supposed to be there and who he was meeting in relation to events which were relevant to issues in these proceedings. In my judgment, there is real force in this submission.

151. The only records of any significance came from WhatsApp exchanges. These were the only records of the principal means by which the Individual Defendants communicated with each other and the remainder of their inner circle, viz. WhatsApp, Viber, mobile telephone or the use of the 'Black', a secure telephone network by which several dozen individuals who featured in the evidence at trial were able to communicate with each other by calling numbers recorded by their name in a directory. Amongst those records are examples (mostly at the time of and after nationalisation) of WhatsApp messages between the Individual Defendants which recorded nothing of substance, because they did no more than request one or other of them to speak on the Black.

152. Although Mr Kolomoisky has given some disclosure of messages from the period between 2015 and 2016, increasing substantially from 2017 onwards, he has disclosed no messages in the period 2013 and 2014 when the Misappropriation was taking place. Indeed there is no record of any communication between the Individual Defendants during the period of the Misappropriation apart from what the Bank justifiably called a fragment of Mr Bogolyubov's mobile phone call logs covering the period February to

May 2014. However, even during 2017 (in particular immediately prior to the commencement of these proceedings in December 2017), it is possible to see from a comparison of the WhatsApp messages disclosed by Mr Bogolyubov and those disclosed by Mr Kolomoisky that in this period at least, there were communications between the two of them, of which Mr Bogolyubov had retained a record while Mr Kolomoisky had not.

153. Mr Anderson said that both Mr Kolomoisky and Mr Bogolyubov also had a "burn after reading" policy. This allegation concentrated on documentation destruction, as opposed to documents not coming into existence in the first place, and I am satisfied that this undoubtedly happened in many instances. A stark illustration of this was a further admission by Mr Kolomoisky in his disclosure certificate that his "general practice has been not to retain hard copy documents". He went on to say that, after reviewing a hard copy document, his "practice has been to dispose of the document immediately or once any action points have been completed". The Bank criticised this as an extraordinary way for a supervisory board member of a major financial institution with c.20 million customers to behave. Notwithstanding the Ukrainian context to which I have already referred, I agree; it gives some small insight into some of the unusual aspects of the Bank's pre-nationalisation culture.

154. Nonetheless, on one view Mr Kolomoisky's general practice might be said to support an argument that the manner in which he was accustomed to operate provides an explanation for the absence of relevant documentation available for inspection by the Bank, which cannot of itself be regarded as nefarious, anyway so far as these proceedings are concerned. If that is what he always did, so the argument goes, there is no reason to consider that his deliberate document destruction policy should cause the court to draw adverse inferences in the context of these proceedings.

155. However, I do not think that this would be the right conclusion to draw. One overarching reason for this is the striking fact that Mr Kolomoisky disclosed no documentary communications between himself and any third party in the period prior to May 2015. Taken alone, that is capable of having an innocent explanation, but is cast in a rather different light by the fact that he started his disclosure by declining to accept his obligation to disclose relevant documents which it is now clear were within his control, being in the possession of entities which it has subsequently become apparent were either vehicles controlled by him or vehicles which held documents as custodians on his behalf. There were many other occasions during the course of the case's preparation for trial on which the court had cause to criticise Mr Kolomoisky's approach to disclosure. Overall I accept the Bank's submission that, even in a case of this size and complexity, the Bank should not have been required to make so many successful disclosure applications, with conspicuous examples relating to documents within his control which emanated from Primecap and the initial failure to identify PBC as a corporate services provider holding relevant documents which were in fact within his control.

156. The Bank made detailed submissions relying on the procedural history of the difficulties it had in obtaining disclosure of the Primecap documentation. There is no need for me to recite them in this judgment but what occurred was reflected in a number of disclosure orders the court was required to make during the course of the preparation of the case for trial. Taken in the round I think it is fair to summarise Mr Kolomoisky's attitude to the Bank's efforts to obtain that documentation and the compliance by him

with his duties to make proper disclosure as being that "he would delay and obfuscate for as long as possible in the hope that these documents would not come out". But I think that what occurred also betrayed a mindset which sought to make the disclosure process as painful as possible for the Bank, while drip-feeding material to give the impression that he was complying with his obligations. I have no confidence that the Bank has seen all of the surviving documentation in Mr Kolomoisky's control which relate to the issues for disclosure in these proceedings.

157. If anything the position was more stark in relation to PBC, which was not initially identified as a potential custodian of relevant documentation. In the light of what has now transpired, it was obvious that documentation in its possession was in Mr Kolomoisky's control and should have been searched and disclosed to the Bank from an early stage in the disclosure process. Mr Kolomoisky must have known that this was the case if only because 23 PBC employees were said to hold assets for him pursuant to 97 oral agreements. It then eventually transpired that PBC's mail server no longer exists, with the consequence that it was no longer possible to access what was likely to have been one of the more important potential sources of documentation relevant to these proceedings: the e-mails of Mr Melnyk.

158. I have also concluded that Mr Kolomoisky took deliberate decisions to procure the destruction of data which was capable of being relevant to the current proceedings, in circumstances which had nothing to do with a well-established or commercially justifiable practice of document destruction for the types of reason identified by him. A summary explanation of why I am satisfied that was the case is appropriate, although it is fair to say that the essence of those circumstances was disclosed in Mr Kolomoisky's own disclosure certificate.

159. Over an extended period commencing in 2009 and including the period of the Misappropriation, the nationalisation of the Bank and up to the commencement of these proceedings, the Individual Defendants were parties to several sets of legal proceedings in both this jurisdiction and the US in relation to what the Bank called aspects of their business empire. They included English proceedings brought against the Individual Defendants by Victor Pinchuk in 2013 (the "Pinchuk Proceedings"), proceedings brought in England against both of the Individual Defendants by PJSC Tatneft in March 2016 (the "Tatneft Proceedings") and the Shulman Proceedings. They were both also at the centre of English proceedings brought by Eclairs Group Ltd (which they controlled through a series of trusts) and Glengarry Overseas Limited against JKX Oil & Gas Plc in June 2013.

160. There was no suggestion that these other proceedings related to the same matters as have been in issue in this claim, but there was a material overlap on some of the issues which were at the heart of the current dispute, including the manner in which both of the Individual Defendants were accustomed to conduct their businesses and the relationships they had with individuals and entities who have featured in the present proceedings. These included the relationship which the Individual Defendants had between themselves and the relationship which Mr Kolomoisky had with Mr Novikov. They also included the manner in which Mr Bogolyubov used his personal assistant, Mr Anischenko, as a conduit for communicating with others in relation to his affairs. These matters are central to an understanding of the probabilities that the Individual Defendants approved of and procured the Misappropriation.

161. The existence of these proceedings meant that, with the possible exception of a single period between the ending of the Pinchuk Proceedings in January 2016 and the commencement of the Tatneft Proceedings in March 2016, both of the Individual Defendants were subject to clear document preservation obligations pursuant to PD57AD and its predecessors (including at the most relevant times paragraph 7 of PD31B). That obligation extended to any time they knew that they may become party to proceedings. In these circumstances, it is very surprising that, during that short three-month period, Mr Kolomoisky gave instructions to his disclosure provider in the Pinchuk Proceedings (AlixPartners ("Alix")) to destroy the data they had imaged for the purposes of those proceedings from a mobile phone, which was not itself retained after the imaging had taken place.

162. So far as Mr Bogolyubov is concerned, the issue was more about compliance with his obligations than a stark example of document destruction, although like Mr Kolomoisky he had surprising difficulty in obtaining documentation from those who worked with and for him. I also think there are some indications that, although he stood behind Mr Kolomoisky in relation to the very slow pace and incomplete manner in which the Primecap and PBC documentation emerged, he was complicit in the approach that Mr Kolomoisky adopted. This was reflected by the fact that it is now clear that there are 21 PBC nominees holding 79 assets for him pursuant to some form of undocumented arrangement.

163. The Bank made detailed submissions about the unsatisfactory manner in which disclosure in relation to Mr Bogolyubov's e-mail accounts occurred. This required a number of court orders during the course of preparing the case for trial. There were a number of aspects to this. They included the fact that no e-mails were disclosed from one of his accounts in relation to the period prior to 25 February 2016, even though it is clear that the account had been in use during that period. There was also another account which seems to have been deleted by Primecap in mid-2017. Taken overall, I am not satisfied from what I have seen that there has been an explanation for all of the apparent gaps in what has been disclosed. Whether or not the material still exists, I have little doubt that the disclosed documentary record of Mr Bogolyubov's involvement in matters relating to the issues in these proceedings falls very far short of what was in existence at the time the events occurred.

164. The Bank places particular reliance on the fact that it was only by chance (and well after the date on which the trial was due to commence) that significant and highly relevant documentation came to light in the form of material in the possession of two companies wholly owned by Mr Bogolyubov: Grizal Enterprises Ltd ("Grizal") and Sunaltezza, but which had not previously been identified by Mr Bogolyubov as a document custodian. In order to understand the significance of what occurred, it is necessary to reiterate that it has always been at the heart of the Bank's case that the Borrowers and the Intermediary Borrowers (together with Primecap and PBC) were companies in the ultimate beneficial ownership of both of the Individual Defendants. This was always denied by the Defendants and, during the course of the preparation of the case for trial, it was one of the most contentious aspects of the dispute. It was a central part of the Bank's case, because, if established, it gave material weight to its allegations both that the Individual Defendants must have known of and given instructions in relation to the Misappropriation and that they were likely to have benefitted from it in some way.

165. The starting point for explaining what occurred is that neither Grizal nor Sunaltezza was identified during the course of Mr Bogolyubov's disclosure as a potential custodian of the documents he was required to disclose pursuant to the orders for extended disclosure which had been made earlier in the proceedings. As a result of an interlocutory application to enforce the WFO in a number of other jurisdictions, together with certain ancillary relief, the Bank started to probe for additional documentation relating to the source of Mr Bogolyubov's income. This eventually led to the disclosure after the commencement of the trial of bank statements from Grizal and then Sunaltezza which themselves demonstrated that both entities had since 1 November 2017 been making substantial payments to ten individuals, including Mr Melnyk, (together with a further eleventh employee, Konstiantyn Ivlev, with effect from 6 March 2019) who had been employed by PBC.

166. These individuals were recorded elsewhere in the trial papers as having associated roles either on the basis that they were one of the ultimate beneficial owners ("UBOs") of the English Defendants (as claimed by the Corporate Defendants), or one of the ED Principals or one or more of 34 of the Borrowers or one or more of 23 of the Intermediary Borrowers. Many of them had also acted as nominees for the Individual Defendants in relation to other assets in which either or both of the Individual Defendants held an undisputed beneficial interest. I was taken to the employment contract which Mr Melnyk (who had been head of PBC) had with Sunaltezza; he was contracted to work 50 hours per week at a salary of EUR 7,500 per month.

167. This very late disclosure therefore made clear that Mr Bogolyubov's companies were making monthly payments to the very same former PBC employees who the Bank says, but Mr Bogolyubov denies, held interests in various of the Borrowers and Intermediary Borrowers for him and Mr Kolomoisky. They also show that Mr Bogolyubov's companies employed three of the five purported UBOs of the English Defendants (Mr Melnyk and Anna Yesipova from 1 November 2017, and Mr Ivlev from March 2019) and one of the ED Principals (Olena Ryazantseva). The Bank submitted that this was powerful evidence that the Individual Defendants were the true beneficial owners of the Borrowers, the Intermediary Borrowers and indeed PBC and that this documentation should have been disclosed much earlier in the proceedings. Indeed, in the case of Mr Melnyk, the link to Mr Bogolyubov through Sunaltezza had been deliberately obscured by his assertion on a contested disclosure application made in November 2022 that he had no right to search the devices, accounts and telephones of Mr Melnyk (amongst others). In that context it was misleading not to mention that this was probably wrong because he was for much of the period to which the application related an employee of Mr Bogolyubov's own service company.

168. The essence of Mr Bogolyubov's submissions was that the whole issue had been blown out of all proportion and that it certainly does not show that documents have been deliberately withheld. It was said that, promptly upon becoming aware that Grizal and Sunaltezza might hold relevant documents, Mr Bogolyubov took steps to collect and review them and that any defects in the original disclosure process have now been remedied. The substance of what this late disclosure showed was dealt with in a letter from Mr Bogolyubov's solicitors sent shortly before the trial resumed after the long vacation. They said:

> "We are instructed that in or about late 2016/early 2017 our client was informed that it would help to facilitate the granting of visas to certain individuals intending

> to relocate to Cyprus if those individuals were employed by a company which had a trading history of more than two years in Cyprus. Mr Bogolyubov had such a company and was therefore approached for assistance.
>
> Mr Bogolyubov was informed that certain of the individuals provided corporate services to various companies in which he had an interest and would do so through Sunaltezza while it employed them. He acquiesced to the request on the understanding that the employment arrangements would be temporary and that the cost of the employment would be set off against service charges that such individuals would otherwise have charged Mr Bogolyubov's companies. This arrangement was not recorded in writing. Mr Bogolyubov did not enquire about the specific identities of the individuals. Mr Bogolyubov has not seen the employment contracts between Sunaltezza and these individuals and is not personally involved in the payroll process or any administrative aspects of Sunaltezza.
>
> For a short period of time in late 2017/early 2018, Sunaltezza did not have sufficient funds to pay the salaries of the employees in question. As such, the payments were made temporarily by Grizal (as is reflected in the Grizal Statements), pursuant to a financing arrangement entered into by Grizal and Sunaltezza."

169. While I have no doubt that this explanation given on instructions was given in good faith by Mr Bogolyubov's solicitors, I do not accept that the issue has been blown out of all proportion by the Bank or that Mr Bogolyubov was as distant from what occurred as it implies. The fact that he agreed that these companies should make these payments in the first place, and the manner in which the individuals concerned received the payments under contracts of employment entered into with Mr Bogolyubov's own service companies, is a very clear confirmation of the pervading interconnectivity (through these individuals) between the Borrowers, the Intermediary Borrowers, the Corporate Defendants and Mr Bogolyubov. This is all the more striking in circumstances in which it is at the heart of Mr Bogolyubov's case that he had stepped away from the Bank as a result of an agreement he reached with Mr Kolomoisky in July 2014, said to have been formalised by the execution of the Deeds of Waiver and Indemnity in May and June 2015.

170. It is also of central relevance that the PBC nominees included three of the five purported UBOs of the English Defendants, who, as I shall explain later, were said to have been responsible for funding their defence of these proceedings. The employment status they can now be seen to have had within Sunaltezza means that the suggestion that they were responsible for funding any of the Corporate Defendants' defences lacks all credibility. It is very much more likely that the funding came from those behind Sunaltezza, who also had an interest in the outcome of the proceedings, i.e., Mr Bogolyubov and possibly Mr Kolomoisky as well.

171. Two other aspects of the manner in which this information emerged very late in the day caused me real concern, and cast significant doubt on the court's ability to place reliance on unevidenced assertions from Mr Bogolyubov about his continuing involvement with the various corporate entities which participated in the Misappropriation. They also made me sceptical that the court can assume that full disclosure has been given by Mr Bogolyubov and corporate custodians of documents held on his behalf in relation to the important matter of his continuing role in the affairs of the Bank, and the other corporate

entities involved in the Misappropriation both up to and after July 2014. The fact that Mr Bogolyubov has chosen not to give evidence in support of this or any other aspect of his defence supports a conclusion that I cannot proceed on the basis that full disclosure on these issues has been given. I cannot speculate on what remains undisclosed, but nor do I consider it remotely arguable that the absence of further documentation regarding Mr Bogolyubov's relationship with the Borrowers, the Intermediary Borrowers and the Corporate Defendants carries any real weight to prove that part of his case which specifically denied that Mr Bogolyubov controlled the Borrowers or the Intermediary Borrowers via PBC or at all.

172. The first is that, at an earlier stage in the proceedings (January 2022), the Bank had pleaded the Individual Defendants' ownership and control of PBC in support of its allegation that they owned and/or controlled the Borrowers and the Intermediary Borrowers. It scheduled to its pleading a list of individuals who were said to have been officers, directors, representatives, shareholders and/or purported UBOs of the Ukrainian Borrowers and at least 29 of the Intermediary Borrowers. Mr Bogolyubov's response was that he was not acquainted with any of the individuals identified in the schedule (save for Mr Melnyk, who is admitted to have been an officer or employee of PBC) and did not know whether any of those individuals were employees or officers of PBC. This turned out to be a very misleading response, given that it is now clear that nine of those were employed through his own wholly owned service company in the period after nationalisation. No properly evidenced explanation for this inexplicable discrepancy was ever given.

173. The second relates to Ms Markova. She had moved from the Bank's Cypriot branch to Primecap at the time of nationalisation. After the commencement of the proceedings she was sending regular messages to Mr Kolomoisky about the bank balances of the two entities (Sanderlyn and Versala) which were being used to fund the BVI Defendants' defence of these proceedings. This was a state of affairs from which Mr Bogolyubov sought to distance himself and in respect of which he said in opening that "the Bank again seeks to elide the positions of Mr Bogolyubov and Mr Kolomoisky". On 26 January 2023, I made an order requiring both of the Individual Defendants to contact Ms Markova to assist with the provision of information necessary for the Bank to police the WFO. Mr Bogolyubov's response was that he had contacted Ms Markova but that he had not, as at 28 February 2023, received a response.

174. I agree with the Bank that Mr Bogolyubov's response is not credible. Ms Markova was then an employee of Mr Bogolyubov's service company, Sunaltezza, and was at that very period of time receiving regular payments from Sunaltezza in payment of her salary, bonus and expenses. Furthermore, two other employees of Sunaltezza (Victoriya Pyrog and Valeria Diachenko) were the authorised users on Sanderlyn's internet bank account, which ties Mr Bogolyubov in more closely to control of the Corporate Defendants. In my view, this demonstrates that the submission that the Bank was illegitimately seeking to elide the positions of Mr Bogolyubov and Mr Kolomoisky was ill-founded.

175. In my judgment the Bank was entitled to ask: why, if it was true that Mr Bogolyubov had indeed tried to step away from the Bank in July 2014, did he employ a string of former Cyprus branch employees in the year following nationalisation and why did he agree with Mr Kolomoisky in a remarkably informal way that he would take on and pay many of the most important members of PBC's staff? There was never a properly

evidenced answer to these questions, apart from the rather weak explanation given in the Enyo letter from which I have quoted above. In my view, the right inference to draw is that it was in Mr Bogolyubov's interests to keep the PBC team together, because their knowledge of the relationship between the Individual Defendants and the Bank pre-nationalisation was information the dissemination of which it was in his interests to continue to control. What occurred in relation to the individuals employed post-nationalisation by Sunaltezza and Grizal is a small but nevertheless significant extra piece of information which confirms the Bank's case as to his interest in and control of the Borrowers, the Intermediary Borrowers and PBC.

176. In these circumstances, and in the light of the way that disclosure was carried out in this case, I am not satisfied that all electronic communications between the Individual Defendants during the period relevant to these proceedings have been disclosed or even identified. I am not in a position to determine whether those which have not been disclosed have been destroyed and if so when, but what is clear is that the fact that electronic communications between the Individual Defendants during periods critical to this case have not been disclosed does not establish that no such electronic communications occurred.

177. I also accept the Bank's submission that the number of specific disclosure orders which the court was required to make during the course of these proceedings illustrates why I cannot be satisfied that, even taking into account what has been destroyed, all documentation in the control of the Individual Defendants relevant to the disclosure issues has seen the light of the day. Indeed I am satisfied that it almost certainly has not. This means that the absence of documentation in relation to matters in which they might have been expected to have been involved is no evidence that they were not in fact involved. It seems to me that this is more particularly the case when taken together with their decision not to give evidence. I think it is likely that if they had done so, their cross-examination would have further supported the Bank's case that the Relevant Entities were all controlled by the Individual Defendants.

178. A further issue of concern relating to the availability of relevant documentation is reflected in the evidence of Ms Pakhachuk. She joined the Bank as deputy chair of the Management Board at the time of nationalisation and described in her witness statement the immense challenges faced by the Bank's new management when they took over running its affairs. One paragraph is worth citing in full because it gives a clear picture, not challenged in cross-examination, of why the Bank's own records were incomplete:

> "As well as existing staff being actively unhelpful, we were also facing a situation where hard and soft copy documents were routinely missing from the Bank's files. In my view, there had been a deliberate attempt to 'clean out' the Bank's documents before the nationalisation. This was particularly clear for one of the departments for which I was ultimately responsible after my appointment, the Investment Business Department, which was previously headed by Mr Novikov. The offices of that department had been completely emptied by the time I started at the Bank, by which I mean they were stripped of everything: the filing cabinets were completely empty and even the plug sockets had been removed from the wall. The majority of the staff in the Investment Business Department simply left after the nationalisation, and I believe that those who remained only stayed in order to work to undermine and mislead us."

179. There was no evidence that the Individual Defendants were directly involved, and to that extent there is no warrant for drawing any adverse inferences against them arising out of what occurred. I cannot exclude the possibility that this was done on their instructions or with their approval, but the Bank has not sought to prove that it was. It follows that the only inference it is appropriate for me to draw is that it is no answer to the Bank's case that documents in a particular form would have existed if it were to be correct; it is just as likely that they were destroyed as part of the exercise described by Ms Pakhachuk, as it is that they never existed in the first place. As will appear, the state in which the Bank's affairs were found on nationalisation is also relevant to an assessment of one part of the Limitation Defence: viz. whether it is appropriate for the court to exercise its discretion to disapply the limitation period if it is necessary to do so.

Absent witnesses and deficient disclosure: the inferences to be drawn

180. More generally, I think it is likely that the decision of the Individual Defendants not to give evidence in support of their own defences was materially influenced by a recognition that there was no underlying commercial rationale for the loan recycling scheme. They were unable to advance an explanation sufficient to rebut the strong inference that the scheme involved a misuse of the Bank's money and a gross breach of duty to the Bank by those involved in what occurred. Furthermore, I think it likely that they both recognised that by giving evidence in person they would expose themselves to questioning about their role in the Misappropriation to which they would have had no credible exculpatory answer and they therefore chose to decline to do so.

181. I am fortified in reaching this conclusion by the fact that, earlier in these proceedings, it was accepted on behalf of Mr Kolomoisky that, if the matter ever went to trial, he would need to explain what was going on, why it was done and whether there was any dishonest intent. On the face of it, this amounted to a recognition, which in my view was justified, that there was a burden on the Defendants to explain what had occurred. It is therefore clear that Mr Kolomoisky had throughout contemplated that some oral evidence would be advanced by him to clarify his position in relation to the Misappropriation. It is also clear that both of the Individual Defendants took the same view when they served their witness statements in support of their respective defences.

182. One of the principal reasons that both of the Individual Defendants declined to give evidence in person and in the case of Mr Kolomoisky withdrew the witnesses he had originally intended to call was that their cross-examination would have been likely to have strengthened the Bank's case not just that they controlled the Bank, but also that they were the true UBOs of many if not all of the Borrowers, the Intermediary Borrowers, the Corporate Defendants, the ED Principals and the New Borrowers. I have also concluded that the principal reason for Mr Kolomoisky's decision not to adduce evidence at the trial from Mr Kazantsev, Ms Koryak and Mr M Pugach, was the likelihood that exposing them to cross-examination on the evidence they had given earlier in the proceedings would damage the Defendants' case. Mr Kazantsev's evidence would also have been relevant to the important question (particularly so far as Mr Bogolyubov's case was concerned) of the conclusions which the court is entitled to draw from the Kazantsev Spreadsheet.

183. Something similar can be said about Mr Dubilet and the other individuals who played a central role in the Misappropriation, but who were not put forward to explain what occurred or to support the Individual Defendants' case that they were not involved. I am satisfied that one of the principal reasons why none of the Defendants sought to adduce evidence from them in these proceedings is the likelihood that, if they had been called, they would have undermined the case of both of the Individual Defendants that they did not know of or approve the Relevant Loans or the purposes for which they were advanced. Put another way, they had highly relevant evidence to give, were available to the Defendants to do so and it is to be expected that they would have been called if the Individual Defendants did not have countervailing reasons for not doing so.

184. The consequence of these decisions by the Individual Defendants was that no evidence of fact was called by any of the Defendants. They did, however, call expert evidence from a forensic accountant and from asset valuers, some of which took the form of analysing the Bank's documentation for the purpose of describing what occurred as part of the alleged Misappropriation and the Asset Transfers used to reduce the outstanding balances on the Relevant Loans. I shall discuss that evidence later in this judgment.

Introduction to the Bank and its management

185. The Bank is a Ukrainian joint stock company originally established in March 1992 by the Individual Defendants (together with others including Aleksey Martynov) as a limited liability company. In 2000 the Bank was reorganised into a closed joint-stock entity and then became a public joint-stock company limited by shares in 2009. I shall explain the way in which the Bank's shares were held in a little more detail when describing the structure and powers of its general meeting of shareholders (the "General Meeting") but, until its nationalisation in December 2016, each of the Individual Defendants held a major stake in the Bank (albeit in each case falling just short of 50%) and together always held more than 90% of its issued shares.

186. The Bank's financial statements disclosed that its principal business activity was commercial and retail banking operations within Ukraine, having operated under a full banking licence issued by the NBU since the time it was established. At the time of its nationalisation in 2016, the Bank had 30 regional offices and more than 2,400 branches in Ukraine, a branch in Cyprus and an associated bank in Latvia. It had a well-established systemic significance to the banking market in Ukraine, which is illustrated by the fact that at the end of 2012 it had approximately 13 million individual customers and over 450,000 corporate customers across Ukraine. At that stage it was said by the NBU to be the country's leading deposit taker from legal entities with almost 10% of the market.

187. It is at the heart of the Bank's case against both of the Individual Defendants that not only did they have (as between themselves) a major controlling stake in the Bank, but also that they used that control to procure the Misappropriation. It is said that one of the ways they did so was by exercising a dominant influence over the operation of the formal structures for which the Bank's charter (the "Charter") provided. There is no doubt that the extent of their interest as co-owners of more than 90% of the Bank's shares gave the Individual Defendants the opportunity to exercise actual control of the

Bank through its formal structures, and there is also no doubt that they both played an active part in the functioning of both the General Meeting and the Supervisory Board, the work of which I shall come on to explain.

188. However, the Individual Defendants deny that they were involved in the management of the Bank's business and more specifically, they deny that they were responsible for the Bank's decisions to grant loans, or the terms of such loans including the security to be required. Mr Kolomoisky pleaded that all such decisions were made by Mr Dubilet, acting on the recommendation of the ECC. He also denied that he was responsible for any decisions to lend without special resolution of the Supervisory Board where such was required, or that he was responsible for any decision to accept sham documentation to support the making of particular loans. He said that he was not responsible for the compilation of the Bank's list of related parties and pleaded that they were prepared by the Bank's compliance department and approved by Mr Dubilet and the Management Board.

189. More particularly, it was Mr Kolomoisky's pleaded case that he did not procure and was not aware of the grant of the Relevant Loans, the advances of funds pursuant to them (and therefore the Relevant Drawdowns), the Relevant Supply Agreements, the Intermediary Loans or the LFSAs. He also denied the Bank's allegation that the Corporate Defendants were owned or controlled by him and that he owned or controlled any of the ED Principals during the relevant period. As to the Borrowers and Intermediary Borrowers he did not admit having an interest in all of them but did admit to having an interest in some. Mr Bogolyubov's pleaded case was similar to that of Mr Kolomoisky although expressed in more general terms. He emphasised that, although he was chairman of the Bank's Supervisory Board throughout the relevant period, all significant decisions, including in particular all significant corporate lending decisions, were made by the Management Board.

190. So far as the Misappropriation is concerned, the Bank's allegations of control are not supported by any direct documentary evidence confirming that any single one of the Relevant Loans was specifically authorised or procured by either of the Individual Defendants, nor is there any direct documentary evidence that they knew that any single one of the Borrowers would use the proceeds of a Relevant Drawdown to fund an Unreturned Prepayment. However, it was submitted, and I accept, that the extent of their stake in the Bank, the roles and influence which they had in consequence of their stake in the Bank and the nature of the relationship they had with the individuals who managed the Bank on a day to day basis is all evidence which is capable of supporting the allegation. As will appear, their legal rights as shareholders and members of the Supervisory Board, as well as how they in fact acted in practice, provided a solid foundation for the Bank's allegation that they must have been involved in the planning and implementation of the Misappropriation.

191. In order to put this is context, I will first explain the Bank's formal governance and management structures, the roles which the Individual Defendants had within those structures and the extent to which those structures featured in the events which form the subject matter of these proceedings. This sets the context for the evidence as to what happened on the ground. That evidence establishes the likelihood that, throughout the material period, the Individual Defendants exercised an informal controlling influence over the conduct by the Bank of its affairs, which was both consistent with and enabled by their status as shareholders and their formal roles in the governance of

the Bank, most particularly as members of the Supervisory Board. However, while it is clear that in general terms the Individual Defendants exercised influence over each of these bodies, the extent to which each of them did so in relation to the Misappropriation is a matter in relation to which I shall have to make more specific findings in due course.

192. The formal governance and management structures of the Bank, also called its management bodies, were the General Meeting, the Supervisory Board and the Management Board. The constitution and powers of these bodies were governed by the Charter, which itself was amended by the General Meeting on a number of occasions during the relevant period of time. In large part the evidence from which I have drawn my findings in relation to the Bank's formal structures was not contested, although there are a number of respects in which the way in which the Individual Defendants exercised their rights in relation to those formal structures was.

The General Meeting

193. The General Meeting, described as the supreme management body of the Bank, was the forum in and through which the Bank's shareholders, including but not exclusively the Individual Defendants, were entitled to exercise their rights to influence and control its affairs. The Ukrainian Law on Banks and Banking (the "Law on Banks") and the Charter provided for a number of strategic and policy issues to be within the exclusive competence of the General Meeting. These included making determinations as to the main direction of the Bank's activities, the approval of reports on their implementation, and the appointment and removal of members of the Supervisory Board.

194. It follows that, in their capacity as shareholders, the Individual Defendants had the legal power, when acting together, to exercise control over both the Supervisory Board and ultimately the Management Board. Their right to do so was conferred and regulated by clause 9.2 of the Charter and by Article 38 of the Law on Banks, which gave to the General Meeting exclusive competence to make decisions as to the main direction of the Bank's activities (including approval of reports on their implementation) and the appointment and dismissal of chairmen and members of the Supervisory Board, which itself was responsible for the appointment of members of the Management Board.

195. The evidence established that, shortly before nationalisation, more than 49.98% of the Bank's share capital was held either directly or indirectly by Mr Kolomoisky, and in excess of 41.58% of its share capital was held either directly or indirectly by Mr Bogolyubov. The precise extent of the Individual Defendants' respective interests in the Bank had changed from time to time during the course of the preceding six year period. Notwithstanding these relatively minor variations in interest, it was always the case that Mr Kolomoisky's direct or indirect holding in the Bank was more than 45% and Mr Bogolyubov's was more than 41%, and together they always held more than 90% of the Bank's shares. As at 31 December 2013, which was the end of the financial year in which the first of the Relevant Loans was made, the Individual Defendants held direct or indirect stakes in the Bank, amounting to 46.33% in the case of Mr Kolomoisky and 46.66% in the case of Mr Bogolyubov. It was not unusual during this six year period for the Individual Defendants to have an equal interest in the Bank's shares. Thus, as at 8 March 2015 (the date at which Ukrainian law changed in relation

to the definition of related parties for bank control purposes), Mr Kolomoisky and Mr Bogolyubov were each recorded as being the direct or indirect holder of 45.08% of the Bank's capital.

196. As to whether or not the Bank's formal records demonstrated that the Individual Defendants acted in conjunction with each other, its financial statements for the year ended 31 December 2013 recorded that neither of them individually controlled the Bank and that there was no contractual agreement between them on joint control. This statement of position continued to be maintained in the financial statements for the 2014 and 2015 financial statements, although in the case of the latter, Mr Kolomoisky's interest was recorded as having increased to 49.99% while that of Mr Bogolyubov was recorded as having reduced to 41.59%.

197. However, subject to one point, which is an important one from Mr Bogolyubov's perspective, there is no evidence that the Individual Defendants ever exercised their rights as shareholders other than in conjunction with each other and to that extent exercised joint control. It follows from this that the membership of the Supervisory Board was controlled by the General Meeting, which was itself controlled at all material times by the Individual Defendants. The qualification is that Mr Bogolyubov contends that from July 2014, he stepped back from involvement in the Bank's affairs, agreeing to exercise his rights as a shareholder in accordance with the instructions of Mr Kolomoisky. This is a point to which I will return in due course, but, although relevant to the extent of Mr Bogolyubov's likely involvement in the Bank's affairs thereafter, this did not affect the strict legal position as between the two Individual Defendants and the other shareholders entitled to vote at the General Meeting. Even if Mr Bogolyubov was contractually bound to follow Mr Kolomoisky's instructions, he remained the legal owner of the relevant shares, and he continued to exercise his legal rights as such in conjunction with Mr Kolomoisky.

198. By the time of the Bank's nationalisation, the c.10% of its shares not held by the Individual Defendants were held by a number of members of the Management Board, who can properly be characterised as small-scale minority shareholders with no practical ability to affect the decisions made by the General Meeting. As I have already explained, they included a number of individuals who were available to give evidence on behalf of the Individual Defendants but did not do so: Mr Dubilet, Mr Novikov, Ms Gurieva, Mr Yatsenko, Mr Pikush, Mr Gorokhovsky, and Ms Chmona. It is the Bank's case that these individuals were accustomed to comply with the instructions of the Individual Defendants, whether in relation to the exercise of their rights as shareholders or more generally in relation to the affairs of the Bank. It is clear to me that this is a fair description of the relationship between these individuals and the Individual Defendants.

199. Given the size of the minority shareholdings and the relationship which the minority shareholders had with the Individual Defendants, it is not particularly surprising that they did not do anything in their capacity as shareholders which demonstrated any material independence from the Individual Defendants. There is, however, some basic documentary support for this being the case, quite apart from the probabilities arising out of the manner in which the Bank's affairs were structured and managed. Thus, the minutes of the General Meetings for the relevant period (i.e. 2013-2016) demonstrate that resolutions, whether for the appointment of members of the Supervisory Board, the approval of the Bank's annual accounts, the amendment of the Charter or the

distribution of the Bank's recorded profits by increasing its share capital, were always passed unanimously. This extended both to their positive approval of the formal and strategic decisions that were made at the General Meeting and to the fact that none of them are recorded as ever having sought the implementation of anything that was not initiated or approved by the Individual Defendants as majority shareholders; there is no other evidence that steps to that end were ever taken by any of them.

200. In practice, throughout the period in which the Misappropriation was taking place, the General Meeting always acted unanimously. The matters which a General Meeting approved extended not just to the Bank's annual report, balance sheet and consolidated financial statements, amendments to the Charter and the use of the Bank's profits, but also to approval of the conduct of the Bank's business by its supervisory and executive bodies. Thus, at both the 2013 and 2014 meetings at which the accounts for the preceding years were approved, the operation of the Management Board and the Supervisory Board was deemed satisfactory and a resolution was passed approving the Bank's key business areas. The relevant resolutions were passed on the unanimous vote of the Bank's shareholders, including relevantly for present purposes, both of the Individual Defendants.

201. It is also of some relevance to the defence run by Mr Bogolyubov that the shareholders continued to vote for the annual profits to be kept as retained earnings throughout the period Mr Bogolyubov says that he had stepped back from the affairs of the Bank. This is said to have taken place first on his move from Ukraine to England in 2009, and then more substantively after July 2014 when he says that he had agreed to exercise the voting rights attached to his shares at the sole direction or instruction of Mr Kolomoisky. This is a point to which I will return, but there is at least a tension which demands explanation between what Mr Bogolyubov asserted to be a cessation in his involvement in and support for the Bank (combined with what was said to have been an agreement by him to cease exercising the rights which attached to his shares), and his agreement to continue to allow the profits generated by the Bank to be applied in a manner from which he obtained no obvious continuing benefit.

The Supervisory Board

202. As I said at the beginning of this judgment, the Individual Defendants were both members of the Supervisory Board between 2003 or 2004 (the precise date does not matter) and nationalisation at the end of 2016. Throughout the period in which the Misappropriation is said to have taken place and for some time thereafter, Mr Bogolyubov was the chairman of the Supervisory Board and the only other member apart from the Individual Defendants was Mr Martynov. After 30 April 2015, two additional members of the Supervisory Board were appointed: Victor Lisitskyi and Volodymyr Stelmakh, although they did not begin to attend meetings until mid June 2015 when Mr Stelmakh took over the chairmanship from Mr Bogolyubov.

203. It follows that the legal rights of the Individual Defendants were not just exercisable through their shareholdings in the Bank. They were further exercisable through their membership of the Supervisory Board, which acting together they controlled by reason of their shareholding. From 1 May 2015, they did not (even acting together) have a majority of the votes on the Supervisory Board, but even then there is no evidence that

the Supervisory Board ever took any decisions which were inconsistent with the wishes of both Mr Kolomoisky and Mr Bogolyubov as to how the affairs of the Bank ought to be conducted. In short, the evidence demonstrates that, even after May 2015, they continued to control the Supervisory Board both through their continuing role as members and their ability as shareholders to control the composition of its membership.

204. The Law on Banks and the Charter made provision for the powers with which the Supervisory Board was vested. They included powers for the protection of the rights of depositors, other creditors and shareholders and powers to appoint and dismiss the members of the Management Board and to control and propose improvements to its activities. To that end, the Charter contained a lengthy and wide-ranging list of specific supervisory functions which it was required to carry out, supplemented by regulations. The Charter also provided for its competence to extend to making transactional (rather than merely supervisory) decisions, such as where transactions exceeded US$500,000 in value and where transactions were proposed with related parties. Its role also extended to the critical question of monitoring the effectiveness of the Bank's risk management system, as well as defining and approving its risk management strategies, policies and procedures, including risks and limit levels.

205. Mr Kolomoisky accepted in his Defence that, as a member of the Supervisory Board, he was "involved in making some of the decisions made by the Bank at various times". But he also pleaded that the Supervisory Board did not manage the Bank on a day to day basis and that, so far as he recalled, none of the transactions which formed part of the Misappropriation were referred to or approved by the Supervisory Board. He also asserted that many decisions which might be characterised as "significant" were made by executive officers of the Bank without his involvement.

206. Mr Bogolyubov pleaded in his Defence that, as chairman of the Supervisory Board, he was not responsible for, nor did he manage or exercise day-to-day control over the Bank, and he had only a high-level general supervisory role. The way it was put in his written opening (and again in closing) was that his role as such, like his role as a shareholder, was "limited and formal". It was said that he was not responsible for, nor did he control, the lending decisions taken by the Bank and that he had no other executive or administrative role within the Bank. It was also said that the evidence showed very clearly that the Supervisory Board was not being kept informed by the Bank's management about the way it was running the Bank.

207. Mr Bogolyubov also relied on clause 9.1 of the Charter, which provided that "The Supervisory Board does not participate in the Bank's current management". However, that is to take only part of the clause, and is capable of being misleading divorced from its proper context. The preceding sentence is important as well, because it makes plain that the Supervisory Board's remit was not intended to be that of some toothless or largely irrelevant supervisor. It is "the body that protects the rights of depositors, other creditors and shareholders of the Bank, and within its competence, monitors and regulates the activities of the Management Board".

208. More generally, the Bank did not accept that the way in which the Individual Defendants characterised their roles was accurate and I agree with its submission that they both significantly downplayed the true extent to which they participated in the business of the Bank. The Supervisory Board met regularly throughout the period 2013 to 2016. The trial bundle contained minutes of 28 meetings during the course of 2013,

40 meetings during the course of 2014, 54 meetings during the course of 2015 and 81 meetings in 2016. Many of these were short but, until the end of April 2015, they were all recorded as having been attended by Mr Bogolyubov as chairman and a wide range of issues were considered. It was only when Mr Lisitskyi and Mr Stelmakh were appointed to the Supervisory Board in April 2015 that minutes started to record Mr Kolomoisky as attending as well as Mr Bogolyubov and Mr Martynov. All five members then continued to attend regularly right through to nationalisation.

209. During the period in which Mr Bogolyubov was chairman, these meetings included consideration of a corporate code of ethics for the Privatbank group, the procedure for remunerating the Bank's senior management and issues relating to the Bank's corporate risk management. There were also occasions on which the Supervisory Board was recorded as having looked at raising finance through the capital markets and the approval of various financial recovery plans and recapitalisation programmes. This activity occurred during the period of time the Misappropriation was taking place. They also approved changes to the membership of the Management Board.

210. Between the time at which Mr Stelmakh took over the chairmanship from Mr Bogolyubov and the Bank's nationalisation, there were 112 meetings almost all of which were recorded as having been attended by both Mr Kolomoisky and Mr Bogolyubov which continued to deal with a range of matters. These included internal regulations on the production of the Bank's related party list, the appointment of EY in May 2015 to produce a report on related parties, reviews and approval of various versions of the Bank's restructuring plan (the "Restructuring Plan"), including the transfer of assets onto the Bank's balance sheet as part of the Asset Transfers and, shortly before nationalisation, a resolution to implement measures in response to the violations and recommendations identified in a report from the NBU.

211. It was said in the written opening submissions prepared on behalf of Mr Bogolyubov that the minutes do not record that any actual meetings of the Supervisory Board actually took place. That is a somewhat cryptic way of expressing his position, because he does not assert that there were in fact no actual meetings held, nor has he adduced any evidence that they were not. It was also submitted on his behalf that such as occurred were mere formalities in which he engaged in no debate or simply acted as a rubber stamp of approval to motions proposed by the Bank's management.

212. In my view this submission was unsupported by any credible evidence, and I think that the Bank was justified in contending that such evidence as there is contradicts it. A good example is the discussions which took place at meetings of the Supervisory Board chaired by Mr Bogolyubov between April 2013 and April 2015 in relation to successive versions of the Bank's financial recovery programme. All of these meetings were recorded as having lasted for identified periods of time, and involved both a review by those present of the information presented by management and a consideration of the recovery programme as the only item on the agenda. All of the minutes were signed by Mr Bogolyubov and there is no evidence that, by using words such as review and consideration, he was carrying out an exercise that was no more than a rubber stamp.

213. One example to which the Bank drew specific attention was a meeting held towards the end of the period in which the Relevant Drawdowns were being made, at which the Supervisory Board was recorded as having considered and approved detailed documentation in relation to the Bank's need for a stabilisation loan and an increase in

its regulatory capital. The meeting approved, under the signature of Mr Bogolyubov, the Bank's financial recovery programme for 2014 to 2016, which had been proposed by the Management Board. This contained detailed proposals for improving the Bank's financial condition and reducing overdue customer debt and for the shareholders to recapitalise the Bank with additional shareholder contributions of UAH 3,345 million, profit capitalisation of UAH 665 million and a substantial further amount of subordinated debt. In my view, the extent of the material which was considered and the way that this exercise was recorded as having been carried out is wholly inconsistent with the suggestion made on behalf of Mr Bogolyubov that he only had a high-level general supervisory role and everything he did was nothing more than "limited and formal".

The Management Board

214. The Management Board was the Bank's executive body responsible for managing its current operations. The competence of the Management Board extended to all matters relating to the Bank's operations except those which were within the exclusive competence of another body such as the General Meeting or the Supervisory Board. In large part its function was therefore different from that of the Supervisory Board, which was required to be independent of it; this requirement was reflected by a prohibition on any member of the Supervisory Board also being a member of the Management Board. Its functions included the taking of decisions to enter into major transactions where their subject was worth less than 10% of the value of the Bank's assets. Where the subject matter of the transaction was more than 10% of the value of the Bank's assets the relevant decision was a matter for the Supervisory Board or the General Meeting depending on the ultimate value.

215. The membership of the Management Board was controlled by the Supervisory Board, and was therefore controlled by the Individual Defendants. This meant that their appointees on the Management Board controlled all matters relating to the Bank's day to day operations. The Management Board comprised the individuals listed in paragraph 198 above as minority shareholders and a number of other individuals who did not feature in the evidence to any material extent, but almost all of whom also held small shareholdings in the Bank. Most but not all of the members of the Management Board were also involved in approving Relevant Loans in their capacities as members of the ECC.

216. At the highest level of generality it is indisputable that the Management Board was controlled by the Individual Defendants in their capacity as two of the three members of the Supervisory Board. In that capacity, they had the power of appointment to the Management Board, and it was only after 30 April 2015 that they were capable of being outvoted by the three non-shareholder members of the Supervisory Board, who in practice never indicated any dissent from that which the Individual Defendants wished to achieve. To that extent, they had a very considerable influence over the activities of the Management Board. To the extent that they knew what was going on, there is no doubt that their views as to how any particular issue ought to be decided or resolved would be determinative.

217. It was the Bank's case that the more significant members of the Management Board had close relationships with one or both of the Individual Defendants. It was submitted that, in consequence of this (a) it is unlikely that these individuals would be party to activity contrary to the interests of the Bank, and to that extent which was capable of having an adverse impact on the legitimate interests of the Individual Defendants in their capacity as shareholders in the Bank, without their active or tacit approval, and (b) it is likely that they were accustomed to act on the instructions of the Individual Defendants in relation to matters which affected their affairs as much as those of the Bank itself.

218. I agree with the Bank that there was a great deal of evidence which linked the more important members of the Management Board to both of the Individual Defendants. In some respects that is not surprising, because they were all senior executives within the Bank, of which the Individual Defendants were the controlling shareholders. However, because both Mr Bogolyubov and (to a lesser extent Mr Kolomoisky) sought to distance themselves from the day to day management of the Bank's affairs, it is necessary, in so far as it is possible to do so, to give some colour to the relationships they both had with these members of management. Taken overall, it builds a picture from which I have concluded that the Bank's submission that these individuals would not be party to activity contrary to the interests of the Bank without the active or tacit approval of the Individual Defendants is justified.

219. I shall develop my conclusions as to the nature of the relationship between the more important and relevant members of the Management Board and the Individual Defendants a little later in the judgment, but at this stage I will simply summarise who these individuals were, and the extent of their participation in the formal aspects of the making of the Relevant Loans. The first four were individuals whom the Bank contends the Defendants could and should have called to give evidence at the trial. I have already given a brief description of their role when discussing the significance of the fact that they did not do so.

220. The first is Mr Dubilet. He was the pre-nationalisation chairman of the Management Board, having been appointed in April 1997, and was the person said by Mr Kolomoisky to be responsible for the decisions made by the Bank to grant loans, the terms of the loans including the security to be required and the compilation of the Bank's list of related parties. As at 8 March 2015, he held a 3.2% interest in the shares in the Bank. He was the third largest shareholder in the Bank, but his interest was very small in comparison to that of the Individual Defendants. He signed 115 of the agreements for Relevant Loans and chaired the ECC at which each of the Relevant Loans was authorised.

221. The second is Mr Novikov. He was a first deputy chair of the Management Board pre-nationalisation, head of the Bank's Investment Business and was in charge of Primecap. As at 8 March 2015, he held a 1.6% interest in the Bank's shares. He was a member of the ECC and was present at almost all of the meetings at which the Relevant Loans were authorised, approving 127 of them.

222. The third is Ms Gurieva. She was a deputy chair of the Management Board pre-nationalisation and head of BOK, which was one of the Bank's departments which featured heavily in the trial and from which the Relevant Loans to all 46 of the 47 Ukrainian Borrowers originated (see paragraph 237 below). She was a member of the

ECC and approved 129 of the Relevant Loans. As at 8 March 2015, she held a 0.28% interest in the Bank's shares.

223. The fourth is Mr Yatsenko. He was a first deputy chair of the Management Board pre-nationalisation and head of the Bank's corporate VIP business department. He too approved 129 of the Relevant Loans as a member of the ECC. As at 8 March 2015, he held a 0.38% interest in the Bank.

224. The next three were individuals whom the Bank did not assert the Defendants should have called to give evidence, but who featured to a material extent in the documents. All three of them were important members of the Management Board and the ECC who demonstrated a continuing loyalty to the Individual Defendants (and more especially Mr Kolomoisky) after what the Bank called the active stage of the Misappropriation was complete. I shall say a little more about them at this stage.

225. The first is Mr Pikush. He was the general deputy chair of the Management Board pre-nationalisation and responsible for compliance. Like Mr Yatsenko, he also approved 129 of the Relevant Loans as a member of the ECC and, as at 8 March 2015, held a 0.38% interest in the Bank.

226. Mr Pikush was involved both in what the Bank called the active stage of the Misappropriation and also in subsequent relevant events. Thus, from October 2013 onwards (i.e. during the period in which he was approving the Relevant Loans, as to which see paragraph 225 above) he was also participating in the production of the Bank's related party lists for submission to the NBU. These lists were prepared by the compliance department headed by Mr Luchaninov and submitted for comment by him and Mr Dubilet. Mr Pikush was also the recipient of correspondence sent by Mr Luchaninov in February 2014 which made clear that the NBU had concerns about the failure of the Bank to provide information about certain clients of its Cyprus branch. He seems from this correspondence to have appreciated that it may be necessary to provide what he called the 'right' documents to an NBU inspector, which the evidence (as elucidated in cross-examination of Mr Luchaninov) indicates was probably done in order to conceal the concentration of related parties amongst the relevant Cyprus branch clients.

227. In February 2015, Mr Pikush was instructed to investigate the facts behind the disclosure of confidential information leading to publication by an investigative journalism group called NashiGroshi of two web articles (the "NashiGroshi Articles"). I will return to these articles in the context of the Limitation Defence, but it was alleged that companies connected to the Individual Defendants had misappropriated US$1.8 billion from the Bank. Like Mr Yatsenko, he was also one of the recipients of the Luchaninov e-mail.

228. The role he fulfilled was also reflected in the fact that later on (very shortly before nationalisation) he was one of the recipients of the correspondence about the lack of "acceptable collaterals" for the Transformation and the NBU's concerns that the New Borrowers had what Mr Luchaninov called a "non-transparent ownership structure; lack of company cash flows; and small staff sizes." In my view, the evidence establishes that Mr Pikush was closely involved in events around the active stage of the Misappropriation and its aftermath, although there is no evidence that he continued to

have a relationship with Mr Kolomoisky or Mr Bogolyubov after he left the Bank at the time of its nationalisation.

229. The second is Mr Gorokhovsky. He was a deputy chair of the Management Board from January 2014 until nationalisation and head of the Bank's credit card and salaries department. Like Mr Yatsenko and Mr Pikush, he also approved 129 of the Relevant Loans as a member of the ECC and, as at 8 March 2015, held a 0.38% interest in the Bank.

230. There is plenty of evidence that Mr Gorokhovsky continued to be in close contact with the Individual Defendants (and indeed Mr Novikov and Mr Yatsenko) during the period after nationalisation. Thus, he attended at least one meeting in Geneva in February 2018 and in June 2018 lunched with Mr Kolomoisky and Mr Novikov on the shores of the lake. The tone of the correspondence surrounding that meeting indicates an intimate personal relationship with Mr Kolomoisky which seems to have continued into 2019, flying with Mr Dubilet and members of his family to Dnipro in June 2019 on Mr Kolomoisky's private jet.

231. There were further indications of the closeness of the relationship between Mr Kolomoisky and Mr Gorokhovsky during 2018 and 2019 when they exchanged personal WhatsApp messages about such matters as football and birthday greetings. There were also Bank-related messages in which Mr Gorokhovsky was seeking instructions from Mr Kolomoisky for the making of an unidentified payment and in which they exchanged forthright views on what they both regarded as the incompetence of the Bank's post-nationalisation management.

232. Although it was submitted on behalf of Mr Bogolyubov that there was no contemporaneous evidence that Mr Gorokhovsky had ever demonstrated any loyalty to him, that does not tell the whole story. There is credible evidence from communications between Mr Gorokhovsky and Mr Kolomoisky that Mr Gorokhovsky continued to be involved in the joint business affairs of both of the Individual Defendants as late as June 2019.

233. The third is Ms Chmona. She was a deputy chair of the Management Board and head of the Bank's budgeting department. She was party to the approval of 126 of the Relevant Loans as a member of the ECC, and like Ms Gurieva, as at 8 March 2015, she held a 0.28% interest in the Bank.

234. There were a number of other members of the Management Board, some of whom held smaller interests in the Bank's share capital, and/or were members of the ECC involved in approving some of the Relevant Loans. They did not feature in the evidence to the same extent as the seven individuals I have just identified, but there is no evidence to suggest that, by participating in the lending decisions in relation to the Relevant Loans, they acted independently from the other members of the ECC. I was shown little if any evidence of their contact with the Individual Defendants, but there is no reason to think that any of them would have proceeded to participate in the authorisation of any of the Relevant Loans, if there were any indications that proceeding in this manner was not in accordance with what they understood to be the wishes and intentions of the Individual Defendants as the Bank's majority shareholders. They included the following individuals:

i) Lyudmila Shmalchenko, a deputy chair of the Management Board pre-nationalisation and the Bank's Director of Treasury, who was a member of the ECC from time to time and voted in favour of the three relevant loans to the Cypriot Borrowers. She had a 0.19% interest in the Bank.

ii) Stanislav Kryzhanovskiy, a deputy chair of the Management Board pre nationalisation and head of the Bank's Security Service who voted in favour of approving 119 Relevant Loans as a member of the ECC. There is no record that he held any interest in the Bank's shares.

iii) Lyubov Korotina, a member of the Management Board pre-nationalisation and the Bank's Chief Accountant. Like Ms Shmalchenko, she held a 0.19% interest in the Bank's shares.

Other divisions within the Bank

235. The Bank had a number of different operational divisions, relevant to the issues which arose during the course of the trial. They included three departments whose employees were involved in the transactions linked to the Misappropriation: BOK, the Investment Business and the Industrial and Commercial Enterprise Budgeting Business (referred to by Mr Luchaninov as the Budgeting Business).

236. BOK was headed by Ms Gurieva. Its primary function was described by Mr Luchaninov as being to provide banking services to the Bank's so called strategic customers which he understood to be companies within the Individual Defendants' wider business group. This understanding was confirmed by the evidence of Ms Lozytska, the deputy head of client banking services in BOK's client operations accounting department. It operated in a secretive manner with client files kept in hard copy in sealed cabinets and the Bank's employees working within BOK occupied separate premises from the Bank's other divisions.

237. BOK initiated the vast majority of the Bank's largest corporate loans. This included 46 of the 47 Relevant Loans to Ukrainian Borrowers, the single exception being the Relevant Loan to Prominmet, which according to the relevant ECC minutes, was initiated by the credit analysts department (although, elsewhere in the papers, Prominmet is recorded as a client of BOK). I will explain later a dispute on the extent to which Mr Bogolyubov gave instructions to BOK, but I am satisfied that the understanding which Mr Luchaninov and Ms Lozytska had as to BOK's functions was accurate.

238. The Investment Business was headed by Mr Novikov. The evidence did not reveal the full extent of its activities but it was described by Mr Luchaninov as a department the workings of which were not known to Bank employees outside the department itself and the Bank's top management. Ms Pakhachuk described the department as being a "black box", by which I understood her to mean a place whose internal workings she did not understand. What is clear, however, is that, prior to nationalisation, it had a role in designing and implementing the Individual Defendants' asset holding structures and was the custodian of information on those who controlled or had significant shareholdings in the Bank. In particular it was responsible for maintaining the Bank's

lists of related parties (both for IFRS and NBU reporting purposes) until October 2013. It retained the role of maintaining the NBU related parties list until nationalisation, but in October 2013 the role of maintaining the IFRS related parties list was transferred to the compliance department. The reason for this split was never explained to Mr Luchaninov even though he was head of the compliance department. The likely sensitivity of the work carried out in the Investment Business and the reason that Ms Pakhachuk described it as something of a "black box" was explained in her unchallenged evidence as to what she was faced with when she arrived at the Bank immediately after nationalisation (see paragraph 178 above).

239. Whether or not initiated within BOK or the Bank's Investment Business, loans were required to be approved by the ECC which was chaired by Mr Dubilet. It was responsible for approving the Relevant Loans. The evidence shows that none of the meetings were held in person. The members recorded as having participated in the relevant decision-making included several individuals whose role in the events which have given rise to these proceedings I have already summarised: Mr Novikov, Ms Gurieva, Mr Gorokhovsky, Mr Yatsenko and Ms Chmona. It was established that the evidence adduced by the Bank from Mr Luchaninov and Ms Lozytska that Ms Gurieva and Mr Novikov would have taken instructions directly from Mr Kolomoisky and Mr Bogolyubov in relation to their work in BOK and the Bank's Investment Business was not based on personal knowledge. Nonetheless, there is powerful circumstantial evidence which established that BOK and the Bank's Investment Business did not operate independently from instructions given by the Individual Defendants.

240. The Budgeting Business was headed by Ms Chmona. It performed a treasury function for the assets of both of the Individual Defendants. As Mr Luchaninov explained, and I accept, its primary function was to set budgets and cash flow forecasts for Mr Kolomoisky and Mr Bogolyubov's businesses. As he put it "Along with BOK, the purpose of the Budgeting Business was to keep Mr Kolomoisky and Mr Bogolyubov's businesses operating".

241. The Bank also had a branch in Cyprus which featured regularly in the evidence. Its general manager was Vladislav Morgachov and the Corporate Defendants were amongst its customers. It occupied the same building as Primecap (as to which see below). The Cyprus branch's control systems were weak, as was apparent from reports prepared by both the Central Bank of Cyprus and the NBU, the conclusions of which are all consistent with other evidence:

    i) A report from the Central Bank of Cyprus dated 15 February 2016 was expressed in trenchant terms:

        > "The failings of the Branch are considered serious and systemic, resulting in an inadequate and ineffective Anti-Money Laundering ("AML") system, which is needed to identify, assess, and manage potential money laundering risks. The weaknesses in the Branch's policies, procedures and controls were also identified in previous audits carried out by the CBC in 2007 and 2011, and the Branch failed to take sufficient measures to rectify these weaknesses and omissions, despite the CBC's instructions."

    ii) An NBU inspection report from 27 July 2016 found that it was not independent from the Bank's head office and was "fully dependent" on the head office's

managerial decisions and "acts as a tool for both the support of the Bank proper and a vehicle serving the interests of a group of companies in which the Bank's beneficial owners have an interest".

The Individual Defendants and their relationship

242. Both of the Individual Defendants are well-known Ukrainian businessmen who have had interests in a wide range of different businesses including not just the banking sector but also ferroalloys, media, oil and gas trading and real estate. They are close in age and both of them are or were Ukrainian, Israeli and Cypriot nationals; Mr Bogolyubov also has British citizenship. They have been close friends and business partners since the early 1990s and since then have worked together on what Mr Bogolyubov in other proceedings called "many projects and investments". They have had many jointly owned assets.

243. Mr Kolomoisky lived in Ukraine until 2003 when he began to spend much of his time in France, Israel and Switzerland, becoming a Swiss resident based in Geneva in 2010. He became governor of Dnipropetrovsk Oblast in 2014, a post which he continued to hold until early 2015, during a period in which many of the events which are the subject of these proceedings occurred, after which he says that he lived in Geneva and Israel. It is clear that, wherever he may have resided, he continued to spend a material amount of time either in Ukraine or occupied in the affairs of his Ukrainian assets. He returned to Ukraine in 2019, where he remained at the time of trial, although he has now been stripped of his Ukrainian citizenship. He is now in prison.

244. Mr Bogolyubov regarded himself as more international in outlook than Mr Kolomoisky. He left Ukraine in 2007 and moved to London in 2009 where he stayed until 2017 when he moved to Geneva. His position was that since the time he left Ukraine in 2007 he and Mr Kolomoisky had tended towards their own individual projects. Like Mr Kolomoisky he moved back to Ukraine in 2019.

245. There was some documentary material to the effect that the Individual Defendants may have moved apart since 2007, but this was contained in Mr Bogolyubov's served trial witness statement, on which the Bank was not able to cross-examine him and I cannot conclude that what he said gave a full description of the true position. In light of their decisions not to give evidence and attend for cross-examination on their witness statements, the court has an incomplete picture of their relationship during the relevant period and the extent to which they continued to cooperate, but it is possible to reach some conclusions based on the documents that have been disclosed, the statements of other witnesses and the inferences which it is appropriate to draw.

246. I have reached the conclusion that, although it is quite possible that there has been a shift in the precise nature of the relationship between the Individual Defendants, they were continuing to act in conjunction with each other throughout the period relevant to these proceedings, most particularly in relation to the assets in which they had both invested alongside each other, including therefore their respective interests in the Bank. That does not of itself mean that each of them knew everything that the other one knew in relation to the assets which they jointly held, but it does mean that they are likely to

have continued to have regular communication with each other over the entire period with which these proceedings are concerned.

247. The value of those jointly owned assets is very substantial. On the basis of their own freezing order asset disclosure, they both own interests in a large number of the same assets, where the size of their holdings taken together (valued by them at the time of their asset disclosure in aggregate at more than US$8 billion) are either the same or very similar – in other words held 50/50. Many of these holdings give the Individual Defendants between them controlling interests in the relevant entity or underlying business. This joint ownership of other assets is also reflected by the fact that both of them made asset disclosures in these proceedings which listed 201 offshore holding companies in which each of them held equivalent interests, and through the medium of which, they each therefore held indirect interests in underlying assets of approximately equal value.

248. Whether or not this amounts to "virtually all of their most valuable companies" (as the Bank contends but Mr Bogolyubov disputes) is not the core point. What matters is that, by any standards, their jointly owned wealth was very extensive indeed. What also matters is that I do not think that the evidence establishes the accuracy of Mr Bogolyubov's submission that, while Mr Kolomoisky may have been a micro-manager who was always all over the detail, he was not. True it is that Mr Kolomoisky was "everywhere" (as it was colourfully put in one Skype exchange between employees of BOK), and I accept the submission that the same cannot be said about Mr Bogolyubov. Nonetheless, I do not agree that he was not a details man – some of the late disclosure relating to Sunaltezza gives the lie to that. I accept the Bank's submission that the evidence as a whole, including the way they continued to work together in lockstep after the Bank's nationalisation, shows that, while Mr Kolomoisky was obviously the larger personality, they were both closely involved with the Bank.

249. In the same way that the Individual Defendants were both accustomed to hold their equivalent interests in disclosed assets through percentage holdings in the same offshore holding companies, they were also both accustomed to use the same nominee individuals to hold other assets pursuant to oral agreements. Their asset disclosures revealed that one of those individuals was a former employee of the Bank, 21 of them were employees of PBC and eight of them were employees of Primecap. The relevance of PBC and Primecap to these proceedings is a subject to which I will revert shortly.

250. The Individual Defendants were also close on a more personal level. There is evidence, which was not contradicted by either of them, that by the early part of 2017, they had shared office facilities in Geneva and both had homes in Nikolskoye. Although the documentary record of the communications they had between each other is clearly incomplete, the nature of some of the WhatsApp and other messages which have survived showed that they were accustomed to share jokes, memes, snippets of gossip, banter, cryptic comments and even health recommendations, all of a type which reflected a close personal relationship.

251. In support of its argument that the Individual Defendants have continued to be close, both in their business dealings and personally, the Bank relied on the fact that, although they have been embroiled in litigation as co-defendants for over a decade, they have never sought to blame each other for what it called their legal woes, nor have they sought to bring contribution or indemnity proceedings against each other. One example

on which the Bank relied was Mr Bogolyubov's Defence in the Pinchuk Proceedings. The Defence was signed by Mr Howard and Mr Haydon who now act for Mr Kolomoisky in these proceedings, and in that Defence Mr Bogolyubov pleaded that "for the purposes of these proceedings only" he would not dispute that he was jointly and severally liable with Mr Kolomoisky in relation to the agreements and declarations of trust in issue. Another in which it appears that the Individual Defendants cooperated to their mutual benefit was at the interlocutory stages of claims against them both (as well as others) in the Tatneft Proceedings.

252. I am not persuaded by the Bank's submission that this litigation conduct of itself demonstrates that the Individual Defendants had a continuing close affinity which is inconsistent with the way in which Mr Bogolyubov advanced his case as having acted independently of Mr Kolomoisky. They may have both taken the view that taking a different line on points of principle (or even advancing what might colloquially be called a cut-throat defence) was not in their respective interests, notwithstanding a moving apart. There were also some signs of a divergence of position during the course of the trial, such as when Ms Montgomery compared what she said was her client's lack of involvement in matters to the obvious involvement of Mr Kolomoisky.

253. Nonetheless, I have concluded that the litigation tactics they have adopted are consistent with a close longstanding business and personal relationship in which they have been accustomed to operate in conjunction with each other over many years. Furthermore, this becomes more relevant in relation to the contact which it is clear that the Individual Defendants had with each other immediately prior to the commencement of these proceedings. There is compelling evidence that in the period immediately prior to December 2017, the Individual Defendants were in close communication in relation to the steps that they might take to thwart the bringing of any litigation which the Bank might bring against them. Those communications were based on material which Mr Kolomoisky had received from employees of the Bank, notwithstanding that by that stage the interests of the Bank by which those employees were still employed were in direct conflict with those of the Individual Defendants as its former owners.

254. Another important aspect of their relationship was the way in which the Individual Defendants communicated with each other. Mr Kolomoisky has maintained throughout that he does not use e-mail believing it to be unsafe and unreliable and the electronic means by which he was accustomed to communicate with others, including Mr Bogolyubov, were WhatsApp, Viber and the Black. The fact that the first three numbers in the January 2013 version of the Black directory were the Dnipro work numbers for Mr Kolomoisky (0101), Mr Bogolyubov (0102) and Mr Dubilet (0103) gives some indication of its significance as a communication mechanism between the Individual Defendants as two principal members of the Bank's Supervisory Board and the chairman of its Management Board.

255. The closeness of this business and personal relationship is a strong pointer that, in the absence of evidence to the contrary, the Individual Defendants are likely to have acted together in the making and implementation of decisions in relation to the conduct of the Bank's affairs, and I so find. That is not to say that everything one of them knew or did was known or done by the other as well. However, I am satisfied that, when it came to the Bank's management taking any steps of relevance to the interests of the Individual Defendants (whether as shareholders of the Bank, or through their indirect interests in entities having dealings with the Bank), each of them will have known what those steps

were, and they will have acted together in authorising those steps and in originating or confirming the instructions that were given. I accept the Bank's submission that any material involvement of either of them in the planning or implementation of the scheme or the Misappropriation is most unlikely to have been carried out without the knowledge or approval of the other.

PBC

256. I now turn to explain the significance of two entities (PBC and Primecap), which I have already mentioned. They were not part of the Bank, but in these proceedings they have been said by the Bank to have been owned and/or controlled by the Individual Defendants: PBC, as a Ukraine-based hub for establishing and administering their businesses and Primecap, as a Cyprus-based equivalent for their offshore businesses.

257. PBC was an organisation, incorporated in 2001 under the name Privat Business Centre LLC, which provided services to the Bank's Investment Business headed by Mr Novikov. The evidence is that those services included the administration of legal paperwork, the preparation of corporate documents and registration with the relevant state entities on behalf of clients of BOK, approximately 50% of which used its services. Its offices were located in the same building (at 32 Naberezhnaya Pobedy, Dnipro) as the Bank's Investment Business. The head of PBC was Mr Melnyk.

258. PBC played a significant role in the subject matter of the Bank's claim. It is apparent from the structure charts (with which I deal in more detail below) that, during the period in which the Misappropriation and the Transformation were taking place, its employees acted as officers, representatives, shareholders and purported UBOs of all 47 of the Ukrainian Borrowers and at least 29 of the Intermediary Borrowers. The structure charts also disclose that all of the individuals said by the Corporate Defendants to be one of the UBOs of the shares in the English Defendants and Ukrtransitservice were officers or employees of PBC: Mr Melnyk, Iurii Pugach, Mr Ivlev, Ms Yesipova and Iryna Trykulych. Employees of PBC were also in regular contact with BOK throughout the relevant period regarding the grant of the Relevant Loans and the Intermediary Loans, the preparation of the RSAs and the conduct of the 2014 Ukrainian Proceedings. Several of them (initially 10 and then joined by Mr Ivlev to make 11) were taken on by Mr Bogolyubov's company, Sunaltezza, in the period after nationalisation, a matter which only fully emerged during the course of the trial (see the findings made in paragraphs 162 to 175 above).

259. The Bank's pleaded case was that, where it was alleged that the Individual Defendants controlled the Borrowers or the Intermediary Borrowers, its allegation was to include their control via PBC which itself was owned or controlled by them. It pleaded that the officers and employees of PBC acted on the direct or indirect instructions of the Individual Defendants in relation to the affairs of the Borrowers and Intermediary Borrowers, including by causing them to enter into written agreements and transfer funds; i.e., it is alleged that the Individual Defendants controlled the Borrowers and the Intermediary Borrowers through PBC. It was also the Bank's case that officers and employees of PBC acted for the Individual Defendants as nominee directors and shareholders in relation to the Borrowers and Intermediary Borrowers as well as other entities. If, as alleged by the Bank, the Individual Defendants (whether separately or

jointly) owned and/or controlled PBC, the role played by its officers and employees in the affairs of the Borrowers and the Intermediary Borrowers is of relevance to the question of whether the Individual Defendants were involved in the Misappropriation to a greater extent than they have been prepared to admit. It also strengthens the Bank's case that the participants in the Misappropriation were all inter-connected with the two common denominators being the two Individual Defendants.

260. The Individual Defendants both deny that they ever controlled PBC or that they ever gave instructions to its officers and employees. Mr Kolomoisky's case is that PBC was always controlled by Mr Melnyk and his business partners. Mr Kolomoisky also pleaded that he did not own any part of PBC save for a brief period between September 2013 and February 2014 during which he was the UBO of an entity called Songo LLC ("Songo"), a registered shareholder, then holding c.25% of PBC. He alleges that, although he therefore had an ownership interest in PBC for a short period of time, he had had no intention to acquire that interest. He pleaded that he did so because Mr Melnyk and his business partners arranged for 100% of Songo to be transferred to companies held on his behalf for use as a special purpose vehicle in connection with his participation in the provision to the Bank of US$5.2 million of subordinated debt. He says that he did not know that Songo then held just under 25% of the shares in PBC, from which it divested in February 2014 when it disposed of its interest (which it did to Agropromtekhnologiya LLC ("Agroprom"), one of the Ukrainian Borrowers, in which the Individual Defendants both admitted to a minority interest). The credibility of this part of his case must be assessed in light of the fact that he had given earlier asset disclosure at the time of the WFO which showed that at that stage (2018) he owned 100% of Songo.

261. Mr Bogolyubov too denied that he ever had any interest in PBC apart from an indirect holding between November 2013 and July 2015 which varied in amount between 3.54% and 11.08%. This interest was said to be held through a chain of nominees including (a) four Ukrainian companies (Arkhon LLC, Agroprom, Makros LLC and Mitsar LLC ("Mitsar")), which held shares in PBC, (b) a Delaware company called Modena Holding LLC ("Modena") which held shares in the four Ukrainian companies, and (c) Prodromos Georgiou who held 100% of Modena on bare trust for Mr Bogolyubov. In his Defence, Mr Bogolyubov pleaded that he had no personal knowledge of these matters and was not aware at any material time of his interest in PBC. In his closing submissions, it was said that this appeared to be "a technical interest held as a result of the various complex and changing corporate holding structures put together for" him and that his disclosure of it was inconsistent with attempting to use plausible deniability to hide his true connection to PBC.

262. I agree with the Bank's submission that the Individual Defendants' cases on how they came to hold these but only these interests, unsupported as they are by any evidence, lack credibility. The extent of the interests which PBC's registered shareholders held in PBC was constantly changing over the course of the period between 2005 and the Bank's nationalisation, but many of them had established links to one or both of the Individual Defendants over periods of time which extended well beyond the periods for which they admitted that they had the unintended interests in PBC summarised above. The Bank has produced evidenced schedules of the extent of those links which demonstrates pervasive interconnectivity between the Individual Defendants and what appear on any view to be the nominee owners of the ever-changing interests in PBC. It

was said that it was an obvious inference that they owned PBC at all times, but that their ownership was structured in what was said to be the opaque and ever changing manner that they used for many of their other companies, including large numbers of the Borrowers.

263. The Bank relied on a number of other indications that the Individual Defendants' case that they did not own or control PBC is false. Two of such indications might appear to be minor, but in my view they are properly to be characterised as small but telling.

    i) The first was that PBC's former name included the word "Privat" within it, a word which the evidence established that everyone in Ukraine regarded as a reference to one of the Individual Defendants' businesses. It changed its name in 2005, but there is no evidence that it did so in response to a management buy-out or the like. I think that there is real substance in the submission that it is unrealistic to think that the Individual Defendants would have permitted any third party to conduct a business using that name, more particularly where that business entity also occupied part of the same building as the Bank's Investment Business.

    ii) Secondly, in 2010, which was long after the change of name, employees of PBC were still being treated as employees of the Privat group, and were described as "colleagues" when being given the opportunity, together with employees of the Bank and Primecap, to vote on a new Primecap group logo.

264. A further factor which points to the accuracy of the Bank's case that PBC was ultimately owned and/or controlled by the Individual Defendants was that many officers or employees of PBC held very valuable assets for them under arrangements which were oral rather than in writing or, in the case of Mr Bogolyubov, arrangements which were said to have arisen by conduct or implication. In the case of Mr Bogolyubov, his position shifted from being one to the effect that the agreements were oral to being one which alleged that the arrangements arose by conduct or implication, only shortly before the start of the trial. The amounts concerned were very substantial. Mr Kolomoisky's asset disclosure identified 36 of his Ukrainian assets, in which his interests are valued at c. US$1bn, which are held via structures involving oral agreements with PBC employees. Mr Bogolyubov's asset disclosure identified 79 of his Ukrainian assets, in which his interests are valued at c. US$470m, which are held in a similar way.

265. I accept that the mere fact that employees of PBC acted as nominees for both of the Individual Defendants, does not of itself establish a relationship of ownership or control of PBC, although it is consistent with it. This is capable of being the case, even though the evidence shows that employees of PBC held at least 149 roles as management board, committee members and other officers of 45 of the Individual Defendants' assets. However, in my view the arrangements in the present case are powerful indicators that the relationship between each of the Individual Defendants and PBC was more than very close. What makes the Bank's case more probable is that these relationships were said to have been established pursuant to an otherwise unevidenced oral arrangement or arrangements that arose by implication.

266. Where arrangements in this form are said to be in place, it is materially more likely that the service provider, whose employees fulfil the role of nominees, is not a genuine and

independent third party. It is much more likely that the necessary level of trust and reassurance for the ultimate beneficial owner will only be established if the service provider (in this case PBC) is owned or controlled by the person to whom the service is provided. It seems to me that this is particularly likely to be the case in the case of Mr Bogolyubov, given his position that the arrangements were not even pursuant to an oral agreement, but simply arose by implication. It is very difficult to see how that could arise in respect of assets worth several hundred million US$ unless the entity (PBC) employing the nominees who had undertaken these unspoken obligations was itself controlled by the person for whom the asset is said to be held (Mr Bogolyubov).

267. That this was the true nature of this relationship between the Individual Defendants and PBC is also supported by what happened at the time of the Luchaninov e-mail, a document which I will come back to later in this judgment. This e-mail had been sent by Mr Luchaninov to Mr Pikush (copied to Mr Yatsenko and Mr Novikov) on 31 March 2015. It suggested, in light of the NBU's unscheduled review of 42 of the Borrowers, and taking into account the risk of the relevant loan transactions being linked to parties related to the Bank, that 21 directors of the Borrowers, all but one of whom were officers or employees of PBC, should be removed in order to conceal those connections. As I shall explain, changes in the PBC nomineeships then occurred, a development which is unlikely to have occurred in the way that it did, if PBC had not been controlled by the same people who also controlled the entities in respect of which the changes were made.

268. So far as Mr Kolomoisky is concerned, his asset disclosure revealed assets in the form of percentage interests in dozens of entities held pursuant to these arrangements through approximately 23 employees of PBC acting as nominees (together in some instances with employees of Primecap fulfilling the same function). As I have said the value of these assets was substantial (approximately US$1 billion) even in the context of this case. The fact that oral arrangements with a significant number of PBC employees were all that was required both to reflect the nomineeship and to secure Mr Kolomoisky's continuing interest in underlying assets of very substantial value, demonstrated as a minimum that the relationship between him and their employer was both close and habitual.

269. So far as Mr Bogolyubov is concerned, it was pointed out in his written closing submissions that, despite what was said by the Bank in opening, there is no documentary evidence which demonstrates that Mr Bogolyubov was giving any instructions to Mr Melnyk in relation to management of PBC over the relevant period. He accepts that there is evidence of PBC administering what he calls the Scheme, but says that there is no material to evidence his involvement. I agree that there is nothing which amounts to direct evidence that Mr Bogolyubov had management or control of PBC itself, and here as in other contexts, the Bank had a tendency to treat Mr Bogolyubov as if he was one and the same as Mr Kolomoisky.

270. However, there is clear evidence that he was in regular contact with PBC and its employees, sometimes via Mr Novikov, about assets which were held by them on his behalf. His asset disclosure revealed that, out of the 109 assets in the form of percentage interests in diverse entities held pursuant to these arrangements, 79 were held in this way through approximately 20 employees of PBC acting as nominees (together in some instances with employees of Primecap fulfilling the same function). The value of these assets was very substantial as well (approximately US$479 million). The fact that these

very valuable assets were held in this way for Mr Bogolyubov by PBC nominees and the fact that the information as to the role of PBC and its employees was only extracted from him after the application of great pressure by the Bank during the course of preparing the case for trial, underpinned a submission by the Bank that the relationship between these individuals and Mr Bogolyubov was such that everybody knew, without having to be told, that when they came to be the holder, they held for him.

271. Leaving aside the question of whether the Individual Defendants owned or controlled PBC, but consistently with it, the Bank relied in its claim more generally on the fact that there is a close association between the individual PBC employees whom the Individual Defendants assert act as nominees for their assets more generally, and the individuals whom the Individual Defendants now assert to be the UBOs of the Borrowers and the Corporate Defendants. Thus the structure and nominee charts which I describe in more detail below establish that the vast majority of the individuals said by the Individual Defendants to be the UBOs of the Borrowers and four of the Corporate Defendants were both employees of PBC and acted as nominee shareholders, trustees or beneficial owners for the Individual Defendants.

272. In my view, the existence of the admitted relationship between the Individual Defendants and the PBC nominees, and the means by which those nomineeships had come to be established and continued to be maintained gives rise, in the absence of evidence to the contrary, to a strong inference that similar arrangements were in existence in relation to the holdings by those nominees of interests in the Borrowers and the Corporate Defendants.

273. Having regard to these and the other considerations described in this section of the judgment, I think that the Bank's explanation to the effect that the Individual Defendants owned, or at least controlled, PBC at all material times, but that their ownership or control was structured in the opaque manner used by them more generally, and that they were only driven to admit occasional fractional interests once direct documentary evidence emerged, is a more likely explanation. I have also concluded that the Bank has established that the relationship between PBC and both of the Individual Defendants was very much closer than that of a standard service provider and client. In my judgment, PBC was an entity which was at least controlled by the Individual Defendants in all material respects, although I cannot be certain of the legal mechanisms by which that was achieved. It was used by them to provide, amongst other services, employees to act as nominees for them in respect of their interests in assets of which they were the true UBOs.

Primecap

274. Primecap also fulfilled a central role in relation to the Misappropriation and surrounding events. In particular, it was involved in the administration of the Corporate Defendants, including by giving instructions for the execution of RSAs. It also procured the ED Principals to execute backdated instructions and was involved in the administration of the Cypriot Borrowers. It gave instructions for the preparation of correspondence and agreements between the Corporate Defendants and the Borrowers to show to the Ukrainian court for the purposes of the 2014 Ukrainian Proceedings and was involved in transferring some of the Individual Defendants' assets to the Bank

during the course of the Asset Transfers. The extent of its role is not in any serious doubt. As was accepted by Mr Bogolyubov in his written closing submissions, there is a wealth of evidence that Primecap was involved in the administration of "whatever was in fact going on at the Bank, 'Scheme' or otherwise".

275. The Bank pleaded that, where it alleged that the Individual Defendants controlled the Corporate Defendants or any principals for whom they were acting, this was to be taken as including an allegation that their control was via Primecap which was owned and/or controlled by them. It was also the Bank's case that Primecap's officers and employees acted on the direct or indirect instructions of Mr Kolomoisky and Mr Bogolyubov in relation to the affairs of those entities, including (without limitation) causing them to enter into written agreements; execute other documents such as letters; and transfer funds.

276. Both of the Individual Defendants denied that this was the case. Mr Kolomoisky pleaded that, since May 2011, Primecap had been beneficially owned by its managers. Mr Bogolyubov denied that he controlled the Corporate Defendants or the ED Principals via Primecap, or at all. He also denied that the officers or employees of Primecap acted on his direct or indirect instructions in relation to the affairs of the Corporate Defendants or the ED Principals. Mr Bogolyubov reiterated his position in closing, and submitted there was no evidence that he had, or had exercised, any control over Primecap in this regard or at all.

277. Primecap was established in July 2010 by a Cypriot lawyer, Andreas Marangos. Its premises were housed on the first floor of a building which was also occupied both by the Limassol office of the Bank's Cyprus branch and the offices of Marangos & Hadjipapa LLC ("M&H") in which Mr Marangos and his wife, Amalia Hadjipapa, are the partners. Primecap's financial statements recorded its principal activities as being the provision of corporate, M&A and other consulting services. It had more than 40 employees during the period most relevant to these proceedings.

278. There is no issue that, for the first six months after its incorporation, all of Primecap's shares were held by Mr Marangos on trust for Mr Kolomoisky. In January 2011 that holding was transferred by Mr Marangos to a Nevis company, Primecap Investments Limited, formerly Magot Limited ("Primecap Investments"), the shares in which had been held by Christoforos Loukaidis (an employee of M&H) on trust for a BVI entity, Ralkon Commercial Ltd ("Ralkon"), since 2004. From April 2009, 50% of the shares in Ralkon had been held by Andri Kyriakou (a nominee for Mr Kolomoisky) and 50% had been held for an entity called Marigold Trust Company Ltd ("Marigold"). Mr Kolomoisky has pleaded that Marigold was the UBO of this holding. Mr Bogolyubov has pleaded that, if Marigold had a temporary interest in Primecap, he was not aware of it.

279. I do not accept the Individual Defendants' case in relation to Marigold, its interest in Ralkon as from April 2009 and its indirect holding of shares in Primecap as from January 2011. In *Eclairs Group Ltd v. JKX Oil and Gas Plc* [2013] EWHC 2631 (Ch), [2014] Bus LR 18 ("*Eclairs Group*") at [256], Mann J referred to evidence which pointed to Mr Bogolyubov having acquired a 50% economic interest in Ralkon in April 2009. There is also evidence, not gainsaid by Mr Bogolyubov, that Marigold was a trust company of which Mr Anischenko (Mr Bogolyubov's personal assistant) is a director and which was described by Mann J in *Eclairs Group* at [8] as being "owned

by what is said to be a trust whose beneficiaries are Mr Bogolyubov and his family". It is therefore said that it was him, not Marigold, who was the UBO of these shares. In the absence of evidence to the contrary from either of the Individual Defendants, I find that the probabilities are that the effect of the January 2011 transfer was that they (jointly) then became the UBOs of Primecap.

280. Although Mr Bogolyubov has made a bare unsupported assertion that he was unaware that Marigold held 50% of Primecap in the first part of 2011, he has done nothing to substantiate this part of his case, and I think it is unlikely that he was not aware of this at the time. If there was substance in his assertions, there would have been an evidenced explanation of what happened to the 50% holding in Ralkon after it was originally transferred to Marigold in 2009.

281. On 10 January 2011, at the same time as the shares in Primecap were transferred by Mr Marangos to Primecap Investments, the English Defendants executed services agreements with Primecap. The services to be provided by Primecap were all expressed in the same terms and extended to corporate governance issues, invoice and document verification and the preparation and execution of documents on behalf of its client. The trial bundles also contained unsigned copies of the same forms of agreement made out in the names of the BVI Defendants. In the period after its incorporation, staff from the Bank's Investment Division moved to Cyprus. From 1 April 2013, Primecap was managed by Mr Novikov who was remunerated as its "Senior Consultant". He was also an employee and officer of the Bank, being first deputy chair of the Management Board, head of the Investment Business and a member of the ECC which approved the Relevant Loans. I think that Mr Novikov's role at Primecap, when combined with the role he had at the Bank and the close working relationship he had with both of the Individual Defendants, is significant support for the Bank's case that Primecap was then controlled by the Individual Defendants.

282. However, the fact that the Individual Defendants were the beneficial owners of Primecap through Primecap Investments in early 2011 does not of itself mean that they were still the beneficial owners two years later when the Relevant Loans were agreed. In particular, on 20 May 2011 the shares in Primecap Investments were recorded as being held by Ms Hadjipapa, and it is pleaded by Mr Kolomoisky that he has had no ownership interest in Primecap since that date. The Bank does not deny that Ms Hadjipapa holds her interest in the shares in Primecap Investments on trust, but it disputes that this indicated any change in the ultimate beneficial ownership in 2011 for a number of reasons.

283. Firstly, it is said that Ms Hadjipapa has acted as a nominee for the Individual Defendants in their other assets ownership structures. This is established by Mr Bogolyubov's own asset disclosure, which lists Ms Hadjipapa as the nominee holder of shares in a Nevis company (Bexiral Enterprises Ltd) involved in the complex structures through which both Mr Kolomoisky and Mr Bogolyubov hold their interests in one of their jointly held assets (Finance Company Finilon LLC). She also appears in disclosed historic lists of Mr Kolomoisky's assets as the nominee holder of shares in another Nevis company, Faracon Holdings Ltd, which itself is part of the highly complex ownership chain of another of their jointly held assets (PJSC Stakhanovsky Ferroalloy Plant), their respective interests in which is disclosed by both of the Individual Defendants in their asset disclosure. She also appears in a disclosed historic list of Mr Bogolyubov's assets

as the nominee holder of shares in a dormant Cypriot company (Lonastro Investments Ltd).

284. Secondly, the documentation which evidences the contention that Primecap employees or managers might have acquired some form of interest in Primecap Investments is very unsatisfactory. The Bank submitted that the only documents which did so were a number of trust deeds, almost all of which were dated 11 April 2013 (the date at which Mr Novikov started to be remunerated as its "Senior Consultant"). Under these trust deeds, Ms Hadjipapa declared that she held her interests in various blocks of numbered shares in Primecap Investments (all of which were less than 10%) on trust for twelve named Primecap employees. It was submitted by the Bank that this documentation is inconsistent with the case advanced by Mr Kolomoisky, because all of the deeds of trust were executed just under two years or more after the time at which Mr Kolomoisky asserted that Ms Hadjipapa had taken a transfer of the shares for them to be held on trust for the employees.

285. It was also said by the Bank that an analysis of the percentage holdings and the dates on which the trust deeds were entered into demonstrates that much the most probable explanation for them being introduced was in an effort to substantiate an argument that Primecap was not a related party to the Bank. The issue of related parties arose in a number of different contexts during the course of the proceedings, but the Bank pointed out that Primecap was listed in PwC's IFRS list of related parties as at 31 December 2011 and 31 December 2012 on the basis that it fell into the category of "Companies under common control and other related legal entities" and as a related person on the Bank's Insider List as of 1 April 2013 (drawn up in accordance with NBU Resolution No 368). It was only between 1 April 2013 and 1 July 2013 that Primecap was excluded from that list on the grounds that "Due to the change of participants - there are no signs of connectedness".

286. Counsel for Mr Bogolyubov relied on a quite different set of eleven trust deeds signed by Ms Hadjipapa, all dated 1 June 2011, i.e., contemporaneously with the time at which Mr Kolomoisky pleaded that he no longer had an interest in Primecap. They all purported to declare trusts of the same shares in Primecap Investments for almost exactly the same group of employees. However, the groups of identification numbers for the shares attributable to each Primecap employee were different from the 2013 deeds, as were the number of shares held by each of them. There is no obvious explanation for this discrepancy, but more importantly, there is no explanation as to why it was only after 1 April 2013, when the deeds referred to in the Bank's closing submissions had been executed, that Primecap was removed from the NBU list of related parties. If the 1 June 2011 deeds genuinely reflected the persons for whom the shares in Primecap Investments were held by Ms Hadjipapa, Primecap would not have been included on the related party lists after June 2011, nor would it have been recorded that it was only excluded from the Resolution 368 list "due to the change of participants" during the period 1 April 2013 and 1 July 2013.

287. Thirdly, the only explanation for beneficial ownership in the whole of Primecap's share capital being transferred to its employees is that there was some form of management buy-out. However, there is no documentary or other evidence to demonstrate that is what happened. There is also no evidence to show that the twelve employees who were said by Mr Kolomoisky to have become the UBOs of Primecap in 2011 received any dividends or other distributions in return for their interest throughout the period of the

Misappropriation alleged by the Bank. Rather, the evidence disclosed that the only distribution was the issue to Mr Novikov of 1,000 redeemable preference shares as late as 14 November 2017, which entitled him to an annual dividend of €1.2 million in priority to the ordinary shareholders. This was broadly equivalent to Primecap's annual profit for each of the 2013 to 2016 financial years. If the other eleven employees were really the beneficial owners of 90%+ of Primecap's ordinary shares, it is difficult to understand why they would have agreed to its distributable profits being treated in this way.

288. Fourthly, there is some, albeit limited, evidence that both of the Individual Defendants continued to be closely involved in the affairs of Primecap right up until the time of the Bank's nationalisation. The two examples to which my attention was specifically drawn occurred on dates in October and December 2016.

    i) The first was a 20 October 2016 request made to Mr Kolomoisky by Svetlana Melnikova in the Bank's budgeting department (herself acting at the request of Mr Novikov) to authorise payment of amongst other matters Primecap tax and social insurance; an authorisation which he gave without qualification. In my view, the Bank was entitled to submit that he would have questioned this, if he was being asked to authorise payment of the tax and social security for a company he had in fact sold five years earlier.

    ii) The second was an e-mail exchange on 20 December 2016 in which Mr Bogolyubov told Mr Anischenko that Ms Markova had been moved from the Bank's Cyprus branch (which he said was "done") to Primecap within two days of the Bank's nationalisation, and in that capacity would be able to help with a related parties fund transfer enquiry.

289. This second example mirrored the fact that, immediately after the Bank's nationalisation, eleven members of staff relocated from PBC in Dnipro to Cyprus, i.e. Primecap. These included one (Olena Kravchenko) who was said by the Defendants to have been a UBO of 27 Borrowers and 15 Intermediary Borrowers and another (Vadym Pereviznyi) who was said to have been a UBO of 28 Borrowers and 11 Intermediary Borrowers. The inference that this occurred because they were loyal to the Individual Defendants is very strong.

290. In my judgment this evidence taken as a whole gives substantial support to the Bank's case that the UBOs of Primecap have throughout been the Individual Defendants. In circumstances in which neither of the Defendants was prepared to give evidence on which they might have been cross-examined to support their denial that they were, I have reached the conclusion that such evidence as is available points to a clear finding that they were. In short, the position is similar to that which pertained at PBC. The Bank has established that the relationship between Primecap and both of the Individual Defendants goes well beyond that of a service provider and client. In my judgment, Primecap was an entity which was controlled by the Individual Defendants, acted on their instructions and was used by them to provide, amongst other services, employees to act as nominees for them in respect of their interests in assets of which they were the true UBOs.

The Cypriot CSPs

291. Apart from Primecap, there were a number of other Cypriot entities which were involved in the transactions that are the subject matter of these proceedings. Collectively, the Bank referred to them as the Cypriot CSPs or corporate service providers. The most significant was M&H, which had offices in the same building in Limassol as Primecap and the Bank's Cyprus branch. The two eponymous partners were directors of a number of the Individual Defendants' companies and Mr Marangos was a director of Collyer. Both of them were also directors of Sim Lim Trust Company ("Sim Lim"), the corporate trustee of a number of Mr Bogolyubov's trusts which had originally been established in Jersey but had been moved to Cyprus in or before early 2016. The closeness of the firm's relationship with the Individual Defendants was illustrated by the fact that Mr Marangos had his own extension on the Black. There was also evidence that Mr Bogolyubov's personal assistant was in regular contact with Mr Marangos, communicating with him by WhatsApp on numerous occasions through the period relevant to these proceedings, while the tone of some of the direct communications between Mr Bogolyubov and Mr Marangos demonstrated a close personal relationship.

292. The other Cypriot CSPs were Andreas M Sofocleous & Co Ltd ("Sofocleous") for whom Mr Marangos worked before founding M&H, Michalis Tsitsekkos & Associates, Kyriakides, Savvides & Associates and SK Law (Symeou & Konnaris), each of whom either provided directors or nominee shareholders to companies involved in the Misappropriation. This included the offshore companies which themselves held interests in the Borrowers and the Intermediary Borrowers.

293. It is not said by the Bank that the Cypriot CSPs were controlled by the Individual Defendants in any corporate sense. It is, however, the Bank's case that, like PBC and Primecap, the Cypriot CSPs provided employees to act as nominees for the Individual Defendants in relation to a wide range of their assets and that they were involved in the operation of the Misappropriation in their role as nominees for a number of the participating Borrowers and Intermediary Borrowers. It is then said that their role as service providers and that of their employees as nominees for the Individual Defendants' admitted assets gives rise to a strong inference that interests in the Borrowers and Intermediary Borrowers held by the same nominees were also held for one or both of the Individual Defendants. I agree that, in the absence of evidence to the contrary which could have (but has not) been adduced by the Individual Defendants, this is the correct inference to draw.

Introduction to the Misappropriation and the forensic accounting experts

294. I now turn to the Bank's case on the form which the Misappropriation took. The conclusions I have reached are based on the common ground explained in the parties' List of Common Ground and Contested Issues ("List of Issues"), the Bank's internal documentation, the evidence of a number of witnesses called by the Bank and the expert evidence adduced from forensic accountants instructed by all parties to investigate and describe the payment chains which underpin the Bank's claim.

295. In navigating this material, I was assisted by detailed statements of facts ("SOFs") prepared by the Bank, which the parties all accepted accurately reflected the documents on the basis of which they were prepared. These SOFs recorded financial and corporate information in relation to each of the Borrowers and Intermediary Borrowers (together with the Relevant Loans and the Intermediary Loans) drawn from client questionnaires, financial statements, business plans, loan applications, intended use certificates, minutes of meetings and loan agreements.

296. The Bank also produced SOFs in relation to:

i) the Corporate Defendants, including information in relation to the RSAs, the LFSAs and the LFSA Pledges, drawn from the agreements themselves and documentation relating to the 2014 Ukrainian Proceedings;

ii) the Share Pledges, drawn from the pledge agreements themselves together with documentation relating to their amendment and registration; and

iii) the New Borrowers and the New Loans drawn from client questionnaires, financial statements, business plans, loan applications, intended use certificates, minutes of meetings, loan agreements and surety agreements purporting to record New Borrower guarantees of the lending to the Borrowers, the Intermediary Borrowers and others.

297. Even though many of these documents may not accurately reflect the true nature of the transactions which they purport to evidence, the SOFs have been a useful means of collating the information disclosed by the Bank's own records.

298. Before explaining my findings of what actually occurred, much of which is not in dispute, it is important to focus on the elements of the Bank's claim under Article 1166. In particular: what is the harm said to have been caused to the Bank's property by the unlawful decisions, acts and omissions of the Defendants and what is the amount of the compensation to which the Bank is entitled by reason of the harm it was caused? The way it is pleaded in the Bank's statement of case is that the Defendants' unlawful acts caused the misappropriation of US$1,911,877,385 of the Bank's funds through steps taken between April 2013 and September 2014. These steps were said by the Bank to have been procured by the Individual Defendants who were the ultimate beneficiaries of the Misappropriation.

299. The first step in the Misappropriation was the agreement of the Relevant Loans. The next step was said to be the making of the Relevant Drawdowns which caused the Bank harm totalling US$2,335,943,519. It was then said that a portion of the drawdowns under the Relevant Loans "caused the Unreturned Prepayments". What was meant by this was that applying the Bank's causation methodology, the Bank's transaction records demonstrated that a proportion of the Relevant Drawdowns was used to make or fund prepayments to the Corporate Defendants under the RSAs. I shall explain what happened in more detail in the section of this judgment which explains the Relevant Drawdowns.

300. In the event nothing was ever supplied under the RSAs and a net balance (totalling US$1,911,877,385), being a proportion of the prepayments, was never returned. This latter figure is said by the Bank to be the compensation to which it is entitled as a result

of the extent of the harm it sustained from the Misappropriation it suffered by the making of the Relevant Drawdowns.

301. There was a different structure in relation to the Relevant Loans to Prominmet and the Cypriot Borrowers, none of which executed RSAs. Nonetheless, it was the Bank's case that Relevant Drawdowns made under Relevant Loans of which each of them was a Borrower in part funded the making of two of the Unreturned Prepayments:

    i) a Relevant Loan to Prominmet dated 20 September 2013 enabled a UAH 157 million (equivalent to US$18,190,455) Relevant Drawdown to be made on 14 February 2014, which caused the making of part of an Unreturned Prepayment by Foxar LLC ("Foxar") to Collyer in the amount of US$17,252,433 on 19 August 2014; and

    ii) three Relevant Loans to the Cypriot Borrowers each dated 3 March 2014 enabled the making of Relevant Drawdowns totalling US$118 million, which caused the making of part of an Unreturned Prepayment by Alfatrader LLC ("Alfatrader") to Collyer in the amount of US$28,770,600 on 11 June 2014.

302. It was then pleaded that worthless security for repayment of the Relevant Loans was put in place. None of this security was intended to create enforceable commercial obligations and all of the documents were shams and/or otherwise contrary to Ukrainian public policy.

303. The Bank's case is that the consequence of this is that, as a matter of Ukrainian law, the Bank sustained harm for the purposes of Article 1166 at the time that the funds forming part of the Relevant Drawdowns were transferred to the Borrowers, at which point its cause of action was complete. Mr Kolomoisky accepted in his Defence that, as a matter of principle, harm for the purposes of Article 1166 can, in appropriate cases, encompass the transfer of a claimant's funds to a third party, and for his part, Mr Kolomoisky's expert on Ukrainian law, Mr Oleg Alyoshin, put the point in this way:

> "… if the defendant commits a wrongful act which entails a deprivation of property (such as a crime of fraud or misappropriation), harm is caused at the time when the claimant is deprived of its property or when the defendant obtains the claimant's property, depending on what makes the act in question unlawful. Also in this situation, damages can only be awarded to compensate the claimant for its actual loss: no damages will be awarded in respect of harm which has already been remedied by the time the court gives its judgment."

304. The Individual Defendants' principal answer to this is that the Relevant Drawdowns were in fact repaid to the Bank from a combination of three separate sources, with the consequence that any claim against them in tort by the Bank has been discharged. The first source was the Intermediary Loans which repaid the Relevant Loans, the second source was the proceeds of the Asset Transfers and the third source was the making of New Loans at the time of the Transformation.

305. To assist in analysing the causal link between the Relevant Drawdowns said to have been caused by unlawful acts of the Defendants and the losses said to have been sustained as a result of the harm which they caused, the court (Sir Anthony Mann at the first CMC) gave permission for the parties to adduce expert evidence from forensic

accountants. The way in which the court identified the issues it was intended to address was first the accuracy and completeness of the Bank's causation analysis, secondly the accuracy and completeness of Mr Kolomoisky's tracing exercise (which at that stage was based on the Lafferty Spreadsheets) and thirdly the loss alleged to have been suffered by the Bank.

306. The Bank instructed Mr Ian Thompson, a Senior Managing Director in FTI Consulting. Mr Kolomoisky instructed Mr Jeffrey Davidson, managing director of Honeycomb Forensic Accounting. Mr Bogolyubov instructed Mr Luke Steadman, a partner in Alvarez & Marsal Disputes and Investigations LLP. The Corporate Defendants did not instruct an expert in forensic accounting. The principal differences of view were as between Mr Thompson and Mr Davidson, but in large part the reason for this was that Mr Steadman's evidence was limited by a direction given by Sir Anthony Mann to any additional matters he wished to raise in light of his review of Mr Davidson's report.

307. In carrying out their work, the experts applied two very different approaches. Mr Thompson adopted what can accurately be called a transactional data-based methodology. This involved taking the Relevant Drawdowns, the number and value of which were not in dispute (270 totalling US$2,355,943,519), and then, having regard to the supply agreement references in the Bank's transactional data, to link prepayments and returns of prepayments in order to quantify the extent to which those Relevant Drawdowns were themselves repaid by further Relevant Drawdowns. He calculated that a total of US$384,214,201 was repaid in this manner. He therefore established that, after allowing for those forms of repayment, the net total of Relevant Drawdowns was US$1,951,729,318. This was about US$40 million more than the net figure for Unreturned Prepayments (US$1,911,877,385). Mr Thompson's arithmetic, reflecting the payment links recorded as such in the Bank's transactional data, was not in issue between the parties. It was also common ground that, applying this methodology, the Bank's transactional data showed the Relevant Drawdowns as being the source of the Unreturned Prepayments.

308. Mr Davidson adopted a different methodology, which can more accurately be described as a tracing exercise, having not been instructed to address the Bank's causation analysis. The way that he described the exercise he was instructed to carry out was only to consider, by reference to the Bank's transactional data, its analysis of Relevant Loans. His tracing exercise was different to the way in which the Defendants had previously advanced their case based on the Lafferty Spreadsheets and amounted to what can be called a funds flow methodology, or as explained by Mr Thompson: "a cash tracing methodology by which cash inflows to an account are matched to cash outflows, either individually or in aggregate, such that the inflows are traced into the outflows which match the quantum (in US$ or UAH) of the inflow".

309. Mr Thompson was criticised in Mr Bogolyubov's closing submissions as being a glorified calculator for the Bank, who permitted himself to be constrained by his instructions and limited himself to applying the Bank's methodology in order to connect the 270 Relevant Drawdowns to the 82 Unreturned Prepayments. It was also pointed out that he had been criticised for taking what was characterised in *Kazakhstan Kagazy v. Zhunus* [2017] EWHC 3374 (Comm) as too restrictive an approach, which meant that his evidence had not looked at the broader picture and as a result was both flawed and unhelpful. It was suggested that his evidence in the present case suffered from the same flaws.

310. I do not think that this criticism was justified. Mr Thompson made very clear in his reports that the exercise he carried out was to apply the Bank's methodology to establish the accuracy of its case on the extent to which Unreturned Prepayments were funded by Relevant Drawdowns. To do so, he used a process of linking payments in the transaction narrative to the supply agreement reference in the transaction narrative. He also considered the tracing exercise which was advanced by the Individual Defendants, which came to involve a process which was described as Exact Matching, and pointed out the many significant omissions in the form which it originally took.

311. At the time of their reports, each of the experts was a fellow of the Institute of Chartered Accountants of England and Wales ("ICAEW"). During the course of July 2023, after the trial had commenced but before he was called to give evidence, it came to the attention of the Bank's solicitors that Mr Davidson's status as a member of the ICAEW was now recorded as Ceased with a sub-status recorded as Cessated. They wrote to Mr Kolomoisky's solicitors drawing attention to the cessation and attaching a copy of his disciplinary record which disclosed that he had been the subject of a severe reprimand in relation to two disciplinary matters in respect of which there had been hearings on 8 March 2023. None of this information had been disclosed by Mr Davidson either to the Bank or to the court.

312. Mr Davidson's explanation for what had occurred was eventually revealed on 29 September 2023, five days before he was due to give evidence on the recommencement of the trial after the long vacation. He made a witness statement, describing it as being in anticipation of questions he expected to be asked in cross-examination. He disclosed that he had been the subject of two complaints in June and August 2021 in respect of which no disciplinary proceedings had been initiated against him, and that the matter in which he had been severely reprimanded was a failure to provide the ICAEW with responses to those complaints. He also disclosed that the Charity Commission had removed him as trustee of two charities and that those charities had been the subject of statutory enquiries by the Charity Commission. In his witness statement, Mr Davidson also gave notice that he would rely on his privilege against self-incrimination to justify his refusal to answer any questions about the August 2021 complaint to the ICAEW and the Charity Commission inquiry.

313. In light of the position adopted by Mr Davidson, it was not possible for the court to obtain a full picture of what had occurred or the extent to which the matters in respect of which he had been investigated or criticised might have been relevant to the quality of his evidence. However, he accepted in cross-examination that there was no excuse for his failure to provide the information sought by the ICAEW disciplinary committee (although he did not accept that his conduct amounted to a deliberate breach of the rules).

314. In my view, where an expert presents his evidence as a member of a professional organisation, which is expected by him to give the court assurance as to his ability to act in the case, he is under a duty to inform the court if his membership has ceased, more particularly where the cessation is linked to disciplinary proceedings against him. Mr Davidson accepted in cross-examination that he knew that his presentation as a member of the ICAEW would give the court that assurance, but he had no explanation as to why he did not voluntarily inform the court or the Bank of the fact that he had ceased to be a member with effect from 19 April 2023. The manner in which Mr Davidson approached this issue casts real doubt on his ability to be open and

straightforward on matters which might affect the court's assessment of the reliability of his evidence as an independent expert. More particularly it undermined the court's confidence in his ability to give precedence to his overriding duty to the court when faced with other conflicting interests. It seems to me that this is a particularly significant failing when taken together with the fact that Mr Davidson also failed to disclose that he had been the subject of a finding in another case that his opinion was based on wholly unsupported and fanciful assumptions, which ignored the objective facts and undermined his credibility as an independent expert (per Leggatt LJ in *Al Nehayan v. Kent* [2018] EWHC 333 (Comm) at [195]).

The Relevant Loans

315. Between 3 April 2013 and 21 August 2014, the Bank agreed to enter into the Relevant Loans by approving and executing what appeared to be 134 loan agreements with the 50 Borrowers. Each Relevant Loan was expressed to take the form of an agreement for a revolving credit facility for varying amounts, with a currency expressed in either UAH or US$.

316. The Relevant Loans to the 47 Ukrainian Borrowers were denominated in both UAH and US$. They varied in amount between UAH 31 million and UAH 600 million (when denominated in UAH) and between US$5 million and US$57 million (when denominated in US$). Each of the Relevant Loans to the three Cypriot Borrowers was denominated in US$ and had a value of between US$14.5 million and US$59.5 million. The Relevant Loans to the Ukrainian Borrowers were advanced for a period of between eleven months and five years. The initial period for the advance of the Relevant Loans to the three Cypriot Borrowers was three days.

317. The circumstances in which the Relevant Loans were granted, and the surviving internal documentation relating to them, give many indications that, although described as loan agreements, the Relevant Loans were not agreed as proper and genuine bank lending intended to be advanced or repaid on ordinary commercial terms. I have already explained that none of the Defendants has made a positive case as to how the sums drawn down under the Relevant Loans can be said to have been made for legitimate commercial purposes (or that the RSAs were genuine supply agreements). The next few paragraphs of this judgment explain why I accept the Bank's case that these documents, all of which are dated prior to nationalisation, are consistent with a conclusion that genuine lending on commercial terms was not the purpose of the Relevant Loans. I will revert to the legal consequences of that conclusion when I have finished describing the remainder of what occurred.

318. The proposals for all but four of the Relevant Loans originated from and had their risk profile assessed by BOK, described as the initiating unit. Of the four which were not initiated in BOK, the three Relevant Loans to the three Cypriot Borrowers were listed as initiated in the Investment Business and one (the Relevant Loan to Prominmet) is listed as having originated from or been initiated in the "loan experts department" or the "credit analysts department". In fact, where correspondence has survived, it appears that what happened was that the Relevant Loans to the Ukrainian Borrowers were initiated after a discussion or other communication between employees of PBC and employees of the Bank within BOK.

319. The process in relation to the Relevant Loans to the Cypriot Borrowers was slightly different from those to the Ukrainian Borrowers. They were initiated by an individual from Primecap making a request to the Bank's Cyprus branch to prepare the necessary documentation. The Bank's employees then prepared the relevant documents for signature. It is clear from the way in which this was done that the documentation was not in place at the time the Relevant Drawdowns were made, but the loan agreements were then backdated to give the impression that they had been. The Bank said that the application forms were actually completed within the Bank itself. I do not think that the evidence adduced by the Bank establishes that they were actually filled in by officers in the Bank's Cypriot branch, but it is clear that the process of putting the documentation in place was mere formalism and there was never any doubt that, once requested by Primecap, the loans would be made available and the moneys would be drawn down without any further substantive scrutiny being applied.

320. Each of the Relevant Loans was recorded as having been approved by the ECC at meetings the minutes of which were signed by Mr Dubilet and the large majority of which were attended by Mr Novikov (127) and Ms Gurieva (129). Also present at most of what were recorded as approval meetings were Ms Chmona (126), Mr Yatsenko (129), Mr Pikush (129), Mr Kandaurov (123), Mr Kryzhanovskiy (127) and Mr Gorokhovsky (129) together with a number of more junior employees who were unlikely to have taken a line which cut across proposals made by Mr Dubilet, Mr Novikov or Ms Gurieva. Of those, Gennadiy Linskiy, head of the Bank's financial and risk department responsible for monitoring the Bank's financial ratios and capital both pre- and post-nationalisation, approved 128 of the Relevant Loans in his capacity as a member of the ECC. Each of the loan agreements was signed on behalf of the Bank either by Mr Dubilet who signed 115 or by another member of the Bank's senior management: Mr Pikush who signed 15, Vladislav Morgachov (the general manager of the Bank's Cyprus branch) who signed the three Relevant Loans to the three Cypriot Borrowers and Mr Yatsenko who signed one. At the relevant meetings the members recorded as being present normally included the other members of the Management Board, who also had small holdings of shares in the Bank as described in paragraph 198 above.

321. To the extent that any loan made by the Bank exceeded US$2 million, the credit committee regulations required it to be approved by the Supervisory Board. The Charter made similar provision if and to the extent that any loan exceeded US$500,000 and amounted to related party lending. None of the Relevant Loans was so authorised, even though all of them exceeded US$2 million (the lowest in value was c.US$3.7 million). The Bank submitted that this reflected a recognition by the Individual Defendants who were members of the Supervisory Board that they needed to distance themselves from the Relevant Loan approval decision-making as recorded in the Bank's books and records. What it also shows is that the nature of what was being done was such that the employees of the Bank who were involved in their approval and preparation either did not regard the Relevant Loans as genuine lending to which the Charter's limits should be applied or they assumed that (whether generically or specifically) the Supervisory Board approved what was being done. The latter seems to me to be a likely explanation, although I also think it is probable that it was apparent to all those involved at a higher than purely administrative level within the Bank that the Relevant Loans were not in fact agreed for the purposes for which they purported to be made.

322. It is clear that such material as there is amounted to inadequate evidence on which any bank could properly have based a conclusion that the Borrowers were a sensible credit risk. In part this is demonstrated by the absence of documentation. Thus, an analysis of the SOFs confirms that, in relation to 36 of the 47 Ukrainian Borrowers, no information was recorded as to their past trading or credit history and, in relation to the remaining 11, the only information related to other loans made by the Bank. Only one of the three Cypriot Borrowers (Fiastra) disclosed any credit history, and that simply took the form of a previous loan from the Bank.

323. However, there were many other aspects of the information that was held or retained by the Bank which illustrated both the Borrowers' lack of substance and that the approval process conducted by the ECC was little more than a rubber-stamping exercise with several evidenced examples of failures to comply with the Bank's own Lending Procedures Manual.

324. As to the nature of the approval process nearly all of the Relevant Loans were recorded as having been approved within two business days of the loan being initiated, and sometimes even quicker. Given their size, it is difficult to see how they could have been subjected to any proper analysis or feasibility assessment in such a short period of time, or how the members of the ECC could have had sufficient opportunity to consider the relevant materials by reference to the purported criteria that appeared to be required from the face of the documents. Furthermore, the correspondence indicates that it was not uncommon for the documentation to have been put in place after the Relevant Loan was executed and there are some indications that the recorded ECC approvals were not in fact given in the manner disclosed in the Bank's records.

325. One example is Saltiz LLC ("Saltiz") where its use as a Borrower was initiated in an e-mail from Mr Melnyk at PBC to Ms Gurieva in BOK. After an exchange to establish whether or not Saltiz could be lent to, the expert analysis is recorded as having been carried out on the same day (2 December 2013) as the request for the loan was made. The Relevant Loans are then recorded as having been approved by the same eleven members of the ECC on the same day (in part) and in part two days later on 4 December 2013. Another is Uniks LLC ("Uniks") where a US$36.8 million loan was proposed by Tamara Travkina at BOK to Kostiantyn Barsuk at PBC on 28 July 2014. It was then signed on the following day, apparently because Mr Dubilet was then going to be away.

326. As to the Borrowers' lack of substance, nearly all of them were recorded as having had a single employee, save for seven which had two employees and one for which the Bank had recorded no employee information. Furthermore, of the 48 Borrowers in respect of which financial statements have been discovered in the Bank's records, 31 appeared from those statements to have been balance sheet insolvent at all times, nine were recorded as having been balance sheet insolvent in one or more trading periods and eight of the remaining ten had recorded net losses in some or all of the periods to which the statements related. The agreements provided for each of the Relevant Loans to be advanced at an interest rate of between 10.3% and 12%, with the Relevant Loans to the three Cypriot Borrowers bearing interest at 11%. This was well below the levels of between 19% and 19.5% at which the Bank itself was able to borrow from the NBU between February and May 2014. Although the rates on two of these four refinancing loans were reduced to 14.25% in June 2014, the other two remained at 19% and these interest rates taken as a whole were a further indication that genuine commercial lending was not the purpose of the Relevant Loans.

327. As to the purpose for which each of the Relevant Loans was advanced the Bank's recording was remarkably non-specific. In many instances it was said to be "financing of the company's current activities" or "working capital replenishment" with the source of repayment recorded as the Borrowers' "main activity", which itself was identified as "non-specialised wholesale trade" or "other wholesale trade". On a few occasions different language was used to describe the relevant Borrower's main business activity, the financing of which was said to be the purpose of the loan, but it was almost always expressed in generic terms. In relation to some but not all of the Relevant Loans, the Bank's records contained business plans, but it was invariably the case that, where they were provided, the estimated sales revenue looking forward bore little relationship to the historic position or was not recorded at all.

328. I was taken to two examples during the course of the trial and have since looked at the underlying documentation referred to in the SOFs relating to many others. The majority of the proposals (105 out of 134) were categorised as level II (on a scale of I to IV) viz., moderate risk. I agree with the Bank's submission that this risk categorisation cannot properly have reflected the reality of the true nature of what was proposed, and is a clear indication that no genuine scrutiny was carried out as part of any proper form of approval process. The Relevant Loans to the two Borrowers to which my attention was specifically drawn, well-illustrates the point, but the types of deficiency I shall describe was more widely applicable.

329. The first related to a Ukrainian Borrower, Esmola LLC ("Esmola"), which was granted two Relevant Loans on 12 February 2014 for UAH 180 million and on 19 February 2014 for UAH 320 million. The purpose of the loans was said to be "financing of the company's current activities" and the source of repayment was variously described but there was no more detailed description or analysis than "future revenue from commercial activities". Esmola's financial statements for the period ended 31 December 2013 showed assets of UAH 19,700, revenue of UAH 10,000 and the technical and feasibility study (or "business plan") anticipated substantial liquid assets at the end of each of the succeeding three years based on estimated sales revenue for those years of UAH 295 million, UAH 347 million and UAH 377 million, but there is no explanation of how that was to be achieved. With anticipated revenue increases of 30,000 times higher or more, and no explanation of how that was to be achieved, it is impossible to see how this proposal can have been thought to be a proper or genuine loan proposal. Nonetheless, the quality of both loans was categorised as "II (moderate risk)".

330. The second related to Vegatorg LLC ("Vegatorg") which was granted a single Relevant Loan on 15 October 2013 for UAH 54 million. The purpose of the loan was said to be "financing of the company's current activities" and the source of repayment was variously described but in general terms: "revenue from commercial activities" and "available working capital". Vegatorg's financial statements for the period ended 31 December 2013 showed an excess of liabilities over assets, revenue and other income of UAH 28,300 and a net loss of UAH 650,700 (after a small net profit in the previous period). The technical and feasibility study anticipated substantial liquid assets of UAH 1.797 billion at the end of the relevant period on the basis of estimated sales revenue of over UAH 3 billion. This too showed an anticipated increase in revenue by a multiplier of many tens of thousands, but again the Bank's records disclosed no detailed explanation of how that extraordinary result was to be achieved. It is impossible to see

how this proposal (like the proposal apparently made by Esmola) can have been thought to be a proper or genuine loan proposal. Nonetheless, like the loan to Esmola, the quality of this loan was also categorised as "II (moderate risk)".

331. The Bank also relied on the number of occasions on which the recorded expert analyses relating to Borrowers and Relevant Loans were inconsistent with other information in relation to the same Borrower. It made written submissions on a particular example relating to the Relevant Loan application for Agroprom agreed on 19 February 2014 (UAH 100 million) and 20 February 2014 (UAH 390 million). It was said that the assets of UAH 124.9 million disclosed in the expert analysis was inconsistent with the technical and economic feasibility study which indicated that it had liquid assets of UAH 555.5 million. On the face of it, that is a misreading of the SOF because UAH 555.5 million was a forward-looking figure. Nonetheless, this Borrower's financial statements for the previous period disclosed that it was balance sheet insolvent, had no operating revenue in the previous accounting period and made a net loss on other income of UAH 276,200. This made the estimated sales revenue of UAH 955 million resulting in net assets of UAH 555.5 million seem absurdly unrealistic.

332. At a superficial level, all of these considerations are potentially explicable by a combination of incompetent management, inadequate internal controls and, in the case of the failure to comply with the requirements of the Bank's credit committee regulations and the Charter, a careless disregard for compliance with the applicable formalities. However, looked at more carefully and in their proper context they are also consistent with agreements to transfer monies to the Borrowers in a manner which was both dishonest by those who authorised and gave instructions for what occurred and did not amount to the making of genuine loans. The extreme disregard for proper approval processes and the other deficiencies in the manner in which the monies were agreed to be transferred supports a conclusion that the latter is the more probable explanation. As will appear, this is further confirmed by a number of other aspects of what occurred, including the nature of the security provided and how the monies were in fact applied.

333. As I have already described, the Bank's internal documentation discloses a paper trail pursuant to which the Relevant Loans were approved by the ECC. Whether the Individual Defendants gave instructions for the Relevant Loans to be agreed and made, or otherwise participated in the process, is affected by a number of matters, including the question of whether the Bank has made out its case that the Individual Defendants owned and/or controlled the Borrowers and/or the Corporate Defendants, as well as other entities involved in the Misappropriation.

334. I shall revert to this aspect of the Bank's case after I have explained my findings on what happened after the agreements for the Relevant Loans had been made, but it suffices at this stage to record that:

    i) The Individual Defendants accept that 32 of the individuals said by them to be the UBOs of the Borrowers, and 35 of the individuals recorded as being directors of the Borrowers, are employees of PBC or the Bank and are amongst the individuals who also acted as nominees of the Individual Defendants in relation to their own admitted asset holdings;

    ii) Mr Kolomoisky has admitted that at various stages during the periods in which the Relevant Loans were being made he had an interest in 21 of the 47 Ukrainian

Borrowers (a figure which increased from nine during the course of the proceedings) ranging in size from a nominal indirect stake to an interest in excess of 50%; and

iii) Mr Bogolyubov has admitted that at various stages during the periods in which the Relevant Loans were being made he had an interest in 19 of the 47 Ukrainian Borrowers (a figure which increased from 13 during the course of the proceedings) ranging in size from a nominal indirect stake to an indirect interest of 50%, although he pleaded that these were mostly technical and generally very small indirect interests.

335. However, despite these admissions of interest, it was Mr Kolomoisky's pleaded case that he did not exercise day to day control over or manage any of the Ukrainian Borrowers, including Prominmet, and Mr Bogolyubov's pleaded case that he did not control any of the Borrowers and that if they entered into any of the various agreements alleged by the Bank it was not with his knowledge or on his instructions.

The Supply Agreements

336. The next stage in the process alleged by the Bank to have been part of the Misappropriation was the execution of supply agreements, of which the RSAs were the most relevant for the purposes of its claim. Between October 2013 and August 2014, all but one of the 47 Ukrainian Borrowers (the exception being Prominmet) entered into 129 supply agreements (each a "Supply Agreement") with 35 different non-Ukrainian suppliers (the "Suppliers"), amongst which were the six Corporate Defendants. Under the Supply Agreements, provision was made for the relevant Borrower to make prepayments for the supply of goods to be delivered at a later date, with an obligation to return the prepayment in the event of non-delivery by that date. In no case did any of the Suppliers deliver any goods to the Borrowers in accordance with their terms. In relation to 75 of the Supply Agreements (the "Other Supply Agreements"), all of which were entered into in or before May 2014, there is no dispute that the prepayments were returned to the Borrowers within approximately 90 days.

337. The background to the 90-day return of prepayments related to Ukrainian currency control regulations, a summary of which suffices for present purposes. During the relevant period, Ukrainian exchange control restrictions were subject to an exception which permitted Ukrainian residents such as the 47 Ukrainian Borrowers to transfer foreign currency to non-resident entities such as the Corporate Defendants and other Suppliers by way of payment for the supply of imported goods. Where payments were made in advance of delivery, the rules (set out in the Law on Foreign Currency Payment Procedures and various Resolutions made by the NBU) prescribed a maximum length of time for the period between the advance of the original foreign currency prepayment and the date of the subsequent delivery of goods or the return of the prepayment. At one stage (from 2 December 2012) the period was 180 days, but by the time of the events with which these proceedings are concerned it had been reduced to 90 days. Penal interest and fines were payable by the Ukrainian resident transferor in the event of non-compliance.

338. During the course of May, June, July and August 2014, each of the Ukrainian Borrowers except Prominmet entered into 54 further Supply Agreements (the RSAs) with one or more of the Corporate Defendants. The RSAs provided for the supply of industrial equipment or commodities with a total face value of in excess of US$2 billion. The following summarises the RSAs entered into by each of the Corporate Defendants:

    i) Between 3 June 2014 and 20 August 2014, 13 of the 47 Ukrainian Borrowers, including Real-Standart LLC ("Real-Standart") entered into 14 separate RSAs with Teamtrend for the supply of heavy construction equipment (heavy excavators, crawler cranes, truck cranes, wheel loaders, wheel excavators and concrete pumps) with a total contract value of US$509,346,632.

    ii) Between 4 June 2014 and 21 August 2014, 13 of the 47 Ukrainian Borrowers entered into 15 separate RSAs with Trade Point Agro for the supply of 287,000 tonnes of PET, 14,400 tonnes of palm oil and 42,707.5 tonnes of apple juice concentrate with a total contract value of US$653,166,000.

    iii) Between 14 May 2014 and 21 August 2014, 17 of the 47 Ukrainian Borrowers, including Gardera LLC ("Gardera"), Milorin LLC ("Milorin") and Prado LLC ("Prado"), entered into 21 separate RSAs with Collyer for the supply of a total of 2,431,473.95 metric tons of Australian manganese ore lumps with a total contract value of US$775,098,833.

    iv) On 11 July 2014, two Ukrainian Borrowers (Cambel LLC and Vegatorg) entered into separate RSAs with Rossyn for the supply of 561,250 barrels of Urals grade crude oil with a total contract value of US$62,300,000.

    v) On 11 July 2014, one Ukrainian Borrower, Viglon LLC ("Viglon"), entered into an RSA with Milbert for the supply of 300,000 barrels of Urals grade crude oil with a total contract value of US$33,000,000.

    vi) On 11 July 2014, one Ukrainian Borrower, Inkeriya LLC ("Inkeriya"), entered into an RSA with Ukrtransitservice for the supply of 60,000 barrels of Urals grade crude oil with a total contract value of US$6,300,000.

339. Like the 75 Other Supply Agreements entered into on or before May 2014, each of the RSAs provided for the Borrower to make prepayments in respect of the contract price for the goods purported to be sold under that RSA. Each RSA also provided for delivery within a specified period and for the return of the prepayment in the event of non-delivery. With the exception of four partial prepayments none of the prepayments made in respect of the RSAs were returned to the relevant Borrower. Those partial prepayments were a payment by Collyer to Gardera of US$5 million on 28 August 2014, a payment by Collyer to Milorin of US$29,763,200 on 1 September 2014, a payment by Collyer to Prado of US$32 million on 26 August 2014 and a payment of US$19,195,000 from Teamtrend to Real-Standart on 1 August 2014. To the extent that prepayments under the RSAs were not repaid, they constitute Unreturned Prepayments.

340. As I explained at the beginning of this judgment, the pleaded case of the Corporate Defendants was that the RSAs to which the BVI Defendants were party were genuine. However, no positive averments to that effect were made by the Individual Defendants

and, with the exception of the terms of the RSAs themselves, there was no evidence that anyone involved ever intended that the delivery obligations under them would be complied with. Indeed, even the terms of the RSAs themselves are not really evidence of any intent to comply with their terms because, as I will explain they are sufficiently extraordinary to indicate that the rights and obligations for which they appeared to provide make no commercial sense.

341. For reasons I shall explain, the cumulative effect of which is compelling, there are many indications that the RSAs were not genuine supply agreements and that neither the borrower nor the supplier ever had any intention that the goods specified would ever be delivered. I accept the Bank's submission that each of these RSAs was a sham intended to disguise the true nature and purposes of the transfer of funds to which it related.

342. The first reason is that there had never been any delivery of goods under the Other Supply Agreements. Given the similarities between the Other Supply Agreements and the RSAs, this was a clear indication that the same was likely to be the case under the RSAs.

343. The second reason is that the terms of the RSAs were commercially ridiculous and it was obvious that they could not possibly have been regarded as part of genuine trading activity. As examples, the Bank established on the evidence that the quantities to be supplied were wholly incompatible with any reasonable level of local demand:

    i) The 287,000 tonnes of PET to be supplied under RSAs entered into by Borrowers with Trade Point Agro dated June to August 2014 was more than twice the total import volume of PET into the whole of Ukraine for the whole of the year 2014.

    ii) The 42,707.5 tons of apple juice concentrate to be supplied to Borrowers by Trade Point Agro under RSAs entered into between June to August 2014 compares to the figure of only 343 tons of apple juice concentrate imported into Ukraine in the whole of 2014 and the total Ukrainian production for that year of 70,000 to 90,000 tons.

    iii) The 2.431 million tonnes of Australian manganese ore to be supplied under RSAs entered into by Borrowers with Collyer was more than 27 times the total import volume of Australian manganese products into Ukraine for the whole of 2014, and 30% of Australia's national output for the whole of that year.

344. The Bank was entitled to submit (and I so find) that those within BOK and the PBC who were preparing the documentation simply reverse engineered the quantities of commodities to be supplied so that they fitted with the amounts of the Bank's funds to be transferred. This meant that the quantities of the subject- matter of the relevant RSA were absurd.

345. The third reason is that the payment terms under the RSAs gave rise to obvious question marks over the genuineness of the contracts. The prepayments for which they provided were for the full amount of the contract price in advance of delivery, but there was no provision for security in the form of a performance bond, documentary credit or indeed any other form of security, apart from the pledge over the goods to be supplied, which would have been worthless in the event of a failure to deliver. This security was itself

a further indication of the nature of the RSAs as shams to which I shall revert below. In my judgment, it is inconceivable that any genuine agreement for the supply of goods in the quantities and for the prices set out in the RSAs could have been thought to have been concluded by any person who considered and had regard to their terms.

346. The fourth reason is that the evidence established that the Corporate Defendants as purported suppliers had no commercial substance, and such information as is available represented that such activities as they carried out had little if anything to do with the supplies they had apparently agreed to make under the RSAs. Three of them had only one employee and the other three were recorded as having two. The records held at the Bank's Cyprus branch disclosed that none of them had an office, website or other public presence. For the period in which they were entering into RSAs under which they contracted to make supplies of goods said to be worth hundreds of millions of US$, with the right to equivalent prepayments in advance of supply, each of the English Defendants was either registered as dormant or filed total exemption small company accounts which disclosed negligible net assets.

347. The Bank has been unable to find any financial statements for Milbert or Ukrtransitservice. Financial statements for Rossyn for the relevant period were in the trial bundle. They are consistent with an actively trading enterprise but, as the Bank submitted in its written opening submissions, those assets were almost certainly not the result of arm's-length trading operations. This can be seen from its asset disclosure in these proceedings which confirmed that the only means of realising any part of the US$ 500 million-worth of receivables it disclosed as assets would be by way of assignment of those debts "to discharge a corresponding liability which Rossyn" owes to a creditor. The same was said on behalf of Milbert and Ukrtransitservice which also disclosed receivables with a face value of several hundred millions of US$. If that was indeed the only means of liquidating assets generated as a result of their trading activity, the clear inference is that the trades the BVI Defendants were entering into were with related parties under common control.

348. The pleaded position of the Corporate Defendants was that, in entering into the Supply Agreements the English Defendants were acting as agents for the ED Principals pursuant to the English Agency Agreements, in which it was recited that the ED Principals wished "to carry on worldwide export and import trading business as well as investment activity in various countries". Details of the English Agency Agreements are as follows: (a) Teamtrend entered into an agency agreement on or about 13 March 2014 with Hangli International Holdings Ltd ("Hangli"), a BVI company; (b) Trade Point Agro concluded an agency agreement on or about 19 March 2009 with Brimmilton Ltd ("Brimmilton"), also a BVI company; and (c) Collyer concluded an agency agreement on or about 30 January 2014 with Collard Securities Limited ("Collard"), a Belize company. They said that the English Defendants did so in good faith, but without seeking to verify the substance of the arrangements for which they provided. They also said that the RSAs were executed upon the basis that their principals would supply the relevant goods or repay the prepayments prior to supply becoming due.

349. The pleaded position relating to the BVI Defendants was different. The Corporate Defendants did not assert that the BVI Defendants were acting as agents; rather they denied that the relevant RSAs were not intended to create enforceable commercial obligations and contended that each of the RSAs to which one of the BVI Defendants

was party was concluded on an arm's length and commercial basis. They went on to contend that the BVI Defendants were in a position either to purchase oil in the markets in order to make the relevant delivery or would return the prepayment prior to delivery falling due. As the Bank submitted, that pleaded case assumed that the RSAs were genuine supply agreements to be honoured by the BVI Defendants. By the end of the trial that was no longer the case advanced by the Corporate Defendants.

350. It is at the heart of the Bank's case that, as with the Borrowers, the Corporate Defendants were also owned and/or controlled by the Individual Defendants. It was Mr Bogolyubov's pleaded case that he did not own or control the Corporate Defendants and that, if they entered into the RSAs with the Borrowers, they did so without his knowledge or instructions. I shall revert to this aspect of the Bank's case after I have explained my findings on the remaining stages in the Misappropriation.

351. In my view, what I have just described (together with many of the other findings made elsewhere in this judgment) makes clear that, like the Relevant Loans, the RSAs were not what they purported to be. They were intended to give to third parties, probably the Bank's auditors and the NBU, the appearance of creating legal rights and obligations that bore no resemblance to any which the Bank, the Borrowers or the Corporate Defendants intended to create. They were put in place for the purposes of concealing the true transaction, which was to enable the transfer of US$ outside Ukraine in a manner which purported to comply with Ukraine's foreign exchange requirements (but did not in fact do so) through a highly complex loan recycling scheme which operated for the ultimate benefit of the Individual Defendants.

Security for the Relevant Loans

352. A further indication that both the Relevant Loans and the RSAs were not what they purported to be, and were in fact shams, was the nature of the security apparently obtained by the Bank for the Borrowers' obligations under the Relevant Loans. At the time that approvals were given for each of the Relevant Loans, the proposed terms included provision for security to be granted by varying types of pledge agreement, some of which identified the asset over which the security was to be granted but many of which did not. In relation to this security there were often differences between the descriptions given in the Relevant Loan agreements and the descriptions given in the minutes of the meetings at which the relevant approvals were given. The extent to which the security demonstrated further connections to the Individual Defendants is a matter to which I will revert below, but I accept the Bank's submission that the form in which that proposed security was described was vague, and was of itself an indication that the Relevant Loans were not genuine.

353. There were three categories of security which the Bank's records appeared to disclose, all of which are said by the Bank to have been shams and contrary to public policy. It was said by the Bank that the reason for this was that the security was not intended to create enforceable obligations and was put in place on the instructions of the Individual Defendants as part of the process of hiding the Misappropriation.

354. The first category was the RSA Pledges, which were entered into in conjunction with agreements between the Borrowers and the Bank to take over the Borrowers' rights

against the Corporate Defendants under the RSAs. There were 53 RSA Pledges entered into by Borrowers, the first by Rapit LLC ("Rapit") on 5 June 2014 and the last of which were entered into by Darsten LLC, Inkom 2001 LLC ("Inkom"), Rudnex LLC and Transmoloko LLC ("Transmoloko") on 11 September 2014. Under the RSA Pledges, the relevant Borrower pledged its rights under the RSAs to the Bank as security for its repayment obligations under one or more of the Relevant Loans. It is self-evident that this security was only of any value to the extent that the Corporate Defendants' obligations under the RSAs were themselves valuable assets. It is the Bank's case, which I accept, that they were not worth the paper they were written on.

355. The second category was the LFSA Pledges which purported to be security granted over further agreements other than RSAs. The way this was done was that between 5 September 2013 and 22 October 2015, 78 LFSAs were entered into between 45 of the Borrowers and a number of Suppliers. In 37 instances the LFSA was entered into by one of the English Defendants as supplier: 17 by Collyer, 15 by Teamtrend and five by Trade Point Agro. These LFSAs purported to be supply agreements for the purchase of industrial equipment or commodities. The Borrowers then pledged the LFSAs as security for their repayment obligations under the Relevant Loans. In the case of several of the LFSAs the relevant LFSA Pledge was dated some time after the date on which the agreements for the Relevant Loans were executed and the Relevant Drawdowns were made.

356. In many respects the LFSAs were similar to the RSAs. They also made provision for the supply of improbable quantities of commodities and goods, which there was never any real prospect of the Corporate Defendants being able to supply, but there was one important difference. In every case the obligation to make payment was only due to be performed after delivery. Unlike the RSAs, there was no obligation to make a prepayment in advance. However, this did not affect the basic point which was that, like the RSA Pledges, the LFSA Pledges were only of any value to the extent that the Suppliers' obligations under the LFSAs were themselves valuable assets. The evidence is that they were not and no positive case was advanced by the Defendants that they were. I am satisfied that the Bank has established that the parties to them never had any intention of supplying the goods under the terms and that the RSA and LFSA Pledges were worthless shams.

357. The Bank also submitted that it was significant that at least 31 of the LFSA Pledges entered into with the Corporate Defendants were executed at the end of 2014, after what it called the active phase of the Misappropriation had come to an end and the 2014 Ukrainian Proceedings had commenced. I shall explain what happened in those proceedings a little later, but they involved claims by the Borrowers for return of the prepayments on the grounds that deliveries under the RSAs had not been made. I consider that there is substance in the Bank's submission that the likely reason for the use of the LFSAs as security was because documentation needed to be produced to give the appearance that the Bank's lending under (amongst other agreements) the Relevant Loans had always been adequately secured.

358. The Bank also submitted that a clear indication that the LFSA Pledges were all shams, was that that in June 2015 it accepted security granted by Gardera and Nautis-Trade LLC ("Nautis-Trade") over the obligations of two of the English Defendants (Trade Point Agro and Collyer) under LFSAs at a time at which those English Defendants were already debtors to the Borrowers for hundreds of millions of dollars under judgments

obtained in the 2014 Ukrainian Proceedings. In such circumstances, those involved in granting and accepting the LFSA Pledges cannot possibly have thought that it would constitute security of any meaningful value.

359. The third category of security was 50 Share Pledges granted by the Share Pledgors: 38 corporate pledgors and two individual pledgors over shares in 25 companies. The first of these Share Pledges was dated 23 October 2013 and was granted by Everrin Commercial SA over its shares in PJSC Erlan as security for the obligations to the Bank of three entities, including one of the Borrowers (Transmoloko). The last was dated 30 June 2016 and was granted by Caserta Trading Limited over shares in Mavex LLC as security for the obligations to the Bank of two entities, one of which was a Borrower, Karinda LLC ("Karinda"). The Bank contends that each of the Share Pledges was a sham and/or a transaction contrary to public policy which was not intended to create enforceable obligations but was put in place on the instructions of the Individual Defendants in order to hide the Misappropriation and mislead the auditors and regulators. It is the Bank's case that the Individual Defendants owned and/or controlled the shares which were pledged pursuant to the Share Pledges and the pledgor companies themselves.

360. In the event, the Share Pledges were never enforced and they were all released by mid-November 2016 (i.e. just before nationalisation). It was Mr Kolomoisky's pleaded case that the Bank had planned to release the Share Pledges securing the loans to 193 of its borrowers, including 43 of the Borrowers (the "193 Borrowers") and put in place security for the New Loans by registering as collateral for the New Loans mortgages and pledges of the physical assets owned by the Share Pledgors. However, it was his case that this did not occur. The reason for this was said to be that the NBU caused the New Borrowers to use the funds advanced by the Bank pursuant to the Transformation to repay the outstanding loans of the 193 Borrowers (other than the loan to Tamersa LLC ("Tamersa") and the loan to Prominmet), which had the effect of discharging the collateral including the Share Pledges. It is said that they did this without the intended security for the New Loans being in place.

361. For reasons which will become apparent later, this explanation is inherently improbable, given the fact that the NBU's interest as regulator was diametrically opposed to any reduction in the security available to the Bank, but it is also inconsistent with such evidence as there is. Thus, Mr Shekmar's unchallenged evidence was that he never gave any instructions to the Bank to the effect that the loans to the 193 Borrowers should be repaid, or that the security should be released, and that he was unaware of anyone else either from his team or the NBU more generally having done so. Given his role in the conduct of an unscheduled inspection of the Bank at the time of the Transformation, it is inconceivable that he would not have known of any such instruction if it had been given by the NBU.

362. It is also inconsistent with the fact that the process of documenting the release of the Share Pledges was orchestrated by Primecap with the participation of M&H, albeit the dates are difficult to identify with any certainty because some at least of the relevant agreements appear to have been backdated from the time they were executed in November 2016 to an earlier date in October 2016. But whenever the process was completed, there is no evidence that it was done so at the behest of the NBU.

363. As to the identity of the owners or controllers of the Share Pledgors, it has always been Mr Kolomoisky's case that they included companies owned and/or controlled by him and Mr Bogolyubov. The list of those falling within that category expanded during the course of these proceedings, such that by the time of his written opening submissions, Mr Kolomoisky had admitted to owning or controlling 22 of the 38 corporate Share Pledgors and a substantial majority of the companies whose shares were the subject of the Shares Pledges (the latest amendments to the lists were made in December 2022).

364. However, Mr Kolomoisky's pleaded case was that the fact that assets in which he was interested were used to secure particular loans did not imply that he had an interest in either the loan or the borrower concerned. In particular he said that he provided a number of assets to the Bank for its use as collateral for loans as necessary and that he was not responsible for determining precisely how they were to be used. It also remained his case until well into the trial that the Share Pledges fully secured the sums drawn down under the Relevant Loans. The way it was explained in the interlocutory evidence on behalf of Mr Kolomoisky was that this security:

> "was provided by way of pledges over the "corporate rights" of companies i.e. shares in valuable companies with significant production and trading activities generating cashflows and holding real assets ("the Share Pledges"). This security was examined and accepted by PwC over successive audits."

And the way that the point was put in his Re-Re-Re-Amended Defence dated May 2022 was as follows:

> "It is denied that the use of assets in which Mr Kolomoisky was interested to secure particular loans implies that he had an interest in the particular loan or the borrower concerned. Mr Kolomoisky provided a number of such assets to the Bank for its use as collateral for loans as necessary and he was not responsible for determining precisely how they were to be used."

365. Mr Bogolyubov's position was similar although it was expressed slightly differently. It was said on his behalf both in his pleadings and his written opening submissions that he was a beneficiary under a discretionary trust which held an ownership interest in some of the Share Pledge Companies, that he gave his general agreement to the Bank that assets in which he held an interest could be provided to the Bank as security and was aware in general terms that security had been given. However, it was also said there is no evidence suggesting he was aware of, or at all involved in, the grant of the particular Share Pledges themselves. He accepted, anyway for the purposes of these proceedings that Mr Kolomoisky's identification of the Share Pledgors owned and/or controlled by the Individual Defendants was accurate. He also said that, to the extent he was aware of and consented to the shares of companies or other assets in which he had an economic interest being pledged to the Bank as security, he did so in order to improve the Bank's capital and its financial position and not because he had (or was aware of having) any interest in the borrowers whose loans were thus secured.

366. The Bank did not accept the cases of the Individual Defendants on this point. They said it was clear that they owned and/or controlled those other Share Pledgors whose ownership and control was not admitted. They relied on a number of considerations, many of which were interlinked with the evidence which goes to the ownership and

control of both the Borrowers and the Corporate Defendants. I shall revert to this important issue in that context.

367. However, it is right to say at this stage that the Bank is correct to submit that there is no evidence of any agreement between it and the Individual Defendants recording or referring to the terms on which they now say that the Bank was entitled to use their assets as security. I also accept that it is inherently incredible to suppose that either of them agreed to grant such pledges as security for lending to unconnected borrowers on an open-ended basis. It is something that no rational commercial businessmen would do, most particularly where the entities to whom the relevant loans were to be made would (on their case) have been wholly unknown to them.

368. In addition to these three categories of security, the Bank also relied on the fact that, in August 2014, two companies, which it said were owned or controlled by the Individual Defendants, purported to grant security for sums said to be outstanding from seven of the 47 Borrowers (Agroprom, Esmola, Favore LLC ("Favore"), Imris LLC ("Imris"), Industrial Garant LLC, Mastein LLC ("Mastein") and Prado). In the case of one of those companies, PJSC Nikopol Ferroalloy Plant ("NFP"), the security took the form of a pledge of certain rights under a prepayment supply agreement, quantities of manganese ore and certain equipment. In the case of the other, PJSC Ordzhonokidze Mining and Processing Plant ("OGOK"), the security took the form of a pledge of manganese concentrate.

369. This security was arranged as a result of correspondence within BOK between Natalia Shvetsova and Ms Gurieva, and an e-mail at the end of August indicated that Mr Melnyk was to sign for at least five of the seven Borrowers (Agroprom, Esmola, Favore, Mastein and Prado), presumably on the basis that he was recorded within the Bank as their UBO. But this security, even if effective, was not in place for very long, because it was all released through termination of the relevant pledge agreements at some stage during the course of September 2014. On 12 September 2014, Ms Shvetsova had told Ms Melnikova that this was being done "with regard to the upcoming closure of these companies", which was a reference to the closure of the seven Borrowers I have listed above, all of whom were described as ferrotrader companies.

370. Mr Kolomoisky accepted that he was then an indirect owner of 24.79% of NFP and held a 24.3% interest in OGOK, but denied that he controlled either of them or that it is to be inferred from the fact that companies owned and/or controlled by him pledged shares or assets to secure the Relevant Loans that he owned and/or controlled the Borrowers, being companies whose loans were thereby secured.

371. Mr Bogolyubov's pleading was more specific. He denied that he or Mr Kolomoisky owned or controlled either of NFP or OGOK. It was pleaded that, although he had input on certain operational matters during the period, such as the approval of monthly budgets, he did not determine the decisions and actions of either company. He pleaded that both of the companies had their own management and supervisory boards of which he was not a member and that any decisions requiring the approval of their shareholders could only be taken with the agreement of the other shareholders. In particular, he denied that he in fact caused either NFP or OGOK to grant the security I have referred to, or to approve or consent to its grant.

372. In my view, it is unlikely that any of this was done without the consent and approval of the Individual Defendants. There is clear evidence that those involved in these short term pledge agreements (Ms Gurieva and Ms Melnikova in particular) were accustomed to communicating with both of the Individual Defendants on a regular basis in relation to their assets. In light of the nature of the relationships they had with Mr Kolomoisky and Mr Bogolyubov, apparent as they are from such of the documentation as has survived, it is most improbable that they would have sought to arrange security over the assets of companies in which both of the Individual Defendants had such a significant interest (even if not technically a controlling interest) without their express or tacit approval and consent.

The Relevant Drawdowns

373. The Relevant Loans were expressed to take the form of revolving credit facilities and, consistently with that characterisation, the funds said to be available under each Relevant Loan were drawn down over a period of time. For the purposes of its claim, what matters is that the Bank's transactional data recorded that drawdowns made under the Relevant Loans were used in the 90-day cycle of prepayments and returns of prepayments under the Supply Agreements.

374. More specifically, during a period commencing on 1 November 2013 and ending on 1 September 2014, the Borrowers made 270 drawdowns under the 134 Relevant Loans, 83 of which were made in US$, totalling US$1,558,599,352 and 187 of which were made in UAH, totalling UAH 8,803,056,367.270. Most of the Relevant Drawdowns were made in the first half of 2014, but they were also made outside this period. Thus the first were made on 1 November 2013 by Inkom, which drew down two sums of US$30 million and US$12 million under Relevant Loans dated 31 July 2013 and 19 April 2013 respectively. The last were made on 1 September 2014 when Inkom drew down US$5 million under a Relevant Loan dated 21 January 2014, Milorin drew down two sums of US$19 million and US$10,763,200 under Relevant Loans dated 12 February 2014 and 25 February 2014 respectively, Tekhspetsmontazh LLC ("Tekhspets") drew down US$17 million under a Relevant Loan dated 6 November 2013 and Transmoloko drew down US$10 million under a Relevant Loan dated 11 January 2014.

375. These drawdowns were characterised by the Bank as Relevant Drawdowns because they were said to have funded (in whole or in part, and whether directly or indirectly) the Unreturned Prepayments. The US$ equivalent of the Relevant Drawdowns made in UAH totalled US$777 million (applying the NBU daily exchange rate as at the date of each drawdown). The total amount of the Relevant Drawdowns expressed in US$ was therefore US$2,335,943,519.

376. The way in which the flow of funds operated in general was that where a Relevant Drawdown was made in UAH, it was converted into US$. The US$ proceeds of each Relevant Drawdown were then transferred to the account of one of the Suppliers, amongst which were the Corporate Defendants, at the Bank's Cyprus branch. The Bank's transactional data recorded these as prepayments under one of the Supply Agreements (identified as such by a reference). This was done to maintain a record of

what would otherwise have been a prohibited transfer of foreign currency out of Ukraine by the Borrowers.

377. In the case of the Corporate Defendants, the funds to make prepayments under an RSA were therefore credited to their accounts at the Bank pursuant to electronic transfers by the relevant Borrower. On the same day there was an onward transfer of the amount of the prepayment to another account with the Bank which was held (a) in the case of the English Defendants, in the name of the relevant ED Principal (Hangli, Brimmilton and Collard) or a third party supposedly identified by that principal or (b) in the case of the BVI Defendants, in the name of a third party.

378. On or about the expiry of the 90-day period to which I have already referred, the prepayments were recorded in the Bank's transactional data as being returned to the Borrower. Where that occurred, the Borrower was required by rules promulgated by the NBU to convert 50% of the US$ receipt into UAH. The conversion obligation was increased from 50% to 100% for a short period from 21 August 2014 to 22 September 2014 and then reduced again (this time to 75%) for the period from 23 September 2014 until 8 June 2016. In practice, the Borrower then re-converted at least some of those UAH back into US$ in order to make what was recorded in the Bank's transactional data as the next prepayment under a new Supply Agreement. This next prepayment was almost invariably made on the same day as the return of the original prepayment. The Borrower might also have to make additional drawdowns under its Relevant Loan in order to cover (a) the costs of a compulsory national pension insurance fee payable when purchasing foreign currency (b) the losses arising out of the application of different foreign exchange rates and (c) in some instances to provide any additional funds required to make the next prepayment by way of a further drawdown.

379. The Bank's case, as reflected in the contemporaneous transactional data which linked Supply Agreement references where available and used exact matching where they were not, was that the Relevant Drawdowns were used by the Borrowers as the direct or indirect source of prepayments under the RSAs, and more particularly were the source of the Unreturned Prepayments. In 12 instances, Relevant Drawdowns (of which there were 20 falling into this category) were the direct source of an Unreturned Prepayment. In those instances, as soon as money was drawn down under the Relevant Loans, it was transferred to a Corporate Defendant by way of purported prepayment under an RSA. As the Bank put it, the Relevant Drawdowns passed through the Borrowers to the Corporate Defendants at which stage they were at their disposal as purported suppliers under the RSAs.

380. This process of recycling continued until the end of August 2014. It is the Bank's case that from that time onwards, the Suppliers to which the prepayments had been made, did not return them. These Suppliers were the Corporate Defendants, and the prepayments which each of them received were made under the RSAs. The consequence was that an aggregate amount of US$1,911,877,385, being the net amount of the 82 Unreturned Prepayments, was paid to the Corporate Defendants but not returned by them to the 46 Borrowers which had originally made them within the stipulated 90 day period. The Bank pleaded that the total Unreturned Prepayments were broken down as between the six Corporate Defendants. There was no dispute that the Bank's transaction data disclosed that the following description of the breakdown was accurate: Teamtrend: US$474,775,152; Trade Point Agro: US$653,166,000; Collyer:

US$683,936,233; Rossyn: US$61,000,000; Milbert: US$33,000,000 and Ukrtransitservice: US$6,000,000.

381. The figure of US$1,911,877,385 is corroborated by the Kazantsev Spreadsheet which constituted a series of 98 worksheets prepared on an approximately twice weekly basis for the period between 30 December 2013 and 1 September 2014. These worksheets were maintained by Mr Kazantsev, who gave evidence for Mr Kolomoisky during the interlocutory stage of these proceedings but was not called to give evidence at the trial. The worksheets demonstrate that BOK was keeping track of the prepayments and returns of prepayments and that it was recording the total amount of the prepayments unreturned from time to time by reference to supply agreement numbers. It shows that they were all being treated as part of a single scheme. It is an important source of information which assists in justifying the methodology adopted by the Bank when linking the Unreturned Prepayment to the harm caused to the Bank by the making of the Relevant Drawdowns.

382. The 82 Unreturned Prepayments recorded in the Kazantsev Spreadsheet were all made between 28 May 2014 and 1 September 2014. The last five Relevant Drawdowns and the last four Unreturned Prepayments were made on 1 September 2014 by four separate Borrowers: Inkom which made an Unreturned Prepayment of US$5 million to Teamtrend, Milorin which made an Unreturned Prepayment of US$29,763,200 million to Collyer, Tekhspets which made an Unreturned Prepayment of US$17 million to Collyer and Transmoloko which made an Unreturned Prepayment of US$10 million to Trade Point Agro. The last worksheet shows outstanding prepayments which had not been returned totalling US$1,911,877,385, and no prepayment was returned after that date.

383. The Kazantsev Spreadsheet is not just significant as confirmation that the Unreturned Prepayments were never made as arms-length prepayments under genuine supply agreements. It identifies the same Unreturned Prepayments as the Bank has identified and demonstrates that employees of BOK linked prepayments to returns of prepayments by reference to supply agreement numbers and lists the same companies, viz., the Borrowers and the Corporate Defendants, as the Bank has identified as having been involved in the Misappropriation. It also evidences the fact that the prepayments to the Corporate Defendants formed part of a single scheme and that the ending of the scheme when, as the Bank put it in closing, the music stopped, took place at the beginning of September 2014.

384. In my view, it is of material significance that Mr Kazantsev was not called by the Defendants to give evidence. He was prepared to give written evidence for Mr Kolomoisky in 2018 and it has not been said that he was disabled in any way from giving evidence at the trial. It has long been obvious (from e.g., the first report of the Bank's forensic expert dated 24 November 2021) that the Kazantsev Spreadsheet would be relied on by the Bank as confirmatory evidence of the way in which it treated prepayments in its transactional data.

385. I make a similar finding in relation to the other document which corroborated the conclusions reached by the Bank's forensic expert as derived from the Bank's transactional data. This was the Gurieva Spreadsheet, which was dated 19 November 2014. It was found on a device used by Ms Gurieva and a copy of it was also held by Mr Novikov. Some of the information on it was difficult to understand, but the essential

parts were clear enough. It recorded in 41 columns details of each of the Borrowers, the outstanding loan balances summarised by Borrower and the Unreturned Prepayments, including the date, the recipient and the RSA under which each Unreturned Prepayment was made. It also recorded the returns of prepayments which preceded the Unreturned Prepayments in the cycle of payments between Borrowers and the collateral in the form of Share Pledges for the loans. Much of this information is wholly consistent with the Bank's case on how the Unreturned Prepayments were funded. Like the Kazantsev Spreadsheet, the Gurieva Spreadsheet evidenced the same Unreturned Prepayments made by Borrowers to the Corporate Defendants by reference to specific RSAs, showing the same amount of US$1,911,877,385 as outstanding from the Corporate Defendants to Borrowers in respect of the Unreturned Prepayments.

386. I therefore accept that the Gurieva Spreadsheet is contemporaneous evidence of a direct link between the Unreturned Prepayments and the amounts outstanding under the Relevant Loans, using references to specific RSAs, and justifies the methodology adopted by the Bank. It confirms that there was a co-ordinated scheme by which the Borrowers took purported loans from the Bank and used those funds to make Unreturned Prepayments to the Corporate Defendants and that all the companies involved were under common control. It is also good evidence that (in the majority of cases) the Unreturned Prepayments were the final transaction in a cycle of prepayments and returns of prepayments. It is recorded on a working document maintained by the head of BOK (of which Mr Novikov had a copy) and is consistent with the Bank's case on Unreturned Prepayments.

387. It is also of relevance that a comparison of the two documents demonstrates that no prepayments were repaid between the date of the last of the worksheets in the Kazantsev Spreadsheet (1 September 2014) and the date of the Gurieva Spreadsheet (19 November 2014), linking them to the Bank's outstanding loans to the Borrowers. As Mr Thompson pointed out this was significant, because, according to the Kazantsev Spreadsheet, most of the Unreturned Prepayments were due to be returned under the RSAs before the date of the Gurieva Spreadsheet, but that did not occur.

388. The figure of US$1,911,877,385 was also computed by Mr Thompson, having identified from the Bank's transactional data amounts that were returned by a Supplier to a Borrower approximately 90 days after the original prepayment was made. Each of these repayments was recorded in the data by reference to the same supply agreement that was referred to in relation to the original prepayment. The amounts so returned were then followed by a further prepayment to one of the Corporate Defendants.

389. In the majority of instances, the full amount of the prepayment under the RSAs, being the total contract value under the RSAs, is said by the Bank now to be an Unreturned Prepayment because the items of industrial equipment or relevant commodities were never supplied and no part of the prepayments which had been made were ever returned. However, although this was the case in respect of most of the RSAs, it was not the case in respect of all of them because the aggregate of the contract values under the RSAs (US$2,039,211,465) exceeded the value of the Unreturned Prepayments (US$1,911,877,385).

390. This difference reflects the fact that, in four instances, part of a prepayment under an RSA was returned. Those four instances were prepayments made by three of the Borrowers (Gardera, Milorin and Prado) to Collyer totalling US$66,763,200 and by one

of the Borrowers (Real-Standart) to Teamtrend totalling US$19,195,000. That part is referred to in the Bank's expert evidence as a "Partial Return of Prepayment". The breakdown of how these figures are reached is included in schedules to the Bank's statements of case, but it is not necessary to go through them in this judgment because none of the Defendants put in issue the Bank's case as to how those figures were broken down.

391. However, there are some aspects of the Gurieva Spreadsheet which founded a submission on behalf of Mr Bogolyubov that distinguished between two different categories of Relevant Drawdown, described by Ms Montgomery as Type 1 and Type 2 cases. This categorisation was utilised during the cross-examination of the Bank's witnesses and was summarised in counsel's closing submissions as a reflection of the fact that there is no direct link between most (US$2.049 billion) of the Relevant Drawdowns and the Unreturned Prepayments (these were called Type 2 cases), while only the balance of US$ 287 million can be traced directly to 12 Unreturned Prepayments (these were called Type 1 cases).

392. Instead, it was said that in six of the 12 Type 1 cases, the Gurieva Spreadsheet records the subsequent use of the Unreturned Prepayment on a funds flow basis to fund returns of prepayments to other Borrowers. The submission which was then made was that the Bank's methodology ignored what then happened to the monies. It was said on behalf of Mr Bogolyubov that the reality was that the funds did not stop with the Corporate Defendants, because, in Type 1 cases, and adopting a funds flow methodology, the money then came straight back to the Bank to repay other lending and in Type 2 cases, it shows how the Unreturned Prepayments were in fact funded by an intra-day overdraft by which the Corporate Defendants made the previous return of prepayment to the Borrower by drawing down on an overdraft facility, and the effect of the Unreturned Prepayment by the Borrower to the Corporate Defendants was to repay the overdraft.

393. It was then said that the Gurieva Spreadsheet showed that almost all of the Unreturned Prepayments, US$1.811 billion of US$1.911 billion, immediately cycled back to the Bank. I agree with the Bank's submission that it does not support that conclusion, because the US$1.811 billion figure recorded in the relevant column is a figure which is largely made up of previous returns of prepayment and not the subsequent use of the Unreturned Prepayment. In any event, none of the forensic accountants have traced the entirety of the Unreturned Prepayments back to the Bank in that way.

394. It follows that these submissions were said to have been substantiated by an interpretation of the Gurieva Spreadsheet, which is not in my judgment justified by the evidence. As Mr Davidson confirmed in his cross-examination, while there were examples of intra-day overdraft funding, there were also other examples of instances where money had seemed to come in from somewhere else. There was also no evidence from any witness as to the existence of any form of clearing service offered by the Bank and the Gurieva Spreadsheet made no reference to it.

395. In Mr Bogolyubov's opening submissions, the Gurieva Spreadsheet and Kazantsev Spreadsheet were said to be "artefactual, recording the legend that the Bank was seeking to promote rather than the real transactions and their true purpose". However I accept the Bank's submission that the RSAs and their surrounding documentation served a purpose, even if the RSAs themselves were shams. They provided cover for the 90-day cycles of prepayments and returns and were necessary to give the appearance of

compliance with Ukrainian currency control restrictions, the consequences and working through of which were then recorded in the spreadsheets.

396. Thus, to reiterate, when the Borrower applied to convert UAH into US$, it made express reference to the Supply Agreements which justified the conversion and there was clear evidence in the papers that, where the Bank failed to ensure prepayments were recorded as returned within 90 days, the Borrower was fined. This was also apparent from the fact that, where US$ prepayments were returned, they often had to be converted into UAH and back to US$, which was another currency control requirement, thereby triggering the payment of a compulsory national pension insurance fee. As Mr Thompson confirmed this necessitated additional drawdowns, in the form of 'FX top-ups' to compensate for the currency of the pension fund charge and the conversion of the US$ to UAH and back again. Likewise, in the light of the Unreturned Prepayments, the 2014 Ukrainian Proceedings were brought in order to avoid the penal consequences of those currency control restrictions, a matter to which I will refer in more detail later.

397. This all highlights the question at the heart of the Bank's case and the defence sought to be advanced by Mr Bogolyubov in particular. The Bank submitted that it is clear that the true purpose of what was recorded in the Gurieva and Kazantsev Spreadsheets was misappropriation and money laundering. Mr Bogolyubov accepted that the purpose was to evade currency control regulations, but for the first time in opening, he sought to advance a positive but unpleaded case that there was a wider exercise consisting of a pattern of lending, which constituted (improper) loan recycling. However, although this unpleaded argument provided the foundation for a use of funds defence, which relates to the proper compensation to which the Bank is entitled and to which I will revert later in this judgment, the argument based on a wider impropriety or fraud is not exculpatory of the Defendants' conduct. I agree that the loan recycling, and most particularly the use of sham supply agreements and prepayment / repayment cycles to evade currency controls (and hence detection), is wholly consistent with the Bank's case.

398. As the Bank submitted, and as I agree, if and to the extent that there was earlier fraudulent conduct which followed a similar pattern, then that would serve only to provide yet further confirmation as to the fraudulent nature of the Misappropriation. The Bank did not dispute that there was or may have been other improper loan recycling prior to April 2013, although it pointed out (correctly) that the extent and nature of this recycling was not in evidence, as it was no part of the Defendants' pleaded case. I think that the Bank is correct to submit that Mr Bogolyubov's case on this point amounts to nothing more than a factual concession that there was indeed this type of fraudulent conduct at the Bank; it does not somehow provide a defence.

399. As the Bank pointed out, the fundamental point which is not addressed by the argument now made by Mr Bogolyubov is that there is no credible argument as to why what was done was being done. What was its real purpose? The Bank's very simple submission was that the elaborate scheme, involving the continual movement of US$ in 90-day cycles from Ukraine to Cyprus and back again pursuant to a raft of sham documentation was not just being done for the sake of moving money in and out of Ukraine. It must have been for a substantial purpose, the effect of which was revealed when the music stopped at the end of the active stage of the Misappropriation i.e., the outstanding balance in the form of the Unreturned Prepayments. Given the nature and extent of the Individual Defendants' interests in and control of the Bank, and their failure to give

evidence as to what they thought the underlying purpose of the loan recycling was, there is a strong inference that it can only have been for the extraction of US$ from the Bank in Ukraine for the benefit of the Individual Defendants and their businesses.

400. Consistently with this purpose, it is the Bank's case that the end of what it called the active phase of the Misappropriation meant that each of the Corporate Defendants had received the benefit of a prepayment for which they had neither delivered goods nor returned the money and the Borrower did not receive a return of prepayment from which it could repay its Relevant Loan. It is said that the loss to the Bank by reason of the fraudulent scheme was in the amount of the unrepaid Relevant Drawdowns, which, given the nature of the scheme, was approximately the same amount as the total of the Unreturned Prepayments.

401. The end of this recycling coincided with the passing by the NBU of resolution 540 dated 29 August 2014 designed to prevent the use of Ukraine's financial system for money laundering and terrorist financing. It required a bank's leadership to take under their personal control the implementation of foreign exchange trading and introduced procedures "in order to prevent unfair practices of foreign exchange transactions, in particular the purchase of foreign currency under fictitious agreements". Those procedures included the formation of registers to be submitted to the NBU on the date of receipt of a client's application for the purchase of foreign currency, together with accompanying documentation. Three days later, on 1 September 2014, the NBU wrote to affected institutions including the Bank explaining how requests to purchase foreign country currency would need to be submitted in the future.

402. The end of the recycling also coincided with the completion of an NBU inspection or audit report dated 15 August 2014, the purpose of which was to assess the quality and risk of transactions with shareholders and related parties as at 1 May 2014. Its conclusions were that there was a high level of insider lending which had an adverse effect on the Bank's capital. It also concluded that the Bank's risk management systems for related lending were deficient. It recorded that loans were provided to "newly created companies with almost no activity" and secured by a "high share of low-liquidity collateral" – "80% of the collateral accepted by the Bank for calculating loan impairment provisions was rights to after-acquired goods to be delivered at a later date". It is plain that it identified concerns with credit concentrations among groups of borrowers and inherently risky lending to borrowers conducting unprofitable activities.

403. All of this would have supported the impression of unlawful lending and is supportive of the Bank's case as to the underlying purpose of the loan recycling scheme. Indeed, this report was relied on by Mr Kolomoisky as an indication that the NBU knew about many of the problems of which the Bank now complains by August 2014, a consideration which was said to be relevant to the Limitation Defence. It was also submitted that the report would have been available to members of the Bank's legal department, the Management Board, the ECC and the Internal Audit Committee.

404. These kinds of issues seem to have been well suspected in the market in any event. In a 2020 publication of which Ms Gontareva was a co-author, she said the following about her understanding of the Bank at the time she became Governor of the NBU in June 2014:

> "As a market participant, I already knew PrivatBank had major problems. One didn't have to be a chartered financial analyst to conclude that the major share of Privatbank's loans went to the related parties. Even for an outsider it was obvious, having attracted one-third of all deposits of the banking system, that Privatbank did not have any loan to a large company not affiliated with the owners as its client. It was thus clear to everybody in the market, but not for Privatbank's external auditors, who continued to sign auditor's reports showing 5% related-party lending along with financial statements saying that more than one-third of all bank loans went to ferroalloy and petroleum refining businesses, which were officially known to be owned by the bank's shareholders."

405. The consequence of the failure by the Corporate Defendants to repay the Unreturned Prepayments was that the penal interest and fines I have referred to above were payable, unless the Economic Court of Dnepropetrovsk or the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry entertained proceedings by the Borrowers to recover the amount of the prepayment. The Foreign Currency Payments Law provided that those penalties would be reactivated in the event that the proceedings were unsuccessful, but would not be payable from the date on which the court entertained the claim in the event that it decided in favour of the claimants. It is the Bank's case, which I have concluded is correct, that the 2014 Ukrainian Proceedings, which were brought in respect of the Corporate Defendants' failure either to deliver under the RSAs or to repay the Unreturned Prepayments, were designed to deal with the legal consequences of what had been going on and to hide its true nature.

Cash Repayments and the Intermediary Loans

406. As I have already explained, it is the Defendants' case that the Relevant Loans were repaid from a number of sources and that the loss claimed by the Bank, arising as it does out of the making of the Relevant Drawdowns, has therefore been extinguished. The first of these sources is said to have been cash, substantially all of which came from Intermediary Drawdowns made under both Relevant Loans and further Intermediary Loans granted to both the Borrowers and 34 further Ukrainian borrowers which I have already described as the Intermediary Borrowers. These Intermediary Loans were agreed during what the Bank has called the active stage of the Misappropriation and for a period of time thereafter. The second source is the Asset Transfers. The third source is what were called the New Loans totalling c.US$5.7 billion made by the Bank to 36 New Borrowers in October and November 2016 as part of the Transformation.

407. In this section of the judgment I will summarise the Intermediary Loans and what is said to have been their effect. Although the List of Issues does not identify any substantive disputed issues in relation to the detail of how the Intermediary Drawdowns and the Intermediary Loans were described and recorded in the Bank's transactional data, the question whether either or both of the Individual Defendants ultimately owned and/or controlled any of the Intermediary Borrowers, and if so which ones, was very much in issue, as was the question of whether the Intermediary Drawdowns were procured by either or both of them.

408. These questions are directly related to the other substantive area of dispute on this part of the case: the Ukrainian law question of whether the Intermediary Loans were shams or transactions contrary to Ukrainian public policy or void as amounting to related party lending, with the consequence that what might otherwise have been treated as repayments of Relevant Drawdowns by Intermediary Drawdowns stand to be ignored. I shall deal later with these Ukrainian law issues, including whether or not what occurred served to extinguish any liability the Defendants may have had in tort for their participation in the scheme. However, it is an important part of the Bank's case that, as with the Relevant Loans, the Intermediary Loans were part of a loan recycling scheme, were further illegitimate sham lending made to entities which were owned and/or controlled by the Individual Defendants and were intended simply to keep the wheels of the fraud turning.

409. It was common ground that, taking the period 1 April 2013 to the period immediately prior to the Asset Transfers, amounts said to constitute Relevant Drawdowns in the currency of the applicable Relevant Loan totalling US$2.172 billion and UAH 15.283 billion were recorded in the Bank's transactional data as having been made. It was also common ground that, during the same period, sums said by the Defendants to be Cash Repayments amounting to US$1.195 billion and UAH 10.892 billion were recorded in the Bank's transactional data as having been paid. If effective as such, the effect of these Cash Repayments would have been to leave outstanding balances of approximately US$976 million and UAH 4.391 billion prior to the Asset Transfers.

410. The Bank's expert evidence confirms that its transactional data discloses that the first means by which Relevant Drawdowns were said to have been repaid by what the First Defendant called "cash" was through the return of a prepayment which had been made on an earlier date, where that earlier prepayment had, in turn, been made using the proceeds of an Intermediary Drawdown. The second means was where a Relevant Drawdown was purportedly repaid using the proceeds of a further loan (in the form of an Intermediary Loan) which was drawn down after the Relevant Drawdown. In that instance, the proceeds of the further borrowing from the Intermediary Borrower were then applied in partial repayment of the Borrower's outstanding obligations under the Relevant Loan.

411. Like the SOFs in relation to the Borrowers, the 34 SOFs which have been prepared by the Bank in relation to the Intermediary Borrowers were accepted by all parties as accurately reflecting the documents on the basis of which they were prepared. They disclose a very similar story in relation to the standing of the Intermediary Borrowers and the approval processes which were adopted in relation to the Intermediary Loans as was disclosed by the Borrower SOFs in relation to the Relevant Loans. I was not taken through any of the SOFs for the Intermediary Loans during the course of the trial, but they were referred to in the written submissions and I have been through many although not all of them. It is plain that the approval processes had the same characteristics and deficiencies as applied to the approval processes for the Relevant Loans.

412. In summary, the Intermediary Borrower SOFs demonstrate that, as with the Borrowers, the Intermediary Borrowers were obviously wholly unsuitable as a sensible credit risk and had no prospect of repaying the very significant sums borrowed from any genuine business activity. It is also clear from this evidence that the Intermediary Loans were made without any proper scrutiny by the ECC and that the security for them was either

non-existent or manifestly inadequate. In the samples I considered, the ECC meetings at which they were approved were all chaired by Mr Dubilet and normally attended by the same individuals (including as regular attendees Ms Gurieva, Mr Novikov, Mr Gorokhovsky, Mr Pikush, Ms Chmona and Mr Yatsenko). In the samples I considered, the purpose for which the Intermediary Loan was granted was either not disclosed or was expressed in generic terms such as "financing current activities". The nature of the Intermediary Borrower's business was often wholly uninformative such as "Non-specialized wholesale trade" and it was not unusual for the financial statements of the relevant Intermediary Borrower to disclose that the obligations to be undertaken were beyond the servicing capacity of the Intermediary Borrower concerned. Furthermore, many of the Intermediary Loans exceeded the US$2 million limit beyond which approval from the Supervisory Board was required, but there is no evidence that it was ever sought or given.

413. I agree with the Bank's submission that the available material gives strong support to a conclusion that none of the Intermediary Loans was ever intended to be used for the purpose stated on the loan applications. In my view they did not amount to genuine lending and I have no difficulty in concluding that the primary purpose relating to them was to provide a paper trail which did not reflect the true nature of the relationship between the Bank and the Intermediary Borrowers which the applicable lending documentation purported to record. The only function which it fulfilled was to disguise the fact that transfers made to the Intermediary Borrowers were part of the loan recycling scheme.

414. I shall return later to my conclusions about the interests which the Individual Defendants in fact had in the Intermediary Borrowers; my findings on that aspect of the case are in part reached having considered the position of the Intermediary Borrowers in conjunction with that of the Borrowers and the Corporate Defendants. But, as with what he had to say about the Borrowers, Mr Kolomoisky has admitted that, at various stages during the periods in which the Intermediary Loans were being made, he had an interest in 17 of the 34 Intermediary Borrowers. Most of them were small indirect interests, but they ranged in size from nominal indirect stakes in relation to some of them to a 50% interest in Autotradeinvest LLC ("Autotradeinvest"). Mr Bogolyubov has also admitted that, at various stages during the periods in which the Intermediary Loans were being made, he had an interest in 13 of the 34 Intermediary Borrowers, also ranging in size from nominal indirect stakes to a 50% interest in two of them, one of which was also Autotradeinvest, which he held through Marigold and Sim Lim, and of which he and Mr Kolomoisky were therefore the sole joint owners.

Developments in late 2014 and 2015

415. In order to put the Asset Transfers and the Transformation into their proper context, it is necessary to explain some of the developments in the Ukrainian banking sector during the period between the end of 2013 and 2015 and the impact of those developments on the position of the Bank. I shall also describe some of the events on which the Defendants rely as part of the Limitation Defence, in large part because this enables the chronology of what occurred to be better understood.

416. In her evidence, Ms Rozhkova described how from late 2013 onwards, and throughout 2014, Ukraine was experiencing what the Bank called severe political turmoil, including the February 2014 revolution of dignity and the Russian invasion and subsequent annexure of Crimea. In April 2014 Ukraine entered into a US$17.1 billion stand-by arrangement with the International Monetary Fund ("IMF"), in return for which the IMF required Ukraine to make significant reforms to its regulatory structures, including in particular its banking sector. The IMF's concerns in connection with the Ukrainian banking sector, more especially relating to the level of non-performing loans, capital adequacy and the extent of related party lending by Ukrainian banks, was the catalyst for new legislation designed to facilitate the ability of banks to restore their capital and liquidity over a period of time.

417. The first of the provisions to which my attention was drawn which dealt with this type of issue was the NBU's resolution 540 dated 29 August 2014 (see paragraph 401 above). This led to a tightening up by the NBU of foreign currency purchase procedures and the maintenance of a register for that purpose. Thereafter, on 28 December 2014 the Verkhovna Rada enacted Law 78 "on measures aimed at promoting the capitalisation and restructuring of banks". This law was designed to introduce greater flexibility in the ability of the NBU to respond to banks in financial difficulties. It included a statutory obligation for a bank to produce a restructuring or recapitalisation plan rather than requiring the NBU to declare a bank insolvent immediately in the event that a study showed that it did not meet the legal requirements regarding its capital adequacy.

418. The effect of this legislation was to provide all Ukrainian banks with a period of time in which to resolve their problems. However, in the event that a bank failed to provide a plan to meet the NBU's requirements, Law 78 required the NBU either to declare a bank insolvent or to submit a proposal for a solvent nationalisation of the bank through a state funded recapitalisation programme. Ukraine also enacted new legislation in March 2015 in relation to related party lending (Law 218 amending Article 52 of the Law on Banks ("Article 52")), which contained more detailed tests to be applied for assessing whether persons or legal entities were related to the bank in question. It was designed to close what the IMF had called legal and regulatory "loopholes". It listed nine key categories of related party, and also provided for NBU regulations to set out additional criteria for relatedness in due course.

419. These new laws were followed up with a series of resolutions of the NBU concerned with the application of new stress-tests for banks (Resolution 260 dated 15 April 2015) and the introduction of reporting obligations in relation to related parties (Resolutions 314 and 315 dated 12 May 2015), and the reduction in the acceptable ratios for related party lending (Resolution 312 also dated 12 May 2015). The fact that these changes were driven by the IMF was confirmed by Ms Rozhkova who said that the "requirements in relation to stress tests and related parties were required by the IMF to bring the regulation of the banking sector into line with international standards, and ultimately to protect the integrity of the Ukrainian financial system".

420. Meanwhile, and before this new legislation had been introduced, the liquidity crisis at the Bank had begun to become more apparent. This was illustrated by the fact that, on 17 July 2014, Mr Bogolyubov and Mr Dubilet, as chairmen of the Supervisory Board and the Management Board respectively, wrote to Ms Gontareva (recently appointed as Governor of the NBU) expressing concerns about customer withdrawals and seeking

a two-year stabilisation loan in the amount of UAH 2,285 million. It also expressed concern about the number of borrowers asking for extensions of their loan repayment terms as a result of reductions in cash flows and working capital. In light of Mr Bogolyubov's case that he had very little involvement in the Bank's affairs at this time, it is striking that he was a party to this letter which betrayed a detailed understanding of the Bank's liquidity crisis and what were asserted to be the reasons for it.

421. A number of events relevant to these proceedings occurred against this background. Thus, as I have already explained, in September 2014 the active phase of the Misappropriation came to an end and the Borrowers commenced the 2014 Ukrainian Proceedings. It was also around this time that the Gurieva Spreadsheet (the significance of which I have explained in paragraph 385 and 386 above) was produced.

The 2014 Ukrainian Proceedings

422. I now turn to the 2014 Ukrainian Proceedings which are said by the Bank to have been commenced for the purposes of disguising the true nature and purposes of the transfers which formed part of the loan recycling scheme. Between 11 September 2014 and 14 November 2014, i.e., commencing shortly after the last Unreturned Prepayment was made (and on the same day that the last of the RSA Pledges was entered into), 46 of the Ukrainian Borrowers commenced claims in the Economic Court of Dnepropetrovsk and in three cases arbitration proceedings against one or other of the Corporate Defendants seeking return of the money due from the Corporate Defendants. The four Borrowers who did not commence proceedings were Prominmet and the three Cypriot Borrowers, because they had not entered into RSAs with any of the Corporate Defendants.

423. The Bank was a party to all of the 2014 Ukrainian Proceedings because the Borrowers also sought to invalidate the relevant RSA Pledge entered into between the Borrower and the Bank. The first claims were brought by Alfatrader against Collyer and by Raneya LLC and Rapit against Trade Point Agro. The basis of each claim was a complaint that the relevant Corporate Defendant had failed to supply goods under an RSA. The Borrowers obtained judgment in these claims on various dates between 7 October 2014 (when judgment was entered against Collyer in favour of Alfatrader, one of the Ukrainian Borrowers) and 24 December 2014.

424. On 16 September 2014 two arbitration proceedings were commenced in the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry by two of the Borrowers (Gardera and Tamersa) against Collyer and Trade Point Agro respectively. A further arbitration proceeding was commenced against Trade Point Agro on 2 October 2014. These led to arbitration awards in favour of the Borrowers in the early part of 2015. The Bank was not a party to the arbitration proceedings.

425. In each case, the Corporate Defendants accepted liability and judgment was entered for repayment of the sums received by way of prepayments under the relevant RSA. None of these judgments has ever been enforced. In many of these cases, the judgment recorded that the relevant proceeding was preceded by a letter from the relevant Corporate Defendant asserting that it was unable to perform its obligations, followed by a response from the Borrower stating that it was terminating the RSA and seeking

repayment and concluding with an addendum to the relevant RSA requiring the relevant Corporate Defendant to refund the Borrower the amount of the prepayment. The RSAs were also amended to include provision for all disputes to be "settled on the territory of Ukraine".

426. The documentation referred to on the face of the judgments in the 2014 Ukrainian Proceedings was executed as the Bank submitted, "by following a well-trodden path". The process was that PBC sent drafts to Primecap, which Primecap then passed to the relevant Cypriot CSP, which then executed the documentation and returned it to Primecap. Once that process was complete, proceedings were issued. All of these steps were therefore taken in collaboration between those acting on both sides of what was intended to give the impression of being a genuine legal dispute, and there was no sign that any part of this process involved an independent arms-length negotiation.

427. The Bank therefore contended that the 2014 Ukrainian Proceedings were an artificial construct procured and pursued in collusion between, amongst others, the Borrowers and the Corporate Defendants. It was said that they were brought in reliance upon sham documentation created especially for use in the claims. They were not pursued for any genuine purpose of enforcement, but rather to avoid the Borrowers incurring fines for breach of the '90-day' rule and to make it appear that the Borrowers had a plausible excuse for not repaying the Relevant Loans. Quite apart from the collaborative approach adopted by the parties to the preparation of the documentation for making the legal claims, one of the more striking aspects of what occurred is that the Bank itself, at the instigation of Mr Melnyk and employees of BOK (such as Mr Kazantsev and Tetyana Gubanova), funded the Borrowers to pursue the 2014 Ukrainian Proceedings, notwithstanding that the Bank was a defendant and that the part of the relief sought in the 2014 Ukrainian Proceedings was to invalidate what was said to be the Bank's security.

428. The way that the Bank put the point in its opening submissions was that the judgments and arbitration awards obtained in the 2014 Ukrainian Proceedings were no more than "pieces of paper that could be shown to the regulator or auditor if they asked why the Unreturned Prepayments were outstanding and in order to avoid the Borrowers incurring punitive charges under Ukrainian foreign currency control regulations" and that they were issued to cover up the Misappropriation and evade scrutiny from the NBU. Counsel for Mr Kolomoisky submitted that, whether or not that was the intention, they did nothing of the sort. It was said that, on the contrary, the 2014 Ukrainian Proceedings had precisely the opposite effect, because not only did the receipt of claims by the Bank reveal the violations of the Bank's rights to people within the Bank who did not already know about them but, when judgments were given, they were reported on the unified register of court decisions which was a publicly accessible source of information.

429. I think that there is substance in the submissions made by the Bank on this point. I have concluded that the clear inference from the surrounding circumstances is that the 2014 Ukrainian Proceedings were not designed to secure genuine recovery for the Borrowers or the Bank. They were collusively obtained and were intended to avoid the currency control penalties referred to above and to furnish the Bank with evidence (capable of being supplied to the NBU as its regulator) to explain why the Relevant Loans had not been repaid. But I also think that there is substance in what the Defendants had to say about them as well. Anyone within the Bank who had seen the Borrowers' statements

of claim, but who did not know about the structure of the Misappropriation, must have appreciated that there was something wrong with the 2014 Ukrainian Proceedings and that the form they had taken did not accurately reflect what had occurred.

Glavcom, the LIGABusinessInform Interview and the GPO investigation

430. There was also some important publicity in relation to what may have occurred as part of the Misappropriation, which is relevant to the Limitation Defence. On 4 November 2014, the Chief editor of a Ukrainian media website called Glavcom wrote to the Bank's press officer with a request to comment on information it had obtained concerning loans to 42 of the Bank's borrowers. Glavcom's information came from the court's unified register of judgments database, i.e. the available public information generated by the 2014 Ukrainian Proceedings. His letter included a list of the 42 Borrowers, together with a list the Corporate Defendants identified as the relevant Suppliers and the loan amounts. He asked eight questions relating to why the Borrowers were seeking to terminate the Bank's rights under the RSA Pledges with particular reference to the relationship between loans by the Bank to the Borrowers and a number of refinancing loans which had been advanced to the Bank by the NBU during the course of the year. They included questions as to how the Bank expected to recover the funds, how common it was for the Bank to lend against property rights for large transactions, whether the Borrowers were seeking to terminate the security, how much refinancing the Bank had received that year and when such funds were received.

431. The e-mail correspondence between Glavcom and the Bank was copied to Mr Dubilet and to a number of other senior members of the Bank's management, some of whom continued in a senior position after the Bank's nationalisation. They included Mr Linskiy. The reference to refinancing loans advanced by the NBU related to a significant aspect of the criticism which Glavcom directed at the Bank. These loans continued to be advanced by the NBU after the time at which the Relevant Drawdowns and the making of the Unreturned Prepayments had ceased.

432. On 7 November 2014, i.e., after most of the Ukrainian Proceedings had been commenced and judgment had been entered in favour of a number of the Borrowers, Glavcom published an article (the "Glavcom Article") written by Fedor Orishchuk entitled "Did Kolomoisky withdraw UAH 11 billion from Ukraine?" It was said in Mr Kolomoisky's closing submissions on the Limitation Defence that this joined all the dots together and that the allegations made in the Glavcom Article were too topical, too serious and the details too specific to have been ignored. The Glavcom Article referred to "three dozen" claims brought by 30 borrowers against suppliers in the Ukrainian courts and contained allegations that prepayments had been made to foreign suppliers for goods which had not been delivered.

433. The Glavcom Article also suggested that the Bank's chances of obtaining compensation for losses were close to zero, as the collateral for the issued loans were goods which did not exist. A table listed a number of the Borrowers and all six of the Corporate Defendants (as Suppliers) being the subject of the proceedings referred to. The Glavcom Article suggested that they were all related to the Privat group and/or Mr Kolomoisky. As Ms Rozhkova confirmed in her oral evidence, everyone in Ukraine knew that the Privat group was associated with Mr Kolomoisky and Mr Bogolyubov

and that the Glavcom Article would have been understood by any reader to be saying that the money had gone to Mr Kolomoisky or his companies. The way that Mr Kolomoisky's closing submissions described what was being said in the Glavcom Article was that "In other words, the money had gone, the Bank would bear the cost and the beneficiaries were probably the owners of the Bank". I agree that it is likely that any reader of the Glavcom Article would have reached this conclusion.

434. I shall have more to say about the Glavcom Article when explaining my conclusions on the Limitation Defence, but it was widely circulated within the Bank and also came to the attention of KPMG who, although not the Bank's statutory auditors, had been appointed in May 2014 to conduct a "diagnostic check" at the insistence of the NBU. This was apparent from the fact that, on 12 November 2014, Tetyana Kotenko, an audit manager at KPMG, sent an e-mail to Ms Korotina (copied to Mr Vetluzhskikh and to Olga Kucher, the deputy head of the Bank's internal audit department) about the Glavcom Article. This was then copied on to Mr Pikush, the deputy chair of the Management Board responsible pre-nationalisation for compliance and Ms Shmalchenko, another deputy chair of the Management Board pre-nationalisation and director of treasury.

435. On Mr Pikush's instructions the e-mail correspondence initiated by KPMG was then sent on by Mr Vetluzhskikh to Mr Linskiy, apparently on the basis that he was instructed to identify the people in the Bank who had access to the relevant information. This was said by him to be a problem on the basis that the information could have been held and disclosed by individuals in a number of departments within the Bank, including accounting, IT, finance & risk, business employees, internal audit and risk management. He also identified that possible external sources of information for Glavcom had been the Bank's former and current auditors, the NBU and key workers of the NBU. Mr Linskiy then forwarded the exchange to Svetlana Dudko, stating "read it, don't forward it to anyone, we'll talk".

436. The correspondence made clear that Mr Vetluzhskikh regarded the issues ventilated in the Glavcom Article as serious and said that "decisions on the comments should probably be made at the top management level". However, it is also of significance that the purpose of the exercise was to get to the bottom of who might have leaked the information to Glavcom, rather than whether the allegations themselves were accurate. This is consistent with the fact that the thrust of what was said in the Glavcom Article came as no surprise to the Bank's senior management.

437. The matters with which the Glavcom Article were concerned were also referred to at some length in a LigaBusinessInform journalist's interview with Ms Gontareva on 11 November 2014 when she was asked whether the Bank would be fined for withdrawing UAH 11 billion from the country through fictitious import contracts. Ms Rozhkova accepted that LigaBusinessInform's respectability as a news outlet was "not bad". At this stage Ms Gontareva summarised the NBU's reaction to what appeared to have occurred as follows:

> "I have not seen PrivatBank's operation to withdraw UAH 11 billion. So far, I have seen in it like other banks, only an outflow of deposits. And I did not see that Privat delayed at least one payment. To date, I have no complaints about Privat."

438. In the context of the Limitation Defence, the Defendants and Mr Kolomoisky in particular, submitted that this statement by Ms Gontareva reflected only the NBU's public position. It was said that, as the NBU's governor, she would in fact have seen many more concerns about the Bank's lending practices, which meant that what she was prepared to say in public was not an accurate reflection of the totality of the NBU's understanding of what had or might have occurred.

439. Several of the Bank's witnesses were cross-examined about the Glavcom Article. I shall come back to this when explaining my findings in relation to the Limitation Defence, but the first was Ms Rozhkova, who likened Glavcom to what she called the Sun media in the UK. By this she meant that it was equivalent to a tabloid news source, but the evidence also supported the Defendants' case that the website was then widely visited. She said that she could not remember whether she was aware of this article at the time, but pointed out that at that stage she did not work for the NBU. Mr Oleksiyenko and Ms Pakhachuk were also cross-examined about whether they remembered seeing the Glavcom Article at the time. They both said that they had no specific memory of seeing these articles at the time of publication although neither of them was with the Bank at the time (they only joined on nationalisation, just over two years later). Ms Pakhachuk initially said that she had not seen the Glavcom Article before she was shown it by the Bank's lawyers, but then clarified that it was probably amongst the papers which she was asked to read shortly after her appointment at the end of 2016. Mr Oleksiyenko accepted that it was likely that the journalist must have had sources from within the Bank in order to write the article that he did, but was unable to give any specific evidence as to whom it might have been seen by at the time of its publication.

440. On 13 November 2014, the General Prosecutor's Office ("GPO") instituted a pre-trial investigation relating to what was later described by the investigator judge of the Pechersk District Court of Kyiv as "the taking by officials of the [Bank] of someone else's property - state funds of the [NBU], allocated for refinancing in especially large amounts". This was then followed up in early January 2015 by a dispute between the GPO and the Bank's legal department, as to the GPO's entitlement to disclosure of documents relating to the NBU's refinancing of the Bank during 2014 "including contracts, orders, decrees, resolutions, protocols, audit reports, cash flow statements, list of assets of [the Bank] which were adopted by the [NBU] as collateral". The Bank took the position that the GPO had not complied with the rules of the Criminal Procedure Code and was not therefore entitled to the documentation sought.

441. Against that background, and throughout the rest of 2014 and into 2015, the Bank continued to be in detailed negotiation with the NBU in relation to its own financial position and the pressing need to restructure its balance sheet, including the provision of a UAH 3.64 billion refinancing loan by the NBU which required repayment schedules to be certified by both of the Individual Defendants and the provision of security over their respective shares in Borivazh LLC, an entity of which they each held 17.5%. The NBU also continued to take a close interest in the Bank for a number of other reasons. On 8 January 2015, it made an order for an inspection of the Bank for the period 1 May 2014 to 12 January 2015 regarding the fulfilment of its obligations under its stabilisation loan. It was also concerned to understand more about the issues which had first been raised in a public forum by the Glavcom Article.

NashiGroshi and the Luchaninov e-mail

442. This became more of an issue when the NashiGroshi Articles were published on 5 February 2015 referring to the allegations made in the Glavcom Article and updating them by reference to judgments handed down in the 2014 Ukrainian Proceedings. NashiGroshi explicitly suggested that Mr Kolomoisky had procured the misappropriation of US$1.8 billion from the Bank by siphoning off the money overseas. The NashiGroshi Articles contained the following description of what had occurred:

> "Now, let's move on to the mechanics of the transactions we reconstructed from the judgments. The standard scheme looked like this. A PrivatBank-related firm received a loan from PrivatBank, and loan funds remained in the same bank account. The firm then entered into an agreement with a UK company to purchase a product (the name of the product is non-substantial) for tens of millions of dollars. A few days after this deal, the firm transferred a 100 percent pre-payment to the UK company into a PrivatBank Cyprus branch account. Only after that, the Ukrainian firm entered into an agreement with PrivatBank to secure the previously granted loan by proprietary rights to undelivered products from the UK firm. After that, the UK firm reported that it was unable to complete the supply and terminated the deal with the Ukrainian firm without returning the money received. That's how in May-August, USD 1.8 billion was transferred from PrivatBank to PrivatBank Cyprus branch."

443. The focus of the NashiGroshi Articles was on breach of the currency exchange regulations by siphoning money abroad, and contained amongst other things an attack on the NBU for the manner in which it had responded to the initial Glavcom disclosures and a description of the interview given by Ms Gontareva to LigaBusinessInform. But it was clear from the first NashiGroshi Article that the allegation of "siphoning off" was made because the recipients of the loans had what were called "PrivatBank Roots". In the second NashiGroshi Article, there was a more specific allegation that the siphoning off was achieved by Mr Kolomoisky himself and there was more detail of the nature of the connections between the Borrowers, the Suppliers and Mr Kolomoisky.

444. The publication of the NashiGroshi Articles led to a request from the NBU to Mr Dubilet, asking for documents and written explanations to be provided in relation to the lending to the 42 Borrowers identified in the NashiGroshi Articles ("Request 27"). This request, which was made on 12 February 2015, was made as part of the inspection which had been in progress since early January. It received relatively widespread attention within the Bank and caused Mr Luchaninov (acting on the instructions of Mr Pikush) to initiate an internal investigation into what he called "possible information leakage and unlawful disclosure of bank secrecy in connection with" the NashiGroshi Articles. It was recognised in the internal correspondence that the instructions from Mr Pikush based on Request 27 were concerned with what were called "shareholder companies", a relatively obvious reference to the writer's belief that the companies concerned belonged to the Individual Defendants. As with Mr Linskiy's investigation in relation to the Glavcom Article, this was therefore focused on how the information had come into the public domain, rather than whether there was any truth in the NashiGroshi allegation that Mr Kolomoisky had procured the misappropriation of US$1.8 billion from the Bank by siphoning off the money overseas.

445. Mr Dubilet responded to Request 27 on 19 February 2015 asserting that "the said loan operations were performed in full compliance with the requirements of the law" and providing lists of the loans to the 42 Borrowers, the RSAs and the collateral. The underlying documentation was not supplied, but one of the annexes to Mr Dubilet's response to Request 27 gave generic descriptions (and loan and collateral agreement numbers) of what were said to be 612 items of security granted in support of the lending to the 42 Borrowers.

446. In his witness statement, Mr Luchaninov said that he then had a meeting with Mr Yatsenko, Ms Gurieva and Mr Pikush at some stage in March 2015 which he remembered well because it was unusual for him to have a meeting with all three of them together. At that meeting, he was provided with a list of the 42 Borrowers and was asked to analyse whether there were any connections evident from the client information held by the Bank that would link them to Mr Kolomoisky and Mr Bogolyubov. He was then asked, if any such connections were evident, to provide guidance on how those connections could be removed. His recollection was that the instruction was prompted by an investigation that had been launched by the Ukrainian criminal authorities into the 42 Borrowers, an investigation which he had also seen referred to in press articles at the time. There was no evidence of a criminal investigation at this stage and Mr Luchaninov confirmed in his oral evidence (see below) that this was a reference to the conduct discussed in the NashiGroshi Articles. The way that the Bank characterised this instruction was not that Mr Luchaninov should obtain the information required to report truthfully back to the NBU and tell them what parties were related or not related, but that he was being instructed by Mr Pikush, Ms Gurieva and Mr Yatsenko to "bury it" and to "sever the connections".

447. The NBU continued to probe in relation to the questions raised by the NashiGroshi Articles and whether the Bank had been complying with the relevant currency laws and regulations. On 24 March 2015 a further unscheduled on-site audit of the Bank was directed by the NBU "on certain issues related to compliance with the requirements of currency laws and regulations of the [NBU] during foreign exchange transactions on behalf of its customers". The addendum to the inspector's notice of appointment listed the 42 Borrowers. The following day the inspectors requested copies of a wide range of documents relating to their accounts and to the loans made to them. The procedures for providing those documents to the NBU were then agreed between Mr Luchaninov and Mr Yatsenko.

448. The inspectors' next request for documentation relating to the 42 Borrowers demonstrated a shift in focus from the aspects of the NashiGroshi Articles which were concerned with breaches of the foreign currency regulations to information relating to the question of their possible related-party status. The request was made on 30 March 2015 and the Bank was required to respond within two days. This caused Mr Pikush to instruct Mr Luchaninov to provide the information sought regarding the Bank's insiders and related parties as at 1 March 2015.

449. Subsequent to this request, Mr Luchaninov wrote an e-mail on 31 March 2015 to Mr Pikush, copied to Mr Yatsenko and Mr Novikov, which has been called the Luchaninov e-mail. It was forwarded the following day to Ms Gurieva. It gave the results of the work which Mr Luchaninov had been instructed to carry out at the meeting he had with Mr Yatsenko, Ms Gurieva and Mr Pikush. The trial bundles contained two separate translations of the Luchaninov e-mail. As the Bank placed considerable reliance on its

contents, and as Ms Montgomery cross-examined Mr Luchaninov on what he meant to convey when he sent it, I think it is appropriate to set out both translations in full:

> "Good afternoon, due to NBU's unscheduled review of 42 customers who had previously received loans from PrivatBank and had made advance payments under foreign economic agreements, the attached file provides a preliminary analysis of the relationship structure of these borrowers' clients. Taking into account that there is a risk of the loan transactions being linked to refinancing and to parties related to the bank, the document contains proposals to remove such ties."

> "Hello, in reference to the unplanned audit by the National Bank of Ukraine of 42 clients who previously received loans from PrivatBank and made advance payments under international contracts, the attached file contains a preliminary analysis of the structure of connections of these loan clients. Considering that there is the risk of connections of lending operations to refinancing and persons related to the bank, the document provides suggestions on the removal of such connections."

450. The enclosures to this e-mail gave details of the relationships between 24 of the Bank's clients, each of which was one of the Ukrainian Borrowers, which Mr Luchaninov called "the companies being inspected". Each of the 24 Borrowers was said to be a related party to the Bank because it shared a director, chair or member of the supervisory board in common with another entity in which both of the Individual Defendants held a material interest (in most cases 50/50). Mr Luchaninov's proposal or suggestion to deal with the risk of the loan transactions being linked to "refinancing and to parties related to the [B]ank" was said to be to remove the relevant individual from their position as director or member of the supervisory board of either the relevant Borrower or the other relevant entity. There was evidence that most, although not all, of these individuals were employees of PBC and many of them were identified as nominees for the Individual Defendants in relation to other aspects of their asset disclosure in these proceedings.

451. The Bank relied on the Luchaninov e-mail as confirmation that four members of the Management Board (Mr Pikush, Mr Novikov, Mr Yatsenko and Ms Gurieva), each of whom had a close relationship with the Individual Defendants, were complicit in directing an exercise for the concealment of connections between Mr Kolomoisky and Mr Bogolyubov on the one hand and 24 of the Borrowers on the other. It was said that if that concealment had not occurred, the closeness of the connection would have been apparent from the Bank's recorded client information. It was also said that the concealment was done on an industrial scale, because the 24 Borrowers had a total aggregate indebtedness to the Bank of almost US$620 million. The Bank also relied on the fact not just that Mr Luchaninov clearly assumed that the relevant directors could be replaced at will, but also that, as he put it in his evidence, "I thought that Mr Pikush, Mr Yatsenko and/or Mr Novikov could influence the changes that needed to be made". These assumptions seem to have been justified because, in all but two of the cases, the proposal made by Mr Luchaninov was then implemented.

452. Ms Montgomery took the lead in a challenge to the significance of the Luchaninov e-mail. There were two strands to this. The first is that there is no evidence that Mr Bogolyubov himself took any steps to hide his affiliations with the Borrowers from the NBU. The second is that the Luchaninov e-mail was just an example of Bank

employees taking steps to alter the connections between the Borrowers themselves in order to comply with the required credit risk ratios on related party lending. It was said that this was quite different from any organised effort to hide the links between the Borrowers and the Individual Defendants and that the Luchaninov e-mail was just one aspect of promoting a process of borrower disaffiliation, in order to avoid credit risk concentration problems, a process which had been ongoing since June 2014 if not earlier.

453. It is certainly the case that the papers contain a number of examples of instances in which Mr Luchaninov (as the Bank's head of compliance) was expressing concern about affiliations between groups of borrowers which were capable of affecting credit risk concentration rates for insiders. This was also not the first occasion on which the Bank's compliance department had had to deal with the NBU's concerns about the Bank's related party lending, including criticisms of the Bank's internal procedures on this subject. Thus, I was shown an earlier report produced as a result of an NBU scheduled inspection dating from August 2014 in which the inspectors had concluded that "There is a high level of insider lending, as documented by credit risk numbers calculated based on the audit findings, which has an adverse effect on Bank capital". The Individual Defendants were both identified as insiders for this purpose, but the list of related parties identified a much smaller number of entities than were subsequently to be identified by the NBU.

454. It is also the case that one of the translations of the second enclosure to the e-mail opens with language which is consistent with credit risk concentration being a concern, referring as it does to "risk-relevant relations" and "violations of ratios" (although the other one refers to "non-compliance"). But the core of Mr Bogolyubov's submission was founded on the proposition that the Luchaninov e-mail simply evidences that certain of the Borrowers were related to the Bank on the basis that a director of a company in which one or both of the Individual Defendants had an interest was also a director of one (or sometimes two) of the Borrowers. It was said that this is sufficient to give rise to a related party connection because of the expansion of the definition of related party given effect earlier in March by Article 52, but the concern was limited to this and had nothing to do with concealing the Individual Defendants' links with the 42 Borrowers.

455. Ms Montgomery also relied on the fact that, during the course of Mr Luchaninov's cross-examination, he made what was described as a crucial concession which was in complete contradiction to the Bank's case. The oral evidence was as follows:

> Q. So although your witness statement says this email was sent because of a criminal investigation, the reality is that this issue about the 42 clients had been evident to you because of the press report in NashiGroshi?
>
> A. Yes.
>
> Q. As the email itself says, this is not about hiding related parties; this is again about concentration of lending so as to reduce the groupings that might cause capital ratio breaches?

> A. I did not clearly understand the question, but I can comment that this email was a result of the request to our department and after the meeting that took place in the Bank's office. It is described in detail in my witness statement.
>
> Q. It is, but you describe in your witness statement that it is designed to hide connections to Mr Kolomoisky and Mr Bogolyubov, whereas I'm going to suggest it is designed to hide the interconnections at a different level so that these parties are not grouped together for the purpose of concentration of credit risk.
>
> A. Based on the analysis conducted, we provided information as for the connections with the clients and 24 out of 47 have been identified as related and also some directives have been defined through which these connections have been formed.
>
> Q. Yes, exactly. What is happening here is you are identifying cross-connections between groups and seeking to eliminate those cross-connections. You're not trying to hide anything about Mr Kolomoisky or Mr Bogolyubov.
>
> A. Well, we're not hiding information about Mr Kolomoisky or Mr Bogolyubov here.

456. It followed from this evidence, so Ms Montgomery submitted, that the Luchaninov e-mail did not establish the Bank's case that those who gave instructions to Mr Luchaninov went to significant lengths to conceal the Individual Defendants' interests in the Borrowers and the Intermediary Borrowers from the NBU. It also does not provide evidence that Mr Bogolyubov owned or controlled all 24 Borrowers.

457. I do not accept these submissions. In particular I do not agree that the answer given by Mr Luchaninov in the passage I have cited from his cross-examination was a crucial concession which was in complete contradiction to the Bank's case. Mr Luchaninov maintained his evidence, consistently with the documentation, that the e-mail flowed from the investigations relating to the NashiGroshi Articles, which did of course concern criminal conduct (the phrase used was "siphoned off") and had quite specifically raised the issue of whether the Borrowers were related parties to the Bank as a result of the interests that Mr Kolomoisky had in them. It was also not put to him directly that his evidence as to the instructions given to him at his meeting with Mr Yatsenko, Ms Gurieva and Mr Pikush was mistaken.

458. In my view the last answer given by Mr Luchaninov in the citation I have set out above was simply a confirmation that the Luchaninov e-mail and its enclosures did not in and of themselves amount to the hiding of information about the Individual Defendants (see in particular the use of the word "here"). I do not think that his answer can be read as confirmation that facilitating the hiding of the connections between the Individual Defendants and the Borrowers did not, at least in part, underpin the suggestions he made for removing the "connections" or "ties". In short I do not think that Mr Luchaninov's oral evidence is inconsistent with the purpose of the e-mail being to make suggestions as to how the connections between Borrowers and persons related to the Bank could be removed.

459. In reaching this conclusion, I have in mind the wording of the e-mail itself. What was called "the preliminary analysis of the structure of connections of these loan clients"

was prepared as a result of the investigation organised by Mr Luchaninov on Mr Pikush's instructions in response to the NashiGroshi Articles, which itself led to the NBU's investigation and request for further information. As I have explained, the NashiGroshi Articles had been concerned with what appeared to be a misappropriation from the Bank involving many of the Borrowers who had been claimants in the 2014 Ukrainian Proceedings and all six of the Corporate Defendants, and suggested that all the entities involved were related to the Privat group and/or Mr Kolomoisky. The fact that the aspects of the NashiGroshi Articles which were concerned with the connections between the Borrowers and the Corporate Defendants on the one hand and the Individual Defendants and the Bank on the other hand were central to the purpose of the Luchaninov e-mail is clear from its last sentence, whichever of the two translations is used.

460. It may be the case that the Bank would have had good reason to have been concerned about breaches of credit ratios at the level of interconnections between different groups of borrowers, but I think it is relevant that the Luchaninov e-mail makes no reference to that sort of concern. I also agree with the Bank's submission that it is significant that none of the attachments analyse or even mention the outstanding balances on the loans of the Borrowers, which would have been an obvious prerequisite for identifying potential credit ratio breaches. This is also consistent with the fact that, at the time of the Luchaninov e-mail, the 24 Borrowers, whose status as related parties was in issue as a result of the NashiGroshi Articles, did not appear on the Bank's related party lists.

461. In my view, the correct conclusion, which is more consistent with the surrounding circumstances, is that the related party connections with which the Luchaninov e-mail is concerned are the connections between the Borrowers and the Individual Defendants. I also think that the Bank has established that it was self-evident to those concerned that it would be possible to make the interconnectivity less obvious by the simple expedient of procuring the change of the nominee directors of the Borrowers without reference to anyone independent of the Bank or the Individual Defendants. I think that the Bank is therefore correct to submit that the purpose of the e-mail was to recommend the steps to be taken to avoid the 24 Borrowers being linked to the Individual Defendants via their directors, whose status as such did appear on the Ukrainian corporate register, and who also appeared on the public record of the members of the supervisory boards of the Individual Defendants' companies. It was sent in response to the instruction given to Mr Luchaninov to identify the connections between the Individual Defendants and the companies which were the subject of the NashiGroshi Articles and to do what was necessary to "shuffle the pack" (as Mr Anderson put it in closing).

462. The consequence of the Luchaninov e-mail was that in 22 out of 24 cases, the proposals in the Luchaninov e-mail were then implemented over a period commencing at the beginning of April 2015. In relation to three of the Borrowers (Alfatrader, Vesta-Company LLC and Transmoloko), the individual director of the Borrower was replaced in the course of 2015. In relation to the other 19 Borrowers, the individual director of the Borrower was removed from their position on the supervisory board of the existing acknowledged related party or parties.

<u>The related parties' reports and the Rokoman Spreadsheet</u>

463. As Ms Rozhkova explained, the measures required by the IMF and the World Bank had the effect of revealing that the Bank was in fact significantly undercapitalised, which led to remedial actions being required. This was confirmed in a highly critical report sent to Mr Bogolyubov as chairman of the Supervisory Board and Mr Dubilet as chairman of the Management Board on 27 March 2015 after the NBU's scheduled audit for the period May 2011 to 2014. The letter under cover of which it was sent stressed the unsatisfactory nature of the Bank's financial standing. It said that the Bank's management did not provide high-quality risk management and that, as at 1 May 2014, its regulatory capital was negative. Amongst the NBU's many detailed criticisms, was a finding that the Bank had "uncontrolled and significant credit concentrations", a major loan impairment provision shortfall and 77% of borrowers conducting unprofitable activities. The report also criticised the Bank's non-compliance with the disclosure requirements relating to the indirect ownership interests of the Individual Defendants.

464. Taken as a whole, the report and its covering letter was excoriating in its criticisms of the Bank and its management, but, in the context of these proceedings, one of the more striking comments related to the collateral it had for loans in respect of which the report recorded that "80% of the collateral accepted by the Bank for calculating loan impairment provisions was rights to after-acquired goods to be delivered at a later date". It also proposed that the Supervisory Board and the Management Board take "appropriate disciplinary action against persons responsible for violations" and inform the NBU accordingly. It also gave the Bank a very low overall CAMELS rating.

465. In the event, the Supervisory Board, on which both of the Individual Defendants sat, took no action against those responsible for the violations identified in the NBU's report. Indeed, at the next meeting held on 17 April 2015 the Supervisory Board approved the composition of the Management Board without any comment on the NBU's report, while the General Meeting held on 27 April 2015 adopted a very positive tone as to the conduct of the Bank's affairs during the previous year. The minutes of the meeting also recorded the following as a summary of the work which had been carried out by the Supervisory Board, which there is no reason to consider was not an accurate reflection of the extent of its members' involvement in the Bank's affairs:

> "In 2014, the Bank's Supervisory Board held 40 meetings which reviewed issues satisfies under the Bank's Articles of Association that are within the competence of the Supervisory Board, and the Supervisory Board exercised management of financial flows and controlled the work of the Management Board and the Bank as a whole.
>
> …
>
> In 2015 the Supervisory Board will continue to engage in continuous control over the implementation of the measures directed by the Board as of 2015 to improve and promote banking services."

466. The Bank relied on this fact in support of a submission that the court should infer that nothing was done because the Individual Defendants knew perfectly well what the Bank's senior management had been doing all along, because they had been directing it themselves. In general terms, and supported by the representations made in the minutes of the work which the Supervisory Board had been doing, that is the right inference to draw.

467. On 17 April 2015, Mr Luchaninov sent another e-mail to Ms Gurieva, Mr Yatsenko, Mr Novikov and Mr Pikush entitled "Insiders' Related Parties" in which he made recommendations on how to minimise the appearance that apparent related parties should be so characterised. He recommended changes to the officers of what were called the 'new insiders', identified by reference to a spreadsheet which included eleven companies and eight individuals whose officers were to be changed, and more than 100 companies, including a number of Borrowers, in respect of which 'third' companies related to those new insiders were to have their officers changed.

468. On 15 May 2015, what the Bank called the NBU's NashiGroshi audit team reported back. They expressed concern about the quality and liquidity of collateral for certain of the 42 borrowers, they noted the decisions of the courts in the 2014 Ukrainian Proceedings and they indicated the need for further credit reserves pointing out the risk that loans would not be repaid. The report also confirmed much of what had been said in the NashiGroshi Articles about the way in which the scheme had worked. However, the report also concluded that, although the majority of customers "interrelated to each other according to the ownership structure" the 42 Borrowers were not linked to the Individual Defendants or other Bank insiders. The way it was put was that "[n]o facts have been found of relationships of the non-resident legal entities, the owners of the Branch's customers, with the insiders and the Bank's related parties."

469. At about the same time, on 23 May 2015, the NBU appointed EY to prepare a related parties report as at 1 April 2015 in accordance with Resolution 314. The banking sector's relationships with related parties was one of the principal issues about which the IMF had expressed particular concern. In accordance with Resolution 315, the Bank was also required to produce its NBU related party list on a monthly basis, rather than on a quarterly basis as had been the case since 2014. The first list was to be provided to the NBU by 29 May 2015, a requirement which Mr Luchaninov said significantly increased the workload of his compliance department. The procedure was that the draft list was then submitted for approval by Mr Dubilet.

470. EY's report was presented on 16 July 2015 (the "EY Related Parties Report") and identified significant problems with the Bank's related party lending practices and control systems. It concluded that the Bank's N9 prudential ratio (the maximum credit risk on transactions with related parties) was 89.5%. Not only did this demonstrate an exceptionally high level of Bank lending to related parties, it was also in very obvious breach of the ratios required by Resolution 312, which was a maximum of 25%. The report also explained how EY had identified "59 companies (including 6 Cyprus borrowers), whose financial statements and accounts turnover have signs of insignificant business activity from 1 April 2014 to 1 April 2015". The Bank's list of related parties was therefore materially incomplete and identified that these borrowers were engaged in a "scheme" involving artificial loan servicing and financial aid through the making of returnable prepayments.

471. In reaching that conclusion, these borrowers were found by EY to have a number of the same characteristics including: the receipt of loans in foreign currency to pay for what were called "external economic contracts", monies advanced by the Bank as virtually the only source of funding and financial statements which did not contain significant revenue, trade receivables or inventories. In each case, loan monies had been used as prepayments for contracts none of which ended with the delivery of goods, but in respect of which the prepayments were eventually cancelled and returned to the

borrowers prior to August 2014, but not returned thereafter. During 2014, interest on loans was serviced mainly by loans granted by the Bank, although some of the borrowers paid interest from funds, the source of which EY were unable to identify; their activities during the period 2013 and 2014 were unprofitable and did not generate significant revenues from operations. The final common characteristic was that it appeared that shareholders of the borrowers were all non-resident companies, with nominal directors as "UBOs", or no record of beneficiaries at all "if none of them has substantial ownership in the company."

472. The NBU's initial conclusions based on the EY Related Parties Report were sent to the Bank in a letter dated 31 July 2015. Ms Rozhkova said that the NBU took the view that 165 of the Bank's customers which were not included on the Bank's related party lists were in fact related parties. This included 28 Borrowers, all but three of which were identified as Type 529 related parties which as Ms Rozhkova explained "encompassed entities and individuals through which transactions were enacted for the benefit of other related parties, where such entities or individuals were influenced by the related party. In essence, it targeted companies used to transit funds on behalf of a bank's owners." She then went on to explain:

> "In my experience, at the time, it was very common in the Ukrainian banking sector to create an SPV with unknown or obscure shareholders that could not easily be linked with the shareholders of a bank. Such companies would then be used as a conduit for obtaining bank funding, and would funnel money as part of transactions in the interests of shareholders. Whilst the corporate register might not show any links between the company and a bank's owners, if flows of funds between the companies were properly analysed, it was often possible to determine that the company was connected to many other entities, which were directly connected with the owners."

473. The Bank was then instructed to submit to the NBU no later than 1 September 2015 an updated report on credit and lending transactions with its related parties, or what was called "justified evidence that the party is not related to the bank in accordance with specified criteria and to provide duly certified documents". The categories of information and documentation to be provided were then listed.

474. On the same day that the Bank received the EY Related Parties Report, the deputy head of BOK, Liliya Rokoman, sent an e-mail to Ms Gurieva copied to Ms Lozytska entitled "Suggestions for disaffiliating the affiliated counterparties". The e-mail was as follows:

> "Attachment contains two spreadsheets: "counterparties group - suggestions for directors" and "change of beneficiary owners"
>
> At the first stage we suggest replacing directors with new ones, which will allow to significantly reduce concentrations across all groups, and 15 groups will be normalised. At the second stage, beneficiary owners should be changed, this information has already been provided."

475. Ms Rokoman's proposals were then developed during the course of the next few days and culminated in the production at the beginning of August 2015 of two spreadsheets (the "Rokoman Spreadsheets"), one concerned with changing directors and the other entitled "Change of Beneficial Owners". So far as the directors' spreadsheet was

concerned, it contained a list of directors of 82 companies under the heading of "Who to exclude" and included the directors of 22 Borrowers and 23 Intermediary Borrowers, including Uniks, in which both of the Individual Defendants have admitted to holding a 100% beneficial ownership.

476. The Rokoman Spreadsheet proposing the changes to beneficial owners identified nine beneficiaries of 31 offshore companies using a cypher in the form of an alpha-numeric code. It was possible to decrypt the cypher by using a spreadsheet prepared in the Bank's Cyprus Branch on 8 May 2015 which gave an alpha-numeric code to the purported beneficiaries, each of whom was an employee of PBC or the Bank: B20 (Mr Pereviznyi), B3 (Andriy Akudovich), B8 (Andriy Kolobkov), B32 (Artem Zamsha), B17 (Mr Melnyk), B29 (Ms Trykulych), B14 (Sergei Kryvovyaz), B19 (Gennadiy Nikolenko) and B11 (Ms Kravchenko). Amongst other information, the Rokoman Spreadsheets identified the companies of which each individual was said to be a beneficiary, the proposed replacement beneficiary by reference to a further alpha-numeric code and the reduction in group debt which the change would produce (i.e. the debt associated with a group of companies connected to a particular individual).

477. The evidence demonstrates that some, although not all, of the proposed changes were implemented. However, its real significance as a document is that it records the way in which beneficial interests in some of the Borrowers were held through offshore companies, purportedly owned by PBC and Bank employees and how the Bank was prepared to allow changes in the ostensible ownership of the Bank's borrowers to be made so as to avoid breaching the related party lending limits (both N7 and N9). I agree with the Bank's submission that it was an obviously sensitive document, as demonstrated by the need to use an alpha-numeric code to decrypt the names of purported beneficiaries. I also agree that the fact that employees of BOK were able to propose and implement such changes confirms both the nominee status of the purported beneficial owners and the likelihood that the true beneficial owners were all the same people, because otherwise the manipulation of ostensible beneficial ownership could not have been carried out in the manner proposed.

478. At this stage there was further publicity in relation to the siphoning allegations that had originally been made by Glavcom in November 2014 and then followed up by NashiGroshi in February 2015. On 20 August 2015 an article entitled "The MVS and GPU are searching where Privat has placed almost UAH 20 billion of refinancing" appeared on the daily.rbc.ua website, which described how the GPO and the Ministry of Internal Affairs had been investigating for almost a year the case of the Bank "siphoning abroad more than UAH 19 billion of refinancing". This report seems to have been based on a government minister's answer to a request from a People's Deputy for information about what were called possible unlawful actions by officials of the Bank relating to what was described as "seizure of funds received in the form of loans for refinancing and stabilization loan, as well as on other issues".

479. The Government's response to the request for information was:

> "We hereby inform that the Main Investigation Department of the Ministry conducts a pre-trial investigation in the criminal proceedings No. 42014000000001261, commenced on 13.11.2014 by the General Prosecutor's Office of Ukraine on the fact of seizure by individual Bank officials of NBU public funds allocated for Bank refinancing in especially large amounts, on the grounds

> of a crime provided for in Part 5 Article 191 (Embezzlement, misapplication or assimilation otherwise of property by abuse of official position) of the Criminal Code of Ukraine.
>
> "To date, pre-trial investigation in the said criminal proceedings is ongoing. Suspicion of the commission of the crime was not served to anyone."

480. The article on the daily.rbc.ua website went on to make the point that pre-trial investigations were continuing and the investigators had been permitted by the court to familiarise themselves with original documents relating to the NBU refinancing. It also described the substance of the allegation as being that in 2014 the Bank "under pledge of property rights to the goods, issued loans in the amount of US$18-73 million to Ukrainian (over 40) and foreign (over 50) companies and these companies entered into dubious agreements and transferred those funds to the accounts of [the Corporate Defendants] with 100% prepayment for the purpose of supposedly, receiving goods." However, the focus of the article was as much on the way in which the NBU had allowed public money to be used, which the Bank then paid away, as it was on whether officials of the Bank had been guilty of misappropriating money belonging to the Bank.

481. There was then correspondence between the NBU and the Bank during the course of September and October 2015 in which the Bank sought to persuade the NBU that a significant number of the 165 customers it had identified were not in fact related parties (and indeed that only 33 were). It did so having received advice from Avellum Partners ("Avellum") at the beginning of September as to how to remove links between the companies concerned and the Bank so that they were no longer "companies which transact business in the interests of Bank insiders and over which Bank insiders have influence". It was said that the Bank would either have to "disclose the company ownership structure all the way up to the beneficial owners" or would have to "adjust the company's ownership structure so that none of the group's insiders have any influence over the company (by removing insiders from the ownership structure or reducing their ownership interests / stakes)". They even made the rather surprising suggestion that "if the Bank is not able to provide a sufficient number of new beneficiaries to implement an ideal structure, it is possible to consider the acquisition of all Group 3 companies by one or several beneficiaries on the same day". [emphasis in original]

482. However, Mr Luchaninov's unchallenged evidence included an example of a rather less straightforward approach. On 6 October 2015, Mr Dubilet commented by way of concern that, if the draft NBU related party list for that month was approved with all of the proposed customers included, the amount of the Bank's lending to its related parties would be too high. Mr Luchaninov said that, in order to ensure that the Bank's related party lending was reduced sufficiently (in that case below UAH 43 billion), Mr Dubilet gave an instruction which Mr Luchaninov construed as requiring companies to be removed from the list until the sum of the Bank's lending to the parties included in the list was below that figure. The Bank characterised this as manipulation of the draft NBU related party list for that month, and I agree that this is what it was.

483. I also agree that the conduct of individuals within BOK and PBC during this period shows that the proposals for the removal and replacement of directors and beneficial owners of the Borrowers or Intermediary Borrowers was uninfluenced by the position of any unconnected third parties. Such evidence as there is all supports the Bank's case

that the nominee directors and purported UBOs can properly be characterised as a fungible pool of individuals (mainly employed within PBC) who could be swapped as and when required.

484. Furthermore I consider that the Bank was correct to submit that there were no genuine changes of beneficial ownership made during the course of this process, and that the individuals concerned consistently eschewed the need to disclose that Mr Kolomoisky and Mr Bogolyubov were in fact the true UBOs of many if not all of the entities concerned. In the event, and despite the processes which had been put in place by PBC and the Bank, the NBU's eventual conclusion was that 136 of the 165 entities that had originally been identified as related parties were correctly classified as such. The list of 136 included 21 Borrowers and eight Intermediary Borrowers. On 15 December 2015, the NBU notified the Bank of those conclusions.

The Restructuring Plan and the proposal for the Asset Transfers

485. Also on 15 December 2015, the NBU published its final report on Outcomes of the Diagnostic Study of the Bank as of 1 April 2015. Like the conclusions on related party lending, this report had been in the course of preparation throughout the late summer and autumn of 2015, with Mr Kolomoisky initially being warned in September 2015 by Ms Gontareva that the "amounts are huge": the amount she indicated was UAH 120 billion. In the report, the NBU concluded that the Bank was unlikely to be able to enforce the pledges over contractual rights in light of the collateral identified in the samples analysed. It concluded that 90% of the collateral sampled consisted of property rights to receive goods under supply contracts and that there was a high risk of the Bank being unable to satisfy its claims against this collateral, noting that the contracts had not been performed and that there was no evidence of the Suppliers' ability to provide the goods.

486. The report also identified (a) a serious deterioration in the servicing of the Bank's corporate lending portfolio, (b) loss-making operations for the majority of the Bank's corporate borrowers and (c) pervasive financing of debt through further lending and the extension of repayment deadlines. The NBU's consequential conclusion was that the Bank needed additional capital of an amount in excess of UAH 113 billion (the US$ equivalent of which was then c.US$4.84 billion) in order to comply with the applicable capital adequacy ratio. (This figure was formally approved later, by resolution of the NBU dated 14 January 2016.)

487. In the letter under cover of which the report was sent to the Bank, the NBU required the Bank to prepare a realistic capitalisation programme to guarantee compliance with the applicable regulatory capital adequacy ratios by 1 January 2016. In order to meet this deadline, the NBU requested the Bank to submit a plan for consideration by 25 December 2015. The precise time is not apparent from the evidence, but sometime around this period, Ms Rozhkova described how she had met with Mr Kolomoisky to discuss the results of the stress testing. She explained to him that, in circumstances in which the IMF's requirements were that all banks should achieve a positive value of capital by 1 January 2016 and a N2 capital adequacy ratio of 5% by 1 June 2016, the Bank needed to comply with the timelines which had been discussed.

488. The Bank's initial proposals as to how that would be achieved were sent by Mr Dubilet to the NBU in a letter dated 24 December 2015, which included proposals in relation to improving loan security and what he called changes in the portfolio structure. Mr Dubilet described what he referred to as "confirmation from shareholders", by which (despite argument to the contrary) I think he must have meant both of the Individual Defendants, which had caused the Bank to consider it realistic to reduce the portfolio of affiliated parties to the level set by the norm by 31 December 2016. It proposed to do this "by repayment of loans and placing of collateral assets on the balance sheet". The letter also specifically referred to the use of shareholders' funds in order to improve the Bank's capital position. This reference was to a proposal to recapitalise the Bank from the possible future proceeds of arbitration proceedings against the state of Ukraine for breach of the Energy Charter Treaty. Those proceedings had been brought by companies through which the Individual Defendants both held minority but material interests in PJSC Ukrnafta.

489. On 31 December 2015, the NBU wrote to the Bank welcoming its commitment to bringing the volume of related party lending within the applicable regulatory ratios by the end of 2016. However, it went on to explain that the probable future proceeds from litigation were ineligible as a source of new capital and said that the proposed measures would only partially meet the need for additional capital. It stressed that the NBU required a realistic restructuring plan for the Bank, which would guarantee compliance with the necessary capital adequacy ratios to be submitted by a postponed capitalisation programme date of 1 February 2016.

490. There were then negotiations between the NBU and the Bank during the course of January and February 2016 in which the question of transferring assets from borrowers to the Bank's balance sheet (including proposals for valuing such property) were debated. This included a letter from Ms Rozhkova to Mr Dubilet dated 21 January 2016, asking the Bank to finalise its plans for re-capitalisation before 25 January 2016 and to consider the possibility of obtaining additional collateral to cover credit risk of UAH 50.1 billion, reducing loan concentrations to related parties, accepting borrowers' property onto the balance sheet of the Bank in the amount of UAH 31 billion, converting subordinated debt, obtaining shareholders' contributions and "other measures". Mr Dubilet was the Bank's immediate point of contact with the NBU, but it is clear from the documents (and indeed the very nature of the NBU's requirements) that both of the Individual Defendants participated in and were aware of the proposals to be made to deal with the NBU's concerns in the same way that they must have been aware of the proposals presented by Mr Dubilet in his December letter.

491. This was then followed by a letter from Mr Dubilet dated 29 January 2016 in which he proposed that collateral for large loans totalling UAH 107.8 billion would be registered on the Bank's books and records, as to UAH 45 billion by 1 April 2016 and as to UAH 62.8 billion by 1 September 2016. Mr Dubilet's letter also referred to the fact that the Bank's shareholders, i.e. again both of the Individual Defendants, had confirmed that it would be possible to convert their subordinated debt in the amount of UAH 5.5 billion and that Mr Kolomoisky would cause the injection of equity capital of UAH 5.6 billion into the Bank by 31 December 2018 and UAH 4.4 billion by 31 December 2019. This letter was written on the same day that both the Management Board and the Supervisory Board approved the Bank's capitalisation programme and the Restructuring Plan. The

Supervisory Board did so at a meeting in which both of the Individual Defendants participated and at which they both voted in favour of approval.

492. In my view, the evidence of the Individual Defendants' active participation in the formulation and presentation of the Bank's recapitalisation proposals at this stage of the negotiations with the NBU is compelling. Although the signatory on much of the correspondence on behalf of the Bank was Mr Dubilet, the Supervisory Board on which they both sat was actively consulted and it is most improbable that he would have said what he said about the shareholders' involvement if that had not accurately represented their informed position. Furthermore, Ms Rozhkova referred to a number of meetings she had with Mr Kolomoisky in the early part of 2016 in which she remembered informing him that the Restructuring Plan should not be dependent on his wider business interests. As she put it, she told him that "we simply needed a clear plan that proposed realistic ways to provide the additional capital required, so that the Bank could actually solve the problem and meet the applicable regulatory requirements."

493. At the beginning of February 2016, the NBU instructed Kroll. Ms Rozhkova confirmed in cross-examination that it took this course in order, amongst other things, to assist in a search for the Individual Defendants' assets in the event of a shortfall in the Bank's funds. However Ms Rozhkova was insistent that the focus of this was not on the potential for post-nationalisation claims against the Individual Defendants, the formulation of which it had already identified. In evidence, which rings true and which I accept, she said that the question which mattered if the Bank were to become insolvent was whether the Deposit Guarantee Fund ("DGF") would find any evidence that the shareholders were responsible. But the reason for retaining Kroll at this stage (and Alix at what seems to have been a later date) is illustrated by the following exchange:

> "Q. What was going on here, Ms Rozhkova -- let's be absolutely clear about it -- was at the beginning of 2016 the NBU was retaining Kroll and AlixPartners because the NBU contemplated that in due course a claim might need to be brought in the name of the Bank against the shareholders. Is that true or false?
>
> A. It's not true, my Lord, because we asked Kroll to find the assets of the former shareholders of PrivatBank, also to understand if they really can fulfil the recapitalisation plan because Mr Kolomoisky and Mr Bogolyubov signed the plan and promised -- sorry -- to put a lot of additional collateral which should be -- "collateral", I mean the real estate, the plans, the aircraft and others -- into the Bank to secure the loan, and for us it was very important to understand if they really have it."

494. Mr Howard returned to this point with Ms Rozhkova a little later, but she reconfirmed the essence of her evidence in slightly different words. Having taken her to a biz.nz.ua article from May 2017, the following exchange took place:

> "Q. Now, I take it from that that the true position is that at the beginning of 2016 the NBU was planning for nationalisation and preparing for that and searching for assets of the Bank's beneficial owners with a view to their being sued by the Bank, because it would have to be by the Bank, in due course to obtain recompense. Do you agree?

> A. I cannot agree with it. My Lord, we hired AlixPartners to help us to prepare for the potential nationalisation of the Bank if the negative case will be realised -- I mean negative case, if shareholders will not fulfil their recapitalisation plan which was agreed with NBU.
>
> Q. And Kroll were searching for their assets?
>
> A. Yes, Kroll were -- and we asked Kroll to research their assets to understand how this plan is really -- let me say, can be realised by the shareholders, and due to the systemical importance of the Bank, when we received the plan from the shareholders and approved this plan in the board meeting at the NBU, it was one of the conditions of the memorandum and our partners also want to receive from us some confirmation that this plan is a realistic one."

495. This followed other steps, which the Individual Defendants said that the NBU and the Ukrainian Government had been taking to instruct professional advisors, including Hogan Lovells, as early as the middle of July 2015. It was said by the Individual Defendants that these steps included the development of a strategy to recover losses from the Individual Defendants in the event that the Bank's restructuring failed and the Bank had to be nationalised. In particular, it pointed to three meetings which Mr Christopher Hardman of Hogan Lovells attended at the offices of the Presidential Administration in September 2015, November 2015 and February 2016, parts of which were attended by President Poroshenko, in order to discuss assistance that his firm might provide to the NBU.

496. I infer from this evidence that the topic of the assets available to the existing owners was discussed, but the context was not as specific to the Bank and the Individual Defendants as that for which they now contend, nor was it focused on claims which had already been formulated let alone prepared. The evidence from Mr Hardman (which was adduced for the purposes of an interlocutory application) is that the discussions at those meetings was high level and general. Indeed the generality of the discussions is apparent from the fact that it also appears from the evidence that the issue of who might be any claimant was discussed, because the NBU itself was at this stage a major creditor of the Bank in respect of the refinancing loans, the proceeds of which it suspected had been misapplied.

497. The President and his advisors were interested to understand what Hogan Lovells had been able to achieve on the Ablyazov and Pugachev cases. In particular, Mr Hardman was told that Ukraine had many banks which were in difficulties and in respect of which there may be a need for asset recovery assistance to be given. He said:

> "My impression was of a genuine need to address severe difficulties being experienced in the banking sector and to learn what possibilities may be open to seek redress internationally (not just in England)."

498. There is no reason to doubt the accuracy of the impression with which Mr Hardman was left as a result of these meetings. I think it is clear that the possibility that the Bank might have claims against the Individual Defendants was in the mind of the Ukrainian authorities when these meetings were being held. I also infer that, because of the size and systemic significance of the Bank, claims against them will have been more at the forefront of the Government's thinking than similar claims against the owners of other

banks experiencing the severe difficulties in the banking sector referred to by Mr Hardman. However, I do not consider that these meetings throw very much light on how, if the Bank were to be nationalised, any claims against the Individual Defendants might be formulated or pursued. There is no indication that any evidence was being considered at this stage or that there was detailed discussion about the facts; it is clear to me that the discussions were much more general than that.

499. On 4 February 2016, there was another meeting of the Supervisory Board attended by the Individual Defendants, both of whom were recorded as taking part (and there is no reason to conclude that they did not in fact do so). The existing draft of the Bank's recovery plan in the form proposed by the Management Board was approved. The form of the draft which was approved at that meeting was not in the evidence, but on the same day, Mr Kolomoisky wrote to Ms Gontareva undertaking to make the additional contributions to the Bank's capital referred to by Mr Dubilet, each amount to be funded from his own private resources. He also assured the NBU that he would cause the capitalisation of the Bank to comply with the applicable capital adequacy ratios in the amounts and within the terms determined by the NBU. A few days later, Mr Kolomoisky wrote again accelerating the dates on which he agreed to effect his own personal injection of further capital by a year in each case. He also added a commitment as a member of the Supervisory Board to assure the NBU that, from 1 March 2016 to 31 December 2020, loan repayments would be made from the list of large concentrations (or related party lending) at a rate of at least UAH 1.293 billion per month.

500. The NBU's response on 10 February 2016 was that these proposals were still inadequate, including in relation to the time periods for the reductions of the related party loans and the liquidity ratio to be applied to the assets suggested as collateral. It also commented that there was no duly executed letter of guarantee from the Bank's shareholder, which must have been a reference to Mr Bogolyubov, because Mr Kolomoisky had already signed one. This was relied on by Mr Bogolyubov as an indication that the NBU knew that he was unwilling to sign one. I do not think that that necessarily follows and in any event this reference does not detract from the fact that the evidence (particularly his participation at Supervisory Board meetings, and what Mr Dubilet told the NBU that the shareholders had agreed) clearly indicates that Mr Bogolyubov knew exactly what was going on and was actively consulted on the discussions between the NBU, Mr Kolomoisky and the Bank. At about this time, Ms Gontareva spoke to Mr Kolomoisky in the presence of Ms Rozhkova and informed him that, if the Bank provided a satisfactory restructuring plan, it would be afforded a proper opportunity to fulfil it, but if it did not do so, the NBU would have to declare the Bank insolvent.

501. Two days later, on 12 February 2016, at a meeting in which Mr Bogolyubov and Mr Kolomoisky participated, the Supervisory Board unanimously approved the proposal for the Bank's financial recovery programme for the period 2016 to 2019. The plan included a restructuring programme which incorporated a list of actions. This list included a proposal for the Bank to take 169 items said to be worth UAH 31.13 billion onto its balance sheet by 1 April 2016 (including property to be given to the NBU as collateral for the NBU's own refinancing loans) and to submit a schedule for the sale of such assets over a two-year period. It also approved a proposal for the Bank to take substitute collateral in the form of mortgages of what were described as "275 objects".

The plan stipulated that the relevant mortgage agreements "would contain terms on the Bank's right to satisfy the creditor's claims through the quick and unconditional obtaining of title to such property - by means of pre-trial settlement".

502. The assets to be transferred were listed in an annex (Annex A) to the Restructuring Plan itemised by reference to 32 identified borrowers (including ten Borrowers and four Intermediary Borrowers) whose indebtedness to the Bank, totalling in aggregate UAH 30.75 billion, was to be reduced or discharged by the transfer of an identified asset. The majority of the assets, valued at a total figure of UAH 31.12 billion, were described as "oil base", but they also included miscellaneous items of real property amongst which were the FC Dnipro training base, situated at Mykhailo Didevych (Pionersky) Lane 14 and 12, Dnipro (the "Training Centre") listed against Karinda LLC, the Metalurg Stadium situated at 7 Khersonskaya Street, Dnipro (the "Stadium") and a number of hotels and office buildings including Hotel Mir situated at 40 Richchia Zhovtnia Avenue, Kyiv ("Hotel Mir") and Hotel Zirka Bukoveluya in Palyanytsia, Ivano Frankivsk Oblast ("Hotel Zirka"). Each asset was given a value, with a representation that an updated valuation of the oil bases had been requested from Baker Tilly Ukraine EC LLC ("Baker Tilly" or "BT"), to be submitted to the NBU by 19 February 2016.

503. The assets to be mortgaged were listed in another annex (Annex B) to the Restructuring Plan. They included numerous gas stations and a number of other assets including aircraft, a Radisson Blu managed hotel in Croatia called Hotel Split and GM Georgian Manganese Holdings, valued in aggregate at UAH 76.69 billion. The mortgages were to be granted by 1 September 2016 in support of loans totalling UAH 76.24 billion to corporate clients with high concentration of debt, including 27 of the Borrowers. The NBU stipulated that this was to be done over a four month period at a rate of 25% per month.

504. On 23 February 2016, the NBU resolved to agree to the Restructuring Plan. The resolution No- 103/БТ stipulated that assets to the value of UAH 31.13 billion (as set out in Annex A) were to be transferred to the Bank's balance sheet by 1 April 2016, subject to verification of fair value by the NBU. This deadline derived from an NBU resolution applicable to all Ukrainian regulated banks requiring them to achieve what Ms Rozhkova called a positive value of capital by that date, itself extending a deadline originally required by the IMF. The resolution also required assets to the value of UAH 76.69 billion (as set out in Annex B) to be mortgaged by way of additional collateral by 1 September 2016, also subject to verification of fair value by the NBU. This too reflected a deadline applicable to all banks. It was Ms Rozhkova's evidence that the extension of these deadlines for all Ukrainian banks was influenced by the lack of progress made by the Bank in improving its capital position, a decision which reflected the importance of the Bank to the Ukrainian financial system more generally.

505. The NBU resolution also recorded that, in the event that the acts for which the Restructuring Plan provided were insufficient to increase the Bank's capital by the required amount, the Bank's shareholders (i.e. the Individual Defendants) would be obliged to provide additional collateral within one month of the failure to comply with the terms of the Restructuring Plan. The resolution also included a number of other restrictions on the types of transaction the Bank could enter into until the Restructuring Plan had been complied with, including prohibitions on transactions with related parties and the granting of loans to borrowers with non-transparent ownership structures and clients whose financial position did not prove their capacity to service loans on market

terms and conditions. Ms Rozhkova, as acting deputy head of the NBU, together with the acting director of the NBU's banking supervision department (G A Gritsenko) and the head of the NBU's department of monitoring of parties related to banks (Mr Zavadetskyi) were charged with controlling the performance of the resolution.

506. The authority to give effect to the recognition of the Asset Transfers on the Bank's balance sheet was given at a meeting of the Supervisory Board held on 28 March 2016, in which both of the Individual Defendants participated. The minutes of the meeting recorded that those attending reviewed information from Mr Dubilet before giving the Board's approval. The resolution was "to recognise property on the Bank's balance sheet towards the repayment of the borrowers' debts to the Bank under the loans issued according to the list contained in Appendix No 1". Appendix 1 was similar but not identical to the list which had been included at Annex A to the Restructuring Plan.

507. The evidence clearly establishes that Mr Kolomoisky led the discussions with the NBU which led to the submission of the Restructuring Plan, at the heart of which were the Asset Transfers. It is therefore surprising to say the least that, in his Defence, he declined to admit that he had any responsibility for decisions made by the Bank to accept assets in return for the repayment of Relevant Loans or as to the valuation of such assets. The only exception to this non-admission was his admission that he was one of the five members of the Supervisory Board who gave their approval to the acceptance of assets onto the Bank's balance sheet at the 28 March meeting.

508. I am also satisfied that Mr Bogolyubov was well aware of what was proposed, and participated in the Supervisory Board's determination of the way forward. Ms Rozhkova said that it was made clear to her by Mr Kolomoisky on a number of occasions that he would need to check with Mr Bogolyubov before he agreed to points of detail in relation to the implementation, and there is no reason to think that he did not do so. Indeed she said in her cross-examination that Mr Kolomoisky told her "a lot times" that he needed to "negotiate" with Mr Bogolyubov. He also participated at meetings of the Supervisory Board at which successive versions of the Restructuring Plan were discussed and approved for submission. Although there is no record of any agreement by him to make a personal contribution to the recapitalisation in the manner agreed by Mr Kolomoisky, it is clear to me that he must have both known about and approved the proposal to convert his shareholder subordinated debt as referred to in Mr Dubilet's January 2016 letter.

509. There was also other miscellaneous correspondence which demonstrates that Mr Bogolyubov was keeping a close interest in those of his assets (often held by him through trustees including in particular Sim Lim) which were put forward as part of the Asset Transfers. The Bank drew particular attention to an advisory e-mail from Evgeniy Ruvinskiy on 6 July 2016 dealing with what was described as the transfer of buildings, by which he meant the direct sale of properties to the Bank at the price specified in the mortgage agreements. Mr Ruvinskiy advised Mr Bogolyubov that, as the balance sheet values of six of his assets (including Hotel Mir) were significantly less than the values which were to be attributed to them in the mortgage agreements, substantial adverse tax consequences would arise. The potential exposure was in excess of UAH 386 million, a failure to pay which would result in criminal penalties for the relevant company's directors and chief accountant. The discrepancies were striking: the aggregate balance sheet value currently attributed to these properties was UAH 77.8 million while the aggregate value attributed to the same assets under the mortgage

agreements was UAH 1,056 million, a more than thirteenfold increase. One of those assets was Hotel Mir, in respect of which the book value (only UAH 14 million) was very substantially less than the amounts which the experts now agree it was worth (between UAH 250 million and UAH 260 million), but for present purposes the point of significance was that Mr Bogolyubov was on very clear notice that the proposed credit value of UAH 449 million for Hotel Mir was far in excess of the value so far recognised.

510. Ms Rozhkova said that the NBU was aware that implementation of the Restructuring Plan would be a difficult process but she said that it was not unrealistic. She said that it was required to ensure that the Bank conformed with its obligation to increase its capital by 1 April 2016 (a deadline that had already been extended). There is some evidence that the Bank tried to push back against what the NBU insisted it should provide by way of new capital, but there is no evidence that the NBU was being unreasonable in the requirement that it sought to impose. Indeed, quite the contrary, the evidence is more consistent with the NBU struggling to make the Bank and the Individual Defendants take the relevant legal and regulatory requirements sufficiently seriously and face up to the scale of the Bank's capital problems.

511. Furthermore, as Ms Rozhkova also explained, in the events that occurred, the NBU permitted the Bank an additional five months to complete the Asset Transfers without taking the enforcement steps that Ms Gontareva had already explained the NBU would have to take if the Restructuring Plan was not complied with. The position as of 1 April 2016 was that, of the UAH 31.13 billion required by the NBU's February resolution to have been transferred onto the Bank's balance sheet, only assets to the value of UAH 5.628 billion had in fact been transferred. The evidence also demonstrated that the Bank's proposals for supplying additional collateral of UAH 76.69 billion in the four month period prior to 1 September 2016 did not then comply with the terms of the Restructuring Plan, a situation which remained unchanged as at 25 May 2016.

512. On 1 July 2016, the Bank Audit Department of the NBU completed an audit report on the Bank's loan portfolio quality and loan risk. It was heavily critical of the Bank's lending and reached a number of conclusions, including that:

> "The Bank's management purposefully makes management decisions aimed at servicing a group of companies that are related to the Bank and/or are within the scope of the interests of the Bank's beneficial owners"

and after making a number of other serious criticisms of the Bank's management and the quality of its loan portfolio concluded:

> "Therefore, the Bank is an instrument for raising funds for lending to a wide range of parties related to the Bank. Most of the corporate loan portfolio is scheme-based and sham.
>
> The management's actions are aimed at [fictitious] maintaining the quality of assets and avoiding the formation of reserves in the required amounts with a wide range of instruments"

This report also commented that the accepted collateral quality was of particular concern and drew attention to what it called the "increase loan risk" where borrowers

had been made advances to fund prepayments for the delivery of goods by amongst others the English Defendants, where the property rights in those goods had been assigned to the Bank by way of collateral.

513. On or shortly before 1 July 2016, the Individual Defendants both signed a shareholder representation letter addressed to PwC in connection with their audit of the Bank's financial statements for the year ended 31 December 2015. They both confirmed their 12 month commitment to provide the Bank and its subsidiaries with operational and financial support sufficient to enable it to continue in operation for at least twelve months from the date of the letter. They acknowledged that Mr Kolomoisky had provided his personal guarantee as collateral for the refinancing loans provided by the NBU during the course of 2014 and 2015. The letter also contained the following representation:

> "We confirm that we understand the terms of repayment of loans through the repossession of property in collateral amounting to UAH 31,845 million on the Bank's balance sheet, as specified in Appendix C, in course of implementation of the Restructuring Plan on refinancing loans, approved by the Resolution of the National Bank of Ukraine No- 103/БТ dated 23 February 2016. We also understand that the respective transactions may lead to obtaining control or significant influence by us over the companies which were under our control or significant influence in the past, and this issue requires additional analysis after finalization of all legal and operational aspects of these transactions."

514. At the beginning of July 2016, the Bank was representing to the NBU that it had taken assets to the value of UAH 31.7 billion onto its balance sheet, comprising 149 petroleum bases. However it appears from the correspondence (in particular a letter of 2 July 2016) and such records as there are of meetings that Mr Kolomoisky had with Ms Rozhkova and Ms Gontareva that the NBU was not prepared to accept the attributed values because their work indicated that many of them were overvalued. In part this was because the valuation reports had been prepared for internal use only and were not capable of being relied on by the NBU. It was also because the NBU's own risk management department had conducted an onsite inspection of relevant oil storage facilities ("OSFs") many of which were found to have been out of service for many years. It appeared to Ms Rozhkova that the Bank's valuers (Baker Tilly) had not been instructed to carry out the more in-depth exercise, including site visits, that would have been necessary to expose the true value of the assets.

515. Shortly after the NBU had made clear to the Bank that it was not satisfied with the values which had been attributed to the assets which had been transferred, Ms Rozhkova had a meeting with Mr Kolomoisky at which it appeared that, although the Bank had made entries in its books to account for assets with a credit value of UAH 31.4 billion, the NBU assessed the value of those assets at just UAH 9.7 billion. Mr Kolomoisky told her that he had thought that the NBU would simply perform formal checks and that, so long as assets were transferred to the Bank and paperwork was provided, that would be sufficient. She informed him that the NBU was serious about the real need for the Bank to restore its capital position to acceptable levels and that she did not believe that the overvaluation was accidental. She also explained in her witness statement that the position was a serious problem for the NBU, because receipt of further funding from the IMF was contingent on all banks making sufficient progress

in recapitalising. The NBU considered that the Bank's failure to provide assets of sufficient value put this funding at risk.

516. It was only after a meeting with the then President of Ukraine, Petro Poroshenko, which was attended by Mr Kolomoisky, Ms Gontareva and Ms Rozhkova, that the situation changed. At that meeting, Ms Rozhkova explained to the President and Mr Kolomoisky that a substantial portion of the assets that were taken onto the Bank's balance sheet as part of the process of implementing the Restructuring Plan did not have sufficient value. This meant that the NBU could not verify to the IMF that the recapitalisation of banks had reached the level necessary for them to release further funding to Ukraine. Mr Kolomoisky said that the NBU was being unreasonable, but the evidence is that the President's response was to ask Mr Kolomoisky to reconsider his position.

517. It seems that this response led to a letter headed Personal Guarantee Undertaking from Mr Kolomoisky to the NBU dated 10 July 2016. In this letter, Mr Kolomoisky acknowledged that the Bank still had to take the measures provided for by the Restructuring Plan. Mr Kolomoisky recognised that, amongst other breaches relating to matters such as the failure to produce a schedule for realisation of the fixed assets up to the end of December 2018, the value of the assets accepted by the Bank onto its balance sheet for repayment of the loans mentioned in Annex A to the Restructuring Plan was UAH 21.7 billion less than the borrowers' debt mentioned in that annex. In other words the value of the assets so far transferred was only UAH 9.7 billion. He therefore gave a personal guarantee that from October 2016 repayment of indebtedness owed by borrowers connected to the Bank would begin and, by the end of August 2016, the Bank would receive onto its balance sheet enough of the assets mentioned in an attachment at the market price previously agreed with the NBU to liquidate the shortfall in capital. The attachment listed assets stated to have a total value of UAH 76.66 billion.

518. In the same letter, Mr Kolomoisky confirmed that the Bank would complete the increase in the quality of its credit portfolio by concluding the pledge of assets to the sum of UAH 76.7 billion. He also said that by the end of August it would submit to the NBU for ratification a coherent plan for the quarterly sale of assets received onto its balance sheet in repayment of loans to a sum of UAH 31 billion. The assets listed in the attachment to Mr Kolomoisky's 10 July letter comprised real estate, aircraft and industrial assets stated to have a total value of UAH 75.1 billion and 251 petrol stations stated to have a total value of UAH 1.5 billion. They included genuinely valuable assets, including, for example, Neftekhimik Prikarpatye Oil Refinery, Borivazh and GM Georgian Manganese Holding, although in the event none of these more valuable assets were transferred to the Bank. They also included assets in which Mr Bogolyubov had interests (Goiania, Pennylane, Dniproazot and Borivazh) and at least one, Hotel Split, of which he was the sole (95%) owner. The Bank submitted, and I agree, that it is plain that Mr Kolomoisky must have been acting with Mr Bogolyubov's authority and approval in sending this list to the NBU.

519. At about this time or possibly a little earlier (4 July 2016), the NBU engaged Alix, which itself retained Asters to advise on Ukrainian law. Ms Rozhkova described the purpose of the engagement, as being part of the NBU's preparation for "the negative scenario which finally was realised", by which she meant nationalisation or liquidation of the Bank. At that stage the NBU was preparing for the possibilities of both options in the event that the Bank was not recapitalised in accordance with the NBU's

requirements. I accept this evidence, which is consistent with the reasons for (and the approach taken to) engaging Kroll earlier in the year.

520. On 27 July 2016, the NBU sent the Bank its audit report for the period 1 May 2014 to 1 January 2016, together with a seven-page covering letter. The recipients were Mr Stelmakh (by then the chairman of the Supervisory Board) and Mr Dubilet. There is no direct evidence that it was sent to Mr Bogolyubov as he was no longer chairman of the Supervisory Board or Mr Kolomoisky, but given its nature and importance, I am satisfied that it is likely that it came to the attention of both of them. The covering letter referred to the impact of active transactions with related parties on the Bank's capital as being critical, given their volume (807.38% of regulatory capital and 70.22% of total assets) and the consequential high level of risk. It also criticised "the practice of … issuing large amounts of loans to borrowers with low solvency, i.e. companies with unprofitable and/or essentially non-existent operations" and the "artificial risk minimisation from lending by a low-liquid pledge in the form of property rights to goods in doubtful contracts, the concentration of which in the collateral structure is … 57.19%". The letter also made specific reference to the "concealment by the Bank of transactions with related parties" which amounted to a clear finding that the serious problems identified in the NBU's 2014 audit report had not been resolved by the Bank's management, but rather the same malpractice had continued.

521. Furthermore, the letter contained an instruction to the Bank to "apply adequate disciplinary measures to persons who have committed deficiencies and violations in the Bank's operations and notify the Department of Banking Supervision and the Department of Bank Audits of the enforcement". It also gave notice that the Bank's overall CAMELS rating was reduced yet further from the 2014 report and was set by the NBU at the lowest level possible (level 5).

522. Despite these very serious criticisms, and the instruction given to apply appropriate disciplinary measures, the only thing the Supervisory Board did after receiving the report was to tell the Management Board "to develop and implement effective measures as regards the elimination of the identified violations and the recommendations of the [NBU]". As the Bank put it "nobody was read the riot act, disciplined, sacked or sued", which is what might have been expected if these criticisms came as any form of surprise to the members of the Supervisory Board (which still included both Mr Kolomoisky and Mr Bogolyubov).

523. Likewise, at the next General Meeting held on 26 August 2016, the shareholders (i.e., the Individual Defendants and the minority shareholders) took a similar line with the minutes recording praise for the Bank's achievements during the course of the year and no identifiable concerns about the criticisms made in NBU's report. The meeting then resolved that "The 2015 performance of the … Management Board be recognised as satisfactory and in line with the purpose and directions of the Company's activities …." and that "Due to the coordinated actions of the Supervisory Board and the Management Board, the Bank fulfils its obligations to depositors, the budget, shareholders, government and regulatory authorities." The Minutes also recorded that "The entire team of the Bank, according to the Supervisory Board, deserves high appraisal and the Bank's Management Board financial and operating performance report deserves approval".

524. I accept the Bank's submission that, if it had been true that the Individual Defendants did not know what had gone on, most particularly in relation to related party lending, they would have taken decisive action when confronted with the catalogue of failings set out in the NBU's 2016 report (just as they would have done on receipt of the 2014 report). They did not do so, and they repeatedly reappointed the members of the Management Board notwithstanding the criticisms of their conduct which had been made by the NBU. This conduct is consistent with the Bank's response to the Glavcom and NashiGroshi Articles in which the concern related more to the leakage of confidential information than it did to getting to the bottom of what had occurred or disciplining employees for misconduct. I agree with the Bank that the most likely explanation for the reaction of the Supervisory Board and the General Meeting is that the conduct of management which was criticised by the NBU amounted to and resulted from compliance with the Individual Defendants' own instructions.

525. Throughout the period in which the assets to be transferred were being identified, Mr Kolomoisky was intimately involved in the process. He communicated with Ms Rozhkova on a regular basis (she thought approximately every two weeks) and explicitly recognised that, where particular assets were not acceptable security, alternatives could be found. The documentary evidence in support of Mr Bogolyubov's involvement was less clearcut and there is little doubt that he did not participate directly in the discussions with the NBU to the same extent as Mr Kolomoisky. Ms Rozhkova said that she assumed that this was because, unlike Mr Kolomoisky, Mr Bogolyubov was not based in Ukraine at the time. However, she said that she was informed by Mr Kolomoisky on a number of occasions that he needed to check with Mr Bogolyubov before agreeing to particular recapitalisation measures.

526. There was no indication from the evidence that Mr Kolomoisky did not do what he told Ms Rozhkova he intended to do and Mr Bogolyubov called no evidence to contradict what Ms Rozhkova said in her witness statement to this effect. I am satisfied that what she says she was told by Mr Kolomoisky about the need for him to consult Mr Bogolyubov about what was proposed is an accurate reflection of what was said. I also find on the balance of probabilities, that the relationship between Mr Kolomoisky and Mr Bogolyubov at this stage was such that consultation with him was both necessary and in fact occurred. I find that he both knew and agreed to the substance of what was proposed by Mr Kolomoisky in his discussion with Ms Rozhkova. I also find that he, like Mr Kolomoisky, can have been in no doubt from the meetings which Mr Kolomoisky had with Ms Rozhkova, Ms Gontareva and President Poroshenko in and about July 2016 that the NBU's requirements for the recapitalisation of the Bank were serious and needed to be implemented effectively and in full.

527. Meanwhile, on 28 and 29 July 2016, the Pechersky District Court granted injunctions on the application of the GPO freezing the Cyprus branch accounts of Trade Point Agro and the BVI Defendants as part of a criminal investigation into the Unreturned Payments. These orders were made as a result of the investigation that had been started as result of publication of the Glavcom Article. They were then revoked during the course of September 2016 on the grounds that there was insufficient evidence that Trade Point Agro and the BVI Defendants, or their officials, were involved in the commission of the specified criminal proceedings under which the attachment was imposed. There is clear evidence that Mr Kolomoisky participated in the process of giving instructions to the Corporate Defendants' lawyers for the revocation of these orders.

The mechanics of the Asset Transfers

528. By the early part of September 2016, the Bank had recorded assets of UAH 30 billion and US$163 million as transferred in accordance with the Restructuring Plan. It had also applied those amounts in reduction of outstanding balances on Relevant Loans, Intermediary Loans and other outstanding loan indebtedness. The technical means by which this was done was that 40 companies entered into mortgage agreements (the "Mortgages") with the Bank for the pledge of some 387 different assets as collateral for amongst other obligations, the outstanding indebtedness under the Relevant Loans and the Intermediary Loans. Each of the Mortgages recorded a value for the assets pledged to the Bank, said to be based on contemporaneous valuation reports.

529. Shortly after execution of each of the Mortgages, the Bank's books recorded that the assets pledged under them had been transferred to the Bank. At or about the same time, the value recorded in the valuation reports was then set against the outstanding balance on the Relevant Loans, the Intermediary Loans and the other indebtedness in respect of which the Mortgages had been granted. The Bank's books recorded that the credit values of the Transferred Assets were set against each Relevant Loan, Intermediary Loan or other indebtedness and were all denominated in UAH apart from the credit values applicable to the aircraft which were denominated in US$. In some instances a single asset was used to reduce the balance of a single loan in the Bank's books. In other instances a single asset was used to reduce the balance on a number of loans. 336 of the total number of assets pledged pursuant to the Mortgages were recorded in the Bank's books as being used to repay all or part of a Relevant Loan or an Intermediary Loan. Of the 336 assets, seven were items of real estate, nine were aircraft, 246 were petrol stations and 74 were OSFs.

530. I have already described the background to the Restructuring Plan and how it led to the Asset Transfers. I have also summarised why the process of transferring assets onto the Bank's balance sheet was regarded by the NBU as an essential part of recapitalising it and the apparent reluctance of the Individual Defendants to ensure that this was achieved.

531. Amongst the 336 Transferred Assets were two hotels, Hotel Zirka and Hotel Mir. The Bank's pleaded case is that its ownership and control of Hotel Zirka is subject to challenge in the Ukrainian courts and that it has lost title to Hotel Mir following proceedings brought in Ukraine by Artis LLC, the transferor of which was admitted by Mr Kolomoisky to have been ultimately owned by him and Mr Bogolyubov at the time of the transfer. I shall revert to those assets when explaining my findings on value, but by the conclusion of the trial the Bank no longer advanced this argument in relation to Hotel Zirka.

532. The credit values recorded in the Bank's books at the time of the Asset Transfers were based on a number of third party valuations. Those amounts were then recognised in the Bank's 2016 financial statements, and are called by the Bank and its expert valuer the "Original 2016 Values" and by Mr Kolomoisky and his expert valuer the "Original 2016 Fair Values". However, those financial statements were heavily qualified by EY, who had replaced PwC as the Bank's auditors immediately after nationalisation. They said that they were unable to obtain sufficient appropriate audit evidence in respect of

the fair value of the repossessed collateral. In the event, the Original 2016 Values were restated in the Bank's balance sheet as at 31 December 2016 in its 2018 financial statements (i.e. post-nationalisation). Those restated values are called by the Bank and its expert valuer the "Restated 2016 Values" and by Mr Kolomoisky and his expert valuer the "Restated 2016 Fair Values". In reaching the Restated 2016 Values, the Bank used the services of a number of valuers, including in particular Asset Expertise LLC ("Asset Expertise"), Expert+ LLC ("Expert+) and Volyn-Expert LLC ("Volyn"). The reports they produced will feature from time to time in my findings as to the value of the Transferred Assets.

533. I shall also refer from time to time to a report which was produced by EY in accordance with instructions given by the Bank and NBU. This report came about because, on 5 October 2016, the NBU passed resolution 323-rsh/BT, which amongst other things required the Bank to ensure the involvement of an internationally recognised audit company to update the 2015 stress tests and to verify the adequacy and quality of the measures taken by the Bank to comply with the NBU's resolution No- 103/БТ dated 23 February 2016 (as to which see paragraphs 504 and 512 above). Amongst other things, this had required the fair value of the assets to be transferred to the Bank to be subject to verification by the NBU.

534. The product of this part of resolution 323-rsh/BT was EY's Bank Business Audit Status Report dated 22 November 2016 (the "EY November 2016 Report"), a reading of which makes clear why the Bank's 2016 financial statements were so heavily qualified. Amongst other matters it included a desktop review of the fair value of the Transferred Assets "which were subsequently verified by the NBU".

535. It is also clear from NBU resolution 323-rsh/BT that as at 5 October 2016 the NBU was not then satisfied that there had been proper compliance by the Bank with resolution No- 103/БТ and that was one of the reasons why EY were appointed to carry out the exercise which culminated in the EY November 2016 Report. I do not think that anybody who had seen NBU resolution 323-rsh/BT could have been in any doubt that part of EY's task was to verify the Bank's capital position, which inevitably involved doing what it could to comment on and verify the value of the Transferred Assets. In the event EY carried out a number of desktop valuations of the Transferred Assets as part of the process of preparing the EY November 2016 Report. Ms Rozhkova agreed in cross-examination that so far as she was concerned the NBU was rigorous in the way it checked the value of the assets and properly verified them, but the evidence does not support a conclusion that what are described as "NBU verified values" were in fact accepted by the NBU as correct for capital adequacy purposes.

The Transformation

536. Towards the end of September 2016, it was becoming clear that the Bank was unable to comply with the terms of the Restructuring Plan. Failure meant that it would be in breach of the requirements of Law 78 and Resolution 260 to achieve a capital adequacy ratio of 5% or more by 1 October 2016. This led to Mr Kolomoisky suggesting to Ms Rozhkova that the NBU should consider a solvent nationalisation of the Bank, for which there was an earlier precedent arising out of the 2008 financial crisis. By this he meant that there could be an injection of additional state support while the existing

shareholders would retain part of their shareholding. Ms Rozhkova's response was that this would only be a possibility if the Bank's capital position was positive but insufficient to meet the regulatory requirements. She said that the IMF's requirements made clear that, if the Bank remained insolvent, an insolvent nationalisation would be the only option.

537. However, an alternative approach, recorded in a memorandum agreed between the IMF and the Government of Ukraine as an acceptable solution for the Ukrainian banking sector, was for the Bank to transfer problematic loans to operational companies with both sufficient cash flow to service their debts and the ability to provide proper collateral for the loans. Ms Rozhkova discussed this possibility with Mr Kolomoisky during the course of their meetings in September and early October 2016 and Mr Kolomoisky indicated in general terms a willingness to pursue this option and mentioned a number of his companies as potentially suitable for this purpose. He was told by Ms Rozhkova that he and his team needed to submit plans and documents to a specialist team at the NBU for evaluation. She suggested that the NBU would then be able to carry out a preliminary assessment of the financial standing of the companies and the value and validity of the proposed collateral. She said that if everything was satisfactory, the NBU would then be able to approve the plan in principle before the Bank began to implement it.

538. At some stage, the date of which is not entirely clear but was almost certainly on or shortly before 5 October 2016, Mr Kolomoisky and Mr Bogolyubov signed a letter addressed to the NBU "regarding the status of complying with obligations for the bank capitalization". The proposal made by the Individual Defendants was expressed in general terms and was drafted with the assistance of Ms Rozhkova herself. This acknowledged that the Individual Defendants had not been able to comply with their obligations under the Restructuring Plan and (in reflection of their ability to control every aspect of the Bank's affairs) offered to provide the NBU with full and open access to the Bank's premises and all its transactions and information systems, in return for the Government agreeing to implement what they called a state-supported capitalisation of the Bank, i.e., what was contemplated by Law 78 as a solvent nationalisation.

539. In this letter, the Individual Defendants also admitted that repayment of loans provided to large corporate entities were crucial for the Bank's future viability and would minimize "the budget costs for the state", and therefore agreed to take all possible steps to ensure their repayment. They then gave the following guarantee:

> "Considering the above the ultimate owners of the bank herewith guarantee the following:
>
> 1) Compliance with all conditions provided for by the Law 78 including conversion of all liabilities of all related parties to capital and ensuring that the bank's capital value is positive.
>
> 2) Restructuring of corporate credit portfolio based on market conditions by transferring the existing loans to operating companies, whose sources of income are real and transparent, clearly defining the repayment dates for such loans and ensuring quality maintenance of the loans.

> 3) Registering a collateral for the said loans at the market value and according to the requirements of the applicable law."

540. What occurred at this stage demonstrated that both of the Individual Defendants were continuing to participate in discussions with the NBU, a joint approach which continued right up until the Bank's nationalisation. As in the period prior to discussions about the Transformation, it remained the case that Mr Kolomoisky was the NBU's principal point of contact with the Bank's shareholders, but Ms Rozhkova said that Mr Kolomoisky always made clear that Mr Bogolyubov would need to be consulted before any further recapitalisation measures could be agreed. Apart from the Deeds of Waiver and Indemnity, which I address later, there was no evidence that this did not reflect the true position.

541. Ms Rozhkova described the proposal to restructure the corporate credit portfolio by transferring existing loans to operating companies as broadly reflecting the provisions in the latest memorandum between the IMF and the Government of Ukraine (as to which see above), which allowed for consolidation of cash flows with "creditworthy affiliated companies". As she also explained, the IMF imposed strict conditions for such measures including reliable and comprehensive legal documentation, a viability test to ensure that credible financial plans were provided for any proposed consolidation of cash flows and proper valuations of assets received as loan repayments or new loan collateral (to be conducted by an international appraiser by no later than the end of September 2016), all to be accompanied by verification from the NBU.

542. In her evidence, Ms Rozhkova emphasised the importance to the NBU of the need for the Bank to transform its credit portfolio in the manner envisaged by the IMF and the Government. I accept this evidence, which was confirmed by the form of the NBU's resolution dated 5 October 2016 (see also paragraph 533 above), which itself required the Bank to submit to the NBU within five working days (i.e., by 12 October 2016) what was called:

> "a Corporate Loan Portfolio Restructuring (Transformation) Plan under the market conditions by transferring the existing loans to the operating companies that have real and transparent sources of income, determining the clear time period for repayment of these loans and execution of additional collateral to ensure the achievement of a positive value of the Bank's capital, subject to the requirements of the Resolutions No. 260, No. 103/BT and No. 351 and ensuring its future viability;"

543. As I have already explained, the NBU's 5 October 2016 resolution also required the Bank to appoint an internationally recognised audit company. This obligation reflected one of the conditions set out in the IMF's memorandum and was accepted by the Bank on 13 October 2016, when it appointed EY to conduct the audit. The results of that audit were recorded in the EY November 2016 Report.

544. Ms Rozhkova described the purpose of the NBU's 5 October 2016 resolution as being to provide one last chance for the Bank to achieve the required level of capitalisation and to continue to operate under the ownership of the Individual Defendants. She said that this was the option that she and the rest of the team at the NBU, preferred. She said that she had already made clear to Mr Kolomoisky that the detail of the proposals was a matter for the Bank to propose to the NBU. However, in order to ensure that the

Bank's proposals were realistic and to provide reassurance to the Bank that the NBU would accept the outcome of this process, she suggested that the Bank propose a list of new borrowers and new loan collateral, and that the NBU could then do a preliminary assessment of the financial standing of these companies and the value and validity of the collateral. Ms Rozhkova thought that this would avoid the Bank spending a great deal of time putting in place replacement borrowers and security, only to find that they were not acceptable to the NBU.

545. In the event, this was not what the Bank did. It made no concrete proposals for the new companies or other aspects of what the NBU had called a Corporate Loan Portfolio Restructuring (Transformation) Plan within the required five working days. In consequence the NBU resolved on 17 October 2016 to appoint Mr Shekmar to perform an unscheduled inspection of the Bank.

546. Amongst other matters, the inspection was designed to cover the extent of the Bank's compliance both with the 23 February 2016 resolution which had approved the Restructuring Plan and with the 5 October 2016 resolution which had required the Bank to produce a transformation plan for the transfer of existing loans to operating companies with "real and transparent sources of income". The inspection was also required to consider the Bank's compliance with restrictions in relation to related party lending, and lending to customers with non transparent ownership structures whose financial standing did not support their ability to repay their loans. In his evidence, Mr Shekmar also explained that the inspection was intended to cover the progress made by the Bank in implementing the recommendations of the NBU's 2016 audit report (see paragraph 520 above), including in particular the extent to which the Bank had increased its provision for loans and procured higher quality collateral when issuing new loans.

547. It is of relevance that, around this time, Ms Rozhkova refused to continue with her face to face meetings with Mr Kolomoisky. They came to an end when, at one of them, he became aggressive and made the "hungry tiger in a cage" threat I referred to earlier in this judgment. This meeting had been called by Ms Gontareva and was also attended by two other deputy governors of the NBU. It is worth setting out in full what occurred on that occasion, because Ms Rozhkova's evidence was not challenged and it gives a good flavour of the sort of behaviour of which Mr Kolomoisky was capable, and the fact that he seems to have regarded himself as above the law. It is entirely consistent with other evidence as to his domineering character and the extent to which he was accustomed to getting his own way:

> "Ms Gontareva had called the meeting because we had seen little or no progress from the Bank on the intended restructuring of its loan portfolio and time was beginning to run short. Ms Gontareva began the meeting by saying that we could not see that any progress had been made. I had the impression from the outset of this meeting that Mr Kolomoisky was in a very aggressive mood, although it wasn't exactly clear what had happened to provoke this. He said to Ms Gontareva that, if the NBU did nationalise the Bank, he would simply relocate to Israel. But he was at pains to make clear he would be able to reach us even from Israel, saying that "I have very long arms". After Ms Gontareva left the meeting to attend to other matters, Mr Kolomoisky looked at me, touching his stomach, and said that he was a "a hungry tiger in a cage, but the door is open – so you can leave" and repeated what he had said earlier about having long arms, but going further this time and

> saying that he would be able to find me anywhere. I had (and continue to have) no doubt that this was a physical threat he was making against me."

548. In the event, on 20 October 2016, Mr Yatsenko sent to the NBU what he called "information on transformation of the petroleum industry loan book as you requested". This was the first part of what came to be called the Transformation and made proposals for the making of New Loans. However, it did not address the wider corporate loan portfolio, nor did it include all of the information specifically required by the NBU's 5 October 2016 resolution.

549. On the same day, but without waiting for the NBU's approval, the Bank proceeded to implement this part of the Transformation by making entries in its books recording the issue of the first UAH 20 billion of New Loans to five New Borrowers (Borand Trade LLC, Business Prom Innovatsiya LLC, Dream-Company LLC, Khromia LLC and Like City LLC) all of which were used to repay the indebtedness of certain of the 44 Borrowers. These New Loans had been approved by the ECC at meetings attended by Ms Gurieva, Mr Novikov, Mr Pikush, Ms Chmona and Mr Yatsenko the previous day. I am satisfied that this process was directed from senior levels within the Bank, including in particular Mr Dubilet, who had been asked by Mr Yatsenko to approve the terms of the New Loans on 19 October 2016. On the basis of their involvement in the planning of the Transformation, I accept that it is very likely that the instructions to do so came from Mr Kolomoisky to Mr Dubilet and were given with the approval of Mr Bogolyubov.

550. By a letter of engagement also dated 20 October 2016 (supplemented by a Statement of Work dated 18 May 2017), Kroll was engaged by the NBU "to conduct an investigation into the activities of [the Bank], its Cyprus based branch ... and its affiliate in Latvia ..., during the period 1 January 2007 until the date of nationalisation on 16 December 2016". The report which was eventually produced and dated 29 November 2017 stated that:

> "The overall objective of the investigation was to gather documentation and evidence to support a legal strategy for potential civil and criminal proceedings in multiple jurisdictions."

551. Ms Rozhkova was cross examined on the report on the basis that, although Kroll refer to a letter of engagement dated 20 October 2016, they were in fact engaged by the NBU from February 2016. Ms Rozhkova agreed with that suggestion and it is plainly correct so far as it goes. But it is not at all clear to me that the development of a legal strategy for potential civil and criminal proceedings in multiple jurisdictions is the correct way of characterising what was agreed to be Kroll's function as early as February 2016, not least because the reference to the Statement of Work dated 18 May 2017 shows that the scope of the engagement developed even after they were given their letter of engagement in October. Nor do I think there is any evidence that the following conclusions reached by Kroll by the time they did report were clearly identified at the time they were originally instructed:

> "The investigation has identified a series of activities, which, taken together, indicate that the Bank was subjected to a large scale and coordinated fraud involving the former UBOs of the Bank (the former UBOs") and certain employees, over at least a ten year period, which resulted in the Bank suffering a loss of at least

> USD 5.5 billion. The fraud involved loans being issued to a network of parties related to the former UBOs of the Bank and their affiliates. Funds from these loans were subjected to a mechanism to disguise the onward flows, through a series of accounts in the names of shell companies controlled by the former UBOs or their affiliates, and were in part channelled to other destinations for the benefit of the former UBOs or their affiliates. The loans, and the interest due on these loans, were then repaid through the issuing of new loans to other parties related to the former UBOs, which in turn were repaid by further loans. During the Review Period, the recycling of loans, the servicing of interest on those loans through issuing of new loans and the continued extraction of funds for the benefit of the former UBOs and their affiliates began to take on characteristics of a pyramid scheme, whereby new loans of ever increasing value had to be issued to allow the scheme to continue. This resulted in a material increase in the loan book during the Review Period. In late 2016, the majority of this related party loan book was consolidated into loans to 36 borrowers which were related to the former UBOs and their affiliates. These loans remain outstanding and the majority are overdue at the date of this report. The Bank therefore suffered a loss of at least the value of these loans UAH 126.9 billion (USD 5.5 billion)."

552. On 27 October 2016, Ms Rozhkova wrote to Mr Dubilet to point out that the form of Transformation plan provided by the Bank only contained information on restructuring the loan debt for the petrochemical industry, and did not contain all the required terms, in particular as to repayment of existing loans, and the registration of collateral. The NBU therefore required the Bank to submit a plan for restructuring the entire corporate loan portfolio by 31 October 2016, taking into account the requirements set out in the 5 October resolution and providing the specific dates for the "debt repayment transactions and registration of collateral (in terms of counterparties)".

553. The initial version of the proposed Transformation plan was then amended in further versions of the plan sent by the Bank to the NBU under cover of a series of letters during the first half of November 2016. The first draft of a more comprehensive Transformation plan covering UAH 111 billion (c.US$4.3 billion) of the corporate loan portfolio was submitted on 15 November 2016 followed by a final draft on 23 November, but a final version of the full Transformation plan was only formally submitted to the NBU on 28 November 2016, ten days after the last of the New Loans had been issued and recorded in the Bank's books. It listed the loans of the 193 Borrowers (including all but seven of the Borrowers and the Intermediary Borrowers: the three Cypriot Borrowers, Kembel LLC, Nautis Trade and Vegatorg (Borrowers) and Tinto LLC (Intermediary Borrower)) and the 36 New Borrowers to which those loans were to be transferred. It also described the maturity dates of the New Loans (all of which were denominated in UAH) almost all of which stipulated for a repayment date in 2024, 2025 or 2026 (i.e., in 8-10 years' time), together with the collateral by which they were all to be secured.

554. In the event, New Loans amounting in total to UAH 126.9 billion (then equivalent to c.US$5 billion) were recorded in the Bank's books as having been issued by the Bank to the New Borrowers during the period 20 October 2016 to 18 November 2016. So far as the Bank's records were concerned, this amounted to completion of the Transformation, but as with the initial implementation of part of the Transformation on 20 October 2016, the Bank sought to give effect to the transfers of the borrowing

obligations to the New Borrowers before the final draft of the Transformation plan had even been sent to the NBU, let alone approved by it. The way this was done was by closing out those existing loan positions in the Bank's books, and purporting to utilise the proceeds of the New Loans to repay the debts of the 193 Borrowers.

555. It is the Defendants' case that Relevant Loans repaid via the Transformation totalled c.US$405.6 million and c.UAH 3.075 billion. It is also the Defendants' case that Intermediary Loans were repaid via the Transformation; they totalled US$56.5 million and UAH 7.283.5 billion. It is accepted by the Bank (and verified by Mr Thompson) that these amounts reflected the figures recorded in the Bank's transactional data for the Relevant Loan and Intermediary Loans balances prior to the Transformation, the total amounts by which the outstanding balances were reduced by the Transformation and the closing balances on the Relevant Loans and the Intermediary Loans after the Transformation.

556. However, the Transformation plan was never agreed with the NBU and it is the Bank's case that the way in which the whole exercise was carried out amounted to an attempt to present the NBU with a *fait accompli*, artificial and deficient though it was. Ms Rozhkova accepted that the NBU allowed the Bank to complete what was an unapproved transformation "under their own responsibility", but the reasons it took the approach it did was because of the early October shareholders' letter from the Individual Defendants. As she put it in cross-examination: "In this letter, the shareholders promised us to do this restructuring according to the requirements which NBU provided before, so that's why we did not stop these activities, and to have possibility to check the results."

557. In my view that is an accurate description of what occurred. Despite the fact that the Individual Defendants initially ran a positive case that the Transformation was devised and implemented by the NBU, it is clear that the Bank proceeded to issue New Loans and record the repayment of existing loans in its books without waiting for the NBU to agree to any of the details of Transformation plan, and the clear inference is that it must have been done deliberately. The final draft of the Transformation plan was only received by the NBU after the recording of the Transformation in the Bank's books was effectively complete.

558. Furthermore, the Bank does not accept that the transactions recorded in its books reflected the true legal consequences of what had occurred. It submitted that the making of the New Loans and the application of their proceeds in the manner I have described did not amount to a genuine repayment of the debt owed by the 193 Borrowers and more specifically any amounts in respect of the Relevant Loans. This is a point to which I shall return.

559. At the same time as the various versions of the Bank's Transformation plan were being sent to the NBU, the process of releasing the Share Pledges (which I have already described in paragraphs 359ff above) was completed. The Share Pledges were not discharged as a "consequence" of repayment of the 193 Borrowers' loans as alleged by Mr Kolomoisky. They were the subject of termination agreements signed by the Share Pledgor and the Bank. However, although draft replacement pledges over the same shares that would have provided purported security for the New Loans were prepared, they were never executed, the initial delay being excused as a result of "delays in transporting documents". EY were told by the Bank (and recorded this in the EY

November 2016 Report, although the precise source of the information is not disclosed) that, although the New Borrowers were shell companies with no assets, they were expected to "take over the business from other companies (the 'donor companies') owned by the ultimate beneficiaries of the new borrowers".

560. The Bank's case is that the New Borrowers were also all owned and/or controlled by Mr Kolomoisky and Mr Bogolyubov, and because they had not yet received a transfer of the businesses from what were called the 'donor companies' they had no creditworthiness and were not "operating companies" with "real and transparent" sources of income. Similarly, it was also said that the collateral for the New Loans consisted of worthless pledges over supply agreements that would never be performed. All of this meant that the security, like the New Loans themselves, was plainly inadequate and failed to comply with the NBU's requirements for the Transformation. There was no explanation as to why the 'donor companies' themselves which did have valuable assets could not have become obligors under the New Loans.

561. Part of Mr Kolomoisky's case was that he had no substantial involvement in the Transformation process. He pleaded that implementation of the Transformation was supervised and controlled by the curator (Ms Domashenko) and other NBU staff within the Bank. He said that they did so by reviewing the legal and credit files of all borrowers, determining whether potential New Borrowers were related parties, directing the Bank to use the 36 New Borrowers as grantees of New Loans to be used to repay the loans which had been made to the 193 Borrowers, overseeing the repayment by the New Borrowers of the loans outstanding from the 193 Borrowers and being aware of the arrangements to be made to secure the loans to the New Borrowers.

562. This case was pleaded in two different but linked contexts. The first was in support of Mr Kolomoisky's allegation that the NBU was concerned to bankrupt the Bank as part of a campaign against him. This aspect of his case was abandoned in opening. The second was in support of his pleaded case that any loss suffered by the Bank in respect of the loans to the 193 Borrowers outstanding prior to the Transformation (including the Relevant Loans) was caused by the NBU and/or by the Bank acting under the control of the NBU and not by Mr Kolomoisky.

563. In addition to his pleaded case, the manner in which the Relevant Loans and the Intermediary Loans were dealt with by the Bank and the NBU as part of the Transformation was referred to in Mr Kolomoisky's closing submissions in the context of the Repayment Defence. In particular it was referred to in relation to an argument based on the Bank's choice to allocate repayments to the liability of the Borrowers as opposed to any other liabilities. I summarised this argument in the introductory section of this judgment.

564. The Defendants' argument based on the Bank's choice to allocate was first advanced in its current form in Mr Kolomoisky's written closing submissions, and ultimately depends on what the Bank did or did not choose to do post-nationalisation. The fact that the argument was not based on what occurred pre-nationalisation is because Mr Kolomoisky explicitly eschewed reliance on the fact that the Bank initially credited the Borrowers with repayment "while it was owned and arguably controlled by" him. The case he sought to advance in his closing submissions was that the Bank had an opportunity post-nationalisation to decide which loans to treat as valid and repaid and

consciously decided to treat the New Loans as valid and outstanding and the loans to the 193 Borrowers as having been repaid, a position that it has maintained to this day.

565. I will come back to this way of putting Mr Kolomoisky's case later in this judgment (and the extent to which the pleaded case on loss was still pursued in closing was unclear), but for present purposes, I need to make factual findings in response to both what was pleaded and what was said in his closing submissions about the Transformation-related conduct of the Bank and the NBU pre-nationalisation.

566. In his closing submissions Mr Kolomoisky expressed his case as to the role of the NBU as follows:

> "Throughout 2015 and 2016 when the Bank and the NBU knew all about the Supply Agreement Fraud Allegations and the misuse of loans for the benefit of [Mr Kolomoisky], the NBU could have required the Bank to declare the Relevant and Intermediary Loans void, but it did not do so. Instead, the NBU and the Bank together determined a plan which would treat them all as valid with a view to securing their repayment or collateralisation:
>
> (1) The NBU required a Restructuring of the Bank which involved in part the repayment of loans (including Relevant and Intermediary Loans) in return for Transferred Assets and the Transformation of existing loans into New Loans.
>
> (2) The Transformation of the remaining loans to the 193 Borrowers involved the advance of funds to 36 New Borrowers. Although the NBU knew at the time that the New Loans did not comply with its requirements, the NBU allowed the Bank to make those loans and did not intervene."

567. The way it was put in closing therefore accepts a less assertive role for the NBU than the way this part of Mr Kolomoisky's case was pleaded. However, it remains the position that he alleges that the NBU allowed the Bank to make the New Loans and did not intervene. The Bank's position is that such an allegation, like the pleaded case, was always inherently incredible, was wholly inconsistent with the documents and the agreed purpose of the Transformation and was unsupported by the evidence of any witness.

568. It is clear that the NBU knew and intended that the restructuring of the Bank's corporate lending portfolio (as contemplated by what became the Transformation) would involve what Ms Rozhkova called the transfer of bad debts held by customers with low creditworthiness to affiliated companies with, for example, profitable operating businesses. As I have already explained this was one of the recapitalisation measures which had been suggested in the IMF's September 2016 memorandum. However, the documents make clear that the detail of the Transformation was arranged by employees within BOK (such as Ms Gurieva and Ms Koryak) and then transmitted to the NBU by Mr Yatsenko, or in one instance Mr Pikush, after the New Loans had been issued and repayments of the old loans had been recorded. The NBU did not participate in identifying the New Borrowers, agreeing the terms of the New Loans or the extent of the collateral given to the Bank as security for the New Loans. It is clear that this was all dealt with within BOK.

569. Furthermore, none of the communications arranging the New Loans was copied to the NBU until such time as the various drafts of the Transformation plan itself were sent to the NBU by Mr Yatsenko or Mr Pikush as the case may be, and there is no mention or suggestion in any of the documentation that the NBU played any role in the Bank's decisions as to the identity of the entities which were to participate as New Borrowers. In particular there is no evidence that, at the time the relevant entries were made in the Bank's books, the NBU knew that the New Loans did not comply with its requirements, or indeed that it did anything which constituted "allowing" the Bank to make loans to the New Borrowers in the first place.

570. So far as NBU individuals or groups of individuals "within the Bank" are concerned, two are relevant: the inspector Mr Shekmar (and his team) and the curator, Ms Domashenko. Mr Shekmar's unchallenged evidence was clear on this point. He said his team's role was limited to requesting and analysing the Bank's documents, identifying violations and making recommendations. It did not have the power to give, and did not give, instructions to the Bank. He also said that they were only informed of the New Loans after they had been issued and were only provided with files for the New Borrowers after that (and upon request). Ms Domashenko's unchallenged evidence was clear as well. She confirmed that she observed and reported on the steps taken by the Bank pursuant to the Transformation plan, but that she did not have any control over, or supervise, its implementation, nor did she play a part in selecting the New Borrowers.

571. I accept Ms Rozhkova's evidence that, in light of the way in which the Transformation was conducted, the Defendants are wrong to suggest that the NBU had any responsibility for selecting any of the 36 New Borrowers or for instructing the issue of New Loans to any of them. This was a process controlled by the Bank under the overall supervision of Mr Kolomoisky, the detail of which was not approved by the NBU. There is clear evidence that, like the Borrowers and the Intermediary Borrowers, the New Borrowers were shell companies which were very far removed from the types of replacement borrower, which the NBU had in mind in order to assist in recapitalising the Bank in light of the extreme weakness of the covenants of much of its loan book, including in particular the debts due from the Borrowers and the Intermediary Borrowers.

572. As to the role played by Mr Kolomoisky, I do not accept his pleaded case that he had no substantial involvement in the process. I am satisfied that he was closely involved in all of the arrangements and what was done was only done with the approval of both him and Mr Bogolyubov. Dealing first with Mr Kolomoisky's role, I accept as accurate the following description given by Ms Rozhkova in her evidence:

> "I knew that Mr Kolomoisky was deeply involved in the decision to enter into the Transformation and it was clear to me from my prior discussions with Mr Kolomoisky that steps such as those associated with the Transformation Plan would not have been taken by the Bank without the approval of Mr Kolomoisky."

573. Mr Bogolyubov's role is less easy to discern. It is clear that he was committed to the Transformation because he was a signatory to the letter to the NBU which is referred to in paragraphs 538 and 539 above. There is also evidence that Mr Kolomoisky always made clear that Mr Bogolyubov would need to be consulted before any further recapitalisation measures could be agreed. This is not surprising as both recapitalisation

and the nationalisation of the Bank which was ever-present in what might happen would have a fundamental impact on his continuing interest as a major shareholder of the Bank.

574. Ms Rozhkova's evidence is consistent with and supportive of the inferences which arise in any event in relation to both of the Individual Defendants. It was they who had the interests in the underlying businesses owned by the 'donor companies' I have already identified, and it was they who were the owners and controllers of the New Borrowers, which EY had called shell companies with no assets, and which were expected to take over the businesses of the 'donor companies'. They were the owners and controllers of more than 90% of the equity in the Bank and were also very substantial borrowers from the Bank, in particular through the interests they had in the Borrowers themselves, the loans to many of which were intended to be replaced by the New Loans which were the subject matter of the Transformation.

575. Given these interests, and given the extent of the obvious pressure from the NBU to recapitalise the Bank, it is in my judgment inconceivable that the Individual Defendants did not both know and approve of the terms of the Transformation, including the nature and identity of the New Borrowers and the facts that they themselves had limited resources from which to repay their obligations under the New Loans.

576. On 22 November 2016, which was shortly before the final version of the Bank's Transformation plan was presented to the NBU, EY completed the EY November 2016 Report which was then sent to the Bank and the NBU. It concluded amongst other things that the Bank required additional regulatory capital of between UAH 138.9 billion and UAH 146.4 billion (the US$ equivalent of which was then c.US$5.43 to US$5.72 billion). For current purposes, there were two other significant groups of findings. The first is the commentary it gave on the fair value of collateral and tangible assets included in the Bank's assets lists, a matter to which I will return later in this judgment when explaining my findings on the true value of the Transferred Assets.

577. The second is that it records the results of EY's analysis of the New Borrowers' financial statements and security agreements, and its preliminary analysis of credit risk on the restructured portfolio. In EY's view, the New Borrowers' financial statements indicated a low probability of repayment of interest and principal, and that neither the collateral that had been put in place (over contractual rights), nor the security that was anticipated by the Transformation plan (over corporate rights) would meet the NBU's requirements. It also noted that the Bank's management had claimed that it planned to replace pledges over corporate rights with mortgages of physical assets from the same companies, but that no such security had been put in place.

578. EY's conclusions were consistent with the information provided by the New Borrowers in support of their loan applications. Even if taken at face value, they manifestly lacked either the income or assets necessary to repay the New Loans. Thus, by way of example, the SOFs demonstrate that, in their financial statements for the most recent period before the issuance of their New Loans, ten of the 36 New Borrowers reported no significant assets or revenue and 30 of the 36 New Borrowers reported losses. It was also clear that the Transformation involved the Bank losing the limited security it had for the existing loans to the 193 Borrowers (this included the Share Pledges), without receiving any genuine security for the New Loans. The only security obtained by the Bank was pledges over what were said to be contractual rights to receive goods

which plainly did not amount to the proper collateral contemplated and required by resolution 323-rsh/BT.

579. It was suggested to Ms Rozhkova and Mr Oleksiyenko in cross-examination that the Bank was better off as a result of the New Loans because they were all advanced in UAH and it was therefore no longer exposed to the depreciation of the UAH against the US$. Ms Rozhkova agreed with this suggestion, but I do not think she was right to do so and I agree with the Bank's response that the suggestion is wrong. The Bank's currency position was not improved by converting its assets from a stable currency (US$) into a depreciating currency (UAH). The extent of the Bank's exposure to currency risk meant that if the Bank's depositors had chosen to seek repayment of their US$ deposits, the Bank would not have been able to finance the payments from its own US$ assets and would have been required to purchase US$ on the open market, using its UAH resources to do so. In circumstances in which the UAH was depreciating, that was a perilous position for the Bank to be in.

580. The Bank submitted, and I accept, that by contrast, it was a very beneficial position for the Individual Defendants, as the owners and controllers of the New Borrowers. The value in US$ of their indebtedness under the New Loans would continue to reduce as the depreciation of the UAH continued. I shall return to this point when considering the arguments as to the appropriate currency in which the Bank ought to be entitled to recover compensation, with which I will deal at the end of this judgment.

581. Not long after the final version of the Transformation plan was submitted to the NBU, the Bank began to postpone payment of its debts, at which stage Ms Rozhkova concluded that the Bank would need to be nationalised, in order to protect both its 20 million ordinary customers and the Ukrainian financial system more generally. On 14 December 2016 the NBU notified the Bank that it had determined by resolution the previous day that 1,092 entities were related parties to the Bank. The list included all 36 of the New Borrowers and a very significant number of the Borrowers (some 28 in addition to those which had been identified in 2015) and Intermediary Borrowers.

582. On 16 December 2016, Mr Kolomoisky and Mr Bogolyubov wrote to Volodymyr Groysman, then the Prime Minister of Ukraine, with a formal request that the government acquire the shares in the Bank. This letter included a promise to restructure the Bank's loan portfolio by 1 July 2017 through the provision of independently valued collateral, with what was said to be a potential continuation of this deadline until 1 January 2018 so long as 75% had been restructured by 1 July 2017. In her evidence, Ms Rozhkova said that, in the light of what Mr Kolomoisky had said when suggesting a solvent nationalisation, she considered that, in making those promises, Mr Kolomoisky and Mr Bogolyubov were probably seeking to avoid criminal liability for their actions in relation to the Bank. In their closing submissions this letter was referred to by the Bank and the Individual Defendants as the Nationalisation Letter.

583. On Sunday 18 December 2016, the NBU resolved to declare the Bank insolvent. The resolution recorded many of the events of the previous year which I have already summarised, that the Bank's regulatory capital (H1) ratio was negative and that its H2 Ratio was also inadequate. It also recorded that the Bank's managers and shareholders had failed to ensure the implementation of the Restructuring Plan and that the overdue debt to the NBU was UAH 14.2 billion as of 16 December 2016. It stated that the Bank was therefore to be nationalised. On the same day, the Cabinet of Ministers of Ukraine

passed Resolution 961 under which, in accordance with Article 41-1 of the Ukrainian Law on Deposit Guarantee Fund (the "DGF Law"), the Ministry of Finance was empowered to purchase the entire issued share capital of the Bank for UAH 1 and the Bank issued additional shares in itself to the Ministry of Finance in exchange for UAH 116.8bn (US$4.45bn) of bonds issued by the government of Ukraine.

584. The following day the DGF passed a series of resolutions which introduced the temporary administration of the Bank for the period of one month and began the process of withdrawing the Bank from the market, a process which was to be implemented through a procedure for the State, represented by the Ministry of Finance, to become the shareholder of the Bank. From that point onwards, the Individual Defendants were no longer able to exercise control of the Bank through their shareholdings and many of the members of its senior management left the Bank.

The period between nationalisation and the commencement of these proceedings

585. The details of what happened next are primarily relevant to the Limitation Defence, but much of it is also now of real significance to the new way in which the Defendants put the Repayment Defence. This is because of the emphasis which they now place on what are said to be manifestations of the Bank's post-nationalisation choice to treat the Borrowers as having repaid their liabilities in respect of the Relevant Loans.

586. On 21 December 2016, Mr Shlapak was appointed chairman of the Management Board, a position which he held until 25 July 2017. Two days later, on 23 December 2016, Ms Pakhachuk joined the Management Board. Her evidence gave an illuminating description of what the Bank's new management found when they went in. This description, like the summary of what occurred more generally between the time of nationalisation and the commencement of these proceedings, is relevant to part of the Limitation Defence. The following relatively lengthy citation from Ms Pakhachuk's witness statement speaks for itself and in my judgment is an accurate summary of the difficulties with which the Bank's new management were faced:

> "13. It is difficult to overstate the complexity and pressure faced by the new management team as we took over the administration of the Bank at the end of 2016. The Bank is the largest bank in Ukraine and is of systemic importance to Ukraine's banking sector as a whole. In 2016, around half of Ukrainians had an account with PrivatBank.
>
> 14. I can recall clearly that our immediate priority after nationalisation was to investigate the Bank's liquidity problems and the resumption of the Bank's liquidity management. The nationalisation of the Bank in December 2016 had protected it from insolvency, but the Bank also had an enormous cash flow problem: it had liabilities reaching more than USD 6 billion, whereas the cash available was only about USD 70 million, and customers were regularly withdrawing their deposits. All of us on the Management Board understood that if the Bank could not remain liquid, there was a real risk of mass withdrawal of deposits, with millions of Ukrainians being unable to access their savings. Ukraine was, at that time, already in a very difficult position politically and economically – it was dealing with the aftermath of the Revolution of Dignity and the Russian

> annexation of Crimea and fighting in the east. We were all aware that civil unrest was a real possibility if ordinary Ukrainians became unable to access their deposits at the Bank. For these reasons, at the outset there was no real focus or thought given to investigating and preparing civil claims against the Former Owners.
>
> 15. The first few months following nationalisation were extremely busy in terms of work. In addition to the issues pertaining to the great problems on securing liquidity, we also had to take charge of all the other aspects necessary to operate an enormous commercial entity. That included building a new organisational structure almost from scratch by virtue of the fact that the previous heads of many of the main divisions, for example Timur Novikov (who headed the Investment Business Department) and Tatiana Gurieva (who headed the Customer Services Department, BOK) simply left after the nationalisation without any proper transfer of their work or even of their documents to the complexes of the bank and the archive, as well as consideration of all the day-to-day management decisions and building up an understanding of how the Bank had operated in the past across all areas of the business. All of us on the Management Board were at our absolute limit. Our typical hours for January and February were from 8 am to 10 pm every day of the week (i.e. including weekends). In March 2017, we started to stabilise the work and our work schedules to save our energy to have some free time on Sunday, but it was many months before we reached anything like standard working hours."

587. This evidence was corroborated by Ms Rozhkova, who explained in her evidence that the period following the Bank's nationalisation was a hugely challenging time for her personally. She said that all of her efforts were focused on the NBU's communications with the public and in particular the Bank's customers, in order to instil confidence that their money was safe and to avoid a run on the Bank.

588. Also on 23 December 2016, NashiGroshi published an article entitled "The scheme of withdrawal of funds from Privatbank by the Kolomoisky- Bogolyubov-Dubilet Group". It reported that since January 2014, c.US$4.27 billion had been withdrawn abroad from the Bank which was close to its Bloomberg-estimated capital deficit of c.US$5.5 billion. It also reported that:

> "The most significant amount of $1.82bn was loaned out in May-August 2014 to 42 companies with PrivatBank roots. They transferred funds as a full prepayment to a British company for certain goods to an account at PrivatBank Cyprus branch. Only after that, the Ukrainian company made an agreement with PrivatBank that the collateral for the previously taken loan was the property rights to the goods that had not yet been delivered from the British. The British company would then inform the Ukrainian company that it could not deliver the goods and terminate the agreement with the Ukrainian company without returning the funds. Read more about the scheme in the article *The National Bank Overlooked Privat's Billions*."

589. This article was therefore reporting the gist of some of the allegations which are now made in these proceedings. It was one of a number of articles published towards the end of 2016 and in January 2017, which examined in some detail the nature of the Bank's corporate loan book and the pervasive extent of related party lending (i.e., to borrowers related to the Individual Defendants). They included one published on 12 September 2016 by Antiraid, an article published on 1 November 2016 by

BneIntelliNews and an article published by VoxUkraine 2017 on 20 January 2017 entitled "Good bank, bad shareholder, evil regulator."

590. In the immediate aftermath of nationalisation, the NBU had a role in formulating the priorities to be addressed by the new members of the Supervisory Board. Thus, on 6 January 2017, the acting Governor of the NBU wrote to the Supervisory Board drawing its attention to a set of priority issues requiring prompt resolution. Not surprisingly these focussed on steps required to ensure the Bank's future viability and planning for appropriate increases in its capital given the low quality of its corporate loan portfolio. There was specific mention of the Individual Defendants' 16 December 2016 undertaking to the Prime Minister to ensure a complete restructuring of the corporate loan portfolio, with high quality security. There was also a process of what was called "on-boarding" involving the Ministry of Finance, in which members of the Bank's new management were given briefings in relation to the Bank and its affairs.

591. On 17 January 2017, the first meeting of the Bank's post-nationalisation, Supervisory Board took place. It appointed EY as the Bank's auditors and instructed them to perform a detailed investigation into the Bank's capital and asset position, including an analysis of the Bank's collateral position on its full loan portfolios, including its loans to related parties. At the same time a new unit, to be headed by Sergiy Stratonov, was set up within the Bank, the function of which was to oversee what Ms Pakhachuk called "all issues related to the Bank's portfolio of lending to parties related to the [Individual Defendants]".

592. Later the same month, on 26 January 2017, the Management Board made a number of significant changes to the personnel in the Bank's legal department, which was required because of the new management's concerns that the existing staff were loyal to the Individual Defendants. On the same day Mr Shlapak signed an order establishing a commission to conduct an official investigation into loans made by the Bank after it itself had received refinancing loans from the NBU in the period 2014 to 2016. It was meant to report by 24 February 2017. The members of the commission were the head (Taras Levadskiy) and two members of the Bank's department of criminal prosecution and legal protection. It was suggested by the Defendants that Mr Levadskiy may have been appointed to chair the commission because he was already familiar with the issues having been involved in the Bank's response to the GPO investigation during the course of 2015 and that may indeed have been at least one of the reasons for his appointment.

593. Whether Mr Levadskiy's commission reported within its intended timescale was not clear; Ms Pakhachuk did not recall seeing any report, although she was aware in general terms of his investigation. The content of what it discovered was not in evidence either, because there was no copy of any report in the trial bundles, although there was some evidence that it existed because a document described as a Copy of the conclusion dated 10.03.2017 "On the results of the official investigation into the facts of issuance by the Bank of loans to legal entities and individuals after receiving NBU loans for refinancing in 2014-2016" was listed in a search report initiated by the National Anti-Corruption Bureau of Ukraine on 6 July 2017.

594. In these circumstances, it was submitted on behalf of Mr Kolomoisky that it should be readily inferred from its non-disclosure that the contents of the Levadskiy Report would only serve to confirm that the Bank's new management already knew everything that it needed to know about the Misappropriation to bring proceedings at that time (i.e., 10

March 2017). On the basis of what I have seen, I can infer that it is likely that a report exists and that privilege has been claimed for it. However, on the assumption that litigation privilege was claimed, the most that can be said is that it is likely that the report was obtained for the dominant purpose of potential use in contemplated litigation, although the available information does not identify the form which that litigation might take. On that basis, it is difficult to draw the inference for which Mr Kolomoisky contends; I cannot say that it is likely that it established that all of the facts necessary to prove the Bank's claims were, as a result of the report, pleadable as such.

595. On 30 January 2017, the NBU sent the results of Mr Shekmar's 17 October 2016 unscheduled inspection to the Bank. He described the main achievement of the Transformation as being "the currency restructuring and elimination of groupings of counterparties that are associated both with one another and with the Bank". But he went on to say that the nature of the transactions performed and the inadequacy of the scope of the activities of the New Borrowers, which were generally newly created companies, testified to its artificiality and the fact that it did not actually reduce the Bank's risks.

596. Mr Stratonov reported back to the Supervisory Board on the operation of his new department on 6 March 2017. He explained that it had started work in February, that it had hired five lawyers, that there were 230 credit cases under its mandate, that inspection of collateral would be completed by a team of 300 people by 31 March 2017, that decisions on a revaluation of collateral would be made by 30 April 2017 and that a separate archive of credit documents would be created by the same date. I shall come back to the inspections in the context of my findings on the valuation of the Transferred Assets. He also reported on outstanding debt as of 1 March 2017 and referred to the Bank having sent letters to all related party debtors requesting immediate payment of overdue interest and the provision of additional collateral.

597. On 19 March 2017, EY produced a lengthy report entitled "Report on the results of analysis of the capital need of Privatbank" (the "EY Capital Report"). A further version was produced on 3 April 2017. Mr Oleksiyenko pointed out in his evidence that the scope of EY's work was focussed on analysing the Bank's capital and asset position and advising on the extent of the Bank's requirement for additional capital. He also said that at no point were EY instructed to assist in the identification of potential claims that the Bank might have as a result of this analysis, or otherwise. He also said that EY's report made for stark reading for the Supervisory Board, explaining that: "We had a fair idea of the types of issues that EY identified, from sources such as Mr Stratonov's report, but it was still a sobering experience to have that information set out by highly experienced third-party advisors".

598. Ms Pakhachuk also remembered being very struck by EY's conclusions: "it was the point at which I began to think that things at the Bank really could be worse than we even imagined". One of its 'Key Conclusions' was that the total credit risk assessed by EY as of 19 December 2016 in a conservative scenario was UAH 222.3 billion and that, in that same scenario, the effective rate of reservation for corporate loans was 98%. Based on the results of the EY analysis, 164 corporate borrowers of the 168 analysed had a default probability of 100% on the application of the appropriate regulatory criteria. As a result of the Supervisory Board's consideration of the EY Capital Report on 26 April 2017, the Bank sought a capital injection from the NBU in the sum of UAH 38.565 billion.

599. The 98% impairment on the New Loans described in the EY Capital Report was recognised in the Bank's first post-nationalisation financial statements signed off on 25 May 2017. EY's auditor's report contained a comprehensive disclaimer of opinion on the financial performance and cash flows in these financial statements, but the footnote relevant to the 98% loan impairment recorded as follows:

> "In October - November 2016, the Group restructured a part of its loan portfolio with a total value of UAH 137,082 million before allowance for impairment as at 31 December 2016. During the restructuring, the Group changed loans currency to UAH, lowered interest rates, extended maturity of loans to 2024 and 2025, converted some of loans into finance lease and changed collateral pledged under loans. As at 31 December 2016, the Group recognised UAH 135,018 million of allowance for impairment under these loans."

600. Meanwhile, one week after the first version of the EY Capital Report was produced, the Supervisory Board approved terms of reference for an internationally recognised firm to be hired to negotiate the restructuring, collateralisation and collection of what were called the impaired loans of the Individual Defendants or parties directly or indirectly related to them. The terms of reference provided for an 11-week assignment starting in mid-April, with a two-week period for developing a strategy and a nine-week period for its implementation. On 13 April 2017, a consortium led by Rothschild & Co was appointed to conduct negotiations with the Individual Defendants for what the minutes recorded as the "restructuring, collateralization and collection of the impaired loans, other exposures and financial leasing outstanding, of the UBOs or of parties directly or indirectly related to the former UBOs to maximize their value". This was a reference to the commitments the Individual Defendants had undertaken in the Nationalisation Letter. The Bank issued a press release announcing the appointment on 6 May 2017.

601. Mr Oleksiyenko, who was not personally involved in supervising Rothschild's work but was updated on it along with the rest of the Supervisory Board, remembered being told that that Rothschild had had a handful of meetings and a larger number of phone calls with the Individual Defendants and their representatives. This was confirmed by Mr Shlapak in a letter he wrote to the Minister of Finance on 18 July 2017 in which he said that Rothschild had had four meetings with the Individual Defendants, whom he called the "Former UBOs" and that they would report back to the Supervisory Board on 20 July 2017.

602. On 14 June 2017, Mr Kolomoisky commenced judicial review proceedings against the NBU, the Cabinet of Ministers, the DGF and the National Securities and Stock Market Commission, seeking a declaration of unlawfulness and a cancellation of the decisions resulting in the Bank's nationalisation. This was two weeks before the expiry of the 1 July 2017 deadline under the Nationalisation Letter to restructure at least 75% of the Bank's corporate loan portfolio, which did not occur. Although negotiations with the Individual Defendants continued, it seems likely that this development made a material contribution to no deal being reached, because Ms Rozhkova was recorded in an article published by Economic Pravda on 22 June 2017 as having told Finbalance the following:

> "The lawsuit is about contesting the recognition of Privatbank as insolvent and nationalization. In the lawsuit, Mr. Kolomoiskyi wrote about raiding by the state" and
>
> "How can we hope for success in the restructuring [of insider loans, - ed.], if the ex-owner of the bank, despite the fact that there are letters with his obligations, goes to court, files a lawsuit to declare the NBU's decision on recognition illegal" Privatbank" is insolvent, according to the decision on nationalization, as well as all sureties?"

603. It is not possible to say that this was the moment it was clear to the Bank that the terms of the Nationalisation Letter would not be complied with or whether there was still hope for a negotiated solution and that realisation only crystalised the following month. The minutes of the 20 July 2017 Supervisory Board meeting record that it received an update from Rothschild on the progress of the negotiations, although how that progress was described is not apparent. This was the last meeting attended by Mr Shlapak as chair of the Management Board, and he reported on what was called "the status of the loan portfolio related to the ex-owners of the Bank". His report, which was described by Ms Pakhachuk as "so stark as to be inherently memorable" and was regarded by her as the really decisive moment for the Bank in deciding to investigate the possibility of bringing civil claims against the Individual Defendants. It was accompanied by a 126-page PowerPoint presentation entitled "Problem assets of PrivatBank". Some of the slides to which my attention was drawn showed a huge reduction in interest receipts in respect of the New Loans.

604. At a meeting of the Management Board held on 27 July 2017, which was the first one chaired by Ms Pakhachuk after the resignation of Mr Shlapak, Yaroslav Matuzka, then head of the Bank's legal department, reported that it was unlikely that the Rothschild negotiations would result in an agreement between the Bank and the Individual Defendants. He suggested that, if the purpose of the negotiations with the Individual Defendants was not achieved, Hogan Lovells should be instructed to begin preparing a claim in the English Court once "the matter has been agreed with the Supervisory Board and the Ministry of Finance". The Defendants submitted that it is clear that, by 27 July 2017, the Bank had also received advice that it could sue in England. I agree that, given the nature of Mr Matuzka's recommendation, it is likely that the Bank had already been advised that it should be possible for the causes of action, which might be available to it, to be pursued in the English courts.

605. Mr Matuzka's recommendation was accepted and the Management Board resolved to instruct Hogan Lovells, once the approval of the Supervisory Board had been obtained, which it was at a meeting held on 3 August 2017. Hogan Lovells were then formally instructed on 7 August 2017.

606. Ms Pakhachuk explained in her evidence that, by this point, the position had changed substantially from that in the early months following nationalisation. In particular, she said that the position of the related party lending portfolio had continued to deteriorate, that the levels of overdue interest and principal payments had reached concerning levels and that the new management's understanding of the Bank's position was substantially more developed, as a result of the work which had been done by Mr Stratonov, EY and Mr Shlapak. However, she said that litigation with the Individual Defendants was not the Bank's preferred option. Consistently with the way in which Mr Matuzka's

recommendation to the Management Board was expressed, the new management all preferred some form of agreed solution.

607. Ms Pakhachuk also explained that as a result of the Bank's concerns that a significant portion of the Bank's employees remained loyal to the Individual Defendants, Hogan Lovells was instructed to develop the claims without the Bank's involvement and without providing regular updates to the Bank's staff. Instead, it was agreed that, at the end of that process, when the claims were almost prepared, Hogan Lovells would report to the Supervisory Board in order to obtain authorisation to begin the proceedings.

608. On 2 October 2017, Ms Pakhachuk wrote to Ms Rozhkova to ask that the NBU provide to Hogan Lovells copies of materials and information received by the NBU inspection teams. That letter was accompanied by an annex, which described various categories of documents that had been collected by Kroll on behalf of the NBU. This led to Hogan Lovells receiving and being able to review the documents collected by Kroll during the course of its instruction by the NBU.

609. It is apparent from Ms Hryn's evidence that, while these preparations were proceeding, notices asserting events of default and accelerating the debt were served on all 36 of the New Borrowers. The likelihood is that this was taking place between August and October 2017. Claims in respect of the New Loans were then prepared by the Bank's recovery and collection department. Ms Hryn said that some were prepared by the Bank at the same time as preparation for the commencement of these proceedings was underway. In the event, only three claims were actually issued against New Borrowers: Santekh Master LLC and Triumf 15 LLC in mid-September 2017 and a claim against Arnad Group LLC approximately one month later. However, a day or two later the legal department was instructed not to file any further claims in relation to New Borrowers. Ms Hryn confirmed that her understanding of the Bank's position on the New Loans was that they gave rise to valid and subsisting rights which the Bank was entitled to enforce, and sought to enforce, by way of demand notices, which were never withdrawn.

610. On 15 December 2017, the Bank lodged the papers for its application for the WFO. These included a 116-page affidavit with a very substantial exhibit, a lengthy expert report on Ukrainian law, a 58-page skeleton argument, draft Particulars of Claim, and drafts of freezing orders and orders permitting service out of the jurisdiction. The judge was asked to set aside one day for pre-reading and one day for the hearing, which in the event was required. The WFO was then granted by Nugee J on 19 December 2017 and the claim form was issued two days later on 21 December 2017.

Exercise by Mr Kolomoisky of influence and control over the Bank and its affairs

611. The starting point for the extent of Mr Kolomoisky's control, and to this extent he acted in conjunction with Mr Bogolyubov, was their legal right as majority shareholders to control the Supervisory Board and their legal right as the majority of the Supervisory Board to control the composition and conduct of the Management Board. I have already explained these legal rights and how they worked in practice earlier in this judgment. This section of my judgment seeks to bring a little more colour to what seems to have happened on the ground. It supports the Bank's case that it is incredible to suggest that

the Misappropriation could have been planned or implemented without their approval and consent.

612. It was an essential part of the Bank's case that the relationship, which Mr Kolomoisky had with individuals for whose appointment to management positions within the Bank he and Mr Bogolyubov were responsible, gave him effective control over the Bank's business which was exercised in conjunction with Mr Bogolyubov. Furthermore, it is said that the nature of the relationship he had with a number of the individuals who played a direct and documented role in the Misappropriation made it extremely unlikely both that Mr Kolomoisky did not know what was going on and had not given specific instructions for the steps forming the constituent parts of the Misappropriation to be carried into effect. That this was the case is said to have been reinforced by the fact that a number of the individuals concerned left the Bank at the time of nationalisation, but continued to be in close contact with the Individual Defendants thereafter (as I explained in the context of my findings in relation to the available witnesses who were not but could have been called to give evidence by the Individual Defendants).

613. The first of these individuals is Mr Dubilet, the chairman of the Management Board and member of the ECC who participated in the making of each of the Relevant Loans. He was therefore closely involved in the events and steps which formed part of the Misappropriation.

614. There is strikingly little in the way of direct documentary evidence of the contact between Mr Dubilet and Mr Kolomoisky pre-nationalisation, which is surprising, because he was chairman of the Management Board of one of Mr Kolomoisky's significant assets and Mr Kolomoisky was a man who was always concerned to have a complete grasp of the detail of his major investments. In part this is as a result of Mr Kolomoisky's practice of not communicating by e-mail. But it is also clear to me that the absence of any documentation is no indication of the extent of the communications which they in fact had and which were likely either to have been in an unrecorded form or, if recorded, to have since been lost or destroyed. Indeed, in light of the efforts made by the Bank during the course of preparing this case for trial to obtain full disclosure from Mr Kolomoisky on the nature of his relationship with Mr Dubilet, the total absence of any documentation makes it probable that such as existed has since been destroyed.

615. The absence of any documentary records of their communications with each other is in sharp contrast with what occurred post-nationalisation, which I have summarised in the parts of this judgment in which I discussed the availability to the Individual Defendants of witnesses, who were likely to have been sympathetic to their case but were not called at the trial. It is of course possible that the way in which Mr Dubilet was treated and communicated with by Mr Kolomoisky post-nationalisation, was not reflective of the way in which they had communicated pre-nationalisation; the position was different because it is likely that post-nationalisation the communication would have been more focused on the consequences of what had occurred, while pre-nationalisation it would have been about the management of the Bank and its business. However, it seems to me that, if what had occurred at the time of the Misappropriation had come as a surprise to Mr Kolomoisky, there would have been some contemporaneous indication that he held Mr Dubilet responsible for the difficulties which this was or might be causing the Bank, with the potential for an adverse impact on the value of his investment. There is no such indication.

616. These considerations support a conclusion that it is inherently improbable that there were any material aspects of the strategy of how the Bank's business was conducted pre-nationalisation which were neither procured nor authorised by Mr Kolomoisky at the time. That does not mean to say that the implementation of any aspects of the Bank's business strategy was specifically authorised by him transaction by transaction. But having regard to the extent of his legal rights qua shareholder and member of the Supervisory Board, the nature of his relationship with Mr Dubilet, and his own character, I am satisfied that it is probable that Mr Kolomoisky's influence on all material strategic decisions as to the conduct of the Bank's affairs was pervasive.

617. The second individual who was said by the Bank to have acted in accordance with the instructions of Mr Kolomoisky was Mr Novikov. As I have already explained, the relevance of this relationship to the claims made in these proceedings is that Mr Novikov was involved in the approval of 127 of the Relevant Loans, was head of the Bank's Investment Business and was in charge of Primecap. He too was therefore closely involved in the events and steps which formed part of the Misappropriation and it is therefore of central relevance if he would not have carried out his functions in relation to the Bank's affairs without the tacit or active approval of Mr Kolomoisky.

618. His relationship with Mr Kolomoisky was very close. He had important roles not just at the Bank, but also in relation to other of the Individual Defendants' joint business assets. As he said in his evidence in the Pinchuk Proceedings, given in June 2015: "I also sit on the supervisory boards of a number of businesses affiliated with either or both of the [Individual] Defendants". He also gave a flavour of the true nature of the relationship in the following passage from that evidence:

> "During my years at PrivatBank I have formed a working and personal relationship with both Mr Kolomoisky and Mr Bogolyubov. I would say that my role throughout the period relevant to these proceedings was that of a subordinate required to act on the instructions of Mr Kolomoisky and/or Mr Bogolyubov; my role was not that of a business partner or equal."

To some extent, this was dealing with a slightly earlier period (up until 2011), but some of what was said related to the time his witness statement was made and there is no reason to think that the nature of the relationship between Mr Kolomoisky and Mr Novikov was any different throughout the period of the Misappropriation.

619. However, it is striking that, in the context of these proceedings, there is an absence of material which evidences the sort of instructions referred to by Mr Novikov in his Pinchuk Proceedings evidence. With the exception of a few uninformative messages between May 2015 and October 2016, there are no surviving documents which evidence the giving or receiving of instructions during the period of the Misappropriation or from then until nationalisation. In part this is explained by the fact that he received these instructions by phone, by text message (which may have been deleted) or in person, but never by e-mail. But even so, the paucity of the surviving records of such matters, is striking when compared to the evidence he gave as to his earlier level of communication with Mr Kolomoisky and then again as to the level of their communication after nationalisation. It is another reason why there remain real and substantial concerns that documentation relevant to the issues in these proceedings has either been destroyed or deliberately suppressed.

620. Based both on the evidence he gave in the Pinchuk Proceedings, which established that he was then Mr Kolomoisky's right-hand man (and found to be such by Mann J in *Eclairs Group*), and on the level of communication that he had with Mr Kolomoisky post-nationalisation, I am satisfied that Mr Novikov had a close personal and working relationship with both of the Individual Defendants throughout the period relevant to these proceedings. It is not credible to think that there was a convenient fall-off in the level of their communication during the period most relevant to the issues in these proceedings. I also consider it is clear that he was accustomed to act in accordance with Mr Kolomoisky's instructions and then to regularly update both of the Individual Defendants on the outcome of what occurred as a result of those instructions (a working practice which he explained in a different context in his Pinchuk Proceedings evidence). It is most unlikely that he would have participated in any activity which might be regarded as contrary to the Individual Defendants' interests without at least clearing it first with them before doing so.

621. Another individual who was at the centre of the events surrounding the Misappropriation and who was said by the Bank to have acted in accordance with the instructions of Mr Kolomoisky was Ms Gurieva. She too participated in the approval of almost all of the Relevant Loans as explained (in her case) in paragraph 222 above.

622. The documentary evidence of Ms Gurieva's personal connection to the Individual Defendants is sparse when compared to that of Mr Dubilet and Mr Novikov, but it is clear that her relationship with Mr Kolomoisky was sufficiently significant for her to have had a direct line of communication with him relating to general business payments, which is evidenced pre-nationalisation by a significant number of WhatsApp exchanges and they appear to have known each other well. On the face of it, this relationship was consistent with what might be expected as between a bank employee responsible for the treasury function and an important commercial customer, and is therefore of limited relevance to the extent of Mr Kolomoisky's influence over the decisions made by the Management Board.

623. However, it does establish that they were very accustomed to regular communication with each other and there is some material which is corroborative of the extent to which Mr Kolomoisky was authorising payments on behalf of entities from the operation of which he has sought to distance himself. However, for current purposes the important point is that the nature of the relationship between them, as further evidenced by what occurred after nationalisation (as to which see paragraphs 129ff above), was such that it seems to me improbable that she would not have participated in anything of significance in relation to the Bank's affairs if she had thought it was not in the interest of Mr Kolomoisky for her to do so, or that it was not in accordance with his approval. The evidence indicates, and I so find, that she would not have played the role that she did in the events surrounding the making of the Relevant Loans without the specific or general approval and authority of Mr Kolomoisky.

624. Mr Kolomoisky is also said to have exercised that control through instilling a culture of extreme deference and fear within the Bank, which was said to have been reinforced by his reputation as an aggressive businessman and the employees' knowledge and belief that they would lose their jobs if they did not do as they were told. It was through these sometimes insidious means that the Bank alleges that Mr Kolomoisky, together with Mr Bogolyubov, controlled all significant decisions made by the Bank, and in particular those relating to the Misappropriation, the decisions to approve the Relevant

Loans and the Relevant Drawdowns and the subsequent steps to cover up what had happened through the 2014 Ukrainian Proceedings, the Asset Transfers and the Transformation.

625. To an extent, the Bank's case on its internal culture at the time of the Misappropriation was supported by parts of Ms Pogorelaya's evidence. She said that the culture within the Bank was such that employees simply did not question (or refuse to comply with) instructions given by their superiors. The way she expressed herself was that she simply carried out her instructions and tried not to think too deeply about it. She said that she was sure that she would have lost her job if she had refused to perform a task she had been asked to carry out and that she could not afford to take that risk, because it would not have been easy to find an equivalent job elsewhere. There is no reason to believe that her experience of how to survive in light of the way things were done within the Bank was anything other than widespread amongst its employees – she said that this was part of the Bank's culture and her evidence to that effect was not challenged by the Defendants.

626. The Bank's case on the culture of deference to instructions from superiors was also consistent with the evidence of Mr Luchaninov and Ms Pakhachuk that there were other groups of employees within BOK, and Ms Gurieva was specifically mentioned, who were accustomed to receive instructions from Mr Kolomoisky. (The position in relation to Mr Bogolyubov is less clear-cut and I will revert to it below). These instructions related in particular to the affairs of the Bank's strategic customers, which were understood to be companies within the wider business group of both Mr Kolomoisky and Mr Bogolyubov. The Bank also demonstrated from miscellaneous e-mail exchanges and Skype chats between employees within BOK that employees jumped the moment anything of interest affecting the Individual Defendants arose (particularly in so far as it affected what seems to have been called the shareholder programme) with Ms Rokoman only half jokingly referring to Mr Kolomoisky as being everywhere.

627. Ms Pakhachuk agreed with the Bank's description of existing employees being loyal to the Individual Defendants as opposed to the new management team introduced on nationalisation. She described in her witness statement how Mr Novikov and Ms Gurieva simply left on nationalisation without a proper transfer of their work and that the new management were not certain that they could trust the information given to them by the employees who remained. She went on to say in a telling passage in her evidence:

> "The Former Owners are extremely well known in Ukraine as powerful and influential individuals and, from the beginning of my time at the Bank, I can remember being struck by the feeling that this influence was continuing amongst the Bank staff even though the Former Owners no longer controlled the Bank. I specifically remember having the impression that the existing Bank staff regarded the nationalisation as a temporary phenomenon, something that would come and go, and that the Former Owners would eventually return to their previous positions to control the Bank."

628. She made clear in her oral evidence that the loyalty which this evidence described was to both Mr Kolomoisky and Mr Bogolyubov. She also said that while she accepted that this was an impression, rather than one for which she was able to point to any specific exhibition of personal loyalty, her impression was part of a consistent picture which

comes through in a number of small respects, but which serves to build a more compelling whole. It is right to say that the evidence is consistent with the loyalty being more focused on Mr Kolomoisky than it was on Mr Bogolyubov (indeed there was some contemporaneous material which confirmed that to be the case), but I am satisfied that the way in which it came across to the Bank's new management was that it was applicable to both of them.

629. In broad terms I accept the thrust of Ms Pakhachuk's evidence as to the culture within the Bank. Furthermore, and despite the views I have expressed about the way Ms Lozytska gave her evidence, I agree with her statements to the effect that it took the form of an unwillingness to ask questions about the relationships between the Bank's customers and the Individual Defendants unless the material with which they were presented raised on its face clear suspicions that was the case.

630. The Bank submitted that the culture of fear was reinforced by the Individual Defendants' reputation as aggressive businessmen, and the knowledge that they would lose their jobs if they did not do what they were told. I accept that the culture was intimidatory to some at least of the Bank's employees, but while there was evidence, which I accept, that Ms Rozhkova was subjected by Mr Kolomoisky to threats which implied physical violence (I have already referred to these) there is no direct evidence that Mr Kolomoisky behaved in the same or a similar manner to any of the Bank's employees. I do not, however, think that the Bank's submission that the culture was one of "extreme" deference, even fear within the Bank is made out. The evidence does not go that far, but it does support a clear finding that Mr Kolomoisky was a domineering businessman, who instilled loyalty in those who were prepared to do his bidding, but who had no hesitation in getting what he wanted by intimidating others. This had a direct impact on the culture within the Bank which meant that instructions which did or were thought to emanate from either or both of the Individual Defendants were complied with in an unquestioning and uncritical manner. This was more particularly the case where the instructions related to Bank customers, which were or were suspected to be related in some way to the Individual Defendants as the Bank's shareholders.

631. In a more technical context concerned with related parties, there is a revealing e-mail exchange in June 2015 relating to the issue of regulatory control, which is illustrative of the true position. Mr Medvedev, Mr Luchaninov, Mr Vetluzhskikh and Mikhail Romanov (general counsel in the Bank's compliance department both before and after nationalisation) were all party to the exchange. Mr Luchaninov and Mr Medvedev both expressed the view in this exchange that Mr Kolomoisky and Mr Bogolyubov were not the Bank's controllers but were major shareholders and that the Bank's auditors and the NBU should be informed as much. However, Mr Vetluzhskikh was more doubtful – as he said: "this position is not self-evident- I, for example, although I know what the definition of a controller is, still don't understand why it's that way" and asked Mr Romanov to comment.

632. Mr Romanov's response was illuminating. He said:

> "We're not able to confidently confirm that Mr BGB and Mr KIB are not controllers

> a controller is a physical person or legal entity not controlled by other physical persons, which is able to exercise decisive influence over the management and business of a legal entity by direct and/or indirect sole or joint ownership in that legal entity of 50 or greater percent ownership interest and/or votes therein, or which is able to, independent of any formal ownership, to effectively exercises such influence under agreement or in any other manner.
>
> i.e. control does not necessarily always require "50%." No one will be able to deny that Misters BGB and KIV do not have a material influence over the management of the bank.
>
> in addition, the controller - under the Commercial Code, the Law on Money Laundering and the Law on Registration - is the ultimate beneficial owner (controller). Misters BGB and KIV are listed as the ultimate beneficiaries (controllers) of the Bank on the EDRPOU website."

633. Mr Medvedev's response was as follows:

> "Dear Colleagues,
>
> No need to complicate matters. NBU should receive direct and accurate answers that can only be contested when resorting to proposals and guesses, rather than showing documents. By the way, when the Bank Group structure was formed, the Bank was specified as the controller, not IVK and GBB. And we know why:)
>
> Formally: directly and indirectly each of them owns less than 50% of the Bank's capital; they do not have an agreement on joint share management; on the Supervisory Board they have 1/5 votes (they did have 1/3 votes).
>
> **They do not have control!** It is impossible to prove this any further!"

634. This was obviously a technical debate about the meaning of control from an audit and regulatory perspective, but it is apparent that the Bank's compliance department had a very clear understanding that both of the Individual Defendants exercised a material influence over the management of the Bank amounting to *de facto* control and that nobody could deny it. The reason for this was that, notwithstanding the fact that neither of them alone held 50% or more of the Bank's share capital, they were both able to exercise decisive influence over the management and business of the Bank. It was equally clear that a deliberate decision had been made to structure the Bank in a manner which sought to avoid technical control from arising, which had little if anything to do with the position on the ground.

635. Mr Kolomoisky made little effort in his closing submissions to counter the wealth of evidence which showed that he was a dominant and controlling presence in the affairs of the Bank, and many of his submissions were presented on the basis that this was the right way to characterise his conduct. It is clear to me that he was both a controller through his status as a major shareholder and member of the Supervisory Board and also exercised a level of influence which amounted to *de facto* control over the Bank's affairs and the manner in which it conducted its business, exercised in many respects in consultation and with the approval of Mr Bogolyubov. I am satisfied that the form that control took was that nothing was decided other than at the day to day operational level,

other than on his express instructions or with his explicit approval. In particular I think that it is inconceivable that the structure of the loan recycling scheme and the detail of how it would operate could have been designed or put in place without his express informed consent.

Exercise by Mr Bogolyubov of influence and control over the Bank and its affairs

636. The nature and extent of Mr Bogolyubov's interest and control is not so easy to discern, and it was a central part of his defence that his position was very different to that of Mr Kolomoisky by the time the Misappropriation took place. As he did not attend to give evidence to support this case, the closing submissions made on his behalf concentrated on the contention that the Bank had not established a credible *prima facie* case that Mr Bogolyubov was involved in any wrongdoing and that the documentary record in fact led to an inference that he was not involved in what was called the supposed Scheme. The credibility of his case on this issue is informed by the evidence on the extent to which he had ceased to have any active management role in the Bank.

637. In making that assessment it is important to keep in mind that Mr Bogolyubov was the holder of c.45% of the shares in the Bank, that he was chairman of the Supervisory Board which appointed the Management Board, that he admitted an interest in 19 of the Borrowers and that he accepts that nominees from PBC who held his assets on oral agreements or who subsequently became employees of Sunaltezza are included amongst the nominee UBOs of the Borrowers and other Relevant Entities.

638. Mr Bogolyubov's argument on this aspect of the case was based not just on his contention (albeit not evidenced by him personally) that he did not in fact give any instructions to the Bank's managers and was not in fact involved in any part of its day to day management. It also extended to the true nature of his interest in the shares he held in the Bank, because he said that, since July 2014, he had been exercising the voting rights attached to his shares in the Bank (and his duties as chairman of the Supervisory Board) at the sole direction or instruction of Mr Kolomoisky.

639. While it is not disputed by the Bank that the role played by Mr Bogolyubov was different from the role played by Mr Kolomoisky, and that in a number of respects his involvement was less immediate to what occurred, the Bank contends that there is no evidence to support the submissions made on behalf of Mr Bogolyubov that he somehow stepped away from the Bank during the Misappropriation. There are a number of aspects to this part of Mr Bogolyubov's case which require careful examination.

640. The first is the assertion that, on Mr Bogolyubov's move to London in 2009, he developed a number of other interests, in particular Consmin, a large manganese ore producer. Although his absence from the witness box meant that it was not possible to explore with him the precise extent of his other interests in this period, there is some documentation which supports that this was one of a number of other substantial businesses with which he was involved in some capacity or another. I accept it is quite likely that, after 2009, he devoted less time to the affairs of the Bank, but I do not agree that the very limited material which he has chosen to disclose in relation to his other

interests supports a submission that, notwithstanding his shareholding and membership of the Supervisory Board, his approach was "hands-off".

641. I also accept that, although it was not possible to test the precise extent of his role, or what "hands-off" actually means in this instance, there is no obvious reason why he would have participated in the day-to-day activities of the Bank. Nonetheless, the surrounding circumstances are such that it is not possible to accept without more corroboration that he was inactive to the extent described in his closing submissions. This is not just because he was a major shareholder of the Bank with a significant financial interest in the way it conducted its business. It was not just an investment for him; he was also a member of the Supervisory Board, and more than that its chairman, a position which he did not relinquish until April 2015. On the face of things, it is inherently unlikely that, having that shareholder interest and those Supervisory Board positions, he would have minimised his participation in the Bank's affairs to no more than attendance at the statutory meetings. As with Mr Kolomoisky, part of the reason for this inherent unlikelihood is the nature of his relationship with Mr Dubilet, Mr Novikov and Ms Gurieva, all three of whom were significant members of the Management Board and intimately involved in the steps relied on by the Bank as part of the Misappropriation.

642. The documentary material discloses that, like Mr Kolomoisky, Mr Bogolyubov had a long-standing pre-nationalisation relationship with Mr Dubilet. They were in regular communication on a whole range of such matters (e.g., the data showed 108 mobile phone conversations between them over the period 3 February 2014 to 1 June 2014) as it is reasonable to expect would be discussed between the chairman of a bank's supervisory board and the chairman of its management board. To that extent, there is nothing particularly surprising about the correspondence, although it serves to emphasise that he was far more than just an investor. My attention was drawn to a whole range of different matters on which Mr Bogolyubov was consulted by Mr Dubilet and for which his authority was sought. Many of them related to his own assets (e.g., authorisation of credit limits for managers of his other businesses), but that of itself shows a focus on the details where banking decisions related to his own personal position. He also kept a close eye on matters connected to the issue of related parties and I was shown one example (there seemed to be many more) of his involvement in agreeing a loan repayment schedule, this one for a loan issued by PrivatBank Latvia to RG-Trans LLC.

643. The Bank produced a very detailed 27 page schedule to its closing submissions referring to numerous instances from the correspondence of Mr Bogolyubov's documented involvement with the Bank and its former employees. It covers the period January 2013 to April 2021 and lists many examples not just of Supervisory Board meetings and instances of Mr Bogolyubov's involvement as a shareholder of the Bank, but also his interactions with the NBU and interactions with others as to the Bank's business. Some, but by no means all, of these interactions were said in Mr Bogolyubov's submissions not to have the significance attributed to them by the Bank, and in several instances that is the case. But much of the interaction covers the period after Mr Bogolyubov said that he had reached an oral agreement with Mr Kolomoisky to step back from his role in the Bank. This is a point which I shall deal with shortly, but I accept that the focus in this period is on his role as a member of the Supervisory Board and in communicating

with the NBU, with which he continued to be deeply and intimately involved; there is less miscellaneous communication with Mr Dubilet and others.

644. I do not agree with the submission made on behalf of Mr Bogolyubov that these communications can all be characterised as unrelated to the 'Scheme' or that they were 'innocuous'. In my view, it is significant that they included matters such as the Bank's capital needs relating to a proposal for the issue of subordinated debt, the grant of stabilisation loans, related party letters, the Restructuring Plan and the Asset Transfers all of which were related to the value of the Bank's loan book and in the case of the Asset Transfers to steps taken by the Individual Defendants in response to the Misappropriation. It is also significant that the communications extended, pre-nationalisation, to matters relating to Mr Bogolyubov's other business interests, including setting the limits for which the Bank should lend to his own companies. In that regard, the relationship between them extended materially beyond that to be expected between a bank's chairman and one of its controlling shareholders.

645. At the time of the Misappropriation, there is only one short period (between February and May 2014) in which there is an apparently complete record of telephone communication between Mr Bogolyubov and Mr Dubilet. I have reached the conclusion that there is no reason to think that this level of regular communication between the two men was unusual. The more likely explanation for the absence of any direct evidence of such communications in other periods is not that they did not occur, but that the records of them have not survived. The level of communication for that single four-month period, combined with the fact that there is no evidence that Mr Bogolyubov was in any manner surprised when the making of the Relevant Loans and the events surrounding the Misappropriation were reported by the press (a point which also applies to Mr Kolomoisky and to which I will return), is evidence that, if Mr Dubilet had given evidence at the trial, it is unlikely to have supported Mr Bogolyubov's case that he did not know about or give approval to the Relevant Loans.

646. Mr Dubilet was not the only individual involved in the Misappropriation with whom Mr Bogolyubov was in regular contact pre-nationalisation and who is said to have acted in accordance with his instructions in relation to the affairs of the Bank. Thus, the surviving direct evidence of Mr Bogolyubov's pre-nationalisation contact with Mr Novikov is more pervasive than that of Mr Kolomoisky and included e-mail. In the period after 2011, these communications covered a wide range of matters including personal investment opportunities, social events, the Bank's audit and treatment of related parties, asset financing and loan proposals (from the Bank and other financiers such as Sberbank) in relation to Mr Bogolyubov's assets including Hotel Split, which had been included in Annex B to the Restructuring Plan, correspondence about the operation of the banking market in Cyprus, and correspondence about Mr Pinchuk and the Pinchuk Proceedings.

647. There was also correspondence relating to the Deeds of Waiver and Indemnity said to have been executed in May and June 2015, which I referred to at the beginning of this judgment and to which I revert below. There is also some evidence of pre-nationalisation WhatsApp bank payment-related communication between Mr Novikov and Mr Bogolyubov's personal assistant, Mr Anischenko. He moved to Geneva with Mr Bogolyubov in 2017 and has continued to work for Mr Bogolyubov since the commencement of these proceedings. But Mr Bogolyubov's own pre-2017 WhatsApp messages with Mr Novikov have been deleted.

648. Although the communications between Mr Bogolyubov and Mr Novikov were regular and covered a wide range of topics, the number of e-mails overall was not extensive. The same cannot be said about phone communication. Although very few telephone logs were disclosed, it is striking that, between February and May 2014 (which was the same relatively short period in which telephone records have been disclosed relating to Mr Bogolyubov's contact with Mr Dubilet), Mr Bogolyubov also communicated on an almost daily basis with Mr Novikov. In the light of the practice adopted by Mr Bogolyubov of destroying documentation which would have been relevant to these proceedings, I consider it is very likely that the disclosed material relating to his relationship with Mr Novikov does not give anything other than a wholly incomplete picture of what in fact occurred.

649. By contrast there is no direct evidence of Mr Bogolyubov's pre-nationalisation contact with Ms Gurieva, such as to establish that he gave specific instructions to her as to how she should carry out her duties. Furthermore, Ms Montgomery's cross-examination of Mr Luchaninov established that his assumption that, because Ms Gurieva managed BOK and because BOK was a specialised unit for servicing strategic Bank clients amongst whom were the Individual Defendants and their companies, she would have been taking instructions directly from Mr Bogolyubov, was not based on any direct evidence. Nonetheless it is clear that, in the absence of evidence to the contrary, and because most of the most valuable companies accepted by the Individual Defendants in their asset disclosure lists as their jointly held assets were also recorded as clients of BOK, it is highly likely that Mr Bogolyubov had more regular contact with Ms Gurieva than the disclosed documentation shows.

650. It was also said on behalf of Mr Bogolyubov that it is not part of the Bank's case that any acts comprising the loan recycling scheme were authorised by the Supervisory Board. That is right so far as it goes but, as Mr Bogolyubov accepts, one of the functions it was responsible for was lending policy and it played a significant role in the Asset Transfers when he was still a member. I do not accept that the evidence demonstrates that Mr Bogolyubov's role as member and chairman of the Supervisory Board can properly be characterised as no more than limited and formal. It simply shows that its functions did not include day to day management, although even that does not give a complete picture of the true position, because the Charter required all loans exceeding US$2 million and all related party lending exceeding US$500,000 to be authorised by the Supervisory Board.

651. However, there is no documentation which shows that these formal lending requirements were ever complied with and it seems highly likely that the contrary was the case, in any event by any form of formal board approval. There is credible evidence that Mr Bogolyubov had not been signing off on loans at all since 2010 and that, notwithstanding the provisions of the Charter, everything had been been signed by Mr Dubilet. This appears to have been news to Mr Luchaninov who was head of compliance, all of which demonstrates that the Bank's internal controls were not functioning properly. Indeed the NBU addressed the position in two of its audit reports (sent to Mr Bogolyubov on 15 August 2014 and 27 March 2015), which criticised the communication between the Supervisory Board and the Management Board. One of these reports also made particular reference to a failure to obtain Supervisory Board approval for loans to related parties.

652. It was said on behalf of Mr Bogolyubov that this illustrated not just that he was not involved in assessing any of the relevant risks, let alone in approving or being involved in the provision of the circular loans, but also that he was not involved in approvals which the law required to be given by the Supervisory Board of which he was chairman. This was said to be an example of why it was not possible to infer from the functions which the Supervisory Board should have fulfilled that his membership of the Supervisory Board meant that he must have been aware of and approved related party lending.

653. Mr Bogolyubov is correct to say that the NBU was very critical of the ineffectiveness of the interaction between the Supervisory Board and the Bank's management. Indeed the Bank's description of the criticisms of the deficiencies highlighted in that regard as 'excoriating' is fully justified. They extended to (a) failures to conduct regular assessments of the effectiveness of the Management Board's actions on managing the Banks operations, (b) failures to submit to the Supervisory Board timely, meaningful, accurate and complete reports on the management of significant risks and the methods of control over these risks and (c) failures to ensure that joint written decisions of the Management Board and the Supervisory Board were made when granting loans and guarantees to members of the Bank's management where the loan exceeded UAH 120,000.

654. The effect of Mr Bogolyubov's submission was that this failure to comply with the formalities of what should have occurred was inconsistent with the Supervisory Board having knowledge of the extent of related party lending and the Relevant Loans. Either the Supervisory Board did not know what was going on and cannot be criticised for it or, at most, the members were simply negligent in their supervision of management rather than knowing participants in management dishonesty.

655. Quite apart from the fact that Mr Bogolyubov chose not to attend court to enable the Bank to test his case on this point in cross-examination, I do not think that carelessness is the right inference to draw. The reason for this is that I agree with the Bank's submission that a rather more striking aspect of what occurred is the way that Mr Bogolyubov responded or did not respond to the NBU report of which he (like Mr Dubilet) was a named addressee. Thus, there is no evidence that the Supervisory Board was surprised by what had been disclosed by the NBU or took any action to enforce the obligations of the Management Board to introduce mechanisms to enforce the requirements of the NBU's regulations (echoed in what was at the relevant time clause 9.3.3.(45) of the Charter) on related party lending. This is all the more striking in circumstances in which he and Mr Kolomoisky were the main individuals in respect of whom the related party issue arose. This is a point which is further affected by my findings in relation to the ownership and control of the Relevant Entities.

656. I think that the Bank is correct to submit that Mr Bogolyubov's reaction to this highly critical report was the opposite of what a person in his position with no prior knowledge of these deficiencies would have done. Neither he nor Mr Kolomoisky insisted on an investigation, nor did either of them take any steps to institute disciplinary action or proceedings against the members of the Management Board, whom he now says were responsible for what occurred. Indeed, in their capacity as members of the Supervisory Board, they voted in favour of the Management Board's reappointment and, as I shall explain later in this judgment, they both agreed to the charging of assets in which they

had an interest as security for stabilisation loans advanced by the NBU and for further contributions to the Bank's capital.

657. At the very least, this is consistent with the fact that the reason that Mr Bogolyubov as its chairman did not do so was because he already knew exactly what approach the Bank's management was taking to the issue of related party lending and had given his approval to what was being done. For reasons which will become apparent, the absence of any manifestation of surprise by the members of the Supervisory Board (including most particularly the Individual Defendants) is not just consistent with their prior knowledge of widespread improper related party lending, it also reflects and corroborates the other circumstantial evidence that they knew and approved of lending in the form of the loan recycling scheme of which the Relevant Loans formed part and also that it was being extended to related parties for their own ultimate benefit. On that last point, the obvious question which arises, to which there has been no answer given during the course of the trial, is why he did not make an enormous fuss about what had been discovered if it had not all been done for the ultimate benefit of him and Mr Kolomoisky and on their instructions.

658. This conclusion is corroborated by the attitude of the shareholders at their meeting held on 27 April 2015, which was held after the NBU's March report had been provided to Mr Bogolyubov one month earlier. It was recorded that:

> "The work of [the] Management Board in 2014 shall be acknowledged as satisfactory and in accordance with the purpose and direction of the Company's activities"
>
> and
>
> "Due to the established actions of the Supervisory Board and the Management Board, the Bank fulfils its obligations in time to the budget, shareholders, state and supervisory authorities…"

659. There was a similar response to the NBU's 2016 inspection report which referred to related party transactions consuming more than 70% of the Bank's assets and over 800% of its regulatory capital, and which went on to make similar criticisms of the Bank's internal controls and reporting procedures to those which had been criticised in the NBU's report for 2014. The Supervisory Board simply told the Management Board to implement the NBU's recommendations, but again there is no evidence of any surprise at the form the NBU report had taken. Again, at the shareholders' meeting held on 26 August 2016, the performance of the Management Board was recognised as satisfactory, with the following recorded in the minutes, and no indication that an investigation was required into the reasons behind the NBU's conclusions:

> "The entire team of the Bank, according to the Supervisory Board, deserves high appraisal and the Bank's Management Board financial and operating performance report deserves approval."

660. One of the points made on his behalf in closing was that there was no evidence to support an inference that Mr Bogolyubov had any control over Mr Kolomoisky. I accept that submission, not least because I also accept that the evidence of Mr Kolomoisky's own strong and domineering character was pervasive and the same

cannot be said about the evidence relating to the way that Mr Bogolyubov behaved. It points to him being a less central figure in the affairs of the Bank than Mr Kolomoisky. However, it remained the case that the Bank was properly to be regarded as one of the Individual Defendants' jointly owned assets (of which there had been many over the years) and there is every indication from the way in which shareholder and Supervisory Board decisions were made that, throughout the period up to nationalisation, they worked in conjunction with each other in relation to its affairs.

661. The Bank sought to bolster its case on the extent of Mr Bogolyubov's controlling influence by adducing evidence from Mr Luchaninov. He explained that he made assumptions that Ms Gurieva and Mr Novikov would have taken instructions directly from both Mr Kolomoisky and Mr Bogolyubov. In both instances there was some justification for the assumptions he made based on the way in which BOK and the Bank's compliance department (of which he was head) operated. Indeed the fact that Mr Luchaninov's assumption was genuinely made was not disputed by the Defendants.

662. However, the weight of this evidence is affected by Mr Luchaninov's acceptance that he had no personal knowledge of how Mr Bogolyubov in fact acted because he had never witnessed any instructions being given by him. His lack of any detailed understanding of Mr Bogolyubov's real role is also apparent from the fact that he did not know that Mr Bogolyubov had moved to London in 2009. Furthermore, his evidence in relation to the instructions he assumed were given by Mr Bogolyubov to Mr Novikov related to a disclosure exercise carried out by Freshfields in relation to the Pinchuk Proceedings in which Freshfields acted for Mr Kolomoisky, but not Mr Bogolyubov. As Mr Luchaninov himself accepted, this went some way to undermining his assumption that Mr Novikov was acting for both of the Individual Defendants rather than just Mr Kolomoisky.

663. The basis for Mr Luchaninov's assumptions was also affected by his agreement that he had never met Mr Bogolyubov or seen him at the Bank's premises. The fact that he was rarely present, anyway in Mr Luchaninov's department, was confirmed by his oral evidence that "some colleagues have seen Mr Bogolyubov personally, but that was long ago", by which he meant times which may have been more than 10 years prior to the time with which these proceedings are concerned. I accept that all of this significantly affects the weight which it is appropriate to attribute to this aspect of Mr Luchaninov's evidence.

664. The Bank also adduced evidence from Ms Lozytska that she assumed that Mr Dubilet, Ms Gurieva, Mr Novikov, Mr Yatsenko and Ms Chmona would have had close relationships with both of the Individual Defendants. As I have already explained, she was challenged about this and accepted that she had no direct knowledge of their interpersonal relationships and based her assumption on the structure of the Bank's management committees and the Supervisory Board. Taken alone, what Ms Lozytska had to say was of limited evidential value because it added very little to the undisputed fact that Mr Bogolyubov had roles pursuant to which he would have received reports from Mr Dubilet who would himself have received reports from the heads of the various business divisions, included BOK.

665. Nonetheless, Ms Lozytska, who was employed by the Bank at the time, stood by her belief that the Individual Defendants had a close relationship with the heads of the Bank's various business divisions and, in the absence of any evidence from Mr

Bogolyubov to explain that he did not, I think that this assumption cannot be discounted altogether. It is part of the overall picture, which gives some support to an inference that Mr Bogolyubov was very much more than just an investor with a wholly non-interventionist role as chairman of the Supervisory Board.

666. It follows that, while I agree that there is little by way of particularisation of the basis for the assumptions which were made by Mr Luchaninov and Ms Lozytska, I do not think that they can be dismissed out of hand. I also consider that they were consistent with the evidence of Ms Pogorelaya and Ms Pakhachuk, the latter of whom had said in an interview that Mr Kolomoisky was believed by 70% of the Bank's employees to have been "a god, a giant who created something that no one could create", but she rejected a suggestion made in her cross-examination by Ms Montgomery that this supported the proposition that members of the Bank's staff were only loyal to Mr Kolomoisky. She said that, although she had no personal acquaintance of Mr Bogolyubov and Mr Kolomoisky, they were in her view "both equally responsible persons". It is clear to me that, in general terms, this description both of Mr Kolomoisky and Mr Bogolyubov reflected a widely held view by the Bank's employees of the role within the Bank which they both fulfilled.

667. This evidence has to be treated with some caution, but I have no real doubt that it all reflected a common understanding within the Bank. As Mr Luchaninov explained, he came to the conclusion that Ms Gurieva was taking instructions from Mr Bogolyubov having observed the way in which BOK, as the specialised unit for servicing the Bank's strategic clients, was in possession of and used information relating to the beneficial owners of those strategic customers. Although the evidence was neither specific nor very clear (and evidence about the basis of the assumptions he made in relation to instructions given by Mr Bogolyubov to Mr Novikov is similarly unclear), I think that the point he was trying to express was that the work which BOK was doing was on the basis that both Ms Gurieva and Mr Novikov were in a general sense known to have been in communication with Mr Bogolyubov, even though he did not observe that contact himself.

668. They are also consistent with the status which Mr Bogolyubov had within the Bank as shareholder and chairman of the Supervisory Board and the nature of the long-term relationship he had with Mr Kolomoisky whose influence on the Bank's affairs generally, and lending practices in particular, was more immediately dominant and pervasive than that of Mr Bogolyubov.

The Deeds of Waiver and Indemnity

669. Initially, Mr Bogolyubov sought to bolster what he said were the limitations in his role at the Bank by relying on the following paragraph in his Defence:

> "On 2 March 2014, Mr Kolomoisky was appointed governor of the Dnipropetrovsk region. Mr Bogolyubov was concerned about the potential impact upon the Bank of Mr Kolomoisky holding such a high-profile political position at a time when Russia was at war with Ukraine. In June 2014, Mr Bogolyubov decided that he wished to divest himself of his shareholding in the Bank. It became apparent that Mr Bogolyubov would not be able to sell his shares in the Bank at that stage but,

> until he could do so, he decided to reduce his limited role on the Supervisory Board. He subsequently resigned."

670. Subsequently, in his Re-Re-Amended Defence served several years after the commencement of the proceedings, Mr Bogolyubov added the following allegation, which sought to rely for the first time on the existence of an oral agreement, later confirmed by the execution of certain deeds of waiver and indemnity:

> "On or around 12 May 2015, Mr Bogolyubov and Mr Kolomoisky executed a deed of waiver and indemnity (the Deed of Waiver) recording an oral agreement that had been made between them on or around 1 July 2014 concerning Mr Bogolyubov's desire to divest his shares in the Bank. The Deed of Waiver recorded that (and it was the case that) since 1 July 2014, Mr Bogolyubov had been exercising the voting rights attached to his shares in the Bank and his duties as chairman of the Supervisory Board at the sole direction of Mr Kolomoisky. In May and June 2015, Mr Bogolyubov entered into similar agreements with the Bank's then other significant shareholders (Triantal Investments Limited, Timur Novikov and Alexander Dubilet)."

671. I shall call the deed dated 12 May 2015 the "Initial Deed of Waiver". Mr Kolomoisky's signature was witnessed by Mr Novikov and Mr Bogolyubov's signature was executed by an English solicitor called Alex Van Der Zwaan, neither of whom were called to verify its authenticity. It contained a number of recitals. The first referred to an agreement reached on 1 July 2014 between Mr Kolomoisky and Mr Bogolyubov in respect of any liabilities arising from Mr Bogolyubov's positions as chairman of the Supervisory Board or his direct and indirect shareholdings in the Bank. The second was that, in order to maintain public confidence in the Bank and to maintain the stability of the Ukrainian financial system, Mr Bogolyubov would stagger the reduction in his direct and indirect shareholding in the Bank over time until he was no longer a shareholder and that he would remain as chairman of the Supervisory Board pending the identification of an appropriate replacement. The third was that, despite remaining a shareholder of the Bank and being in the position of chairman of the Supervisory Board, Mr Bogolyubov "no longer exercises any management control over PrivatBank *de facto* even though he continues to do so *de jure*". It went on to record that, since 1 July 2014, he had been voting his shares in the Bank and acting as its chairman at the sole direction of Mr Kolomoisky.

672. The operative parts of the Initial Deed of Waiver then reiterated the recitals in relation to how Mr Bogolyubov had been exercising his voting rights, that he no longer exercised any management control and that anything done by him since 1 July 2014 had been done solely as a result of instructions given by Mr Kolomoisky. By clause 3, Mr Kolomoisky agreed to procure a waiver from the Bank and all of its shareholders relating to any breaches or potential breaches committed by him as shareholder or chairman of the Bank since 1 July 2014. By clause 4, Mr Kolomoisky agreed to indemnify Mr Bogolyubov against any liability for loss arising out of any claim arising in connection with his position as chairman or shareholder of the Bank, including in respect of his own "negligence, gross negligence, fraudulent or otherwise unlawful acts".

673. Although they were not all pleaded, Mr Bogolyubov's opening and closing submissions also referred to four further deeds which he entered into later in May 2015 and in June

2015. One of these further deeds of waiver was with Mr Kolomoisky himself; the other three were with three of the Bank's minority shareholders (Mr Dubilet, Mr Novikov and Triantal Investments). These further deeds which, like the Initial Deed of Waiver, were all governed by English law, appear to have been the product of Mr Kolomoisky's partial compliance with his obligations under clause 3 of the Initial Deed of Waiver. They operated to release any claims the relevant counterparty had against Mr Bogolyubov arising out of his shareholding in the Bank or his chairmanship of the Supervisory Board for the period after 1 July 2014. Mr Bogolyubov's entry into them and the Initial Deed of Waiver (together the "Deeds of Waiver and Indemnity") was described in his closing submissions as the point of greatest significance in relation to his alleged control of the Bank.

674. Notwithstanding the language of clause 3 of the Initial Deed of Waiver, there was no evidence that Mr Bogolyubov became party to similar deeds of waiver with the minority shareholders other than Mr Dubilet, Mr Novikov and Triantal Investments, although the trial bundle did contain an undated draft of a further deed for signature by the Bank. There was no evidence that this was ever executed.

675. In its Reply, the Bank put Mr Bogolyubov to proof of the authenticity of the Initial Deed of Waiver and specifically pleaded that Mr Bogolyubov was not able to delegate or abrogate his duties as chairman of the Supervisory Board, whether by acting at the sole direction of Mr Kolomoisky or at all. The latter point is one to which I will revert a little later, but it seems to me that Mr Bogolyubov is correct to submit that the Bank does not in substance maintain that the Deeds of Waiver and Indemnity were not authentic as documents, but rather that they did not accord with the reality of the situation, which was that Mr Bogolyubov "continued to have a role in the Bank". Indeed it is clear that the aspects of the entry into the Deeds of Waiver and Indemnity on which the Bank placed most reliance were (a) the reasons they were entered into, (b) the reasons they were then kept secret and (c) the reasons why Mr Bogolyubov had not instituted any proceedings against Mr Kolomoisky under the indemnity.

676. The Bank relied on a number of considerations to support its argument that whatever might have been recorded in the Deeds of Waiver and Indemnity, there was in fact no oral agreement made between Mr Kolomoisky and Mr Bogolyubov in July 2014. The first is that there are no other documents dating from the period between July 2014 and May 2015 which refer to or evidence in any manner the oral agreement alleged. This is despite the facts that the court made an order for specific disclosure in relation to the negotiation and conclusion of what was alleged to have been the oral agreement and no documents were disclosed by Mr Bogolyubov, and that Mr Bogolyubov continued to chair Supervisory Board meetings (there were 35 during the period between the alleged oral agreement and 12 May 2015) and to carry out his other duties as chairman without recording that he was doing so at the sole direction of Mr Kolomoisky.

677. These included regular communications with the NBU in relation to the grant of nine stabilisation loans and the regular signing of loan repayment schedules. It is also strikingly inconsistent with Mr Bogolyubov's position that, during the course of December 2014, March 2015 and April 2015, he joined with Mr Kolomoisky in granting security for some of these stabilisation loans over his own personal assets, with no contemporaneous evidence that, at the time this security was granted, he had any claim against Mr Kolomoisky if that security were ever to be called on, or that he ever told the NBU that this was the case.

678. The second is that Mr Bogolyubov has not himself explained in evidence, and has not called evidence from any other individual to confirm, the basic elements of the alleged oral agreement, including the words used, who they were expressed by and to whom, and when and where they were spoken; nor is there any evidence from Mr Kolomoisky which supports the case now made by Mr Bogolyubov. Indeed it goes rather further than that because in Mr Kolomoisky's own abandoned evidence, which was referred to on this point in submissions made by both the Bank and Mr Bogolyubov, it was said that the only agreement actually reached on this topic was that reflected in the Deeds of Waiver and Indemnity themselves, the discussions for which did not commence until 2015. The most that could be said arising out of Mr Kolomoisky's abandoned witness statement was that discussions in relation to splitting their joint assets had started in 2014 after Mr Kolomoisky became a politically exposed person as a result of his appointment as governor of Dnipropetrovsk Oblast, but that no agreement was reached at that stage. Such evidence as there was from Mr Kolomoisky was that agreement as to how to proceed was not in the event reached until after a particular aspect of Ukrainian law was changed in 2015, which I infer was shortly before the Initial Deed of Waiver was executed.

679. The third is that there is no record that, during the period between the conclusion of what was said to be the oral agreement reached in July 2014 and the execution of the Initial Deed of Waiver, Mr Bogolyubov voted his shares and acted as chairman at Mr Kolomoisky's direction. Mr Bogolyubov does not point to anything which contradicts this as a matter of fact, but says that this does not counteract the existence of clear evidence of the agreement in the Deeds of Waiver and Indemnity themselves. I disagree. In my view, if there had been the agreement alleged, there would have been some trace of its existence or some contemporaneous indication that this was the way they were now operating. None were drawn to my attention.

680. As to the Deeds of Waiver and Indemnity, it is stressed by the Bank that there is no evidence that the Bank itself was a party to any of them – there was certainly no version executed by the Bank. On that basis alone, therefore, they do not give Mr Bogolyubov a defence to the Bank's claims. Indeed, I did not understand Ms Montgomery to contend to the contrary, and to that extent the Bank has created something of a straw man. She also accepted in her oral opening that the first RSAs were entered into before the date to which the Deeds of Waiver and Indemnity related back. It followed, as she put it, that "it's not a get out of jail free card in that sense". This is correct and, as the Bank pointed out, the 1 July 2014 date was after many of the Relevant Loans had been agreed and many of the Relevant Drawdowns had been made. However, their significance is said by Mr Bogolyubov to be not so much that they might function in themselves as a defence to the Bank's claim, but rather that they evidence what was happening on the ground. They are therefore said to corroborate Mr Bogolyubov's case on the extent to which he had stepped back from active participation in the Bank's affairs, anyway during the period after June 2014.

681. The Bank disagreed, and submitted that the form of the Initial Deed of Waiver in fact supports its case. Its significance lies in the fact that the very wide-ranging indemnities extend not just to Mr Bogolyubov's own negligence and gross negligence, but also to his own "fraudulent or otherwise unlawful acts". It is said that the obvious inference to be drawn from his failure to explain why he required a waiver extending to fraudulent

acts is that he knew that he had committed fraudulent acts between July 2014 and 12 May 2015 and that he feared detection at that time.

682. I think that there is some substance in the fact that the Deeds of Waiver and Indemnity were entered into in the form they were because Mr Bogolyubov was concerned about fraud in the most general sense. However, although I agree with the Bank's submission that an indemnity against fraudulent conduct is unusual, I do not think that the inclusion of such words indicates of itself that he knew he had been dishonest in the period subsequent to 1 July 2014 (although it is certainly consistent with such a state of mind). What is more probable is that he knew that the manner in which the Bank's affairs had been conducted meant that he might find himself at the end of proceedings alleging that he had been party to or otherwise implicated in fraudulent activity, and he was sufficiently concerned to cover himself against that eventuality given that he anticipated that, going forward, he might find himself in a less influential position to control the course that such proceedings might take.

683. The Bank also relied on the fact that the July 2014 oral agreement and the Deeds of Waiver and Indemnity were kept secret from the Bank's auditors. This is clear from the fact that its financial statements audited by PwC for both 2014 and 2015 contained the following statement:

> "As of [the relevant year end, and the previous year end] according to the share registers the ultimate major shareholders of the Bank were Mr I.V. Kolomoyskiy and Mr G.B. Bogolyubov who as at [the relevant year end] owned directly and indirectly respectively [relevant percentage shareholdings] of the outstanding shares and neither of which individually controlled the Bank. The major shareholders of the Bank did not have a contractual agreement on joint control of the Bank."

684. A similar representation was made to EY for the purposes of the EY Related Parties Report, in relation to which the language to be used was subject to discussion both within the Bank and with EY (I referred to it in paragraph 631 above). The words settled on were: "… none of the shareholders of the Bank is to be considered as its controller, because each of them [has less than a 50% shareholding] and there is no agreement between them that enables such impact". I agree with the Bank that, if the Deeds of Waiver and Indemnity were genuine, the way in which the position was expressed both in the Bank's financial statements and in the EY Related Parties Report was seriously misleading.

685. It was submitted on behalf of Mr Bogolyubov that the fact the agreements were not made public is consistent with the concern stated on the face of the Initial Deed of Waiver that it would damage public confidence in the Bank and the Ukrainian financial system more generally if it was known that Mr Bogolyubov no longer wished to be associated with the Bank (see the second recital I referred to above). I can see that that might be the case, but for the chairman of a bank to suggest it is appropriate to hide from that bank's auditors, regulators and the public at large the fact that he no longer wishes to be associated with the bank and is no longer able to exercise his rights as shareholder and his duties as chairman of the Supervisory Board free of the instructions from his co-shareholder is a remarkable proposition. It is self-evident that the suggestion is not of itself inconsistent with Mr Bogolyubov stepping back from

involvement in the Bank's affairs, but the way it appears to have been done betrays a wholesale disregard for all normal and ethical standards of commercial conduct.

686. The Bank said that one of the other striking aspects of the entering into of the Deeds of Waiver and Indemnity is that, like the anterior oral agreement said to have been reached in July 2014, there is almost no contemporaneous documentation relating to their execution or implementation. Given the significant nature of what was proposed, that is very surprising. The Bank also submitted that the total absence of documentation relating to the practical operation of the Deeds of Waiver and Indemnity raises deep suspicions about the purposes for which the documentation was entered into and whether it did in fact reflect or record the true position. The trial bundle contained only two letters by which Mr Kolomoisky gave Mr Bogolyubov an instruction to act in a particular manner pursuant to his rights under the Deeds of Waiver and Indemnity, both a long time later: one in March 2016 in relation to a company called Fransiano and one on 27 September 2016 instructing Mr Bogolyubov to sign a draft letter to Ms Gontareva at the NBU.

687. Both were addressed to Mr Bogolyubov at his London address, which the Bank said was also surprising because the evidence is that, by the end of September, his marriage had broken down and he was no longer living in London. I did not find this a very persuasive submission because, although some of the evidence from the Bogolyubov matrimonial proceedings indicated that he left the UK shortly after the family returned from a holiday in March 2016 that year, there is other evidence that he was visiting the matrimonial home in Belgrave Square on a relatively regular basis and had not yet relocated to Switzerland, which only occurred at the beginning of 2017. In light of that evidence I do not find it particularly surprising that correspondence was addressed to him at Belgrave Square.

688. The Bank said that the metadata of these documents cast doubt on whether they were contemporaneous instructions, because it appeared to show that they were created in 2019. However, I am not prepared to proceed on the basis that this was the case, because Mr Bogolyubov's solicitors confirmed that they had originally been received from their client in hard copy, which meant that the applicable metadata was by its very nature unrelated to the date of the documents' creation. Of more significance is the fact that there is no contemporaneous corroborating evidence such as e-mails, replies to the relevant instruction or witness evidence that they were indeed sent and received.

689. Indeed, such evidence as exists is more consistent with the Deeds of Waiver and Indemnity not accurately recording Mr Bogolyubov's continuing active interest in the affairs of the Bank, because he was held out, anyway by Mr Kolomoisky, in a manner which was inconsistent with the apparent language of the Initial Deed of Waiver. Thus, at meetings with the NBU during the course of the summer of 2016 (i.e., over a year later), Mr Kolomoisky was still representing to the NBU that he needed to check with Mr Bogolyubov before he could agree to various points in relation to the Restructuring Plan and indeed that "some steps should be negotiated with" him. While an ordinary shareholder is likely to have an interest in any restructuring plan, this is difficult to understand if, as the Initial Deed of Waiver recorded, he had for some time been "voting his shares in Privatbank … at the sole direction of" Mr Kolomoisky. I should add that Ms Rozhkova knew that Mr Bogolyubov was not based in Ukraine and assumed that this was the reason why issues relating to the Bank were led by Mr Kolomoisky. Although this was only an assumption, she was not challenged on the basis for the

assumption and it is inconsistent with the idea that Mr Bogolyubov was not continuing with his participation in the affairs of the Bank.

690. In my judgment, the evidence justifies a conclusion that it is unlikely that the oral agreement pleaded by Mr Bogolyubov was reached in July 2014. I find that it was not. I also consider that the consequence of this finding is that the Deeds of Waiver and Indemnity were seriously misleading in the impression they expressly gave as to the prior existence of an oral agreement, which had not in fact been reached. I have also reached the conclusion that, although the Deeds of Indemnity and Waiver were probably signed when they purported to be signed in May and June 2015 and to that extent were authentic, they did not reflect the true nature of Mr Bogolyubov's role in relation to the Bank going forward, and were not intended to do so. If they had been, they would not have been kept secret and the public representations that the major shareholders of the Bank did not have a contractual agreement on joint control of the Bank could not have been made. Furthermore, it is unlikely that Mr Bogolyubov would have continued to conduct himself in relation to the affairs of the Bank thereafter as he did to the extent described elsewhere in this judgment.

691. What might happen if Mr Bogolyubov were to seek to enforce them against Mr Kolomoisky is a matter of speculation, but I do not think that they give the support to Mr Bogolyubov's defence to this claim that he maintains. In short, they do not provide any material evidence that he was as "hands-off" in relation to the Bank's affairs as he seeks to contend. I am therefore driven to the conclusion that it was dishonest for Mr Bogolyubov to use them for the purpose of bolstering his case that he had already given up to Mr Kolomoisky his freedom to act at a stage when no such agreement had in fact been reached. I also consider that, even after they were signed, it was highly misleading of him to allow the Bank's auditors and the NBU to proceed on the basis that he still fulfilled his role as chairman (and then member) of the Supervisory Board of the Bank if he had an enforceable right to in effect delegate those duties to Mr Kolomoisky.

Summary of the influence and control of the Individual Defendants

692. Against the background I have just described, although there are important differences between the Individual Defendants as to the way in which they exercised their influence over the affairs of the Bank, the evidence points to both of them playing a significant role not just in supervising the Bank's affairs but also in giving informal and often unrecorded instructions and approvals to the Bank's management in relation to the conduct of its affairs. In my view, the Individual Defendants exercised their influence over the Bank in a manner which is capable of being characterised as control. It operated in a more immediate sense than simply exercising their rights through the medium of the General Meeting and the Supervisory Board and to that extent, they were both much more than disinterested investors. Their influence was materially more pervasive than that.

693. I have also concluded that the Bank's management was conditioned to acting in accordance with their instructions and in what they conceived to be the interests of the Individual Defendants. The nature of the relationship between the Individual Defendants and the members of the Bank's management means that it is most improbable that the members of the Management Board would have authorised the

implementation of any strategic decisions in relation to the conduct of its business without what they considered to be the approval of the Individual Defendants, particularly where those decisions related to something as significant as the operation of a loan recycling scheme which they must have known to be unlawful. This continued to be the case throughout the active period of the Misappropriation, although I also find that by the time the Deeds of Waiver and Indemnity were entered into, Mr Bogolyubov was starting the process of stepping away from the involvement that he had in the Bank's affairs, a process which was anyway partially implemented when he was replaced as chairman of the Supervisory Board in mid June 2015.

694. I have also concluded that, in the absence of any evidence from the Individual Defendants that they had no knowledge of strategic decisions taken by the Management Board and cannot for that reason be said to have authorised them, the balance of probability is that they did. As will appear, this is one but only one of the reasons why I have rejected the Defendants' case that the Individual Defendants did not know about or authorise the Relevant Loans and did not participate to that extent in the Misappropriation. The Bank has adduced very strong circumstantial evidence that they did, and that the suggestion that the Bank's senior management were off on a frolic of their own is fanciful.

695. It is a central part of the Bank's case that, not only the Bank itself, but also all of the other entities involved in the Misappropriation (viz. the Borrowers, the Intermediary Borrowers, the New Borrowers, the Corporate Defendants and the ED Principals) were owned and/or controlled by one or both of the Individual Defendants. Similar, but not identical issues, are said to arise in relation to the ownership and control of the Share Pledgors. In reaching my conclusions on this aspect of the case, the findings I have already made as to the level of control which the Individual Defendants exercised over PBC and Primecap are of relevance, as are my findings in relation to the manner in which the Individual Defendants exercised their influence and control over the affairs of the Bank.

696. It is said by the Bank that establishing the Individual Defendants' ownership and/or control of all of these entities goes a long way towards proving that they were behind the Misappropriation, and that without the involvement of those entities, the Misappropriation could not have been implemented in the way that it was. In large part the Individual Defendants deny the totality of this part of the Bank's case. In summary, both of the Individual Defendants admit to having held an ownership interest in some of the Borrowers and the Intermediary Borrowers during the period of the Misappropriation, but they both deny any personal control of any of them, anyway on a day-to-day basis. They also deny that they owned or controlled any of the New Borrowers or that they owned any of the Corporate Defendants or the ED Principals.

Ownership and control of the Borrowers and Intermediary Borrowers

697. As Mr Anderson put it in the Bank's closing submissions there remained two live issues in relation to the Borrowers and the Relevant Loans. The first was whether the Individual Defendants procured the Relevant Loans and the Relevant Drawdowns. The second was whether they owned and/or controlled the Borrowers. The two questions are intimately interlinked, because it is most improbable that the Relevant Loans would

have been entered into by the Borrowers in the absence of specific or general consent from the individuals by whom they were controlled. By the end of the trial there was no real issue that the loans to the Borrowers and the Intermediary Borrowers were all agreed for the purposes of making prepayment under the sham RSAs in a manner which was clandestine and contrary to all principles of prudent banking.

698. The Bank alleges that the true beneficial owners of each of the Borrowers were the Individual Defendants (or one of them) and that a large number of individuals said by the Individual Defendants to be the beneficial owners of a Borrower are in fact no more than nominees for the Individual Defendants. This is denied by both of them, although by the commencement of the trial Mr Kolomoisky had admitted to having an interest in 21 of the Borrowers and 14 of the Intermediary Borrowers while Mr Bogolyubov had admitted to having an interest in 19 of the Borrowers and 13 of the Intermediary Borrowers.

699. As the majority of the Borrowers and Intermediary Borrowers in which one of the Individual Defendants admitted an interest was an entity in which the other Individual Defendant also admitted an interest, approximately half of the Borrowers and half of the Intermediary Borrowers fell into this category. For the most part, these admitted interests were small percentages, but in respect of four Borrowers (Alfatrader: 90%, Dorteks LLC ("Dorteks"):100%, Prado: c.55% and Uniks: 100%) and one Intermediary Borrower (Aftotradeinvest LLC ("Aftotradeinvest"): 100%), the admitted interests of the Individual Defendants taken together exceeded 50% for all or a material part of the period in which the Misappropriation was said to be taking place and in the case of Dorteks and Aftotradeinvest amounted to 100%.

700. These admissions were said by the Bank to indicate of themselves that the Individual Defendants controlled all of the Borrowers, because the nature of the scheme was such that it made no sense for the Borrowers not to be under common ownership and control. The Bank also submitted that the ownership interests disclosed by these admissions were in fact the tip of the iceberg. It was said that there was a mass of additional evidence which established not just that a significant number of the Borrowers and Intermediary Borrowers were entities in which the Individual Defendants had an interest, but also that the court should conclude on the balance of probabilities that they were all controlled by the Individual Defendants, in large part through the medium of a complex web of entities and nominees, all of whom operated both as to ownership and control as mere ciphers of the Individual Defendants. Much of this evidence is circumstantial, but looking at it as a whole, it is said to amount to compelling proof of the Bank's case on this issue.

701. The Bank submitted that the Borrowers were used in near-identical ways, which itself is strong evidence that the Individual Defendants also owned and controlled the other Borrowers. It also demonstrated that in one instance (AEF LLC ("AEF") was given as the example), Mr Bogolyubov acquired what was said to a be a new interest in a shell company which was already heavily indebted to the Bank. In another (Alfatrader was given as the example), Mr Kolomoisky disposed of his 45% interest in Alfatrader when it was already indebted pursuant to a Relevant Loan for UAH 160 million and then reacquired a 20% indirect interest seven months later. It was submitted that it is incredible to think that any third-party arms-length purchaser would be remotely interested in acquiring shares in such companies. I agree.

702. More generally, it was said that the extent of the fluctuations over time of the Individual Defendants' admitted interests in some of the Borrowers and Intermediary Borrowers was all part of a game of cat and mouse played by BOK, PBC and Primecap which involved hiding the Bank's related party lending by shuffling the ownership of Borrowers to obscure the true picture from the NBU. I think that the Bank is probably right about that, not least because there was never any evidenced explanation for why the Individual Defendants' disclosed interests in those of the Borrowers, which were the subject of their admissions, fluctuated in the way they did. No legitimate credible explanation has been advanced by the Individual Defendants, and I have concluded that the Bank is correct to submit that, whatever the precise reason, what occurred obscured the true position and is at the very least consistent with all of the Borrowers and the Intermediary Borrowers being companies owned and controlled by the Individual Defendants.

703. The Bank also pointed out that, despite their admissions of ownership interests in Alfatrader, Dorteks, Prado and Uniks (in which they admit to having held all or more than 50% of the issued shares) and which between them entered into ten Relevant and Intermediary Loans between 17 February 2014 and 3 September 2014, with a cumulative value of US$99 million and UAH 1.66 billion, the Individual Defendants have not adduced any evidence to explain why they did so. It is submitted that the reason for this is obvious: there is no innocent explanation. While both of the Individual Defendants pleaded that they did not exercise day-to-day control over any of the Borrowers, including these four companies, it is not positively asserted that they did not exercise any overall control over any of them and I am satisfied that this is what they did. Alfatrader, Dorteks, Prado and Uniks would not have been used as part of a loan recycling scheme or as vehicles for the Misappropriation without the actual or tacit approval of the Individual Defendants, which is very strong evidence that they would have known all about the nature of the scheme.

704. One of the facts on which the Bank relies is the speed with which Mr Kolomoisky was able to put together the Lafferty Spreadsheets at the time of the jurisdiction challenge and the access which he had to the thousands of bank statements from which they were said to have been prepared. Taken alone, this may not establish control of the Borrowers by one or both of the Individual Defendants, but the ease with which Mr Kolomoisky was apparently able to access the bank statements of the Lafferty Spreadsheets Companies, including as they did all but one of the Borrowers, is said to be a telling indication that the relationship was at the very least a very close one. Like many of the other points it is not conclusive in itself, but I agree that it supports the Bank's overall submission.

705. There are a number of further indications which are consistent with the relationship being one of control and not just proximity. The first is the actual ownership structure for each Borrower and Intermediary Borrower, which for the purposes of the trial has been recorded in two categories of chart. The information disclosed in these charts has been derived by the Bank from a number of different sources, including miscellaneous contemporaneous documentation disclosed during the course of the proceedings and further information given by one or other of the Individual Defendants in response to requests from the Bank. While the Defendants do not accept the conclusions to be drawn from these charts, which are said by them to have limited evidential value, the basic factual information which they contain and portray is not positively disputed. The

Defendants do, however, contend that the material on which some of the connections relied on by the Bank is based is sometimes tenuous and sometimes based on second-hand information; it therefore needs to be treated with caution.

706. I accept that there is some substance in those words of warning, and I have taken them into account when assessing the evidence as whole. I also agree that the burden remains on the Bank to establish its allegations that the Borrowers and the Intermediary Borrowers were owned and/or controlled by the Individual Defendants. Nevertheless I also take into account the fact that in his opening submissions Mr Kolomoisky said that he would address in his closing submissions the specific inferences which the Bank seeks to draw from the information disclosed by the charts, but in the event chose not to do so. I also take into account the fact that the Defendants chose not to call any evidence at all from the individuals concerned in order to counter those inferences. No reasons were advanced as to why they chose not to do so, apart from to say that it was unnecessary because the Bank's case was misconceived in the way it was formulated.

707. As will become apparent, I do not accept that the Bank's case was misconceived in its formulation. I also think that, if there were to have been an answer to the inferences which the Bank invites the court to draw from the information disclosed on the charts, the Individual Defendants would have sought to explain what it was, with the assistance of at least one of the many individuals who participated in the complex corporate structures which are illustrated by these charts and who might be thought able to verify their case. In my view, taken together with a number of other considerations, the absence of such evidence supports an inference that the Individual Defendants chose not to take that course, because if they had done so, it would have become obvious that those who were recorded as UBOs of the Borrowers and the Intermediary Borrowers were in fact no more than nominees for them.

708. The first category of charts relate to the corporate structure for each Borrower as at the date it first entered into a Relevant Loan and each Intermediary Borrower at the date it first entered into an Intermediary Loan. Each structure chart illustrates the chain of interests in the shareholdings in each of the Borrowers as at the relevant date. In some instances the structure chart showing the chain of interests is byzantine in its complexity, with a number of other entities and individuals holding varied direct and indirect minority interests in the shares issued by the Borrower, while the shares in many of those other entities themselves were also widely held by yet further holding companies or individuals acting as nominees. In others the corporate family trees are less complex with a single entity or individual recorded either as the sole holder of 100% of the shares in the Borrower or as a direct or indirect holding company of the Borrower.

709. Where one or both of the Individual Defendants admit that they hold an interest in a Borrower or an Intermediary Borrower, that interest is reflected as an ultimate beneficial ownership interest in the relevant structure chart. In many instances these admitted interests are themselves held through a complex web of other entities and nominees many of whom are employees or officers of PBC or the Bank. In all but a very few cases, the remaining ultimate beneficial interests are then recorded in the structure charts as being held by some 37 nominees, 24 of whom were employees of PBC and six of whom were employees of the Bank, again through a complex web of other entities and nominees. In some instances the UBO of a Borrower or Intermediary Borrower is said to be a single individual, but in many others the number of individuals

said to hold the ultimate beneficial ownership in one of several fractional interests in a Borrower or Intermediary Borrower runs into double figures.

710. A small number of the recorded UBOs of a fractional interest in a Borrower or Intermediary Borrower are not officers or employees of PBC, but the majority are. The same individuals appear time and again as UBOs of fractional interests in different Borrowers and Intermediary Borrowers. Thus by way of example, ten PBC employees (Tetyana Akimova, Mr Akudovich, Mr Kolobkov, Ms Kravchenko, Mr Melnyk, Mr Nikolenko, Olena Pivovar, Mr I Pugach, Ms Trykulych and Yulia Velk) were recorded as UBOs of an interest in more than fifteen Borrowers or Intermediary Borrowers and six of them (Mr Akudovich, Mr Kolobkov, Ms Kravchenko, Mr Melnyk, Mr Nikolenko and Mr I Pugach) each had more than 25 to their name.

711. One of the sources of the Bank's information for recording particular individuals as UBOs of an interest in each Borrower or Intermediary Borrower has been called the Beneficiary Key and was prepared after the time at which what the Bank has called the active period of the Misappropriation, had come to an end. The NBU was becoming more active in its investigations of the extent of the Bank's exposure to related parties. In that context, the Bank's risk management department sent a memo to Mr Dubilet seeking access to data on clients of the Bank's Cyprus branch. In particular it sought access to information on the nominee and beneficial owners, executives, chairmen and members of the Supervisory Board of borrowers at the Cyprus branch. This memo found its way to a number of recipients including Mr Morgachov, Mr Novikov and Mr Yatsenko, the latter of whom refused to allow access to this information from outside Cyprus.

712. The documentary evidence which has survived supports the Bank's case that what happened next was that an alternative solution was reached involving the preparation of an Excel spreadsheet which identified 32 beneficiaries and then allocated a beneficiary number to each of them. Amongst those beneficiaries were each of the individuals I have just mentioned as well as Mr Bogolyubov identified as B4 and the Individual Defendants together identified as B9. With the assistance of this information it has been possible to identify the individuals who are disclosed on the structure charts as UBOs of each of the Borrowers, recorded as such in documentation discovered within the Bank.

713. The Bank's case is that, despite their characterisation as such, these individuals are not in any sense the UBOs of the Borrowers. This is said to be a misleading description of their true status, because they were in fact nominees for the Individual Defendants, and to describe them as UBOs is wrong in the same way and to the same extent as was the concept of a 'nominee UBO', which was described by Bryan J in *Yurov* at [524] as a contradiction in terms. Set in the context of the later manipulation of the identity of the UBOs at a time when the NBU had started to probe the extent of the Bank's loan book to related parties, the Bank submitted, and I agree, that what Bryan J went on to say has resonance in the current case:

> "… to purport to be someone you are not, and to purport to perform a role that you do not perform (other than in name) is inherently dishonest and deceptive – and indeed the purpose of the use of nominee UBOs is equally obvious, namely to deceive third parties … and to render opaque both the link between the Bank and

particular companies/assets, and between the companies and the UBOs (the Shareholders under the structures that were set up)."

714. The structure charts also disclose that, of the 110 intermediate shareholding companies that appear within them, 54 also appear in the Individual Defendants' WFO asset disclosure as holding assets on their behalf, 57 were Lafferty Spreadsheets Companies and nine are Share Pledge Companies. These companies also appear in the Individual Defendants' disclosed contemporaneous asset lists (dating from prior to nationalisation) and in the structures by which they admit to holding their interests in the Borrowers and Intermediary Borrowers between 2013 and 2016. Furthermore, only 15 of the intermediate shareholding companies do not fall into any of these categories, one of which is itself an Intermediary Borrower in which both Individual Defendants admit to holding interests and the remainder of which disclosed purported UBOs who were PBC or Bank employees or otherwise have close links to the Individual Defendants.

715. The Bank submitted that one of the more striking aspects of these charts is that the entities in respect of which the Individual Defendants have admitted that PBC individuals are acting as their nominees pursuant to undocumented arrangements are held within very similar structures to Borrowers and Intermediary Borrowers in respect of which no such admissions have been made, viz., a chain of companies ending with a PBC individual held out as the UBO. It is submitted that it is absurd that the Individual Defendants have refused to make the same admission in respect of the Borrowers and Intermediary Borrowers and have identified the PBC individuals as genuine UBOs of the Borrowers. It is said that the PBC individuals identified as the nominal UBOs of the Borrowers and Intermediary Borrowers are plainly nominees. Not only is that what they did as part of their job (and there was no evidence that any of them had independent resources of their own), it is said to be the only explanation for the chopping and changing apparent from what occurred at the time of the Luchaninov e-mail, the Rokoman Spreadsheets and the Avellum e-mails. That being so, the question for the court is: whose nominees were they? It is said that in circumstances in which the Individual Defendants have admitted using identical structures and the very same people as nominees, usually pursuant to oral agreements, it can only be the Individual Defendants, not least because there is no evidence that any other clients of PBC might fit the bill.

716. The Individual Defendants do not dispute that, with very limited exceptions, the structure charts accurately record the way in which the shares in each of the Borrowers (and other entities higher up the corporate tree) were held. However, they deny that the court can infer from the information that the nominees who are disclosed as the UBOs of the identified interests in each relevant Borrower did in fact hold that interest as nominee. In particular they assert that the manner in which the charts disclose that the beneficial ownerships were held reflects the true position, which is that in respect of the vast majority of the interests in the equity of the Borrowers and Intermediary Borrowers held by those identified employees of PBC or the Bank, those individuals held for their own account or at least did not hold for the benefit of or on behalf of either of the Individual Defendants. There was no evidence of substance to support this submission and in the absence of evidence from either of the Individual Defendants to explain how the court can be satisfied that employees of a CSP such as PBC are likely to be genuine UBOs of companies in such a structure, I agree that the Bank's case on the form of this

structure chart is consistent with its overall case as to the true ownership and control of the Borrowers and the Intermediary Borrowers.

717. The second category of charts is a series of 37 nominee charts prepared for each of the individuals identified by the Defendants as being a UBO of an interest in one or more of the Borrowers or Intermediary Borrowers. They were prepared by the Bank to illustrate the connections between the Individual Defendants and each of those individuals. Like the structure charts, the accuracy of the raw data which is contained within them is not challenged by the Defendants.

718. These charts illustrate that each recorded UBO played a role (often pursuant to an oral agreement) as an officer or registered shareholder of other companies in which there is evidence that the Individual Defendants themselves hold a controlling or minority direct or indirect interest. These other roles were not disputed by the Individual Defendants. On the face of it, they evidence a relationship between one or both of the Individual Defendants and each of the recorded UBOs which was wider than the relationship which was said by the Bank to arise out of the status they had as nominees for the Individual Defendants in their holdings of interests in the Borrowers and the Intermediary Borrowers. In short, it was submitted that, because many of the individuals, almost all of whom were employees of PBC, fulfilled the status of nominees for the Individual Defendants in other contexts, it is probable that they fulfilled the same function in relation to the Borrowers and the Intermediary Borrowers.

719. As counsel for Mr Kolomoisky submitted, unlike the structure charts, the nominee charts do not reflect the position at a particular moment in time, but record links which existed across time. To that extent they must obviously be treated with appropriate caution, because the issue of relevance is the extent to which the charts evidence the Bank's claim that the Borrowers and the Intermediary Borrowers were owned and/or controlled by one or both of the Individual Defendants at the time of the Relevant Loans. However, that question is itself capable of being evidenced by the relationship between the recorded UBOs and the Individual Defendants over a more extended period.

720. So far as nomineeships were concerned, counsel for Mr Kolomoisky submitted that many of the individuals identified on the charts were employees of Primecap or some other corporate service provider, who did not work exclusively for the Individual Defendants. It was then submitted that it is commonplace in Ukraine and Cyprus for the same professional nominees to perform roles in unrelated companies for a number of different principals. It was also said that the fact that some of these individuals performed roles for companies with which the Individual Defendants are associated does not mean that any other companies for whom the same individuals perform roles were associated with the Individual Defendants as well.

721. In my view, this does not go very far as an explanation because PBC is the only entity providing corporate services whose employees feature as a recorded UBO. The recorded UBOs fall into one of the following categories and several fall into more than one: 23 individuals who were employees of PBC, six individuals who were employees of the Bank, 33 individuals who have fulfilled executive or Supervisory Board roles in businesses in which one or both of the Individual Defendants hold an interest and 23 individuals in respect of whom there is evidence or an admission that they hold their interests in other entities for the benefit of one or both of the Individual Defendants.

Only five of the individuals amongst the recorded UBOs are not recorded as employees of PBC or the Bank (Nikita Aboyan, Andrii Khomutov, Sergei Svyatchenko, Vitalyi Tymshyn and Yevgen Zasimenko).

722. It was submitted on behalf of Mr Bogolyubov that the relevant question for the court is not whether he had (often technical) ownership interests, but whether he controlled the Relevant Entities and, more importantly, whether he was involved in the relevant acts said to comprise the scheme. So far as it goes, that submission is plainly correct. It was said that in many cases it appears that companies that were at one time or in one respect real trading companies were also used in the scheme as fungible shell companies, without regard to any interest held by Mr Bogolyubov and without reference to him. He said that a good example was Uniks, and that as much of the evidence relied on by the Bank post-dates the scheme, this tells the court nothing. In particular, it was said that nothing can be read into the fact that Mr Bogolyubov has continued to use the same CSPs or the same individuals in relation to his assets.

723. It was also said that Mr Bogolyubov has always been open from the outset that his assets are held in complex structures and that he uses CSPs in the management and ownership of these assets and structures. It was asserted that this has been the case long before any issues arose within the Bank. In particular, he has declared interests in 233 assets, the ownership chains of which involve 281 holding companies and 109 individuals. It is said that he has been upfront in disclosing these asset structures, and indeed his interests in the Borrowers over the relevant period, including by providing details of nominee structures. I accept that he has never hidden the complexity of his asset holding structures, but I do not accept that the history of the case shows that he has always complied with his disclosure obligations, expeditiously or in full; he has not.

724. Reliance was also placed on the fact that Mr Bogolyubov disclosed interests in 13 Borrowers in the Defence served on 17 January 2020, together with interests in six further Borrowers added proactively in early 2023. It was pointed out that many of the matters relied upon in the Bank's structure charts come from admissions he has made. It was also said that his asset disclosure refers to many assets which are not in his name, including some of the companies the Bank has from the outset said are involved in some way in the scheme. It was submitted that this behaviour is not consistent with Mr Bogolyubov seeking to hide his interests in assets where unhelpful for him or invoking "plausible deniability" where an asset is not in his name.

725. It is also right for the court to ask itself why the Individual Defendants felt that they needed to make any admissions of ownership at all. The Bank suggested that the reason appeared to be that, by the time they came to plead their Defences, there was already a paper trail connecting the Individual Defendants to the Borrowers and the Intermediary Borrowers in which they admitted an interest. It pointed out that many of Mr Bogolyubov's admissions related to companies in a group headed by Modena, which I have already referred to in my discussion of PBC. Modena is identified in related-party shareholder representation letters to PwC produced in early 2016, in draft related-party disclosures as an entity "controlled" by Mr Bogolyubov and as 100% owned by Mr Bogolyubov in his pleading in the Tatneft Proceedings and in his 2018 WFO asset disclosure, given on 19 January 2018, some time before he was required to plead his Defence in these proceedings. The rest of his admitted interests are also each held via at least one company that appears in the asset disclosures he made before he pleaded his Defence. As for Mr Kolomoisky, with one exception (Jaco Management Limited,

a holding company for the Intermediary Borrower Avtotradeinvest), his admissions are in respect of interests ultimately held by companies in which he admitted an interest in his 2018 asset disclosure.

726. I accept that the mere fact that an employee of a CSP such as PBC is recorded as a UBO of one or more of the Borrowers or Intermediary Borrowers does not establish that either of the Individual Defendants was in fact the owner and/or controller of that Borrower or Intermediary Borrower concerned. But that is not the only aspect of what occurred on which the Bank relies. To do so would be to divorce the evidence from its proper context. To revert to the approach adopted in *Yurov*, the nature of circumstantial evidence is that its effect is cumulative, and the essence of a successful case based on circumstantial evidence is that the whole is stronger than its individual parts.

727. In the present case, the relevant context includes the matters I have already considered such as the similarity of these apparent holding structures to the manner in which admitted assets are held by the Individual Defendants, but it also includes other evidence as to what occurred as part of the working through of the scheme. One aspect of this is the findings I have made regarding the relationship between PBC and the Individual Defendants (as to which see paragraphs 256ff above). Another was the Luchaninov e-mail, the significance of which I have explained in paragraphs 449 to 462 above and the related party discussion which went on in the Autumn of 2015. Those discussions were in response to the production of the EY Related Parties Report, which had caused the NBU to conclude that 165 (later reduced to 136) of the Bank's borrowers were related parties (of which more than 20 were Borrowers). The Bank's response also incorporated the production of the Rokoman Spreadsheets and critically the steps taken to change the PBC nominee directors and UBOs of 19 Borrowers and five Intermediary Borrowers.

728. The Bank's response included taking the advice from Avellum I have already referred to, but what it ultimately did was reflected in correspondence between Mr Luchaninov, Mr Yatsenko, Ms Gurieva and Mr Novikov. It is clear from that correspondence that what then occurred can properly be described as a juggling of the individuals who were to be recorded as being the UBOs of the various borrower entities. There was no reference to any third party who might be characterised as an independent owner of any of those entities and there is no explanation as to how or why any independent third party might be able to (or wish to) use the Bank's loan recycling scheme as a source of sham loans to their own borrowing vehicles.

729. I agree with the Bank's submission that the fact that it was possible for employees within BOK to juggle the nominees as they did is inconsistent with any case that these nominees in fact represented some unidentified independent third-party owner. I accept the Bank's submission that the only way in which this could have been done was if all of the lending was to entities who stand behind the same individuals who stand behind all of the nominee UBOs. All the indications are that all the participants in the scheme were under common control. As the Bank put it in closing, those ultimate controllers were in a position to manipulate the nominee UBOs to give the appearance of compliance with credit ratios when in fact the new UBOs are just further nominees.

730. The Bank also relied on the inferences to be drawn from the security which was given for the Relevant Loans, and in particular the Share Pledges. I have explained what happened in paragraphs 359 to 366 above. It was admitted that 22 of the 38 Share

Pledgors and 20 of the 25 companies whose shares had been pledged were owned and/or controlled by one or both of them. However, they contended that they had no actual knowledge at the time the pledges were granted that they were being granted as security for the Relevant Loans.

731. The Bank submitted that there was no evidence of any general agreement between the Bank and either of the Individual Defendants for their assets to be used in this manner and it is inherently incredible to suppose that the Individual Defendants agreed to pledge their assets as security for lending to unconnected borrowers on an open-ended basis. It is said that no rational commercial businessmen would offer such collateral for loans to wholly unknown entities and that the only credible explanation is that the Individual Defendants knew that the scheme to extract money from the Bank for their benefit required some ostensibly credible security. It is said that they therefore agreed that their assets could be used to create the appearance of security for lending to their own shell companies (i.e. the Borrowers), although they were in fact all shams. This was also said to have been confirmed by the fact that the Share Pledges were never enforced – and were released shortly before nationalisation. It was said that this was a striking indication that the Share Pledges were never intended by the Individual Defendants or the Bank to create enforceable obligations.

732. The Bank also pointed to evidence that the Share Pledges were all created, executed and backdated in the same way, and that of the 16 Share Pledgors where ownership and/or control is denied, seven participated in the Misappropriation as Lafferty Spreadsheets Companies, two of which (Celastrina and Densitron) were two of the three Cypriot Borrowers. Of the five companies whose shares were pledged where ownership and/or control was denied, two are Lafferty Spreadsheets Companies.

733. In my view the Bank's case on the significance of the Share Pledges has real substance. I do not think it is established that the Individual Defendants knew and approved the form that each of them took, but I am satisfied that the Share Pledges were not executed for the benefit of lending to unconnected third parties. I find it is likely that each of the Share Pledgors was ultimately owned and/or controlled by each of the Individuals Defendants, both of whom knew and approved the principle of executing the Share Pledges, because the scheme for Misappropriation required some ostensibly credible security. The most obvious way to give credibility to the security (and therefore to make the Relevant Loans appear more genuine) was to agree, anyway in principle, that their assets could be used to create the appearance that the security was genuine, even though they did not intend the Share Pledges ever to be enforced.

734. Having weighed the evidence, and recognising that much of it is circumstantial, I have nonetheless concluded that the Bank has established that the individuals who are identified in the structure charts as being the persons by or for whom the shares in each of the Borrowers and Intermediary Borrowers were ultimately or indirectly held, were bound to act in relation to those shares on the instructions of the Individual Defendants. In my judgment, there is a compelling case that, although the charts disclose that the shares of the relevant top company were held on trust for named individuals, those individuals themselves exercised their rights as nominees for the Individual Defendants, who therefore had control over the exercise of those rights.

735. It follows that one of the major building blocks in the Bank's claim that both of the Individual Defendants were involved in the Misappropriation, and were the persons for

whose ultimate benefit the Misappropriation was conducted has been established. I also consider it likely (and therefore proved on the balance of probabilities) that the Individual Defendants have always known that this was the case, and that this important aspect of their defence to these proceedings was therefore built on a deliberate lie.

Ownership and control of the Corporate Defendants and the ED Principals

736. The Bank also alleges that the Corporate Defendants were, from January 2013 at the latest, ultimately owned and/or controlled by the Individual Defendants. This has always been denied by all of the Defendants (including the Corporate Defendants). The way that the scheme and the Misappropriation worked meant that the role of the Corporate Defendants was directed and coordinated in a centralised manner, which itself implied a centralised control. This is obviously consistent with that control being exercised by the Individual Defendants as the controllers of the Bank itself.

737. It is also consistent with the disclosed information in relation to the directors and nominee shareholders of each of the Corporate Defendants. When eventually disclosed, the Individual Defendants' cases on these important relationships, with the exception of the asserted UBOs of Rossyn and Milbert (and part of the time Ukrtransitservice), show them to be individuals working for one of the Cypriot CSPs, details of which I have given in paragraphs 291ff above. That in itself makes them improbable candidates for being UBOs of companies participating in the scheme in the manner I have already described. As a matter of common sense they must have taken their instructions from elsewhere.

738. The likelihood that the source of those instructions and control was one or both of the Individual Defendants is apparent from a number of facts, the first of which related to the identity of those who were said by the Individual Defendants to have fulfilled the role of directors and nominees in relation to the Corporate Defendants. There was no dispute as to their identity or as to the other connections they had with the Individual Defendants. The only individual who was not identified as holding other assets or acting as a nominee director for other companies for the Individual Defendants was Chara Kyriakou who was a director and nominee shareholder of Rossyn with effect from 1 December 2014. As to the others, I can summarise the position as follows:

i) Michalakis Tsitsekkos, who was a director of Teamtrend and the nominee shareholder of Teamtrend and Trade Point Agro, holds 17 other assets for Mr Kolomoisky with a cumulative value of US$397 million and 13 other assets for Mr Bogolyubov with a cumulative value of US$53 million.

ii) Anna Korelidou, who was also a director of Teamtrend, holds interests in five other assets for Mr Kolomoisky and nine assets for Mr Bogolyubov.

iii) Mr Marangos, who was a director and nominee shareholder of Collyer, was involved in the incorporation of Primecap and was a long-standing associate of both Individual Defendants (as I have explained earlier in this judgment). Together with Mr Anischenko, Mr Bogolyubov attended his wedding in Cyprus, at which Mr Novikov was the best man. He was also a director of Sim Lim and

in that capacity provided corporate trustee services to Mr Bogolyubov. He also holds interests in eight Borrowers and one Intermediary Borrower.

iv) Giannakis Savvidis, who took over as a director and nominee shareholder of Collyer from Mr Marangos, holds interests in four assets for Mr Kolomoisky and 29 assets for Mr Bogolyubov.

v) Eleni Constantinou, aka Eleni Savvidou, who was a director of Ukrtransitservice and a director and nominee shareholder of Rossyn, also acted as a director or secretary of other companies in which the Individual Defendants admitted to holding an interest and appears in the Structure Charts of five Borrowers and one Intermediary Borrower.

vi) Christakis Konnaris, who was a director and nominee shareholder of Milbert, also holds interests in eight assets for Mr Kolomoisky with a combined value of US$204 million and six assets for Mr Bogolyubov with a combined value of c.US$53 million.

vii) Ms Thrasyvoulou, who was also a director of Ukrtransitservice, acted as the secretary or director of a number of companies in which the Individual Defendants had an admitted interest.

739. This evidence simply demonstrates that the same Cypriot CSPs provided corporate services (in the form of directors and nominee shareholders) to the Individual Defendants as they did to the UBOs of the Corporate Defendants. It points to the possibility that the Corporate Defendants might have been owned or controlled by the Individual Defendants, but does not in itself establish that was the case.

740. In their answers to the Bank's requests for further information dated 27 March 2020 and 16 July 2021, the Corporate Defendants pleaded the following details relating to their own UBOs. For these purposes, the Corporate Defendants' UBOs were described as "the persons with the power to control their respective companies, along with those companies' directors". For the period 2013 to 2016, the UBOs of the English Defendants were all said to have been Mr Melnyk, Mr I Pugach, Mr Ivlev, Ms Yesipova and Ms Trykulych, with Mr Melnyk as the only UBO of Trade Point Agro up until 22 February 2016. The UBO of Rossyn was said to have been Andrey Romanovsky and the UBO of Milbert and Ukrtransitservice was said to have been Mykhaylo Kiperman, save that from 30 March 2014 the interest Mr Kiperman had held in Ukrtransitservice was said to have been held for Ms Trykulych.

741. All of these individuals featured regularly in the evidence in different capacities, and it was the Bank's case that they were not the true UBOs of the Corporate Defendants against whose name they were listed, anyway in the sense described in *Yurov*, but rather held their beneficial interests in each of the Corporate Defendants for the benefit of the Individual Defendants. This was a credible starting position for the Bank to take based simply on the fact that the real jobs of all of them, apart from Mr Romanovsky and Mr Kiperman, were simply as employees of PBC. It is convenient to deal with the other connections between the Individual Defendants and the purported UBOs of the English Defendants separately from those between the Individual Defendants and the purported UBOs of the BVI Defendants.

742. As to the other roles of the individuals said to have been the UBOs of the English Defendants, the Bank drew attention to the following examples:

i) Mr Melnyk featured regularly in the evidence, and I have referred to some of those occasions earlier in this judgment. He held 11 assets for Mr Kolomoisky worth c. US$183 million and 19 assets for Mr Bogolyubov worth c. US$116m), all pursuant to oral agreements. He ran PBC and also featured as a purported beneficial owner of 27 Borrowers and 11 (or possibly 12) Intermediary Borrowers. It is said that he has loaned the Corporate Defendants c. £1.3m for their legal fees in these proceedings.

ii) Mr I Pugach was a PBC employee featured as a purported beneficial owner of 15 Borrowers and 12 Intermediary Borrowers. He replaced Mr Melnyk as the purported beneficial owner of Cristalmax (a Lafferty Spreadsheets Company) following the Rokoman e-mail. He holds ten other assets for Mr Kolomoisky pursuant to oral agreements and 20 other assets for Mr Bogolyubov on similar terms.

iii) Mr Ivlev was also a PBC employee who held corporate roles in six companies in which the Individual Defendants admit interests.

iv) Ms Yesipova was another PBC employee and a purported beneficial owner of one Borrower (Ribotto) and one Intermediary Borrower (Kinan). In February 2019, she gave instructions to Cypriot CSPs and Primecap for the sale of interests in a different Borrower (Tekhspets) and a different Intermediary Borrower (Autotradeinvest). She holds four assets for Mr Kolomoisky pursuant to oral agreements and three assets for Mr Bogolyubov on similar terms.

v) Ms Trykulych was another PBC employee and the purported beneficial owner of 13 Borrowers, nine Intermediary Borrowers and one of the ED Principals (Hangli). She was also added as the new purported beneficial owner of one of the Lafferty Spreadsheets Companies following the Rokoman e-mail. She holds nine assets for Mr Kolomoisky pursuant to oral agreements and six assets for Mr Bogolyubov pursuant to similar arrangements.

743. As to the other roles of individuals said to have been the UBOs of the BVI Defendants, Mr Romanovsky, held out as the UBO of Rossyn, was not an employee of PBC or one of the Cypriot UBOs. However, the Bank demonstrated that he has had a close relationship with the Individual Defendants, representing their interests in other contexts, over the years. Thus, he was appointed to the management of one of their joint assets, PJSC Eksimnaftoproduct in 2005, where he served as chair between 2006 and 2014 and was on the board until 2018. He has also made statements to the press as the representative of another of the Individual Defendants' companies, PJSC Odesnaftoproduct, and had an extension on the Black.

744. The Bank also pointed to a number of other specific matters which meant that it was wholly improbable to suppose that Rossyn was ultimately owned by Mr Romanovsky. They included the facts that he has not come forward to explain his ownership or how he used Rossyn and that Rossyn made an unsecured loan of €44m to Mr Kolomoisky's sister, Larisa Chertok, which was outstanding in 2013. The Bank also pointed out that, as part of the process of reducing the Bank's list of related parties in January 2016,

other members of the Bank's compliance department e-mailed Mr Luchaninov with a proposal to remove Mr Romanovsky as beneficial owner of Rossyn, or alternatively replace him as the chair of Eksimnaftoproduct. In the event, he remained in both positions but the fact that the Bank thought it was able to make such a proposal and the way in which it was expressed indicated that the members of that department appreciated that Mr Romanovsky was not the genuine beneficial owner of Rossyn.

745. Like Mr Romanovsky, Mr Kiperman, who was held out as the UBO of Milbert and (until March 2014) as the UBO of Ukrtransitservice, was not an employee of PBC or one of the Cypriot UBOs. However, there was evidence that he and his father Yuriy have been business associates of the Individual Defendants for decades. The summary of some of the connections set out in the relevant nominee chart shows that Mykhaylo Kiperman has held a number of assets for both Mr Kolomoisky and Mr Bogolyubov and has had a number of corporate roles in a number of the companies they own. They were also put forward as purported beneficial owners of Transferred Assets, an issue which I will come back later in this judgment. It seems to have been commonplace for assets which were ultimately controlled by the Individual Defendants to have been held by members of the Kiperman family.

746. One of the added and unexplained oddities in relation to the transfer of what was said to be the ultimate beneficial ownership of Ukrtransitservice from Mr Kiperman to Ms Trykulych on 30 March 2014 is that there is no rationale for this to have been done and none has been suggested. It occurred during the period in which Relevant Drawdowns were being made and meant that the individual now said to be the UBO of Ukrtransitservice is simply an employee of PBC. As I have already explained she held many other nominee connections with the Individual Defendants.

747. There are a number of other miscellaneous indications that the Corporate Defendants are in reality what the Bank called in its opening submissions "part of a stable of" the Individual Defendants' companies who, with the assistance of compliant CSPs, carry out instructions given to them by the Individual Defendants. If that is right, it would be accurate to conclude that the Corporate Defendants were indeed controlled by the Individual Defendants at the time of the Misappropriation. They include the fact that documentation emerged which shows that Sofocleous was invoicing Teamtrend and Collyer both for attending meetings with Mr Kolomoisky and for "changing the records of 167 companies" which, absent any explanation, cannot all have been companies for which Teamtrend and Collyer were responsible. Mr Kolomoisky never answered the Bank's request for an explanation.

748. The Bank also suggested that indications of control by the Individual Defendants also include what seems to have occurred in 2003, during the course of proceedings brought in England by Michael Shahar against Mr Tsitsekkos and Ms Korelidou, together with a number of other defendants, alleging that they had unlawfully deprived him of his ownership of Teamtrend and its underlying subsidiaries, which were said to own a shopping centre in Dnipro and a contract to run Dnipro airport. Mr Kolomoisky, who was not himself a defendant, responded by bringing a second action together with Sergei Cheklanov seeking declarations that Mr Cheklanov was Teamtrend's beneficial owner. Two points are said to arise. First, in the only available judgment, Mann J observed that "it is not wholly clear why Mr Kolomoisky is a party to this action since he does not seem to claim any relief". It is said that an understanding of Mr Kolomoisky's asset holding structures, would explain why: if the action had gone

further, it would have become obvious that Mr Cheklanov was a nominee for Mr Kolomoisky. Secondly, there is evidence to the effect that at least one of the assets supposedly owned by Teamtrend at the time of the Shahar proceedings (the example is the ZUM referred to in paragraph [7] of Mann J's judgment) has ended up in the declared ownership of the Individual Defendants (described in their respective asset lists as a 22.6% interest each in "TDV TSUM" or just "TSUM").

749. Another example of the use of the Corporate Defendants in a similar manner related to the Individual Defendants' holding of 32.29% of their 94.18% interest in Botievo Grain Receiving Station through Collyer. Mr Bogolyubov submitted that this does not demonstrate control of Collyer itself. However, this is but one example of a situation in which Collyer was being used by the Individual Defendants and Mr Bogolyubov in particular as a vehicle through which real assets were being held on his behalf. Taken alone, that may not prove control, but it remains a material part of the jigsaw.

750. The interest which Mr Kolomoisky showed in other legal proceedings to which the Corporate Defendants were party also reflected a probability that they were entities which he controlled. As I explained in paragraph 527 above, at the end of July 2016, the Perchesky District Court granted injunctions on the application of the GPO freezing the Cyprus branch accounts of Trade Point Agro and the BVI Defendants as part of a criminal investigation into the Unreturned Payments. Two weeks later, on 9 August 2016, Mr Kolomoisky received a WhatsApp message from one of his associates, Oleksandr Granovsky, which related to the orders which Mr Kolomoisky might wish to have revoked and also explained that the GPO had applied for a further arrest order against Teamtrend. The Bank suggested that the reason that Mr Kolomoisky was interested in this information and expressed no surprise that he had been informed, was that he was and was known by Mr Granovsky to be the true UBO of the Corporate Defendants.

751. The Bank also suggested that the true nature of the relationship between the Individual Defendants and the Corporate Defendants was apparent from the commencement and conduct of Ukrainian defamation proceedings in 2017. It was said by the Bank that these proceedings were commenced by the English Defendants in Ukraine, apparently in order to protect their reputation, but in reality in an attempt to justify a *lis alibi pendens* defence to any claim that might be commenced against the Corporate Defendants in England. There is plenty of evidence, which indicates that at the time they did so the Defendants were aware that a claim against them in England was both likely and imminent.

752. The Bank said that it was absurd to suppose that the Corporate Defendants themselves had any business reputation in Ukraine to defend; they had already been the subject of judgments in the 2014 Ukrainian Proceedings holding them liable for US$1.8 billion, they had taken no steps to protect their reputation in the aftermath of the NashiGroshi Articles in February 2015 and the Corporate Defendants' own evidence was that they did not currently engage in any active business trading. These are all strong indicators that the English Defendants were all acting on the instructions of the Individual Defendants in the commencement and conduct of these defamation proceedings for purposes collateral to the protection of their own repudiations, an approach which was entirely consistent with the approach that the Corporate Defendants took to the defence of the 2014 Ukrainian Proceedings.

753. Finally I should add this. I have already alluded to the evidence that two Cypriot companies, Sanderlyn and Versala, have been being used to fund the BVI Defendants' defence of these proceedings (see paragraph 173 above). There is no discernible independent commercial reason for them to be funding the Corporate Defendants' defence in this way. As the Bank pointed out, they are not litigation funders by trade: Versala's main business activities include "investing with holding of investments in the ferroalloy, mining and processing and metal branches" while Sanderlyn trades in oil and oil products. However, such evidence as there is indicates that both those Cypriot companies are ultimately owned and controlled by the Individual Defendants. Thus, the sole shareholder of Sanderlyn is Eftychia Xonofontos, who (according to the Individual Defendants' own assets lists) holds six assets for Mr Kolomoisky and five assets for Mr Bogolyubov, while the sole shareholder of Versala is Margarita Papanikolau, who (according to the same source) holds Mr Kolomoisky's interest in an Isle of Man company, Helenium Ltd, and four assets for Mr Bogolyubov. Furthermore, Sanderlyn's company secretary is Martineus Secretarial Services, of which Mr Tsitsekkos is the sole shareholder. The inference I draw is that this funding has been advanced in the interests of and for the benefit of the same individuals who control Sanderlyn, Versala and the Corporate Defendants.

754. I was referred during the course of closing submissions to a schedule of the sources used for payment of the Corporate Defendants' legal costs of these proceedings. As I understood it, the figures were not agreed, but nor was there a substantial dispute about its accuracy. It showed that, for the most part, the Corporate Defendants' legal costs have been paid by unsecured loans from those said to be the relevant Corporate Defendant's UBOs (i.e., the employees of PBC (sometimes through an entity called Emmett Group LLC)) or Mr Kiperman as the case may be. It also disclosed the loans from Versala and Sanderlyn. It was submitted on behalf of the Bank that it is obvious that the PBC employees (Mr Melnyk, Mr I Pugach, Mr Ivlev, Ms Yesipova and Ms Trykulych) were in no position to make the advances of several million pounds said to have been advanced by them and the loans must have come from elsewhere. I think that is plainly the case, illustrated by the salary which Mr Melnyk commanded at Sunaltezza when he was transferred after nationalisation. As the former head of PBC he is likely to have been one of its highest paid employees, but his pay was EUR 7,500 per month, which makes it absurd to suggest that he, let alone the other employees of PBC, might have been making loans in their own right. The only candidates are said to be the Individual Defendants (or their corporate vehicles). In my view, the evidence establishes that this is likely to have been the case.

755. Many of the points relied on by the Bank would not in and of themselves prove its case that the true UBOs of the Corporate Defendants are in fact the Individual Defendants, although they are all consistent with that being the case. However, looked at together, and in the absence of any properly evidenced explanation to the contrary from the Individual Defendants themselves, I am satisfied on the balance of probabilities that the Corporate Defendants are, and have been since the time of the original making of the relevant loans, part of the Individual Defendants' "stable" of corporate vehicles in the sense that they are ultimately controlled by them, comply with their instruction and will only participate in activity with approval, whether transaction specific or more general in form.

756. It is not possible to reach a certain conclusion on the precise terms on which their interests in the Corporate Defendants were held, whether as against the nominee shareholders or as between themselves. However, I am satisfied that the involvement of the Corporate Defendants in the Misappropriation was ultimately carried out on the instructions of and for the benefit of the Individual Defendants. To suggest that what occurred may have been done on the instructions of PBC or senior employees of the Bank without the approval and consent of the Individual Defendants seems to me to be absurd, and no other candidates have been suggested, let alone justified by any credible evidence.

757. It is also said by the Bank that the Individual Defendants owned and/or controlled the ED Principals, pointing out that they were held through the Individual Defendants' admitted nominees, that the Individual Defendants have long-standing connections with them and that they were controlled via Primecap.

758. The asserted UBO of Hangli was Ms Trykulych, whose role I have described in relation to the Corporate Defendants. As the Bank pointed out she was therefore simultaneously said to have been one of the purported UBOs of Teamtrend (and therefore one of the "persons with the power to control" it) at the same time as she was also one of the alleged UBOs of one of the ED Principals. This undermines the English Defendants' pleaded case that they "have no knowledge as to whether their Principals effected supply of the goods or returned prepayments under the Agency Supply Agreements and do not admit that they did not".

759. The asserted UBOs of Brimmilton were Andriy Kolobkov and then Iuliia Lykhachova. Mr Kolobkov is a PBC employee who sat on the board of eight of the Individual Defendants' companies and was a purported beneficial owner of 18 Borrowers and 8 Intermediary Borrowers. He was removed from the supervisory board of other of the Individual Defendants' companies following the Luchaninov e-mail, and was removed and replaced as the beneficial owner of two offshore companies following the Rokoman e-mail. Ms Lykhachova is a PBC employee who holds interests in two assets for Mr Kolomoisky pursuant to oral agreements. She was removed as a director of Well Rise LLC in May 2015 following the Luchaninov e-mail.

760. The asserted UBO of Collard is Ms Ryazantseva, a PBC employee who holds assets for Mr Kolomoisky pursuant to oral agreements, has acted as a director of companies owned by the Individual Defendants or in which they have an interest and was a purported beneficial owner of 5 Borrowers and 5 Intermediary Borrowers.

761. The ED Principals, like the Borrowers, the Intermediary Borrowers and the Corporate Defendants were part of the loan recycling scheme in the sense that their role was part of the process of concealing what was going on. The five themes which the Bank relied on as a summary of the connections between the Individual Defendants and the Relevant Entities (which I describe below) apply to them as much as they do to the other Relevant Entities. In my judgment, the Bank has also established that, at the relevant times, it is likely that the Individual Defendants owned and controlled the ED Principals.

Ownership and control of the New Borrowers

762. I have explained the role of the New Borrowers in the course of describing the Transformation in paragraphs 536ff of this judgment. It is apparent from much of that explanation that the New Borrowers were introduced at the behest of Mr Kolomoisky, with the knowledge and approval of Mr Bogolyubov, in an effort to persuade the NBU that by taking the New Loans onto its books in replacement of (amongst other indebtedness) liabilities under the Relevant Loans, the Bank's capital position would be improved. The Bank also submitted that the Individual Defendants sought to use the Transformation as an opportunity to defer the repayment of the existing loans by eight to ten years (with first repayments of the New Loans falling due between 2024 and 2026) and to enable the release of the existing security (inadequate though it was) over shares in their companies. The Bank's case is that it is plain that the New Borrowers are yet further vehicles which were owned and/or controlled by the Individual Defendants. The Individual Defendants deny that is the case.

763. The starting point for the Bank's submission is that the Individual Defendants made commitments to the Bank in the letter dated about 5 October 2016 which I have described in paragraph 538 above. This committed to a transfer of the existing loans to operating companies whose sources of income were real and transparent and was rapidly followed by the NBU's decision 323-rsh/BT. For the reasons I have already given, the development of this commitment as part of the Transformation was initiated by the Individual Defendants.

764. I agree with the Bank's submission that it is not credible to suggest that the Individual Defendants, as the Bank's controlling shareholders and the signatories to the 5 October 2016 letter, would not then have been intimately involved in the Transformation of which the making of the New Loans by the New Borrowers was an essential part. On any view, it was a huge undertaking, involving about two thirds of the Bank's entire corporate loan book and the Individual Defendants must have known that there was a serious risk that the Bank would be declared insolvent if it failed to complete the Transformation. The plan, which was then adopted, purported to repay outstanding loans owed by the Borrowers and Intermediary Borrowers, whom I have already concluded were owned and controlled by the Individual Defendants. It was then implemented through BOK, which (as the Bank put it and I accept) was the part of the Bank which arranged transactions for the benefit of the Individual Defendants.

765. These facts alone make it very likely that the New Borrowers were also controlled by the Individual Defendants, all the more so in the absence of any alternative candidates for individuals who might have been prepared to undertake (or provide corporate vehicles with assets of substance to undertake) the existing commitments of, amongst others, the Borrowers and the Intermediary Borrowers. There is also other contemporaneous evidence which suggests that was indeed the case.

766. Thus, by November 2016, EY had been told that, although the New Borrowers had no businesses of their own, they were "expected to take over the business from other companies "owned by the ultimate beneficial owners of the new borrowers". All of those other companies were entities in which the Individual Defendants admit to owning substantial stakes. EY was also told that the New Loans would be secured by mortgages over the assets of companies, the vast majority of which the Individual Defendants admitted to having owned. The Bank also submitted that there would be no reason for the New Borrowers to repay the indebtedness of the 193 Borrowers, or to take on massive debts to support the Bank's efforts to improve its capitalisation, unless

they were related to the Individual Defendants. Neither of the Individual Defendants has produced any evidence as to the identity of any other person who was willing to take over billions of UAH of debt owed by the Bank's existing borrowers, including the Borrowers and the Intermediary Borrowers.

767. The Bank also drew attention to the fact that, even taking the information provided by the New Borrowers in support of their loan applications at face value, they manifestly lacked either the income or assets necessary to repay the New Loans. There is no credible reason why any putative borrower unconnected with, and not controlled by the Individual Defendants would take that course. Furthermore the formal steps that were taken to arrange the New Loans were very similar to the manner in which previous illegitimate lending, including the agreement of the Relevant Loans, was put in place. I have already alluded to what the SOFs demonstrate in this context, but it is striking that the New Loans were initiated by BOK, were issued within one or two days of the date on which the New Borrower purportedly applied for its loan and the paperwork shows no genuine attempt to assess whether the New Borrower would be able to repay its New Loan, or could provide adequate collateral.

768. I have reached the clear conclusion that, like the Borrowers and Intermediary Borrowers, the New Borrowers were corporate vehicles in fact owned and controlled by the Individual Defendants. I have also concluded that the manner in which the Transformation was sought to be implemented was a wholly artificial exercise, which justified the conclusion of the NBU's post-nationalisation inspection team that:

> "the nature of the transactions performed and the inadequacy of the scope of activity of new borrowers, which are generally newly created companies, testify to the artificiality of the above and the fact that the transformation does not actually reduce the Bank's risks".

Benefit to the Individual Defendants

769. It is the Bank's case that, although it is not a necessary part of its claim under Article 1166 to show that the Relevant Drawdowns ended up in the Individual Defendants' accounts or companies, it is quite clear from the documents not just that they knew and approved the Misappropriation, but also that it was for their ultimate benefit. It submitted that, in any event, benefit was relevant because it gives the lie to Mr Bogolyubov's case that he had no involvement in the Misappropriation and that the scheme, which he accepts occurred, was masterminded by Mr Dubilet without his approval and consent. It also shows that the Borrowers were mere conduits for money flowing for the ultimate benefit of the Individual Defendants and the companies they controlled, leading inexorably to the conclusion that the Borrowers must have been owned and controlled by the Individual Defendants, and it corroborates the Bank's case that the Relevant Loans and the RSAs were shams in the form of an artificial device to extract US$ from the Bank, with the consequence that the transactions of which they formed part were all void.

770. The Defendants took slightly different approaches to this part of the case with Mr Bogolyubov asserting in opening that "[w]e've not heard a word about benefit", while Mr Howard took an alternative line in cross-examination directed at establishing the

Limitation Defence. He suggested to Ms Rozhkova that the awareness the Bank must have gained as a result of reading the reports in Glavcom (see paragraphs 430ff above) could be summarised as follows: "it would not be difficult to conclude that this appeared to be … an arrangement whereby funds were being withdrawn for the benefit of Mr Kolomoisky" and "it's obvious that the Bank … would have claims against its shareholders for having transited the Bank's money to their companies".

771. What Mr Bogolyubov submitted was the absence of any real evidence of benefit was at the heart of the way his case was presented in closing submissions. His argument concentrated on demonstrating that there had been no misappropriation of the Bank's monies and that the reality of what the Bank relied on was no more than one part of a loan recycling scheme, in respect of which the Bank had been unable to prove that it had sustained any loss. There are a number of difficulties with this submission, which I will explain in this section of the judgment, but one which is worth explaining at the outset is that (as will appear) the burden of proving that compensation in the full amount of the harm constituted by the Relevant Drawdowns can appropriately be reduced, lies on the Defendants. Mr Bogolyubov has chosen not to attend court to give evidence to confirm that he received no benefit from the loan recycling scheme, despite the fact that there is no other obvious explanation for what he thought it was intended to achieve.

772. One example of benefit to the Individual Defendants flowed from the analysis adopted by Mr Davidson (Mr Kolomoisky's expert forensic accountant). In his reports he sought to show what happened to the Relevant Drawdowns on what he called a Funds Flow basis, but concluded that he had been unable to trace US$557 million of the Relevant Drawdowns. Mr Thompson (the Bank's expert forensic accountant) then demonstrated, using Mr Davidson's methodology, that three of those Relevant Drawdowns could be traced to loan repayments by PJSC Zaporozhye Ferroalloys Plant ("ZFP"), a substantial company in the Ferroalloy Holding group in which both of the Individual Defendants held interests. He also demonstrated that a UAH 157 million drawdown by Prominmet could be traced on the same Funds Flow basis to the Individual Defendants or their corporate vehicles in that it was possible to trace:

i) US$653k to a payment by Grizal to Mr Bogolyubov's personal account under a counter-financing agreement dated 22 July 2013 (as I have already explained Grizal was a company wholly owned by Mr Bogolyubov); and

ii) US$16.6 million to a payment by High Wings Aviation to an account of De Gama GmbH at Deutsche Bank to purchase a Bombardier aircraft under an 'Aircraft Sale and Purchase Agreement' dated 3 April 2014, that plane being described in Mr Kolomoisky's asset disclosure as a Challenger 604 "held for the benefit of Mr Kolomoisky on the basis of an oral agreement between Sergiy Melnyk [sic] and Mr Kolomoisky".

773. Although Mr Davidson confirmed during his cross-examination that he was content that Mr Thompson's analysis was correct, the Individual Defendants did not explain their receipt of these funds. In oral closing submissions, Ms Montgomery said that Mr Thompson had accepted in cross examination that he could see "no sign that Mr Bogolyubov or Mr Kolomoisky got any part of those Unreturned Prepayments", but that does not take matters very much further because it was never likely that there would be any record from a forensic accounting perspective of payments being made directly

to the Individual Defendants – on any view the flow of funds was much more complex than that.

774. In relation to the remainder of the US$557 million, which Mr Davidson had said was paid "into accounts where there is such a degree of mixing that any form of exact matching becomes impossible", the Bank attempted to make a further direct link, although in the event it foundered. Initially, Mr Davidson had accepted the following example that was put to him in cross-examination. It was suggested to him that the transactional data showed that what was said to be a US$30 million Relevant Drawdown by Tekhspets made on 26 June 2014 could be followed to Divot Enterprises Limited ("Divot"), a company the shares in which are held on trust for Mr Kolomoisky. Divot then made payments totalling US$195 million to Mr Bogolyubov's company, Grizal, (between 27 July 2013 and 6 October 2016).

775. In the event this line of questioning was based on a false premise because, as Mr Bogolyubov's counsel explained in their written closing, the drawdown was not in fact a Relevant Drawdown. It follows that, although Mr Davidson accepted in cross-examination: "although we can't engage in Exact Matching, what we can say is that proceeds from the Relevant Drawdowns went to a company which itself was funding one of the Second Defendant's companies", the Bank cannot rely on the underlying example which caused him to agree to what was put to him.

776. However, there was also evidence that it was well-known by employees of the Bank within BOK that funds being advanced under Relevant Loans were intended for the ultimate benefit of the Individual Defendants' companies. This evidence included the recording in e-mails dating from December 2013 and January 2014 of a documented link between a number of Borrowers and projects in which companies owned or controlled by the Individual Defendants were engaged. The Bank made submissions on several examples.

777. The first example was correspondence which demonstrated that there was a proposal for Forsa Ltd LLC and Real-Standart to be the Borrowers for a project involving PJSC Kyivguma, a company owned and controlled by the Individual Defendants.

778. The second was an initial proposal that Alfatrader and Mitsar (sometimes spelt Mizar) were initially to be the borrowers of US$50 million each in relation to loans for the funding of work at Hotel Split, a four star Radisson Blu hotel in Croatia, beneficially owned by Mr Bogolyubov. The proposal then changed with Ortika LLC ("Ortika") replacing Alfatrader and Ribotto LLC ("Ribotto") replacing Mitsar. In the event, between 20 January 2014 and 27 February 2014, Ribotto drew down US$50m in Relevant Drawdowns and made a prepayment in that amount to Wolcott Corporation (a non-relevant supplier) and between 17 January 2014 and 6 February 2014, Ortika drew down US$50 million in Relevant Drawdowns and also made a prepayment in that amount to Wolcott.

779. Confirmation of this proposal was given by Vyacheslav Vetluzhskikh, the Bank's pre- and post-nationalisation head of internal audit in an e-mail he sent to Mr Yatsenko on 8 April 2015 with a copy of a letter from PwC. PwC had noted that the Bank was "involved in a project to fund the construction of a hotel in Croatia" (i.e., Hotel Split) and that "in 2014 the borrower raised financing by structuring the transaction using intermediary companies (Ortika, Ribotto and Prudis LLC ("Prudis"))". PwC said those

borrowers should be added to the related parties list prepared in accordance with IFRS, but the important point for present purposes is that it confirmed the funding structure. This was then re-confirmed in an internal Bank presentation dated 30 June 2015, which addressed the financing of Hotel Split, including the construction of a new wing called the Cane Bay Residence, identified the "Borrowers" as Ortika, Ribotto and Prudis and gave the outstanding balances on their loans.

780. The third example was an initial proposal that Milorin was to be the borrower of US$15 million in relation to work at the Shakhsky Dvorets building, aka the Shakh / Shah's Palace, an administrative building in Odessa. It appears in Mr Bogolyubov's assets list and is held by Ukrinterinvest, which itself is admitted to be an asset owned by the Individual Defendants. The proposal then changed with Intorno LLC ("Intorno") replacing Milorin as the borrower. In the event, between 14 February 2014 and 27 February 2014, Intorno drew down UAH 135 million (c.US$15 million) in Relevant Drawdowns and made a prepayment in that amount to Faberge.

781. In addition to these examples, there were many other references in the papers to occasions on which the Bank made advances to Borrowers which were then allocated in the Bank's transaction data or otherwise identified as financing for the Individual Defendants' other assets. This became particularly apparent as the Bank came under increasing pressure during the course of 2015 to be more transparent in relation to its identification of related parties, one example of which was a memo from Mr Medvedev to Mr Novikov in which he explained the need to add two of the Ukrainian Borrowers (Alfatrader and Milorin) and two of the Intermediary Borrowers (Vinibur LLC and Letara LLC) to the list of related parties for IFRS purposes on the grounds that they were involved in the financing of ZFP. In the event this did not occur, but there is no suggestion that the underlying role of these entities was not accurately described.

782. Further confirmation of this borrowing structure was given in the Kazantsev Spreadsheet and the Gurieva Spreadsheet which allocated each of the Borrowers to a recognisable industry sector in which the Individual Defendants were known to have assets. Thus both the Kazantsev Spreadsheet and the Gurieva Spreadsheet allocated the original 46 Ukrainian Borrowers to one of a number of categories of asset class, all of which appear to relate to known assets of the Individual Defendants. There is also evidence in an e-mail sent by Maksym Leshchenko, the deputy head of client lending at BOK, to amongst others Mr Kazantsev on 26 January 2015, which appears to evidence that US$1.8 billion was outstanding in respect of loans to the Borrowers (which were also identified as being outstanding in the Gurieva Spreadsheet). The Bank submitted that it was striking that in that e-mail US$1.8 billion of the Borrowers' then outstanding indebtedness was ascribed to identifiable assets (such as ferroalloy, tanker projects, rubber projects, PET trading, IMRP trading, aircraft trading, Kievguma, Hotel Split and Bukovel) all of which were assets and projects in which the Individual Defendants had an interest.

783. It was said on behalf of Mr Bogolyubov that this correspondence does not have the evidential value which the Bank ascribes to it, and that these attributions were no more than a reference to the labelling given to the Relevant Loans, in a form normally employed to identify the area of business which was to be used as ostensibly legitimate cover, even though the lending in fact had no relationship to that business. I do not accept that submission, more particularly in circumstances in which the Individual Defendants did not themselves give evidence to confirm that none of their businesses

received any benefits from the advances of the Relevant Loans, whether through a direct funds flow (whatever tracing methodology was used), or otherwise.

784. The likelihood of benefit to the Individual Defendants' own businesses is also corroborated by the Bank's financial statements, which confirm that the majority of its lending went to sectors in which the Individual Defendants had significant interests through other corporate vehicles. The notes to the Bank's 2014 financial statements contain a detailed breakdown of the extent of its exposure to particular economic and business sectors and it is possible to compare those to the Individual Defendants' known business interests, so that they fit within the relevant sector. It was said by the Bank that this correlation admitted of only two possibilities: either that the Bank was lending for the ultimate benefit of the Individual Defendants' own companies, or that the Bank was being used to fund the businesses of their rivals. It was suggested (and I agree) that, given the Individual Defendants' controlling stake in the Bank, the latter is absurd. It was also suggested (and I agree) that the former is borne out by Ms Lozytzka's evidence that BOK's "strategic clients" were "companies and plants which fell within industry sectors in which [the Individual Defendants] held business interests" (see paragraph 67 above).

785. In support of its case as to the correlation, the Bank also submitted that there was a striking discrepancy between the scale of the lending to sectors in which the Individual Defendants had major holdings and the disclosed related party lending: it only amounted to 11%, of the UAH 161 billion in corporate loans recorded in the 2014 financial statements. The Bank's auditors, PwC, eventually picked up on this point and elaborated on it in a memo (circulated by Mr Yatsenko to Mr Novikov, Ms Gurieva and Mr Dubilet on 21 June 2016) in which they referred to (a) the use of what they called traders in particular business sectors (e.g., ferroalloy) which were acting as borrowers for funding to the Individual Defendants' entities and (b) the Bank's failure to identify the beneficial owners of those "traders" or to classify them as related parties.

786. The final matter on which the Bank relied in order to show a flow of benefit to the Individual Defendants from the making of the Relevant Drawdowns relates to the Lafferty Spreadsheets, the preparation and significance of which I have referred to in paragraphs 130ff above. It is said that they show that, according to the individuals who prepared them during the period immediately prior to the Defendants' jurisdiction challenge (and who were said to have personal knowledge of what occurred), at least US$452m of the Relevant Drawdowns went via "break points" to repay loans of ferroalloy companies in which the Individual Defendants had admitted interests. They also depict chains of payments being made and received by some 55 companies that feature in the Individual Defendants' asset disclosure as having real value. The Bank submitted that there could be no reason for the Individual Defendants to have directed their asset-holding companies to make and receive payments forming part of payment chains which display what appeared to be "a money circulation scheme" (the way it was described by Mr Bogolyubov's expert forensic accountant) if they were not benefitting from that scheme.

787. In closing, Mr Bogolyubov's counsel submitted that the Bank's reliance on the Lafferty Spreadsheets was incoherent. They said that the Bank has rejected the Lafferty analysis as inaccurate (which is true) and that the transaction chains comprising the US$452 million said to have gone to the 55 companies were based on the Lafferty Spreadsheets' use of a 'break point' and a 'compensation payment' analysis which was a focus of

particular criticism by the Bank in its opening. They also said that, in order to link different payments to Grizal (and thus Mr Bogolyubov), the Bank relied upon what the Lafferty Spreadsheets show only before the break point, on the basis that "nobody likes break points anymore". They also submitted that the Bank's position is unsustainable, not just because it has disavowed the Lafferty analysis, but also because it is inconsistent with the Bank's own methodology for following funds.

788. So far as it goes, Mr Bogolyubov is clearly right on this point. In support of this particular argument, the Bank relied upon the Lafferty Spreadsheets as showing that various Relevant Drawdowns made by Agroprom on various dates in May 2014 went via Collyer and various other companies to Marganetskiy Mining and Processing Plant LLC and Ordzhonikidze Mining and Processing Plant LLC (two ferroalloy companies in which Mr Kolomoisky and Mr Bogolyubov each held an equal share in c.48% of the equity), which then used them to make repayments to the Bank on the same dates as the Relevant Drawdowns were made. However, on the Bank's methodology, the Relevant Drawdowns made by Agroprom went initially to Collyer in May 2014, but were then returned in August 2014 to Agroprom before being paid out again to Collyer as an Unreturned Prepayment. A similar submission was made in relation to Relevant Drawdowns made by Mastein in May and July 2014.

789. It was then said that the two analyses were mutually exclusive, and that the same funds could not be used both to repay loans by the ferroalloy companies in May and July 2014 and also to make Unreturned Prepayments in August 2014. It was said that the Bank must choose a single case. I do not think that this is an answer to the point made by the Bank, which is that for some time it was accepted by the Defendants that a funds flow analysis showed the proceeds of Relevant Drawdowns ended up repaying loans of ferroalloy companies in which the Individual Defendants had admitted interests. The fact that the flow of funds went in that manner might have been a relevant consideration if the Bank were to be pursuing a proprietary claim for recovery of the actual money paid away at the time of the Relevant Drawdown. But it is not; its claim is for compensation for the harm it sustained as a result of the Individual Defendants' commission of unlawful acts and involves a causation analysis based on the Bank's own transactional data.

790. Having regard to all of these considerations, I have reached the clear conclusion that it is likely that a major part of the Bank's corporate loan book was ultimately made up of advances to businesses controlled by the Individual Defendants (or in respect of which they held a significant economic interest). There is compelling evidence (apparent from elsewhere in this judgment) that the Individual Defendants' business model was to procure loans from the Bank to a façade of shell companies, which then found its way to fund their other businesses. These shell companies were not declared as related parties so as to limit the Bank's declared related party lending. Even though much of the lending was to shell companies, rather than to the underlying trading enterprises, the Bank was able to classify the lending to the specific sectors in which the Individual Defendants had interests for the purposes of its financial statements.

791. The Bank submitted, consistently with evidence adduced from the Individual Defendants' own expert, Mr Davidson, that the manner in which the funds were channelled to the Individual Defendants' companies was so complex as to be impossible to trace (and so it has been left in the type of jungle without a route-map that was referred to by Toulson J in *Komercni Banka AS v. Stone and Rolls Ltd* [2002]

EWHC 2263 (Comm) ("*Komercni*") at [176]), which, so it is said, is one reason why it is not required to prove that the funds ultimately ended up with their companies.

792. I accept that submission. If, in order to establish its claim, the Bank were required to prove that it could trace a particular Relevant Drawdown into the hands of one of the Individual Defendants' companies, its inability to do so because it would be entering a jungle without a route-map would not relieve it from the legal obligation to prove its case. However if there is evidence (which there is) that the Individual Defendants were indeed the ultimate intended beneficiaries of the Bank's lending, amongst which were advances made in the form of the Relevant Drawdowns, the other surrounding evidence may entitle the court to conclude that there was indeed a causal link between the harm sustained by the Bank at the time the Relevant Drawdown was made and the benefit the Individual Defendants are likely to have received. This is the case even though the precise process by which that was achieved, remained in some material respect shrouded in mystery. This is a point to which I will return when considering what has been called the use of funds defence and the bigger fraud argument later in this judgment.

Conclusions as to the role of the Defendants in the Misappropriation

793. The Bank identified five key themes which they said appeared from the detailed points made in relation to the ownership and control of the Borrowers, the Intermediary Borrowers, the Corporate Defendants, the ED Principals and the New Borrowers. The first was that the structure and nominee charts demonstrate how the same companies and nominees were being used time and again to hold interests in those entities. Most of the individuals concerned were PBC and former Bank employees who could be linked to the Individual Defendants in a variety of other ways: holding valuable assets for them under oral agreements (or arrangements arising through "conduct and implication"). The companies holding interests in the Borrowers, Intermediary Borrowers, Corporate Defendants and ED Principals regularly appear in the structures holding assets admitted to belong to the Individual Defendants.

794. The Bank's second theme was that, during 2015, there was a concerted effort to conceal the Individual Defendants' connections with many of the Borrowers. It went on within the Bank (which was of course owned and controlled by the Individual Defendants) and was implemented by the employees with whom they had the closest relationships, in particular Mr Yatsenko, Ms Gurieva and Mr Novikov. The complex process of removing those links in order to fool the NBU involved mass changes of company directorships and purported beneficial ownership, as evidenced by the Luchaninov e-mail and the Rokoman spreadsheet. The secretive way in which this was done was illustrated by the use of the Beneficiary Key cypher to conceal the identities of the purported UBOs and its artificiality was illustrated by the advice from Avellum (e.g. to consider the acquisition of 100 companies "by one or several beneficiaries on the same day").

795. The Bank's third theme was that the Borrowers and when the time came the Intermediary Borrowers were all treated alike – they had the same kind of loans granted after the same type of desultory approval process, near identical RSAs and concluding with the same involvement in the 2014 Ukrainian Proceedings. Furthermore when the

time came, the borrowing of the Borrowers and Intermediary Borrowers was said by the Defendants to have been discharged in the same three ways (i.e., the Cash Repayments, the Asset Transfers and the New Loans which I introduced at the beginning of this judgment). The Bank says that it is not realistic to suggest that these companies were in separate beneficial ownerships.

796. The fourth theme is that, after some pressure, the Individual Defendants have been forced to admit majority interests in four Borrowers (Alfatrader, Uniks, Dorteks and Prado). It asks why did these four companies borrow US$99 million and UAH 1.6bn from the Bank in the same way as all the other Borrowers if the other Borrowers were not also owned by the Individual Defendants? And why did they make Unreturned Prepayments in the same way as all the other Borrowers? It is said that the Individual Defendants' refusal to attend for cross-examination shows that they are unable to answer those critical questions.

797. The Bank then concluded by submitting that the Individual Defendants' case that they do not own the Corporate Defendants is "in tatters". It says that those said to be the UBOs of the Corporate Defendants – such as Mr Melnyk – are all individuals with whom the Individual Defendants have close links and they rely on what they describe as a damning body of evidence which has slowly been extracted from Individual Defendants. This includes in particular two of three English Defendants (Teamtrend and Collyer) being billed for meetings that Mr Kolomoisky and Mr Novikov had with Sofocleous in the two months after the WFO was served and work also carried out by Sofocleous in "changing the records of 167 companies", which can only have been a reference to companies in the Individual Defendants' "stable". It also includes the English Defendants' institution of defamation proceedings for the benefit of the Individual Defendants, despite being judgment debtors to the tune of US$1.8bn, with no business reputation to protect and no assets, and Mr Kolomoisky's reluctant disclosure of WhatsApp messages showing that he controlled Sanderlyn and Versala, which have spent c.£1.5 million in funding the BVI Defendants' defence.

798. I should add that there is no evidence to substantiate any suggestion that people other than the Individual Defendants were responsible for devising and authorising what occurred. They controlled the Bank and each of the Relevant Entities. In those circumstances, not only is it unevidenced, but it is also highly implausible, that employees of the Bank, from Mr Dubilet downwards, would have embarked on the elaborate process of using a network of companies owned or controlled by the Individual Defendants, and large quantities of sham documentation in order to evidence so many sham loans, unless it was being done with the knowledge and approval of both of them.

799. Taken in isolation, much of what I have described about the nature and extent of the control exercised by Mr Kolomoisky and Mr Bogolyubov over the affairs not just of the Bank, but also of the other Relevant Entities, is capable of being read both ways. However, that would be to adopt too compartmentalised an approach to the evidence, which must be assessed in the round. Stepping back, this is not a case in which there is a single document or series of documents which establish the Bank's case as to the Individual Defendants' role in the Misappropriation, but nor is it surprising that such a document does not exist. As I explained earlier in this judgment, both of the Individual Defendants (and particularly Mr Kolomoisky) were accustomed to communicating other than by e-mail and in a manner for which no written record exists. There are

examples of instances in which documentation has been destroyed and I continue to have concerns that not everything of relevance has in fact been disclosed. This provides an answer to the Defendants' submissions that the Bank's case is much weakened by the piecemeal nature of the documentation on which it relies. In short, the evidence that the Bank has been able to adduce is very much more compelling when looked at it in the round than it would be when considering its component parts.

800. I accept the five key themes identified by the Bank. I have concluded that there is overwhelming circumstantial evidence that the Individual Defendants knew and approved of the scheme which led to the making of the Relevant Drawdowns pursuant to the Relevant Loans and the onward transmission of the monies to the Corporate Defendants. It is not possible to say that each of the individual Relevant Drawdowns was made on the specific instructions of the Individual Defendants, but I am satisfied that the Relevant Loans would not have been advanced without their knowledge and approval and that it is likely that each of the Relevant Drawdowns was made in accordance with at least a general instruction that it would be utilised in accordance with the loan recycling structure which was at the heart of the Misappropriation. This included making the Unreturned Prepayments to the Corporate Defendants.

801. I am also satisfied that the Bank has established its case on benefit to the Individual Defendants. In my judgment, the total impact of the evidence is corroborative of the Bank's case that the funds originally misappropriated by the making of the Relevant Drawdowns (and which were then used either directly or indirectly to fund the Unreturned Prepayments) benefitted the Individual Defendants and/or their trading businesses. It is likely that the ability to use (whether directly or indirectly) the proceeds of US$ prepayments made under Supply Agreements in this way was the whole purpose of the loan recycling scheme in the first place, and the fact that the forensic accountants have not been able to identify exactly how and to whom they were siphoned off (to use Glavcom's phrase) after the prepayments had been made does not mean that it did not happen.

802. Furthermore, the fact that the scheme was operated through artificial and sham transactions which had no intrinsic commercial purposes so far as the shell-company participants themselves were concerned, together with the highly complex fund flows which formed part of the scheme, shows that it was all built on dishonest foundations. It makes it much more likely that the whole edifice was designed to ensure that the ultimate indirect beneficiaries of the monies transferred out of Ukraine as a result of the Misappropriation could not easily be identified.

Foreign Law: General

803. It is common ground that the claims in tort for the loss the Bank alleges it suffered as a result of the Relevant Drawdowns are governed by Ukrainian law. There was no material dispute as to the approach that an English court adopts to determining any matter of foreign law. The essential principles are now summarised in Dicey, Morris & Collins on the Conflict of Laws, 16th edn ("Dicey") at paragraphs 3-011 and 3-012:

> "Foreign law should, in general, be proved by expert evidence. The traditional view was that foreign law could not be proved merely by putting the text of a foreign

> enactment before the court, nor merely by citing foreign decisions or books of authority, and that such materials could only be brought before the court as part of the evidence of an expert witness, since without the assistance of the expert the court cannot evaluate or interpret them. This may be especially important when the foreign law in question is found in a number of sources whose relationship to each other is not easily understood or explained …
>
> "But in *Brownlie v. FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, it was said (obiter) that the notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law; when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law; on some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide; but in other cases it may be sufficient to know what the text says."

804. In carrying out the exercise of determining the applicable principles of any foreign law, the court is concerned with deciding the law which a properly directed court of the relevant jurisdiction (in this case Ukraine) would apply. In *Yurov*, Bryan J explained what this meant when seeking to establish the applicable principles of Russian law, as to which similar principles would be applied in relation to the law of Ukraine:

> "In that regard existing foreign judgments are to be given due weight and consideration. I bear in mind that under Russian law judgments of lower courts are not formal sources of law in the same way as they are in England. When considering the Russian decisions, I have also had regard to the legislative framework and wider constitutional background in which they sit."

805. The parties did not agree on the law applicable to the Bank's claim against the Corporate Defendants in unjust enrichment. The Bank contended that the applicable law was the law of Ukraine, being the place to which the unjust enrichment it alleged had the closest connection. The Corporate Defendants contended that the applicable law was the law of Cyprus, being the place in which they were said to have been enriched by the monies representing the Unreturned Prepayments. There were said to be material differences between the law of Ukraine and the law of Cyprus. I will address that issue later in this part of the judgment.

Foreign Law: the Experts

806. The parties called four experts for the purpose of assisting the court in its determination of the applicable principles. Their evidence covered many issues which were not in the event in dispute, and many the relevance of which either always were or became tangential to the matters which I need to decide.

807. The Bank's Ukrainian law expert was Mr Oleh Beketov, a lawyer admitted to the Bar in Ukraine in 2009 and a partner and head of the International Litigation Practice at Eterna Law, based in Kyiv. He gave evidence on the Ukrainian law of tort and unjust enrichment.

808. I agree with the Bank's submission that Mr Beketov was an honest, independent and diligent expert who did his best to assist the court. I have had to scrutinise the way he addressed some of the issues on which he was cross-examined with considerable care, because there were aspects of his evidence which were not very well expressed, and there were occasions on which he lost the thread of the issues he was being asked to address. However, in the end I have been able to reach clear conclusions on the substance of his opinions, and for the most part accept his evidence as to the applicable principles of Ukrainian law on which he gave his view.

809. Mr Kolomoisky's Ukrainian law expert was Mr Oleg Alyoshin, a lawyer admitted to practice as an attorney-at-law in Ukraine in 1995 and a partner and head of the International Arbitration and Litigation practice group at Vasil Kisil & Partners, based in Kyiv.

810. I was not assisted by Mr Alyoshin's evidence to the same extent as the evidence of Mr Beketov. There were a number of reasons for this, but in large part they boiled down to the fact that he found it difficult to honour his duty to assist the court when faced with the need to make concessions which were liable to damage Mr Kolomoisky's case. Sometimes this was apparent from unreasonable intransigence and on other occasions this was apparent from fairly obvious evasiveness in not addressing the issue about which he was being asked. One of the more revealing examples of this attitude came in an exchange with Mr Andrew Hunter KC, who was cross-examining him on behalf of the Bank about the resolution of the Supreme Court in case No. 910/11033/18, *Kakhova Prom-Agro LLC v. PJSC Misto Bank* ("*Kakhova*"), a case concerned with the question of whether it was open to a Ukrainian court to conclude that the parties to the Relevant Loans intended to breach public policy in the absence of a criminal conviction. Mr Hunter was trying to ascertain whether he knew about the decision when he expressed a contrary view in his report without referring to the case. When asked whether it was his duty to bring the decision to the attention of the court if he had been aware of it, he said that he did not know.

811. There were also two other aspects of his evidence, to which Mr Hunter drew attention in his closing submissions and which in my view had a material impact on the quality and credibility of what he had to say. The first was that there were a number of occasions, with which I will deal later in this judgment, on which Mr Alyoshin misrepresented the substance and effect of other opinions on which he relied in support of his evidence. Sometimes this amounted to the suppression of parts of academic articles which were inconsistent and even directly contradicted the views which he said the authors had espoused. On other occasions (such as his view on a significant aspect of the Limitation Defence) he suppressed his own earlier opinions given in other contexts.

812. The second was that his independence was undermined by the existence of a longstanding relationship between his firm (and himself) and Mr Kolomoisky dating back to 2013. This involved advice in relation to other legal disputes as well as to advice in relation to these proceedings. The Bank did not try to explore the nature and extent of the advice given by Mr Alyoshin in cross-examination, but he disclosed in his first report that he had been providing advice to both Mr Kolomoisky and Mr Bogolyubov in relation to the Ukrainian law issues arising out of these proceedings until the time he was first instructed as an expert, which according to his letter of instruction took place in November 2021. It transpired during his cross-examination

that this was a period of about two years because he was first instructed in October 2019.

813. Mr Bogolyubov's Ukrainian law expert was Mr Dmytro Marchukov, a lawyer who has practised law in Ukraine for 16 years and is a partner and head of Cross-Border Litigation at Integrites, based in Kyiv. His evidence was limited to issues relating to Article 1190 of the Civil Code ("Article 1190"), and the Bank was careful to eschew any allegation that he was disingenuous in the way he gave it. I agree that he was an honest and straightforward witness who did his best to assist the court.

814. The Corporate Defendants' Ukrainian law expert was Mr Volodymyr Nahnybida, a lawyer with 17 years' experience in practice and head of the Scientific Laboratory for the Problems of Adaptation of Ukrainian Legislation to EU Law at the Scientific Research Institute of Private Law and Entrepreneurship. He is also Professor of the Department of Civil Law and Procedure at Khmelnytskyi University of Management and Law and practises as Managing Partner of Genuine Law Company, based in Khmelnytskyi.

815. There were occasions on which he, like Mr Alyoshin, was over-argumentative in the way he gave his evidence. As a result, I have found it necessary to approach what he had to say with some caution, although (as will appear) there were aspects of his evidence which were of real assistance to the court.

Ukrainian Law: general

816. One of the areas on which the experts were largely but not wholly agreed related to the sources of Ukrainian law and the approach which Ukrainian law takes to the hierarchy of judicial decisions. This is of particular relevance on the questions of whether a provision of the constitution has direct effect, and the weight to be attributed to decisions of the Supreme Court, which is Ukraine's highest court, and decisions of the Grand Chamber of the Supreme Court. A short summary of the position will help to set in context the conclusions I have reached on such of the Ukrainian law issues and their application as remain in dispute between the parties.

817. Ukraine is a civil law jurisdiction and has a codified system of law, the main legislative sources of which are the constitution, international treaties such as the ECHR (which have direct effect pursuant to Article 9 of the constitution) and the laws of Ukraine enacted by the Verkhovna Rada. Regulations adopted by the NBU are also binding in law on the banks to which they apply, in the same way that the decisions and regulations of other regulatory bodies are binding on the persons who are subject to their regulation. There was a difference of view between the experts on how a Ukrainian court would resolve any conflict between provisions of the Civil Code and provisions of the Ukrainian Commercial Code (which governs relations associated with business activities). In the event, no issue has arisen in respect of which it is necessary to resolve those differences.

818. Ukraine now has a single court of cassation, the Supreme Court, which is divided into four chambers (civil, commercial, administrative and criminal). Like the decisions of the Constitutional Court, the function of which is to resolve the constitutionality of laws

and other legal acts, the decisions of the Supreme Court are regarded as sources of law in Ukraine: thus the lower courts must take into account judgments of the Supreme Court as to how the law is to be applied. The Grand Chamber of the Supreme Court is charged with the task of ensuring uniformity of practice between the other four chambers, and it is agreed by all experts who gave evidence on the point that its judgments carry more weight than those of the other chambers.

819. Nearly all of the decisions on which the experts relied were judgments of the Supreme Court (called "resolutions" in most of the translations with which I was provided). However, the decisions of the lower appellate courts (and even those of the courts of first instance) are of some persuasive weight in determining how the law of Ukraine would approach a particular issue where there is no published practice of the higher courts on the point.

820. There was a difference of view between the experts on the question of whether judgments of the Supreme Court are not just a source of law but are actually binding on the lower courts. The view of Mr Alyoshin and Mr Nahnybida is that they are (as if the doctrine of *stare decisis* were to apply) with the consequence that a failure to follow them will result in a judgment of those lower courts being set aside on appeal. The view of Mr Beketov was that judgments of the Supreme Court need only be taken into account by the lower courts and are only of persuasive authority to the same extent as decisions of the lower courts of appeal. He said that this flowed from the fact that there is no system of binding judicial precedent in Ukraine.

821. I do not think it is necessary to resolve this particular dispute. While there were some decisions in respect of which the views of the experts differed as to what the court actually decided, there is no recent decision of the Supreme Court which was said by any of the experts to be a decision which, if properly understood, did not reflect the law.

Ukrainian law: Article 1166 and the elements of the cause of action

822. The Bank's claim in tort is based on Article 1166, which is as follows:

> "General grounds for liability for property damage
>
> 1. Property harm caused by unlawful decisions, actions or omissions to the personal non-property rights of a natural or legal person, as well as harm caused to the property of a natural or legal person, shall be compensated in full by the person who caused the harm.
>
> 2. The person who caused the harm shall be exempt from paying compensation for the harm if he proves that the harm was caused not through his fault.
>
> 3. Any damage caused by any severe injury or any other personal injury or death of an individual as a result of acts of God must be compensated to the extent provided by law.
>
> 4. Harm caused by lawful actions shall be compensated in the instances provided by the Civil Code of Ukraine or other law."

823. It is common ground between the experts that the elements of a tortious claim, under Article 1166 are (i) unlawful conduct, (ii) harm, (iii) causation between the unlawful conduct and harm, and (iv) fault. At paras [67] and [68] of the resolution of the Supreme Court in case No. 910/12930/18, *Daniel Commercial Bank PJSC* ("*Bank Daniel*"), the way that this was explained was as follows:

> "67. In resolving a dispute over damages, the court must establish the presence or absence of a civil tort containing the following elements:
>
> - unlawfulness of the person's conduct, that is, non-compliance with the requirements set in applicable civil law acts;
>
> - a fact of harm meaning a loss of or damage caused to the property of the victim and (or) deprivation of the victim of the personal intangible right; in general, any impairment of a benefit that is protected by law, and the extent thereof;
>
> - the causal link between the unlawful conduct and the harm, meaning that the harm must be an objective consequence of the unlawful conduct, that is, the unlawful conduct of a particular individual (individuals), who is held liable, is that direct reason that inevitably caused the harm;
>
> - fault of the tortfeasor.
>
> 68. If at least one of these elements is not in place, the civil liability shall not arise."

824. It was common ground that the burden is on a claimant to prove the first three elements of the cause of action, but the burden is on a defendant to disprove fault in the event that those first three elements are established against him (para [71] of *Bank Daniel*).

Article 1166: Unlawful Conduct

825. The concept of unlawfulness is given a wide interpretation for the purposes of Article 1166. In the joint statement, Mr Beketov and Mr Alyoshin agreed that conduct will be unlawful for the purposes of Article 1166 if it breaches "any provision of the Ukrainian Constitution, laws (statutes), international treaties, executive orders, regulatory instruments or court judgments, that is directly applicable to the defendant and expressly or implicitly prohibits the alleged conduct". The issue expressed in such general terms was not addressed by Mr Marchukov. Mr Nahnybida's evidence is consistent with the description given by Mr Beketov and Mr Alyoshin: he relied on a resolution of the Supreme Court dated 19 October 2021 in case No. 910/15931/19, *Centre Retail LLC* ("*Centre Retail*") at [10.13], which expressed unlawfulness as follows:

> "A person's unlawful conduct can be manifested in illegal decision making or misconduct (actions or omissions). Unlawful in civil law is behaviour which violates the mandatory rules of law or legally sanctioned terms of the contract, resulting in violation of the rights of another person".

826. The evidence establishes that these descriptions of unlawfulness are the right starting point for identifying whether the conduct alleged is unlawful for the purposes of Article

1166. In particular, the touchstones are whether the prohibition said to have been breached is a mandatory rule and whether (either expressly or implicitly) it is directly applicable to the defendant.

827. It was also common ground that both acts and omissions to act are capable of constituting unlawful conduct. This was specifically identified as part of the test for unlawfulness in *Centre Retail* and confirmed in the resolution of the Grand Chamber of the Supreme Court in case No. 910/11027/18, *DGF v. Person 1 - 18* ("*Ukoopspilka*") at [7.74]. In the context of explaining that the members of the supervisory board and the executive body of the bank in that case (JSB Ukoopspilka) were jointly responsible for the activities of the bank as a whole, the Supreme Court said:

> "The unlawfulness of their behaviour may consist of both committing certain actions and not committing them, i.e., inaction.".

828. There are two categories of unlawfulness on which the Bank relies. The first category is breaches by Mr Kolomoisky and Mr Bogolyubov of the fiduciary duties they owed to the Bank. They owed those duties as officers of a joint stock company under Article 63 of the Law of Ukraine on Joint Stock Companies ("Article 63" and the "JSC Law" respectively) and as executives of a bank under Article 42 and Article 43 of the Law on Banks ("Article 42" and "Article 43" respectively"). The Bank also relied on breaches of Article 92 of the Civil Code ("Article 92"). It was common ground between the experts that any breach of these provisions would amount to unlawful conduct for the purpose of a claim under Article 1166.

829. The second category of unlawfulness identified in Mr Beketov's evidence was acts and omissions in breach of Article 3(1)(2) and Article 13 of the Civil Code ("Article 3(1)(2)" and "Article 13" respectively) - conduct which violates the rights of another person, or which involves an abusive exercise of the defendant's own rights. There was no common ground on this issue, and in particular it was disputed that these articles could found a claim in tort. It was said by the Corporate Defendants that, because the Bank's claim against them only relied on Articles 3(1)(2), 13(2) and 13(3), the conduct alleged against them was not in breach of any mandatory rule of direct application capable of amounting to unlawfulness for the purposes of Article 1166.

Unlawful conduct: breach of the fiduciary duties

830. The relevant parts of Article 63, Article 42, Article 43 and Article 92, dealing both with the underlying duty and the consequences of its breach, are as follows:

> "Article 63. Liability of officers of a joint stock company's bodies
>
> 1. Officers of a joint stock company's bodies shall act in the interests of the company, follow the requirements of the law, provisions of the charter and other documents of the company.
>
> 2. Officers of a joint stock company's bodies are liable to the company for losses caused to the company by their actions (omissions) in accordance with the law.

3. In the event that several persons are liable in accordance with this article, their liability to the company shall be joint and several."

"Article 42.

The executives of a bank are obligated to act in the bank's interests and to observe the requirements of the law, the provisions of the bank's charter and other documents of the bank."

"Article 43. Duty to protect the bank's interests

The executives of a bank are obligated to act for the benefit of the bank and its clients and are obligated to place the interests of the bank above their own when performing their obligations in accordance with the requirements of this Law.

In particular, the bank's executives are required:

1) to behave responsibly when performing the duties of their office;

2) to take decisions within the bounds of the powers given to them;

3) to refrain from using their office in their personal interests;

4) to secure the integrity and transfer of the bank's property and documents when directors are dismissed from their office."

"Article 92. Civil capacity of a legal entity

1. …

2. …

3. A body or person who according to the constitutional documents of the legal entity or the law acts in the name of the legal entity is obligated to act in the interests of the legal entity in good faith and reasonably and not exceed its authority. Restrictions on the representation of a legal entity shall not apply to its relations with third parties, unless the legal entity proves that a third party knew or, in all the circumstances, could not have been unaware of such restrictions.

4. If the members of a body of a legal entity or other persons who, according to the law or constitutional documents act in the name of the legal entity, breach their obligations concerning their representation, they shall be jointly and severally liable for losses that they cause to the legal entity."

831. Mr Beketov explained in his evidence that these duties are complementary and in some respects are mirror images of each other. Taken collectively, they are often referred to in the Ukrainian banking and legal communities as fiduciary duties, although they are not formally defined as such under Ukrainian law. In support of this way of characterising the duties, the Bank relied on paras [77ff] of the resolution of the Supreme Court in *Bank Daniel* in which the duties arising under Article 92 and Article 63 were described as follows:

> "77. The above statutory provisions provide for the obligations of the legal entity's bodies (officials) to act in the best interests of the legal entity in good faith, reasonably and without abusing their powers and also provide for their liability for breach of the obligations (fiduciary duties)."

832. It is clear from the succeeding paragraphs of the Supreme Court's resolution in *Bank Daniel* that, by the concept of a fiduciary duty, it meant those duties recognised by the OECD Principles of Corporate Governance, as the basic fiduciary duties of directors of companies:

> "a duty of care (acting in good faith, with due diligence and care, and in the best interest of the company, devoting sufficient time, efforts and professional skills) and duty of loyalty (avoiding conflicts of interest and acting solely in the interests of the company upon making decisions in relation to its business)."

833. Good faith is an important ingredient of these duties. As Mr Beketov confirmed in an unchallenged part of his supplemental report, good faith is to be treated as the source of the Supervisory Board's obligations to monitor the Bank's activities. The way he put the point as a matter of general principle was:

> "I would also refer to paragraph 2.4 of the "Methodological Recommendations on Improvement of Corporate Governance in Banks of Ukraine", approved by NBU Resolution No. 98 dated 28 March 2007, … which state that a bank's supervisory board members have a duty to monitor the activities of their bank: "The duty of good faith also imposes on the members of the supervisory boards permanent responsibility for monitoring the bank's compliance with the legislation of Ukraine, as well as for the bank's activities as such". In July 2022, the Supreme Court referred to and described this duty as follows:
>
> > "110. Methodological recommendations for improving corporate governance in Ukrainian banks prescribes that the duty of good faith requires managers to make decisions based on all necessary information, responsibility for monitoring the bank's compliance with Ukrainian law, as well as the bank's activities as such. When making decisions, managers can rely on information provided by bank employees, but this possibility does not release them from personal responsibility for making independent decisions (clause 2.4)"."

834. In cross-examination, Mr Alyoshin accepted that members of the Supervisory Board were officers of a joint stock company's bodies for the purposes of Article 63 and executives of a bank for the purpose of Article 42 and Article 43. In the light of the definitions of officers in the JSC Law and executives in the Law on Banks he was plainly right about this. His evidence as to whether they were also representatives of a legal entity (viz. the Bank) for the purposes of Article 92(3) was initially more circumspect, but I am satisfied on a fair reading of his evidence that he agreed with Mr Beketov's clear evidence that, when members of a supervisory board are acting in the name of their bank, they are obliged to act in its interests, in good faith, reasonably and without exceeding their authority.

835. It was also common ground that the 'other documents' of a company for the purposes of Article 63(1), or of a bank for the purposes of Article 42, would include documents such as the internal regulations of the Supervisory Board and the ECC in the present

case. However, in a number of other respects, the content of the duties owed by the member of the Supervisory Board, including most relevantly for present purpose the Individual Defendants, was not common ground. In particular there was a difference between Mr Beketov and Mr Alyoshin on the important question of when these duties are engaged.

Unlawful conduct: scope and context of the fiduciary duties

836. There were two aspects of the evidence on which the disagreement was more than a difference in emphasis and can properly be characterised as a difference of substance. The first is whether the members of a bank's supervisory board owe these duties at all times (which was Mr Beketov's opinion), or whether those duties only arise when those members are performing their roles, by which he meant acting in their capacity as such. In Mr Alyoshin's view, a member of a supervisory board will not be liable to a bank under these provisions if he caused harm to the bank other than by his conduct as a member of the supervisory board. The way that he explained this in report was that "it is necessary to show a specific and direct connection between his duties and conduct as an officer of the Bank and the losses sustained". He also said:

> "these duties are owed by: a) members of company's bodies and those with authority to act in the company's name when and to the extent that they act towards third parties on the company's behalf and/or b) members of the company's bodies when they vote on corporate decisions that are subsequently put into effect by way of making transactions with third parties as per (a)"

837. This was an important difference of view, relied on by Mr Kolomoisky when the case was opened on his behalf, although only really developed in closing argument on behalf of Mr Bogolyubov. Its significance was explained by Mr Alyoshin in the following terms in his supplemental report:

> "The significance of this is that, following Mr Beketov's approach, a Supervisory Board member who participates in a scheme to embezzle funds from the bank "self-evidently" breaches his fiduciary duties to the bank, because he is under a duty to act in the bank's interests at all times, and he has necessarily failed to do so. On the other hand, if a Supervisory Board member is only subject to fiduciary duties at certain times, it becomes necessary to analyse the acts or omissions that are alleged to have resulted in the embezzlement of the bank's funds and whether they occurred in the course of the performance of activities or obligations to which fiduciary duties applied."

838. When this evidence was tested during the course of his cross-examination, Mr Alyoshin initially seemed reluctant to accept that a member of a supervisory board could ever be acting in breach of fiduciary duty if he did or failed to do something in a context other than while acting as such. However, when pressed, he accepted that a board member was under a duty to disclose any personal interest in a related transaction from the moment in time he became aware of it, irrespective of whether he was involved *qua* board member in the actual decision to transact. He also eventually accepted that, if a member of a supervisory board knew that a misappropriation of the relevant company's assets was about to happen, it "could also be breach of fiduciary duty" and "it may

amount also to the breach of supervisory duty" to fail or at least not to take steps to stop it.

839. Mr Beketov was also cross-examined on this point on the basis that it could not possibly be the case that the chairman of a bank was required to have regard to its best interests when (e.g.) negotiating with the board for a larger bonus. It was said on behalf of Mr Bogolyubov in closing that, as a result of this cross-examination, he changed his approach. On a proper analysis of the evidence, I disagree. It remained Mr Beketov's opinion, which I accept, that in those circumstances the chairman could not simply have regard to his own interests without regard to what might properly be thought to have been the best interests of the bank; his evidence remained that a chairman in such circumstances could not abuse his power in some way to improve his negotiating position. The touchstone continued to be whether his conduct in the performance or non-performance of his official duties was in the best interests of the bank, or whether it amounted to the improper use of his office (whether through action or inaction) to further his own interests.

840. The Bank submitted that Mr Alyoshin's evidence on this point was incoherent and illogical. The submission was based on Mr Beketov's evidence to the effect that such a conclusion would be inconsistent with the fact that (as Mr Alyoshin accepted) a fiduciary duty can be breached by omission as well as positive action and would mean that members of a supervisory board (amongst others) could disregard their duties when making decisions regarding internal company matters. He also pointed out that it took no account of the fact that Article 43 formulates the duty owed by a bank's executives as including an obligation to refrain from using their office in their own personal interests, a restriction which was plainly wide enough to cover preventing the use of knowledge acquired through their position at the bank for their own personal advantage.

841. The Bank also submitted that a significant ground for preferring Mr Beketov's evidence on this point is that it is more consistent with, and indeed supported by a number of decisions of the Supreme Court. The starting point is the resolution of the Grand Chamber of the Supreme Court in *Ukoopspilka* in which the court was concerned with a claim by the DGF, acting as liquidator of Ukoopspilka, against members of its former management. The allegations were that the defendants acted in breach of duty by permitting JSB Ukoopspilka to expend 60% of the value of its assets in the purchase of loss-making unsecured bonds issued by entities connected to its owners. Amongst the allegations were that the defendants failed to perform the functions of risk management and monitoring which led to the withdrawal of funds which caused loss to Ukoopspilka and its creditors.

842. As the Grand Chamber made clear at [7.14] to [7.17], the duties with which Article 92 were concerned extended to a duty of care to act in good faith for the benefit of the company's development, devoting sufficient time and effort and professional skills to its management and a duty of loyalty to avoid conflicts of interest and act in the best interests of the company when making decisions on its activities. In that case, the insolvency of the bank caused by the purchase of loss-making assets was caused in material part by the passive inaction of its managers to act in good faith to prevent possible risks. In short, the harm in the form of the bank's insolvency was found to have been a consequence of two categories of unlawful act – the "active actions" of the actual signing of the contracts pursuant to which the loss-making bonds were acquired

and what the Grand Chamber called "passive inaction", both of which therefore founded the liability.

843. Initially, Mr Alyoshin's evidence was that the resolution of the Grand Chamber in *Ukoopspilka* was subsequently cancelled (as it was) and that subsequent decisions of the Supreme Court had not applied its reasoning. However, he later accepted that he was wrong about the reasoning, because in the more recent resolution of the Supreme Court in case No. 916/1522/22, *DGF v. Persons 1 to 18* ("*Finrostbank*") (decided just before the start of the trial) at [36] and [45], the court cited and applied *Ukoopspilka* with particular reference to its discussion of breaches of duty by omission. The Supreme Court in *Finrostbank* also confirmed that the subsequent cancellation of *Ukoopspilka* had nothing to do with its description of the relevant principles:

> "the cancellation did not occur due to a change in the legal position of the Court, which is set out in the said decision, but in connection with other circumstances established by the cassation court …".

844. It was also suggested by Mr Alyoshin that *Ukoopspilka* and the later resolution of the Supreme Court in *Bank Daniel* were only concerned with actual decisions to approve improper transactions taken by the supervisory board when discharging its functions as such. He said:

> "There is no finding in any of the cases that the supervisory board members would have been held liable under Article 43 of the Law on Banks or Article 92 of the Civil Code for wrongdoing committed in a different capacity, simply because they happened to be members of the supervisory board."

845. However, I think that Mr Beketov is correct to point out that the Supreme Court in *Bank Daniel* also relied on the failures "to exercise proper control over the business indicators of the bank" as an unlawful omission which was causative of the bank's insolvency. This was a failure by the members of that bank's supervisory board to comply with their duty (as described by Mr Beketov's unchallenged evidence) to monitor the activities of its management board and to protect the rights of depositors and other creditors of the bank: Article 37(3) of the Law on Banks. This included amongst other matters the exclusive competence under Article 39(5) of the Law of Banks to ensure the proper operation of the policies set by them and the supervision of their effectiveness.

846. This is also consistent with the approach to *Ukoopspilka* taken by the Supreme Court in case No. 910/9851/20, *DGF v. Persons 1-12* ("*Trust Bank*"), in which the court reached a similar view, this time based on the concept of a 'fiduciary duty' defined in the Guidelines on Improving Corporate Governance in Ukrainian Banks, approved by Resolution of the Board of the NBU on 28 March 2007, which were in force during the periods relevant to both *Trust Bank* and the present proceedings:

> "In accordance with clause 1.12, Chapter 1, Section I of these Guidelines, a fiduciary duty is an obligation to act in the best interests of another person. The bank's manager (fiduciary) is obliged to act in the best interests of the bank (i.e., all its shareholder and clients), and not in personal (private) interests. A fiduciary is always required to act in good faith and with impartiality. A fiduciary must be

> honest and must not conduct business in a manner that provides him/her with undue benefits or harms the interests of clients or shareholders …
>
> With regard to the regulation of banks, such documents are not only the above-mentioned Guidelines, but also the Corporate Governance Principles of the Organization for Economic Cooperation and Development (hereinafter referred to as the OECD), adopted at a meeting of the OECD Council in 1999 (applied by the Grand Chamber of the Supreme Court in [*Ukoopspilka*] at clause 7.15).
>
> The above Guidelines are indeed advisory in nature, but at the same time they set a certain standard of proper behaviour for bank managers, characterized by increased requirements for good faith and reasonableness, prudence and decision-making in conducting business activities, taking into account the interests of the legal entity they represent.
>
> In view of the foregoing, the Supreme Court considers that the courts of previous instances erroneously failed to apply to the disputed legal relations the Guidelines on Improving Corporate Governance in Ukrainian Banks … and the OECD Corporate Governance Principles adopted by the OECD Council in 1999."

847. The resolution of the Supreme Court in case No. 904/8586/21, *SFG Hermes LLC v. Soldatkin* ("*SFG Hermes*"), which was handed down on 14 June 2023 after the trial in the present proceedings had started, was a further case in which the Supreme Court referred to *Ukoopspilka* as a leading authority on the content of fiduciary duties and made clear that it was of general application and not confined to the particular circumstances of that case.

848. In my view, the Bank was correct to submit that the effect of the cases to which it referred in its closing submissions, supported as they were by Mr Beketov's evidence, was that in order to comply with their fiduciary duties, bank officials (including therefore members of the Bank's Supervisory Board) must not only ensure that their actions are taken in good faith, reasonably and in the best interests of the Bank, but must also ensure that they have responsibly managed the Bank and taken measures to prevent so-called 'risky activity'. If they are guilty of culpable inaction, their conduct is unlawful for the purposes of Article 1166 and it is as capable of extending to a culpable failure to take steps to prevent a misappropriation (where an officer simply does nothing), as it is to take active steps in his capacity as such to procure or enable it.

Is a criminal offence an unlawful act?

849. When Mr Alyoshin was then asked whether the position was not even clearer if the board members who failed to stop the misappropriation were the very people who in fact instructed it, his response was that this was not necessarily the case, largely because the example put to him looked like something that was punishable or prohibited under the criminal law, but was not unlawful as a matter of civil law. This was the second aspect of the experts' evidence on which there was more between him and Mr Beketov than a difference in emphasis.

850. This point was ultimately not pursued by any of the Defendants in their closing arguments. The reason that they took this course was not that they accepted that Mr Beketov's view was to be preferred to that of Mr Alyoshin and Mr Nahnybida, but rather that they conceded that the point (like a similar point in relation to Article 228 of the Civil Code ("Article 228") with which I deal elsewhere in this judgment) was an evidential question and therefore a matter for English law as the *lex fori*; it followed that Ukrainian law principles did not apply. Nonetheless, I still think it is necessary for me to deal with the experts' evidence on the point, albeit briefly, because the views that Mr Alyoshin and Mr Nahnybida expressed did not stand up to scrutiny and were a further example of aspects of their evidence which I regarded as unreliable.

851. There was no dispute between the experts that there is no specific tort of misappropriation or embezzlement under Ukrainian law, but the difference can be summarised by the way in which they expressed their position in paragraph 39 of their joint statement:

> "[Mr Beketov's] view is that court practice shows that embezzlement and misappropriation of funds, in addition to being criminally punishable, separately will give rise to standalone liability in tort if the elements of Article 1166 are satisfied. Even if that conduct has not been prosecuted as a crime, its unlawfulness for purposes of Article 1166 may arise from (for example) an intention to cause, or actually causing harm to the victim's property rights and/or the defendant's breach of duty … ;
>
> [Mr Alyoshin and Mr Nahnybida] disagree: in their view, embezzlement or misappropriation of funds as understood under criminal law are unlawful under the criminal law only … . In appropriate cases, the defendant will be liable in tort to the extent that his or her conduct violates rules or prohibitions applicable to that defendant."

852. The way this point was pleaded in the Individual Defendants' statements of case was that conduct which is prohibited only by the Criminal Code cannot be relied upon as the unlawful conduct element of a cause of action under Article 1166 unless such conduct has been determined to be criminal by a criminal court. In that context, the Ukrainian Criminal Procedure Code provides that a person who has suffered damage as a result of a criminal offence has the opportunity to vindicate his rights during criminal proceeding by filing a civil lawsuit against an accused which may then be determined in those proceedings. However, the word "only" is important, because the point which was at the core of the evidence given on behalf of the Individual Defendants was that, merely because conduct amounting to embezzlement or misappropriation of funds was punishable unlawful conduct under the Criminal Code, does not mean that it is also actionable unlawful conduct for the purposes of the civil liability under Article 1166.

853. There was a time at which Mr Alyoshin and Mr Nahnybida appeared to be suggesting that this meant that embezzlement or misappropriation of funds could not, absent a criminal conviction, also be the subject of a civil claim in tort simply by reason of the fact that such conduct constituted a crime. Thus Mr Alyoshin said in the joint statement that "entering into a loan with a prior intention of not repaying the money would, in appropriate circumstances, constitute a criminal act. Such conduct would not be

remediable under tort law independently from a criminal conviction." The way this point was put in Mr Bogolyubov's written opening was that:

> "Victims of behaviour such as misappropriation can seek compensation from the defendant either within criminal proceedings or, following the defendant's conviction in the criminal court, by the bringing of a tortious claim under Art. 1166 of the Civil Code relying upon the criminal conviction as proof of the necessary element of unlawful conduct. Critically, however, a finding of criminal conduct can only be made by a criminal court. Therefore, conduct which is unlawful only in Ukrainian criminal law cannot supply the necessary element of unlawful conduct for a tortious claim under Art. 1166 unless and until the defendant has been convicted of such conduct in criminal proceedings."

854. To similar effect, the Corporate Defendants' position can most clearly be seen from Mr Nahnybida's supplemental report in which he said:

> "Moreover, taking into account that the alleged embezzlement or misappropriation of funds is criminally punishable conduct under Articles 190 or 191 of the Criminal Code of Ukraine (the "Criminal Code") and the Bank's allegations on the Corporate Defendants' procurement and/or assistance in the misappropriation of the Bank's funds and in the subsequent concealment of the same, in my view, for the Bank to rely on abovementioned conduct as unlawful conduct for the purposes of a claim under Article 1166 of the Civil Code, the Bank would first require a criminal court's finding of illegality by the Corporate Defendants in allowing their bank accounts to be used for the transfer of allegedly misappropriated money."

855. However, what Mr Nahnybida's evidence does not go on to explain is that Ukrainian law permits a victim of a misappropriation to sue in a civil court on the basis of civil law unlawfulness (such as breach of duty), even where the facts which form the basis of that unlawfulness would also be sufficient to establish the commission of an offence. Mr Alyoshin accepted that was the case in his supplemental report, and I consider he was right to do so. Where the same factual allegations of misconduct give rise to both liability for the offences of misappropriation or embezzlement under the Criminal Code and also civil law unlawfulness, those same facts are capable of being sufficient to found a claim under Article 1166. As he accepted "If on the facts while committing misappropriation, the defendants also breach their fiduciary duties or another civil law duty, the breach of duty could itself give rise to a tort claim."

856. To go further, as Mr Nahnybida appeared to do, and suggest that, where the same facts would establish both the commission of a criminal offence and a breach of a civil law duty, a claim cannot be brought under Article 1166 until the defendant has been convicted is not the law of Ukraine. As the Bank submitted, if that were to be the law of Ukraine, there would be very surprising results in the case of companies such as the Corporate Defendants, which it was common ground cannot be prosecuted.

857. This was an area on which Mr Nahnybida was cross-examined and gave answers which were difficult to accept. When he first addressed this point in his fourth report, he had said that, for the Bank to succeed in a claim under Article 1166 against the Corporate Defendants relying on their procurement and/or assistance in the misappropriation of the Bank's funds, the Bank would first require a criminal court's finding of illegality by them in allowing their bank accounts to be used in this way. He then corrected his

evidence, because he had to accept (as became common ground), that in the words of Mr Beketov "… under Ukrainian criminal law only a natural person, and not a legal entity, can be prosecuted for a crime". This gave rise to an obvious difficulty for Mr Nahnybida's analysis, because it meant that, if he was right, a corporate entity could never be liable under the civil law for a misappropriation or act of embezzlement, because it could not be prosecuted which he had said was a necessary prerequisite to the misappropriation or embezzlement being unlawful for Article 1166 purposes.

858. I agree with Mr Beketov's evidence that this would be a "nonsensical outcome". I also agree with the Bank's submission that Mr Nahnybida's suggestion that the answer to the nonsense is that a corporate entity must be held vicariously liable for the criminal offences of an employee who has been convicted by a criminal court before any claim under Article 1166 can be brought against it, is most unlikely to be the law of Ukraine. There was no authority to support the suggestion and in my judgment it is wrong. I am satisfied that Mr Nahnybida's evidence on this point was an attempt by him to salvage an unsustainable position which was advanced by way of argument because it was in his clients' interests to make the point and does him no credit as an independent expert with a duty to assist the court.

859. In my judgment the true position under the law of Ukraine is as follows. The commission of a criminal offence can of itself and without more give rise to the necessary unlawfulness for Article 1166 purposes. In that context, the claimant can seek to use the criminal proceedings to obtain appropriate civil law redress once the defendant has been convicted. But if the commission of an offence is the only unlawfulness relied on, the claimant cannot proceed under Article 1166 until the defendant has been convicted. If, however, the same facts also give rise to civil law unlawfulness, such as a breach of duty or other actionable breach of the Civil Code, that unlawfulness is capable of founding the first element of a claim under Article 1166, independently of the criminal offence and whether or not the defendant has also been convicted of it.

Acts of procurement as unlawful acts

860. There was disagreement between Mr Beketov and Mr Alyoshin as to the circumstances in which a person who procures another to commit an unlawful act causing harm (such as misappropriation) will have committed an unlawful act himself for the purposes of Article 1166. Mr Beketov's evidence was that, if the act of procurement was done with intent to cause the harm or was in breach of duty or was otherwise unlawful, the procurer's own conduct will have been unlawful. Mr Alyoshin's position was slightly different. Taking by way of example the act of a borrower entering into a loan with a prior intention of not repaying the money, his evidence was that, regardless of the unlawfulness of the borrower's conduct, the act of the procurer in causing the borrower to enter into a loan in such circumstances, is only actionable if the act of procuring itself amounted to independent unlawful conduct; intent to cause the harm was not of itself sufficient.

861. This is another area in which on a proper analysis, the disagreement between the experts was of little practical significance as against the Individual Defendants. The evidence did not establish that there is any free-standing claim against a person who procures a

breach of duty by somebody else. The situation is only different where the act of procuring is, in the particular context, an unlawful act. The Bank contended that, in the case of the Individual Defendants, procurement of all or any part of the Misappropriation would inevitably be a breach of what the experts colloquially called the fiduciary duties. It followed that in closing its case the Bank did not rely on the Individual Defendants having done anything by way of procurement which, while done with intent to cause harm, was not itself a plain breach of one or more of the duties I have just discussed and therefore an unlawful act in its own right.

Breaches of Articles 3 and 13 as unlawful conduct

862. The second relevant category of unlawfulness rests on different foundations to the claims against the Individual Defendants for acting or omitting to act in breach of one or more of the fiduciary duties under Article 63, Articles 42, Article 43 and Article 92. This second way of putting the Bank's case applies to each of the Defendants (i.e., including the Corporate Defendants) and is that their participation in the Misappropriation and its subsequent concealment were unlawful by operation of other parts of the Civil Code, and that this conduct qualified as unlawful for the purposes of Article 1166.

863. In particular, it was said that the acts, decisions or omissions which the Defendants procured or in which they assisted led to the Bank being deprived of the ownership of its property in a manner not provided for by the constitution of Ukraine or the law (contrary to Article 3(1)(2)) and amounted to acting in a manner that violated the Bank's rights with the intention to injure it and/or an abuse of rights contrary to Article 13.

864. Article 3(1) is in the following terms:

> "The general foundations of civil law will be:
>
> 1) prohibition on arbitrary interference in private life;
>
> 2) unacceptability of ownership deprivation except as established by the Constitution of Ukraine and the law;
>
> 3) freedom of contract;
>
> 4) freedom of enterprise, save for activities prohibited by law;
>
> 5) judicial defence of civil rights and interests;
>
> 6) justness, good faith and reasonableness."

865. Parts of Article 13 are also relied on by the Bank for the same purpose. There was more than one translation of these provisions in the trial bundle but nobody suggested that any material question turned on the precise wording and it seems to me that the following form of words is the right one to use:

> "2. When exercising their rights, a person is obliged to refrain from actions that could violate the rights of others, cause harm to the environment or cultural heritage.
>
> 3. Actions of a person committed with the intent to harm another person, as well as the abuse of right in other forms, are not allowed."

866. At the heart of the debate between the experts on this issue is whether a violation of Article 3 or Article 13 could, in and of itself, constitute an unlawful act or omission for the purposes of the claim under Article 1166.

867. Mr Beketov said that the principles enshrined in these two Articles, and in particular Article 3(1)(2) providing for a prohibition on "ownership deprivation" and Articles 13(2)-(3) providing for a prohibition on abusing the rights of others, constitute substantive rules of conduct that are mandatory for all civil law relationships. He said that they are principles of law which have direct effect and which a Ukrainian court will take into account when considering whether a defendant's conduct is unlawful. The Bank therefore relied on this evidence in support of its case that non-compliance with these mandatory substantive rules was unlawful conduct for the purpose of its claims under Article 1166 against both the Corporate Defendants and the Individual Defendants.

868. Mr Alyoshin and Mr Nahnybida disagreed. They described the language of Article 3 as interpretative and both Articles as laying down principles and guidelines, which should be taken into account when interpreting the norms contained in the other acts of civil legislation, but not in themselves imposing specific duties. Mr Nahnybida also said that Articles 3 and 13 did not enact specific mandatory rules of law. He said that the essence of what was alleged as improper conduct by the Corporate Defendants was the creation and execution of documents to disguise and hide the Misappropriation, which, absent a criminal conviction (as to which see above) was not unlawful conduct for the purposes of a claim under Article 1166. As he put it in his report:

> "Essentially, the Bank would have to identify a specific rule which would prohibit the Corporate Defendants from (1) entering into the Relevant Supply Agreements with the Borrowers, (2) receiving money under the Relevant Supply Agreements on prepayment terms and (3) to dispose of the money after receiving the same from the Borrowers. The Bank has not sought to do so."

869. It followed that, although the experts were agreed that a defendant's conduct can be unlawful if it breaches any provision of the Ukrainian constitution, laws (statutes) etc (as described above), Mr Alyoshin and Mr Nahnybida said that there is no tortious liability which arises as a result of what is said to be a breach of Article 3(1) because that Article makes provision for "general principles of civil law (and only such principles) rather than directly applicable provisions rendering specific conduct unlawful."

870. In support of his position that what he called "general principles of civil legislation" are to be distinguished from rules which impose a specific duty, Mr Alyoshin said that those general principles are used primarily to interpret the law and to ensure that it is applied in a principled and coherent way but cannot be the basis of a claim in themselves. In developing this theme during the course of his cross-examination, Mr

Alyoshin disagreed with the proposition that the violation of one of the principles in Article 3 is a violation of the Civil Code. He said that the principles were not specific enough to form a duty and that they only worked in conjunction with other rules of the Civil Code.

871. The starting point for Mr Alyoshin's evidence was a judgment of the Constitutional Court dated 5 June 2019 in case No. 3-391/2018(6048/18), *Metro Cash & Carry Ukraine LLC*, in which it held, adopting a decision of the ECtHR, that:

> "a legal rule cannot be regarded as a 'law' unless it is formulated with sufficient clarity to enable individuals to regulate their own conduct … the prescriptions of law must be accessible to the person concerned to enable him or her to foresee the consequences of their application."

872. His evidence was that it was therefore necessary to work out whether the general principles laid down by Articles 3(1) and 13 were sufficiently certain, given that the Constitutional Court has also determined that a law will be unfair if it lacks certainty. In his view, they were not.

873. Mr Alyoshin also relied on another judgment of the Constitutional Court dated 28 April 2021 in case No. 3-95/2020/(193/20), *PJSC Industrialbank*, in which the court said as follows at [8.2]:

> "In assessing Article 13(3) and Article l6(3) of the Code for compliance with the provisions of Article 58(2) of the Basic Law of Ukraine, the Constitutional Court of Ukraine states that that these provisions of the Code do not qualify a person's actions as an offence under civil law or as another condition for holding a person liable under civil law. These disputed provisions of the Code impose on participants in civil relations a prohibition of violating the limits of exercise of civil rights and also enable a court to refuse to protect a civil right if a person violates the requirements of Article 13(2)-(5) of the Code. In other words, these provisions of the Code contain an indication of the legal consequences of a person's actions, that they cannot be classified as conditions, grounds or measures of liability under-civil law."

874. Mr Beketov did not dispute what was said by the Constitutional Court as a matter of concept, but during the course of his cross-examination he pointed out that, in referring to "an offence under civil law" the court was concerned with the issue of whether Article 13 gave rise to a free-standing cause of action. It was not concerned with the different question of whether conduct which transgressed Article 13 was unlawful and therefore was capable of satisfying the first of the four elements of a cause of action under Article 1166.

875. As to that, Mr Beketov relied on a number of cases which he said demonstrated, when taken together, that a person who deprives another of their property other than in accordance with Ukrainian law or takes any action intended to harm another, acts unlawfully for the purposes of Article 1166. There were two themes to the evidence on this point. The first was that the Supreme Court has often characterised the principles as rules of direct application. The second was that there are a number of cases in which the Supreme Court has used Articles 3 and 13 as a basis for granting the claimant relief or precluding the defendant from relying on a defence.

876. As to the first of these themes, in case No. 908/1152/18, *Sberbank JSC v. Yuststar Law Firm LLC* ("*Sberbank*"), the Supreme Court was concerned with two of the other paragraphs within Article 3(1) (viz. Articles 3(1)(3) and 3(1)(6)). It said that the principles set out in Articles 3 and 13 were not just embodied in other provisions of the law but were of direct application in their own right. The way that it explained the position, in the context of the interrelationship between the principle of freedom of contract expressed in Article 3(1)(3) and the obligation to act with fairness, good faith and reasonableness in Article 3(1)(6) was as follows:

> "At the same time, the principle enshrined by the legislator of the possibility of restricting the freedom of contract by virtue of the general principles of fairness, good faith, reasonableness can be applied as a rule of direct action, as a direct legal means of regulating rights and obligations in legal relations."

877. Mr Alyoshin said that, in the event, the Supreme Court in *Yuststar* applied these principles indirectly, because it eventually applied them as a means of limiting the freedom of contract for which provision was made under Article 3(1)(3) and as an aid to interpreting Article 13(2) and did not distinguish between direct and indirect application. It was a little difficult to understand what he meant by this, but he went on to summarise his position as follows:

> "Court practice yields no clear answer to the question when and to what extent such principles can be applied independently. It demonstrates that abstract general principles are given substance through, or applied jointly with, other rules and doctrines of varying specificity ... I am not aware of cases where general principles have actually been used as an independent basis of tortious liability where the defendant's conduct was not unlawful in any other, more specific respect."

878. Another case in which the concept of direct application of the Articles 3 and 13 was considered by the Supreme Court was one initially cited by Mr Alyoshin, *Person 1 v. LOS Karlivske Agricultural Enterprise* (Cas No 540/544/18), in which the Supreme Court said:

> "It appears from the interpretation of both Article 3 of the Civil Code of Ukraine in general and clause 6 of Article 3 of the Civil Code of Ukraine that the general principles of civil law have a fundamental nature and other sources of legal regulation, primarily acts of civil legislation, must correspond to the content of the general principles. This, in particular, manifests in the fact that the general principles are essentially the directly applicable rules."

879. It was said by Mr Alyoshin that, in its application to the facts, this was an example of a case in which the Supreme Court did not distinguish between direct and indirect application of Article 3 and Article 13. This fact led him to conclude that there was no clear answer to the question when and to what extent these general principles can be applied independently. He made the same point by reference to the resolution of the Supreme Court in case No. 638/16768/19, *Alfa Bank JSC v. Persons 1 and 2*, to which he was taken in cross-examination. This was another case concerned with the application of fairness, good faith and reasonableness (Article 3(1)(6)) to the principle of freedom of contract (Article 3(1)(3)), in which the Supreme Court expressed the general position as follows:

> "The general principles of civil law include, in particular, fairness, good faith, and reasonableness (clause 6, Article 3 of the Civil Code of Ukraine). It appears from the interpretation of both Article 3 of the Civil Code of Ukraine in general and clause 6 Article 3 of the Civil Code of Ukraine that the general principles of civil law have a fundamental nature and other sources of legal regulation, primarily acts of civil legislation, must correspond to the content of the general principles. This, in particular, is manifested in the fact that the general principles are in their essence the norms of direct effect and must be taken into account, in particular, when interpreting the norms contained in the acts of civil legislation."

880. In his closing submissions, Mr Plewman, consistently with the evidence given by Mr Alyoshin, said that the way in which the last sentence should be construed is that it reflects the circumstances in which general principles must be taken into account, viz. when interpreting the rules to be found elsewhere in the law, including the Civil Code. I do not think that it is possible to read the language in that way. There is no doubt that the courts of Ukraine will take into account the general principles when interpreting other more specific provisions, but that cannot be read as limiting the description of them as "in essence the norms of direct effect" with which the sentence is primarily concerned. In my view, and consistently with Mr Beketov's evidence, the use of the phrase "in particular" makes clear that the Supreme Court was not limiting the application of these general principles to guidelines for the interpretation of other provisions of the Civil Code.

881. The effect of the Supreme Court's approach is that, while Article 3(1)(3) makes direct provision for freedom of contract, that freedom of contract is regulated under Ukrainian law by principles of fairness, good faith and reasonableness (Article 3(1)(6)), in a manner which demonstrates that they are rules of direct application. In my view this gives solid support to Mr Beketov's view that in the same way, a person who deprives another of their property other than in accordance with Ukrainian law breaches Articles 3(1)(2) and, if he does so intending to harm another person, breaches Article 13(3). In both instances, those acts are unlawful for the purposes of Article 1166.

882. Mr Alyoshin also said that there is no case in which a breach of Article 3(1)(2) is relied on as the only basis for unlawfulness, and none has been drawn to my attention. However, I agree with the Bank's submission that the language of several cases decided by the Supreme Court is inconsistent with his evidence that Article 3(1) is merely interpretative. They give further support to Mr Beketov's conclusion that the Supreme Court has not qualified its approach to the application of Article 3 in the manner suggested by Mr Alyoshin, but rather treats Articles 3 and 13 as making provision for rules of general application which have direct effect.

883. The second theme, which underpinned Mr Beketov's evidence that a person who deprives another of their property other than in accordance with Ukrainian law or takes any action intended to harm another acts unlawfully for the purposes of Article 1166, relies on a numbers of Supreme Court cases which used Articles 3 and 13 as a basis for granting the claimant relief or precluding the defendant from relying on a defence. Mr Beketov placed specific reliance on the resolutions of the Grand Chamber of the Supreme Court in case No. 369/11268/16, *Bank Familnyi v. Persons 1-3* ("*Bank Familnyi*") and the Supreme Court in *Sberbank*.

884. In *Bank Familyni* the Grand Chamber was concerned with a gift made in order to avoid payment by the judgment debtor on enforcement of a court order. The conduct of the debtor and the donee was obviously dishonest, and the gift amounted to what the Grand Chamber called an abuse of the property interests of the judgment creditor, being aimed at preventing foreclosure on the debtor's property. It said that, although the gift did not violate specific mandatory or imperative norms (by which it meant specific rules applicable to what might in English law be regarded as a transaction defrauding creditors), the gift could be invalidated under both the general principles of civil law contained in Article 3(1)(6) and the prohibition on abuse of rights in Article 13(3).

885. While Mr Alyoshin accepted that *Bank Familyni* demonstrated that Articles 3(1)(6) and 13(3) could be applied in this way in the context of what he called "frauditor" contracts of the type with which that case and the resolution of the Supreme Court dated 6 March 2019 in case No. 317/3272/16-ts *Person 1 v. Person 2* were concerned, he said that he was not aware of any case where general principles were used as an independent basis of tortious liability in circumstances in which the defendant's conduct was not unlawful in any other more specific respect. He also pointed out, by reference to the resolution of the Supreme Court in case No. 727/2525/20, *Svitwood Ukraine v. Persons 1-2*, that, where a court grants a remedy in this context by reference to the abuse of rights doctrine, the remedy with which it will often be concerned is to invalidate the transaction (which although *prima facie* lawful will not be given legal effect if aimed at causing harm to others), so as to enable the creditor to enforce its claim. In his view the invalidation does not give rise to a right to compensation.

886. When Mr Alyoshin was cross-examined on this particular issue, he accepted that *Bank Familyni* established that conduct amounting to an abuse of rights in contravention of Article 13 "could be treated as unlawful", but reiterated that it was only "for the specific purpose … of contractual relations, … not for the purpose of tortious relations". Although there is obviously a conceptual distinction between the two, he was unable to produce any authority which applied it in this way. In my view, the distinction espoused by Mr Alyoshin has little to commend it as a matter of principle and sits uneasily with how the unlawfulness capable of giving rise to a right to compensation is described in *Centre Retail*. In that case the focus is on behaviour which violates the rights of another person, and does not distinguish between the different purposes for which the unlawfulness is asserted. I agree that the distinction adopted by Mr Alyoshin is not well-founded.

887. An equally significant problem with the approach taken by Mr Alyoshin was the use he made of two academic commentaries on this subject in his supplemental report. He introduced them as relevant to what he called "an important disagreement between Mr Beketov and me as to whether the abuse of a right is capable, in itself, of giving rise to a claim for damages in tort." In cross-examination he clarified that what this meant was that an abuse of rights within the meaning of Article 13 cannot be unlawful conduct for the purposes of Article 1166. The two commentaries he referred to were both contained in a collection of Articles on Abuse of Rights edited by Professor I V Spasybo-Fatieieva. The first was entitled *The Concept, Signs and Forms of Abuse of Subjective Civil Rights* by M O Stefanchuk and the second was entitled *Abuse of Subjective Civil Rights: Signs and Consequences* by B P Karnaukh. Mr Alyoshin exhibited translated extracts from both articles to his report.

888. As to the Stefanchuk article, Mr Alyoshin said that the following passage supported his evidence that an abuse of right is not capable in itself of giving rise to a claim for damages in tort, in the sense that abuse of rights is not unlawful behaviour for that purpose:

> "The special nature of the legal consequences of abuse of rights is that they should not lead to liability (because abuse of rights is not a tort) ... In this regard, the following sanctions are among the consequences: invalidation of transactions, discontinuation of the use of rights without their deprivation, and state refusal to protect the right."

889. Presented in the way that it was by Mr Alyoshin, this citation supported his opinion. However, during the course of his cross-examination it became evident that two pages later in the same article, the author had gone on to explain the following, which was flatly inconsistent with his conclusion:

> "Despite all of the above, it should not be forgotten that abuse is unlawful behaviour, and according to the principle of general tort, damage to property of individuals and legal entities is subject to full compensation in cases where it is caused by unlawful (and, in cases provided for by law, lawful) and, as a rule, culpable actions. This liability may be expressed not only in compensation for the damage caused, but also in the obligation to eliminate the negative consequences caused by the abuse of the right at their own expense, i.e., to restore the situation that existed before the violation."

890. So far as the Karnaukh article is concerned, Mr Alyoshin extracted from the article and cited the following passage in support of his evidence that an abuse of right is not capable in itself of giving rise to a claim for damages in tort:

> "The consequence of tort is civil liability ... In turn, the consequence of an abuse of a right is not liability in the form of deprivation of what belongs to the individual, but only the denial of recognition of a person's right to that which he sought to obtain as a result of the abuse. When a person commits a civil offence, he is deprived of what belongs to him; when he particularly abuses his subjective right, he does not get what he sought to get. This is the essential difference between an ordinary tort and an abuse of a right."

891. It then transpired from a complete version of the article obtained by the Bank that there were two critical omissions from the citation in Mr Alyoshin's report. The first was that, in the translation he had offered, the word "usually" was omitted from the phrase "the consequence of an abuse of a right is not *usually* liability in the form of …" and at the end of the very same paragraph the author had gone on to say:

> "However, there is an exception to this rule when actual harm is caused to another person as a result of the abuse. In this case, the damage is subject to compensation, and compensation for damage is recognised as a measure of civil liability. This is natural, since any damage caused by unlawful actions obliges the perpetrator to compensate for it (see Articles 1166, 1167 of the Civil Code of Ukraine)."

892. When Mr Alyoshin was cross-examined on these omissions, he denied that either article was inconsistent with his evidence that abuse of rights was not unlawful conduct for

the purposes of Article 1166, but was unable to provide a coherent explanation either for why that was so, or for why he had presented the views of Stefanchuk and Karnaukh as supportive of his own. I have concluded that there is no logical basis on which he could have done so. Of equal importance I take the view that his selective approach to citation from these articles was a particularly striking example of his tendency to argue the case on behalf of Mr Kolomoisky. It undermined my confidence in Mr Alyoshin's ability to give an independent and dispassionate explanation of the law of Ukraine on this issue. In my judgment, and for the reasons I have given, Mr Beketov is correct on this point.

Ukrainian law: the scope of Article 3(1)(2)

893. Mr Alyoshin also said that the scope of the general principle enshrined in Article 3(1)(2) was itself limited and that the reference to deprivation of property only extended to deprivation of property at the instance of the state. It therefore had no application to allegations that the Bank was deprived of its property through the acts of any of the Defendants. He said in his report that Article 3(1)(2) does not apply to companies or individuals at all and went on to explain in the experts' joint statement that the principle contained in it:

> "concerns the state to the extent that it exercises its power as sovereign that is empowered, in certain cases to deprive persons of their ownership rights within the limits and in accordance to the rules set out in the laws and the Constitution."

894. The evidence Mr Alyoshin gave in support of this conclusion was again unsatisfactory. He cited no authority, but referred to an article published by Professor Olena Antonyuk in 2017. As presented by Mr Alyoshin, this article appeared to support his evidence that Article 3(1)(2) (in conjunction with Article 41 of the Constitution) enshrined the principle of inviolability of an ownership right by providing for the protection of any property from unwarranted interference by the state, but only the state.

895. Unfortunately, the way in which this was presented in Mr Alyoshin's report was again misleading, because the passage on which he relied was taken out of context and failed to explain that the author's actual conclusions were to precisely the opposite effect; something which only became apparent from the full version of the article, which he did not exhibit to his report, but which was introduced into evidence by the Bank. Those conclusions made quite clear that, the author considered that the interference with which Article 3(1)(2) was concerned extended to deprivations of property by private entities as much as it did deprivations by state bodies:

> "the content of the principle of inviolability of property right lies in the inadmissibility of arbitrary interference with this right by private and public law entities, including the state."

896. The day after he had been taxed with this in cross-examination, Mr Alyoshin sought to salvage the point by referring to a short extract from another work (V.I. Borisova, I.V. Spasibo-Fateeva, V.L. Jarotsky (eds), Civil Law Volume 1, 2011), which he had referred to in his supplementary report and which he said supported his position on Article 3(1)(2). The extract is short, but I do not think that it does. It simply says that

the principle of inadmissibility of deprivation of property rights is reflected in "the fact that the owner has rights of possession use and disposal of his property, which he exercises in accordance with the law of his own will and independently from others. All owners are provided with equal conditions for the exercise of their rights, and the state does not interfere with such exercise." This falls well short of saying that Article 3(1)(2) is not concerned with deprivation of property rights as between private persons. In my view the Bank's criticisms of Mr Alyoshin's evidence on this point, including the way in which he presented his opinion, were justified.

897. Furthermore, Mr Alyoshin was unable to point to any case in which it was held by a court that Article 3(1)(2) is limited to expropriation of property by the state. Mr Beketov, however, referred to a number of cases in which Ukrainian courts have proceeded on the basis that Article 3(1)(2) was applicable in the context of private disputes between nonstate parties. The one on which Mr Hunter cross-examined Mr Alyoshin was the resolution of the Supreme Court in case No. 902/627/19, *Orthodox Church of Ukraine v. Tulchyn Diocese of the Ukrainian Orthodox Church*, which was concerned with what the Supreme Court called "the elimination of obstacles in the use of the property of the Claimant". The issues concerned the "obligation to transfer the keys and title documents" to a complex of church buildings. The protagonists were two communities of the orthodox church one of which was "canonically subordinated to the Moscow Patriarchate" and the other of which was "canonically subordinate to the Metropolitanate of Kyiv".

898. The lower courts had come to the conclusion that "the Claimant had not proved the fact of infringement of property rights or obstruction of its implementation by a legal entity"; that legal entity being the defendant Tulchyn Diocese of the UOC. Part of the debate was about the legal identity of religious organisations, but part was concerned with the question of how they are entitled to exercise their ownership rights. In that context the Supreme Court made clear at [73] that Article 3(1)(2) was part of the foundation of the claimant's right to rely on the "inadmissibility of deprivation of property rights, except in cases established by the Constitution of Ukraine and the law". The case was remitted for a retrial, and the bases for doing so explicitly included the fact that, taking into account the provisions of (amongst other enactments) Article 3(1)(2), religious organisations have the right to demand the removal of obstacles in the exercise of their rights to use and dispose of their property. I agree with the Bank's submission that Mr Beketov's evidence on this point is to be preferred and that Article 3(1)(2) does apply to claims between private parties.

899. Another ground advanced by Mr Alyoshin in his supplementary report for contending that the scope of the general principle enshrined in Article 3(1)(2) did not provide a sufficient foundation for the claims made by the Bank was that it is limited to protecting proprietary rights and is irrelevant to the present dispute where no proprietary claims are advanced. This appeared to be evidence which focussed on the nature of the relief sought to be obtained by the Bank, and amounted to Mr Alyoshin's view that, in the absence of a claim for the return of identifiable property, Article 3(1)(2) had no application.

900. When it was put to him that, irrespective of the remedy sought, the misappropriation of the Bank's funds was an interference with the Bank's ownership rights, he initially said that taking somebody's money without a contractual or other lawful entitled to do it was illegal under the criminal law but was not a violation of Article 3(1)(2). When

pressed, he accepted that illegally taking somebody's property is a breach of the property rights of the owner and cuts across the principle laid down by Article 3(1)(2), but he never actually accepted that it was therefore unlawful. Mr Alyoshin's evidence on this point therefore boiled down to the same issue as the one I have already considered and rejected in my discussion of the question of whether Article 3(1)(2) has any direct effect in the first place.

901. Mr Beketov took a different approach. His evidence was that Article 3(1)(2) enshrines as a general principle the inviolability of private property which constitutes a rule of conduct that is mandatory for all participants in civil law relationships. His analysis was that, by depriving another of their property other than in accordance with Ukrainian law, a defendant acts unlawfully for the purposes of the general tort liability.

902. Despite the Corporate Defendants' submission that, if that was the case it would be "incredibly surprising", I accept Mr Beketov's evidence on this issue. In the absence of any established principle derived from the Constitution or the law permitting such deprivation, conduct which deprives a person of their ownership of property is contrary to Article 3(1)(2) and unlawful for the purposes of Article 1166. Mr Alyoshin's evidence which sought to restrict the application of Article 3(1)(2) in the respects I have described does not reflect the law of Ukraine.

Article 1166: Harm

903. The second element of the cause of action under Article 1166 is the occurrence of harm, which was described in *Bank Daniel* case as "a loss of or damage caused to the property of the victim and/or … in general, any impairment of a benefit that is protected by law, and the extent thereof." It was common ground between the experts that money in the form of cash or in a bank account is a form of property for these purposes and that the loss of money is therefore capable of amounting to harm for the purposes of a claim in tort under Article 1166. As Mr Beketov explained "an electronic transfer of funds from one person to another is thus capable of constituting harm to the transferor." The way that this common ground was pleaded in Mr Kolomoisky's Defence throughout was:

> "It is admitted that harm for the purposes of Article 1166 can, in appropriate cases, encompass the transfer of a claimant's funds to a third party. The only transfer of funds belonging to the Bank occurred when the Bank transferred money to the Borrowers by way of drawdowns under a Relevant Loan Facility."

904. It was also common ground (and clearly spelt out in Mr Alyoshin's evidence) that, where a person commits an unlawful act involving a deprivation of property, harm is suffered by the victim at the time it is deprived of its property or when the defendant obtains the claimant's property, depending on what makes the relevant act unlawful.

905. The experts agreed that the way this principle works in the present context is that, if a person receives money pursuant to an invalid and unlawful loan agreement, the payer will be caused harm by the person who acts unlawfully in obtaining it at the time the agreement is entered into. Mr Alyoshin said that this will not be the case if the loan agreement is valid and lawful, because the lender will have received the benefit of the borrower's contractual promise to repay the loan with interest. However, as he accepted

in his report, if the defendant commits a wrongful act which entails a deprivation of property (such as a crime of fraud or misappropriation), harm is caused at the time when the claimant is deprived of its property, or when the defendant obtains the claimant's property, depending on what makes the act in question unlawful.

906. The Bank submitted, and I accept, that the consequence of this is that, where a claimant is deprived of its property pursuant to unlawful conduct, it suffers harm from the moment that the deprivation occurs, with the consequence that its cause of action under Article 1166 is then complete. The relevance of any subsequent return of moneys to the claimant gives rise to questions of assessment of the compensation to be paid, in other words the quantum of damages to which it is entitled. It follows that issues going to the subsequent recovery of monies of which the Bank was deprived by unlawful conduct go to the circumstances in which it is open to the Defendants to contend that any harm that may have been caused by the deprivation was extinguished by the return to the Bank of the monies paid away. This was at the root of the Repayment Defence.

907. There was no issue between the experts that that Bank bears the burden of proving the nature and extent of the harm (although there was a debate as to who bears the burden of proving the amount of the full compensation payable where it is said that the extent of the harm – in this case the amount of the Relevant Drawdowns – is not the same as the compensation that should be paid). The Bank submitted that it is able to do so by establishing that the Relevant Drawdowns were made. It submitted that, if a Relevant Drawdown was made in consequence of the unlawful conduct of any of the Defendants, the amount of that Relevant Drawdown is harm for which that Defendant will be liable to make full compensation pursuant to Article 1166.

908. The next three questions which then arise as a matter of Ukrainian law are the principles to be applied in ascertaining (a) whether there is a sufficient causal link between the unlawful conduct of any one Defendant and the harm which is suffered by the deprivation of property effected by the Relevant Drawdown, (b) whether the presumption of fault has been rebutted and (c) the assessment of "full compensation" including whether the harm has been extinguished by the restoration to the Bank of the monies paid away or their value (which is the essence of the Repayment Defence).

Article 1166: causal link between unlawful conduct and harm

909. The third element of the cause of action under Article 1166 is the existence of a causal link between the unlawful conduct on which the claimant bases its claim and the harm which it contends it has sustained. It was common ground, recorded as such in the experts' joint statement, that the Civil Code does not contain a statutory test for the purposes of Article 1166 and that causation is established on a case-by-case basis.

910. However, the common ground ended there. Mr Beketov's further evidence was that causation is a question of fact and the general question asked by the court is whether the harm would have occurred but for the unlawful conduct. Mr Alyoshin and Mr Nahnybida agreed that whether a causal link exists in any given situation is ultimately a question of fact, but they disagreed with Mr Beketov's evidence as to the simple application of a "but for" test. In their view the correct approach under Ukrainian law is that, while causation will not be established if the harm would have occurred even in

the absence of the unlawful conduct, the causal link must be what they called "direct, necessary and inevitable".

911. The main case to which Mr Beketov referred in his first report was the resolution of the Supreme Court dated 24 April 2019 in case No. 355/1014/16-ts, *Person 1 v. Military Prosecutor's Office of the Central Region of Ukraine* ("*Military Prosecutor's Office")*. The case was concerned with a situation in which the military prosecution authorities were conducting what was described as an "investigative experiment" within certain criminal proceedings which involved them positioning vehicles on a major highway in a manner which blocked two lanes of traffic. A Mercedes belonging to (but not driven by) the claimant then collided with the vehicles, and another vehicle involved in the experiment was also damaged. In the proceedings which ensued, the lower courts held that the behaviour of the participants in the investigative experiment was causally related to the damage caused to the owners of the two damaged vehicles. The Supreme Court remitted the claim for a retrial on the basis that the local court had failed sufficiently to clarify the actual circumstances of the case because it came to a premature conclusion that *only* the behaviour of the investigators was causally related to the damage caused to the claimants' vehicles. In particular the court did not establish whether the driver of the Mercedes had the opportunity to seek to avoid hitting the obstacle, i.e. "whether his actions were not in direct causal connection with the consequences of the accident".

912. In the passage cited by Mr Beketov, the Supreme Court explained the applicable principles as follows:

> "… a causal link between the tortfeasor's wrongdoing and the harm caused to the injured party is one of the mandatory conditions for tort liability to arise. Determining a causal link is necessary both to secure the interests of the injured party and to exercise the principle of good faith in ordering a person to compensate for the harm inflicted.
>
> A causal link between a person's actions and the infliction of harm involves the harm being the consequence of that person's wrongdoing, rather than any other circumstances. An ordinary sequence of events must not be taken into account. An objective causal link as a condition to liability performs the function of defining an objective legal limit of liability for the harmful consequences of the wrongdoing. A tortfeasor is not liable for any harm, but for the harm caused by his conduct. A lack of causation means that the harm has been caused by other circumstances, rather than the tortfeasor's conduct.
>
> Further, a causal link between the tortfeasor's wrongdoing and the harm must be direct, which is the case where the harm was caused by a particular conduct, without any additional factors. Where the unlawful conduct that gave rise to a specific ability to inflict harm makes it real only if combined with a third party's wrongful act, a legally significant causal link must be established with both the conduct, which gave rise to that specific ability (the conditions for inflicting the harm), and the acts that made it real (the actual infliction of the harm) …"

913. This case was then relied on by the Defendants as a case in which the Court had determined that *only* the last or intervening cause of harm could satisfy the test for causation. The way in which it was put in cross-examination was that the case

established that what is required is direct causation, in the sense that, if a third party's act intervenes between the act of the alleged tortfeasor and the damage, then it will not be possible to show direct causation.

914. Mr Beketov accepted that may be the case in particular instances, but he did not say that that was the determining consideration and I agree with the Bank that the wording of the resolution in *Military Prosecutor's Office* focuses on the fact that the courts below failed to consider any causal conduct by the driver of the Mercedes; it did not conclude that if there were such conduct, any causal conduct by the investigator would for that reason be excluded:

> "the local court, having failed to sufficiently clarify the actual circumstances of the case, … came to a premature conclusion that *only* the behaviour of the investigator … was causally related to the damage caused to the claimants" [emphasis added]

915. Another way in which the Supreme Court has explained the principle appears from its resolution dated 2 August 2022 in case No. 908/314/18, *SI-Invest LLC v. PJSC Semiconductor Plant ("SI-Invest")*, where the issue was whether the directors and founders of a debtor were liable for causing significant property harm to its creditors by unlawful inaction. In its resolution the Supreme Court used language which was similar to that used in the second paragraph of the citation from *Military Prosecutor's Office* I have cited above. It concentrated at [52] on asking whether the harm was an "objective consequence of the conduct" of the person said to have caused the damage. The implication was that, if the harm qualified as an objective consequence of the conduct, it would be sufficiently direct for that purpose. Pulling the threads together from those two cases, identifying the "objective consequence of the conduct" required the court to ask itself whether the harm had been caused by other circumstances, rather than the tortfeasor's conduct.

916. The experts variously referred to a number of other cases in which causation was considered as a matter of principle. Thus in case No. 910/11287/16, *Transzaliznychservice v. Moldavian Railway* ("*Transzaliznychservice*") at [5.13], the Supreme Court emphasised the need for a direct link between the unlawful act and the damage, although did not develop exactly what that meant:

> "The causal link between wrongful conduct and damages is a prerequisite for liability. It must be proved that the wrongful conduct or omission caused [*sic*] is the cause, and the damages caused to the person is the consequence of such wrongful conduct. The tortfeasor's unlawful conduct causes harm only when it is directly related to the harm. An indirect link between the unlawful conduct and the harm means that the conduct is assessed outside the specific case and, accordingly, falls outside the legally relevant link."

917. Although it is plain that, whether a particular relationship between the unlawful conduct and the harm is sufficiently direct depends on the particular circumstances of the case, some of the other authorities are a little more illuminating. One case referred to by Mr Beketov was case No. 439/1127/18-ts, *Person 1 v. Pidkaminska Village Council of Brodivskyi District of Lviv Region* ("*Pidkaminska*") in which the Supreme Court used a rather different form of words when explaining the principles to be applied in a claim based on the unlawful act of a village council said to have caused moral harm in the form of stress and disappointment rather than pecuniary loss. In that context, in a

statement of principle which was not questioned when the matter came back before the Supreme Court at a later stage, the court used the concept of the "main reason" leading to the harm. It said:

> "As for the content of the causal relationship, it lies in the fact that the committed unlawful act is the main reason that led to the infliction of moral harm."

918. It also seems to be clear that the requirement for the causal relationship to be direct does not carry with it any suggestion that only the immediately preceding unlawful act is capable of being sufficiently direct to cause actionable harm. This was apparent from the resolution of the Grand Chamber in case No. 761/45721/16-ts, *Person 1 v. Person 4* (*"PJSC Bank Finance and Credit")*. Mr Beketov was challenged on the way he described this case in his report, but I think that the paragraphs of the resolution on which he relied supported his evidence that an immediate connection between unlawful conduct and the harm suffered by the victim is not required. I also think he was justified in saying as he did in his oral evidence that the passages on which he relied demonstrate that the harm can be caused by both action and inaction which are unlawful. As the court put it in that case:

> "At the same time, wrongful acts or inaction, infliction of damage and detection of its extent may not coincide in time. For example, individual wrongful acts or inaction or a combination of such acts or inaction may result in a loss of liquidity by the bank in the future. The loss of solvency of a bank that was previously solvent may, in itself indicate that the bank has suffered damage."

919. The same point is also apparent from the Supreme Court's resolution dated 20 January 2021 in case No. 197/1330/14-u, *Person 1 v. State Treasury Service of Ukraine* ("*State Treasury*"), in which the Supreme Court said:

> "At the same time, the causal link between the unlawful act of the tortfeasor and the harm must be direct, i.e. when specific conduct without any additional factors has caused the harm. Where the unlawful conduct which created the specific possibility of causing harm turns it into reality only in combination with the unlawful conduct of third persons, a legally significant causal link must be established both with the conduct which created the specific possibility (the conditions for causing harm), and with the actions which turned it into reality (the actual causing of harm)."

920. To similar effect, and as both Mr Beketov and Mr Alyoshin agreed, the question of causation will be affected by the scope of the duty which the alleged tortfeasor has assumed and whether harm sustained is contemplated by the nature of the duty which the alleged tortfeasor has assumed. This is well illustrated in the situation in which the court is analysing the responsibility for harm where there is an unlawful act by one person and an unlawful failure which may have prevented that act by another. In case No. 909/976/17, *State Environmental Inspectorate in the Ivano-Frankivsk Region v. Hutsulshchyna National Nature Park* ("*Hutsulshchyna*"), a national park authority was found liable for the harm of unlawful logging committed by a third party. The Supreme Court said:

> "Thus, the duty to ensure the protection of forest stands is assigned specifically to permanent forest users who are responsible for non-performance or improper

> performance of such duties, including in case of failure to ensure the security and protection of forests from unlawful tree logging. Consequently, civil liability for violation of forest legislation should be borne not only by persons who directly carry out unlawful logging (harm to trees), but also by permanent forest users, whose fault lies in unlawful inaction in the form of non-performance of actions to ensure the protection and preservation of the forest from unlawful logging on the plots under their jurisdiction from the forest fund lands, which has the consequence of unlawful logging (harm) of forest stands by third (unidentified) persons."

921. Although not a resolution of the Supreme Court, the Bank also relied on the decision of the Kyiv Appellate Court in case No. 758/5941/20, *DGF v. Person 1* ("*Energobank*"). This reversed a first instance decision on which Mr Alyoshin had relied in his first report as an example of a case in which the claimant had failed to prove the existence of a causal link between the criminal neglect of his duties by the head of a bank's management board and the misappropriation of the bank's money by third parties. The decision of the Appellate Court illustrated the contrary, relying on *Ukoopspilka* as providing a clear example of a case in which the requirement for a direct link can still be established against a person who neglects their duty, even where the actual harm took the form of a misappropriation by somebody else:

> "If there is a court verdict, and the defendant has been brought to criminal liability for neglect of duty, the defendant's arguments and the court's conclusions that only those persons who took possession of the funds can bear liability for the disappearance of the funds do not correspond to the circumstances of the case and the requirements of the law, which the claimant referred to when applying to the court with a lawsuit. Since the bank's loss of funds and their withdrawal from the correspondent account are also directly causally related to the defendant's omissions, as established by the court verdict."

922. The Bank submitted that *Energobank* demonstrates that it is not the case that causation can only be established from the immediate or last event in the chain and therefore is confirmatory of the principle to be derived from *Hutsulshchyna*. It also submitted that the same actionable harm can be caused by more than one wrong, and by more than one wrongdoer both acting sequentially, so long as there is a sufficient nexus between the unlawful act and the harm. I agree with both of those submissions, based as they are on Mr Beketov's view that the authorities demonstrate that immediacy is not a requirement to establish the necessary causal link.

923. The Bank also relied on the resolution of the Grand Chamber in *Ukoopspilka* (at [7.67]) in support of a submission that, even where there has been intervening conduct by a third party, taking the form in that case of the improper performance of official duties by that bank's curator as representative of the NBU, such conduct will not necessarily break the chain of causation. I agree that this illustrates the fact-sensitive enquiry which a Ukrainian court would carry out when faced with a causation issue of the type with which these proceedings are concerned. It is clear from *Ukoopspilka* that the answer to the question of whether the chain of causation was broken is affected by an analysis of whether the relevant intervening act or omission can be regarded as a proper basis for exempting that bank's defaulting officials from liability.

924. The facts of *Ukoopspilka* also demonstrate (see [7.70] to [7.72]) another aspect of what would be regarded under Ukrainian law as the same principle: a following-through of

the legal consequences of the avoidance of a transaction is capable of affecting the amount recoverable against those who acted in breach of duty when causing a bank to enter into that transaction. However, that does not of itself mean that the claimant is required to follow through the legal consequences of the avoidance (by in that case filing a refund claim against the sellers of the bonds which caused Ukoopspilka's insolvency). Whether such a step is required bears some similarity to the circumstances in which steps are required to be taken to satisfy English law principles on mitigation of loss; it will depend on all the circumstances of the case.

925. In Mr Kolomoisky's written opening, it was said that it was common ground that the standard test of causation is not satisfied by an act which consists of procuring unlawful conduct by another person. The point was not made in that way in closing, but I think that the Bank was right to say both that, on a proper reading of the experts' reports, this was not common ground and that any such submission is inconsistent with the authorities I have described. Under Ukrainian law, whether there is a legally significant causal link between the harm and either the conduct which created the conditions for harm (whether in the form of an act of procurement or otherwise) or the actions which turned it into a reality (per the Supreme Court in the *State Treasury Services* case) will depend on all the circumstances of the case. While the adjective 'direct' as used in the authorities is an appropriate qualification to what is required, even that is not always used and the adjectives "immediate" and "inevitable" are not.

926. It follows from this that it is possible as a matter of Ukrainian law for the Individual Defendants to have caused the Bank actionable harm by their unlawful conduct, even if their only breaches of duty were acts or omissions to act in a manner which procured or allowed the deprivations of the Bank's property to occur in circumstances in which the execution of the relevant documentation and the making of the Relevant Drawdowns were given effect by others. Likewise, it is possible as a matter of Ukrainian law for the Corporate Defendants to have caused the Bank actionable harm, even though their only unlawful conduct was assisting in the scheme initiated with the deprivation of the Bank's property through making a Relevant Drawdown, by executing or agreeing to execute one or more of the RSAs, and by accepting or agreeing to accept receipt of one or more of the Unreturned Prepayments. Whether that is established against the Corporate Defendants on the facts is a matter to which I shall return later in this judgment.

Article 1190: Joint liability

927. The final case to which I was taken in closing by Mr Hunter was the 24 April 2014 decision of the Higher Specialised Civil and Criminal Court of Ukraine (a court which no longer exists, but which had the same effective status as the Supreme Court) in case No. 6-5547CB13, *Gaz Ukrainy v. Person 1 and others* ("*Gaz Ukrainy*"). Mr Marchukov had relied on this case as establishing that, where tortious acts were committed by a number of joint tortfeasors, the approach of the court is to look at each person separately and determine whether that person's conduct is sufficiently closely connected to the harm for the court to be able to conclude that they caused it by their own unlawful conduct. In some instances this will mean that there are a number of persons who will be liable for the same loss.

928. *Gaz Ukrainy* was a case which was primarily concerned with Article 1190, which itself is concerned with compensation for damage caused by joint tortfeasors and takes the following form:

> "1 Persons by whose joint actions or failure to act harm was caused shall bear joint and several responsibility to the victim.
>
> 2. Upon the application of the victim, a court may determine the responsibility of the persons who jointly caused harm in a participatory share in accordance with the degree of their fault."

929. The experts were agreed that Article 1190 does not of itself qualify or characterise any conduct as unlawful. Rather, it provides for the circumstances in which one of a number of defendants liable to the claimant is jointly and severally liable with other co-defendants for the full amount of the damage suffered by the claimant. It was also common ground, as reflected in the experts' agreement, that for the liability of co-defendants to be joint and several under Article 1190:

> "… the harm must be caused by joint acts or omissions of several persons. The criterion of "causing harm by joint acts or omissions" means causing "indivisible harm by interrelated, [cumulative / collective] actions or actions with unity of intent."

930. The experts also agreed in their joint statement, that, if Article 1190(1) is engaged, its effect is that "each of the co-defendants must compensate the full amount of damages suffered by the aggrieved party (as opposed to compensating the victim only for the share of harm directly attributable to their own unlawful conduct)". Thus, a defendant who may, if considered alone, have only himself have caused a proportion of the overall loss suffered by the claimant may be held liable to compensate for the whole. However it is still necessary for the harm to be indivisible.

931. The focus of this common ground was on the concept of 'unity of intent' as further explained in the resolution of the Supreme Court dated 28 April 2021 in case No. 910/12591/18, *Person 1 v. DTEK Power Trade and DTEK Dniproenergo* ("*DTEK*"). This case was concerned with the unlawful conduct of a process for the compulsory purchase of minority shareholder interests. It was established that both the company acting by its supervisory board and the majority shareholders acted unlawfully in relation to the purchase of the claimant's shares at an unfair and obviously understated price. Both were held to be jointly liable as:

> "… the claimant suffered damage due to the interrelated combined actions of the Supervisory Board of the joint stock company and the person making the demand with the unity of intent - to buy out the shares from the claimant at an understated price. Pursuant to part one, Article 1190 of the Civil Code of Ukraine, persons whose joint actions or omissions because damage are jointly and severally liable to the victim."

932. Initially Mr Marchukov had suggested that 'unity of intent' "is a high bar", and that he was not aware of any purely civil cases where the court has explained how the 'unity of intent' indicator can be established, or has been so established. He revised that view when shown *DTEK* and accepted that the concept of a high bar is not one which appears

in the authorities. However, there remained a difference between the experts, because it was Mr Beketov's evidence that, when harm is caused by the joint actions of several persons giving rise to joint and several liability under Article 1190, the test for causation is whether the joint tortfeasors' acts taken together caused harm. The approach of Mr Marchukov and Mr Nahnybida was different. They considered that, while it is correct that causation will not be established if the harm would have occurred even in the absence of the unlawful conduct, court practice clearly shows that the causal link must also be direct, necessary and inevitable. It followed that, when harm is caused by the joint actions of more than one person giving rise to joint and several liability under Article 1190, the claimant's obligation to prove all elements of liability against each defendant individually, includes the direct causal link.

933. Mr Marchukov explained that none of the cases to which he had been referred in cross examination show the Ukrainian courts doing what he described as eliding the test of causation for tortious harm under Article 1166 with the separate question of whether any such liability should be borne jointly under Article 1190. Rather, his evidence was that they demonstrate that Article 1190 will apply only after each of the defendants can be shown separately to have directly caused harm to the claimant, but the extent of the harm caused by each defendant individually cannot be determined (i.e., there is indivisible harm caused by joint actions).

934. Ms Montgomery submitted on behalf of Mr Bogolyubov that, if that is correct, it therefore follows that a person who merely procures the unlawful acts of another cannot be liable under Article 1166, since their conduct will not be the direct cause of any harm. Article 1190 is irrelevant to this analysis, since the necessary prior requirements of Article 1166 are not made out. This was similar to the suggestion made during the course of Mr Beketov's cross-examination that a person who procures somebody else to commit an unlawful act will not be deemed to have caused the loss jointly with that person. The case relied on for the suggestion (case No. 22-ц/793/931/19 *Person 1 v. Person 4*, the Security Camera case), is not authority for the proposition. It would be surprising if that were the case, because, even if a direct link is the only test for causation, which it is not, it is difficult to see why both (a) the relationship between the procurer and the person procured and (b) the nature of the procurement should not be a significant factor in determining whether there is sufficient unity of intent (assuming that the harm is indivisible).

935. In practice, the cases which bear on the point demonstrate that the necessary causal link, whether that be "direct" link (*Transzaliznychservice*), "the main reason" (*Pidkaminska*), "an objective consequence" (*SI-Invest*) or in any other way, was satisfied in relation to the entirety of the loss suffered by a claimant suing two or more defendants all of whom had committed separate and distinct unlawful acts. Whether that was because the defendants had both, individually, caused that loss, or because the two of them taken together had caused it, the end result was the same.

936. However, the Bank submitted that, as a matter of logic there was sense in Mr Beketov's evidence that the causation analysis should be performed collectively, because it is common ground that, for the purposes of Article 1190(1) 'causing harm by joint acts or omissions' means causing "indivisible harm by interrelated, [cumulative/collective] actions or actions with unity of intent", which (per *Gaz Ukrainy*) extends to occasions when it is impossible to determine "what action and to which extent caused the occurrence of that consequence", language also used by the Grand Chamber in its more

recent resolution in case No. 372/1652/18, *Pobutrembudmaterialy LLC* ("*Pobutrembudmaterialy*"). I think there is real force in the submission, supported as it is by Mr Beketov's evidence that, if liability under Article 1190 extends to situations where it is "impossible to determine what action and to which extent caused" the harm, then it follows that the element of causation must be considered collectively.

937. This language from *Gaz Ukrainy* goes rather further than the limitation to "extent" suggested by Mr Marchukov. I do not think that this is eliding the test of causation for tortious harm under Article 1166 with the separate question of whether any such liability should be borne jointly under Article 1190. However, I do think that the real point which comes out of *Gaz Ukrainy* and *Pobutrembudmaterialy* is ultimately an evidential one. In my judgment, the evidence establishes that, where the harm is indivisible, and there is sufficient unity of intent as to the interrelated and cumulative or collective unlawful conduct, each of the tortfeasors will be jointly liable to compensate the victim for the harm caused by that conduct.

938. In the present case that would be established against each of the Individual Defendants, if their conduct in connection with the operation of the loan recycling scheme and the duties they breached as members of the Supervisory Board were sufficiently inter-connected and undertaken towards the same ultimate end, to satisfy this test. In principle, it may also extend to others involved in the Misappropriation (such as the members of the Management Board who participated in the operation of the scheme in breach of duty to the Bank), but that is not a matter for determination in these proceedings, nor has it been suggested by any of the Defendants that, merely because others might have acted unlawfully as well, that in any way affects either their own liability to compensate the Bank for the harm caused by their unlawful conduct or the amount of compensation for which they are liable.

939. As to the position of the Corporate Defendants, I consider that the correct analysis is that, if their unlawful conduct was part of the same scheme for the extraction of funds from the Bank and the movement of those funds out of Ukraine into foreign currency, as the scheme to which the Individual Defendants were party, they may all be liable for the harm caused by that conduct. In theory this might be the case if and to the extent that their participation was agreed by them before the Relevant Drawdowns were made and was all part of a single wider scheme in respect of which it can be said that the Bank suffered indivisible harm by interrelated and cumulative or collective actions of each of the Defendants with unity of intent.

940. However, this is an aspect of the case on which the Corporate Defendants stressed that it is very important to focus with some care both on (a) the nature and extent of the harm which their conduct is said to have caused the Bank and (b) the precise nature of the allegations made against them; it is at the core of their case that the acts and omissions of which they are accused have no causal link to the harm sustained by the Bank in the form of the Relevant Drawdowns, a state of affairs which the Bank cannot save by the application of Article 1190.

Article 1166: fault

941. The final element of the cause of action under Article 1166 is fault. It was common ground that fault is presumed where harm caused by a defendant's unlawful conduct is established. The consequence of this is that, while the absence of fault can be relied upon by the defendant as a defence to a claim in tort, he bears the burden of proof to establish that he was not at fault. It was also clear from *Bank Daniel* that in that context (i.e., negligent breaches of duty by officers of a bank) the Defendants must prove the absence of any fault by showing they took all possible measures and actions to prevent harm to the claimant.

942. It is not alleged by any of the Defendants that they can rebut the presumption of fault if the allegations of unlawful conduct made against them are established by the Bank. It follows that this final element of the cause of action does not give rise to an additional requirement that the Bank is unable to satisfy in the present case.

Article 1166: full compensation

943. When all of the elements of the cause of action are established, the question which then arises is assessing the "compensation in full" to which a claimant becomes entitled in accordance with Article 1166(1). It is clear from the wording of the Article that the full compensation is for the harm caused by the unlawful act on which the Bank relies, which, as the Bank stressed on a number of occasions is the making of the Relevant Drawdowns pursuant to Relevant Loans which were void. The loan agreements for the Relevant Loans simply provided what Mr Hunter called the paperwork pretext for the extraction of funds.

944. The compensation claimed by the Bank is the amount of money which will put the Bank fully back into the position it would have been in, but for the fraudulent extractions of its money. It is not asserting a proprietary claim requiring it to establish that the Unreturned Prepayments were made to the Corporate Defendants from funds drawn down under the Relevant Loans (see the discussion of the Bank's case in the judgment of the Court of Appeal on the jurisdiction challenges (*JSC Commercial Bank Privatbank v. Kolomoisky and others* [2019] EWCA Civ 1708, [2020] Ch 783 at [222] to [228], which remains unchanged). It follows that the compensation it seeks does not depend on showing a tracing link between the Relevant Drawdowns and the Unreturned Prepayment. This was always accepted by Mr Kolomoisky whose written closing submissions put the point as follows:

> "It is common ground (at least between the Forensic Accountants) that the making of an [Unreturned Prepayment] by a Borrower to a [Corporate Defendant] did not of itself cause the Bank a loss. The amount of the [Unreturned Prepayment] is simply the amount which the Bank claims was misappropriated."

945. It follows that, as the experts were agreed that deprivation of money amounts to harm for the purposes of establishing tortious liability, the amount of the Relevant Drawdowns is the amount of the harm for which it is entitled to full compensation; that is the initial financial loss sustained by the Bank. It was then submitted, in my view correctly, that if a sum of money is misappropriated, the immediate loss is that sum, but, by the time the court comes to assess the full compensation payable, the loss may be more or less depending on what has happened in the meantime. It might be more if

as a consequence of the immediate loss to the victim the victim loses opportunities to make profits or has additional expenses. It might be less if the defendant has provided genuine compensation for the victim, or if the victim has been able to mitigate its loss in some recognisable manner.

946. It also follows that what the court is called upon to do when quantifying the amount required by the Bank to compensate it for the harm is to consider, as at the date of assessment, what amount of money will put the Bank back into the position it would have been in but for the Relevant Drawdowns. And, in making that assessment, the court will have regard to what has happened after and in consequence of the unlawful conduct, ignoring matters which fall to be disregarded as a matter of law, such as the use of the funds by the fraudsters to pay off their liabilities. I will come back to consider compensation on the facts in the context of my findings on the Repayment Defence, but there are a few points of legal principle which it is convenient to deal with at this stage.

947. The first legal issue which arose related to the burden of proof. It was said by the Bank that it is for the Defendants to establish on the facts that, in the period which followed the Relevant Drawdowns, they took steps which, as a matter of substance and reality, provided compensation for the harm they caused. The Bank's position is that the Defendants have wholly failed to do that, because they simply rely on cover-ups which provided no value to the Bank.

948. Mr Beketov, Mr Alyoshin and Mr Nahnybida all addressed the question of burden in a number of different contexts. It is apparent that Ukrainian law, like English law, recognises that there are instances in which the burden is a matter of evidence and other instances in which the burden is a matter of substantive law. Generally speaking, however, the starting point is that each party bears the burden of proving facts and matters on which they wish to rely.

949. I agree with the Bank that, whether the burden of proof is to be characterised as an evidential question (and therefore governed by English law), or a matter of substantive law (and therefore governed by the law of Ukraine), the answer is the same. Once the Bank has established actionable harm (in the form of the Relevant Drawdowns), the burden is on the Defendants to show that credit should be given for any receipt by the Bank which reduces the loss. In this case the Defendants have always said that the reduction of the loss is achieved by repayment of the loan if the Relevant Loan was valid or discharge of the restitutionary obligation if the Relevant Loan was void. But in my judgment the burden is on them to prove that the facts on which they rely had that effect as a matter of Ukrainian law.

950. This conclusion on burden is a straightforward application of the experts' agreement in their joint statement that "each party generally bears the burden of proving facts and matters upon which they wish to rely". It also seems to me that it does not just reflect the law of Ukraine. It is consistent with the approach reflected in *Midco Holdings Ltd v. Piper* [2004] EWCA Civ 476 at [23-24] and *Cheltenham BC v. Laird* [2009] EWHC 1253 (QB) at [561]. In my view the following statement by Bryan J in *Yurov* at [1182] is equally applicable in the present case:

> "The Bank having *prima facie* established its loss one would expect that the burden of proof would shift to the Shareholders to establish any case by way of rebuttal in terms of benefits to be credited and the like. That is, I am satisfied, the position as

a matter of English law (certainly in terms of the evidential burden, if not the legal burden) and the contrary was not suggested on behalf of the Shareholders, and equally it was not suggested by any party that the position was any different as a matter of Russian law."

951. Secondly, it is right to record that the experts were unable to refer to any Ukrainian case in which a tort claim has been brought seeking compensation for the misappropriation of monies using the mechanism of unlawful loans where (i) the proceeds of the fraud were used to repay earlier unlawful loans and/or (ii) the unlawful loans were recorded as repaid by later fraudulent loans. The closest that the Supreme Court has got to considering analogous circumstances is *Ukoopspilka*, (the relevant parts of which are discussed in paragraph 923 and 924 above), in which the DGF made claims against Bank officials who had allowed their banks to enter into fraudulent and 'risky' transactions (the purchase of junk bonds) which led to insolvency. The Grand Chamber found that, on the facts of the case, there would have been no point in the DGF pursuing claims against the sellers of the bonds to mitigate its loss. I agree with the Bank's submission that it appears from the Supreme Court's approach that the compensable loss for the purposes of Article 1166 was regarded as quite different from the value of the restitutionary claims, and fell to be assessed as a matter of fact.

952. Thirdly, there was no substantial dispute between the parties that the assessment of full compensation is an assessment of fact for the court, nor was there any real argument against the proposition that full compensation means *restitutio in integrum* or something similar. It is the sum of money needed to make the Bank whole and put it fully back in the position it would have been in but for the wrongdoing. That is the exercise which can be done using the Bank's methodology, the results of which were quantified by Mr Thompson. It is not achieved by Mr Davidson's funds flow approach, which seeks to conduct a funds flow tracing exercise which will lead to different results from that achieved by Mr Thompson's matching of Relevant Drawdowns to Unreturned Prepayments with the use of the Bank's transactional data.

953. The Bank also submitted and I accept that in approaching that question a Ukrainian court will also be guided not just by the clear meaning of the phrase "full compensation" but also by the associated principles of general application including, justice, good faith, reasonableness (Article 3(1)(6) of the Civil Code) and of protecting a victim's rights (Article 15). Mr Alyoshin did not really address this aspect of the test, but looked at overall I think it is clear that, when working out full compensation under Ukrainian law, the court is required to make a factual assessment taking what Mr Hunter called "a real world view, looking at the substance". This means that, taken together with the burden of proof, the Defendants must prove that what they did provided real benefit to the Bank sufficient to amount to full or partial compensation for the extraction of money pursuant to the Relevant Drawdowns. In other words, the question is whether, as a matter of substance and reality, the Defendants are able to establish that compensation for the harm caused by the Relevant Drawdowns has been provided to the Bank. In answering that question, the court is required to consider whether the Bank has received such sum of money as is required to make it whole, and put it fully back in the position it would have been in but for the wrongdoing.

Void and voidable contracts: an introduction

954. The question of whether or not a transaction is void as a matter of Ukrainian law is not of itself relevant to the question of whether any of the Defendants acted unlawfully for the purpose of Article 1166. It is however relevant to two other issues. The first is the Repayment Defence. Nobody says that the legal analysis of how the Repayment Defence works is unaffected by the question of whether the transactions given effect both by the Relevant Drawdowns and by the New and Intermediary Loans were or were not void. However, the parties disagree as to whether the difference in legal analysis affects the efficacy of the Repayment Defence, and if so how.

955. The second issue affected by the application of Ukrainian law principles as to voidness and voidability of transactions is the claim in restitution against the Corporate Defendants. The question of whether the transactions initiated by the Relevant Drawdowns are void is relevant to the issue of whether the Bank has established that there was no lawful basis for the transfers made as a result of the Relevant Drawdowns and in respect of the Unreturned Prepayments. In that context, the Corporate Defendants developed an argument that it would be wrong for this court to determine the question in the absence of the Borrowers, which were parties to the Relevant Loans and RSAs and were recipients of the Relevant Drawdowns, but which are not parties to these proceedings. Although submissions to this effect were only made by the Corporate Defendants, if the point is a good one it affects the conduct of the proceedings more generally because the outcome has some bearing on those aspects of the Bank's case against the Individual Defendants which depend on the question of whether or not a Relevant Loan is void. It is therefore appropriate to consider the point at this stage rather than in the context of explaining my conclusions on the claim against them in unjust enrichment.

956. The way that the point was put in the Corporate Defendants' closing submissions was that, whatever its governing law, the unjust enrichment claims depend upon establishing that the Relevant Loans and RSAs are all void. It was not in dispute that the issue of whether or not the Relevant Loans and RSAs are void is governed by Ukrainian law, as they are all contracts governed by Ukrainian law. However, it was said that they can only be found to be void in legal proceedings to which the Borrowers (being parties to them) are party. Despite the fact that expert evidence of Ukrainian law was adduced on this point, it was common ground by the end of the trial that questions of joinder are treated by both English and Ukrainian law as matters of procedure, so the question of whether there is any substance in this point is a matter of English law.

957. For this reason, it is not necessary to discuss what the position would be in Ukraine if the point was governed by Ukrainian law. Nonetheless, I shall give a brief description of the experts' positions on the point, because it puts in its proper context the conclusion I have reached that it is appropriate for the court to make findings as to voidness, notwithstanding the absence of the Borrowers.

958. Mr Beketov's opinion was that Ukrainian court practice demonstrates that there is no reason why the court cannot proceed to determine a claim in unjust enrichment, which depends on a transaction being void, without joining all of the parties to the transaction. In his view, the proper defendants to the Bank's unjust enrichment claim are those alleged to have acquired or preserved the property, and there is no requirement for every person through whose hands the property has passed (in this case the Borrowers) to be joined, merely because the court is required to determine that the transaction was void as part of its determination of the claim against the acquirer. That would only be

necessary if relief was also being sought against those persons, which in this case it is not.

959. Furthermore, Mr Beketov explained that the only consequence of non-joinder is that findings of fact will not have preclusive effect as against non-parties, which is a reason for joinder, but which does not affect the ability of the court to proceed against a party who has been joined on the basis that the transaction is void. He also expressed the view that, where a transaction is void, the legal consequences of that state of affairs are a matter of law and cannot be changed by agreement between the parties. As the Bank submitted in its closing submissions, given that a void transaction is invalid by operation of law, its invalidity cannot be affected by the presence or absence of parties to the proceedings. The court is not being asked to declare the invalidity of any transaction, it is simply being asked to grant relief against persons who are parties to the proceedings. None of what he had to say was inconsistent with his acceptance in cross-examination by Mr Plewman that, if a Ukrainian court was addressing these claims, and if third parties are affected, they should be joined in the proceedings and, if they are not, they may be able to lodge an appeal.

960. Mr Alyoshin disagreed. He cited the resolution of the Supreme Court in case No. 917/2041/20, *Novye Mosty LLKC v. Liutenka Village Council* in support of his argument that, as a matter of Ukrainian law, a transaction is either valid or invalid. It cannot be treated as valid as between the parties to the transaction but invalid for the purpose of claims between other parties: "Thus the Bank's claims cannot succeed insofar as they depend on the court making determination that transactions are invalid, where the parties to those transactions are not before the court".

961. In their closing submissions, counsel for the Corporate Defendants did not contend that what Mr Alyoshin had to say was also the position which this court should adopt. Their argument was rather different. They said that there are two good reasons why the court should not make any finding as to voidness in the absence of the Borrowers:

    i) The Corporate Defendants would be exposed to double liability if a finding as to voidness is made by which the Borrowers are not bound. The double liability to which they referred was liability in unjust enrichment in these proceedings on the basis that the contracts are void, and liability in contract on the basis that the RSAs are not void.

    ii) There is a risk of inconsistent judgments on the basis that contractual liability under the RSAs has already been established in the 2014 Ukrainian Proceedings, and if that is to be undermined in a later action, then the Borrowers must properly be party to that action. It was submitted that, notwithstanding the Bank's allegations that the judgments in the 2014 Ukrainian Proceedings were collusively obtained, they still stand and the Bank (which was a party to them) has made no attempt to have them set aside. It was submitted that this court should not entertain an argument that could give rise to inconsistent judgments which they said would be "a potential disaster from the legal point of view" to adopt the language of Brandon LJ in *Aratra Potato Co v. Egyptian Navigation Co* (*The "El Amria*") [1981] 2 Lloyd's Rep 119, 128(2).

962. It was also submitted that, in the absence of exceptional circumstances, A (in this case the Bank) cannot seek declaratory relief as to the meaning of a contract between B and

C (in this case the RSAs between Borrowers and the Corporate Defendants) (*Federal Mogul Personal Injury Trust v. Federal Mogul Ltd* [2014] Lloyd's Rep IR 671 at [94]. Thus it was said that A should equally not be entitled to seek a determination that the contract between B and C is void, at least in the absence of both B and C. In my view this case does not assist in circumstances in which it is relevant to the determination of A's personal cause of action in tort or restitution against C for A to establish that contracts between A and B and/or between B and C are void. That would only be relevant if the court was being asked to grant declaratory relief against B, which is not the case in the current proceedings.

963. On the same theme, the Bank's principal response to the Corporate Defendants' submission was that the causes of action it pursues are personal claims in tort and unjust enrichment. They are not claims in rem (as to which it cited *Pattni v. Ali* [2007] 2 AC 85 at [21] to [25]), and therefore the joinder of parties against whom no relief is sought in these proceedings is unnecessary. That is correct so far as it goes, and seems to me to be an answer to the Corporate Defendants' argument based on *Federal Mogul* but it does not really engage with the points made by the Corporate Defendants as to double liability and risk of inconsistent judgments.

964. As the Corporate Defendants do not contend that, as a matter of law, the court is disabled from granting the relief sought by the Bank because the Borrowers have not been joined as parties, the current position is that it is no longer said that there is any legal bar to the issue of voidness being determined in their absence. It is also accepted by both the Bank and the Corporate Defendants that the Borrowers will not be bound by this court's determinations (a position which seems to me to be correct). It therefore follows that the points made by the Corporate Defendants are ultimately all about whether the risk of double liability and prejudice to the Corporate Defendants from inconsistent judgments, mean that, in the interests of justice, the case cannot proceed.

965. I accept that the risk of double liability and prejudice to the Corporate Defendants from inconsistent judgments is capable of being a factor which the court can take into account when determining case management issues before and during the course of the trial. However, the Corporate Defendants never applied to join the Borrowers, and nor did the Borrowers themselves apply to be joined, a course which was always open to them if they were really concerned about either of these two points, once it was apparent from the Court of Appeal's decision on jurisdiction that these proceedings would be continuing in England. The fact that they did not do so, doubtless for what they regarded as good reasons of their own, means that it is difficult to give this argument much weight at this stage of the proceedings, more especially now that it is apparent that the point is one of procedure not substantive law.

966. I also take into account the finding I have made that the Borrowers and the Corporate Defendants are all ultimately controlled by the Individual Defendants, a factor which minimises any risk that double liability or inconsistent judgments might operate to as to inflict genuine prejudice on either the Corporate Defendants, or indeed the Borrowers. This conclusion is fortified by my finding that the judgments in the 2014 Ukrainian Proceedings were collusively obtained. For all of these reasons I reject the Corporate Defendants' submissions on this point.

Void and voidable contracts: the principles of Ukrainian law

967. The starting point is that, to the extent that a Relevant Loan, a Relevant Drawdown or an Unreturned Prepayment qualifies as a transaction under Ukrainian law (as to which it must be a unilateral, bilateral or multilateral act aimed at the acquisition, alteration or termination of civil rights and obligations: Article 202 of the Civil Code), it will not be valid unless it complies with the requirements of Article 203 of the Civil Code. The requirements of Article 203 are as follows:

> "General requirements to be observed for a transaction to be valid
>
> 1. The content of a transaction may not be in conflict with this Code or other civil statutes or state or public interests or public morals.
>
> 2. A party to a transaction must have the necessary civil capacity.
>
> 3. The expression of will by a party to a transaction must be free and correspond to his inner will.
>
> 4. A transaction must be executed in a form prescribed by law.
>
> 5. A transaction must be aimed at causing the legal effect contemplated thereby.
>
> 6. A transaction executed by parents (whether blood or adoptive) may not conflict with the rights and interests of their minor, underage or incapable children."

968. It is also necessary to identify the true transaction, because, if the transaction was concluded by the parties for the purposes of concealing another transaction (which the parties in fact concluded), Article 235 of the Civil Code ("Article 235") treats it as a sham or mock transaction with the consequence that "the relations between the parties shall be governed by the rules applicable to such actual transaction." At one stage it seemed to be the Bank's case that Article 235 itself gave rise to an independent ground on which contracts that were part of the Misappropriation were void. That was not the way in which the argument was put in closing, and in the event there seemed to be a measure of agreement between the parties as to the correct analysis.

969. I am satisfied that the evidence establishes that, as a matter of Ukrainian law, where a transaction of one type is disguised as a transaction of another type, the court is required to look at the rules which are applicable to the true or real transaction. It follows that, if what purports to have been a loan was not in fact a loan, but rather was a transfer of money for no consideration with intent to misappropriate, the court will treat the transfer as having the characteristics of the true transaction when determining its validity and effect. That will include questions as to whether, having regard to its true nature and characteristics, the real transaction is valid, voidable or void.

970. In a case in which the invalidity of a transaction is established by law, Article 215 of the Civil Code ("Article 215") provides that it will be null and void and it is not required to be held invalid by a court. In any such instance, an invalid transaction "entails no legal consequences, other than those connected with the invalidity" which may include an obligation to return in kind everything the recipient has received pursuant to the invalid transaction or, where that is impossible, to compensate the transferor for the

value of everything it has received together with an obligation to compensate any party who has suffered damages or moral damage in connection with the execution of the invalid transaction (Article 216 of the Civil Code ("Article 216")). In language, the accuracy of which I accept, Mr Beketov said:

> "A void transaction will have only the legal consequences associated with its invalidity, such as restitution of property passing under that transaction pursuant to Article 216(1) of the Civil Code, and liability in damages pursuant to Article 216(2) of the Civil Code."

971. In any case in which the invalidity of a transaction is not expressly established by law, but a party to the transaction or a third party challenges its validity on particular grounds, it will be voidable (Article 215(3)). It was common ground that once declared invalid by the court, the transaction will be invalid *ab initio* rather than from the time of the court's declaration. It was also common ground that there is a statutory presumption that a transaction is lawful unless its invalidity is expressly established by law or it is held to be invalid by the court (Article 204 of the Civil Code) and that doubts regarding the validity or enforceability of a transaction should be resolved in favour of it being valid, of legal effect and enforceable.

972. The main provision relied on by the Bank in support of its case on the avoidance of transactions is Article 228, which takes the following form:

> "Legal consequences of execution of a transaction that is contrary to the public policy and has been executed with an aim that is in conflict with the interests of the state and the public
>
> 1. A transaction is to be considered to be contrary to the public policy, provided that it was aimed at (i) violating constitutional human and civil rights and freedoms, or (ii) destructing or damaging or misappropriating any property of a company or individual or the state or the Autonomous Republic of Crimea or a local community.
>
> 2. A transaction that is contrary to the public policy is void.
>
> 3. In the event of failure to satisfy the requirement that a transaction must meet state or public interests or public morals, such transaction may be held invalid. Where a transaction that has been held invalid by court was executed with an aim that was knowingly in conflict with state or public interests, then, if it was the intention of the parties (provided that such transaction was carried out by both parties), the court must order that everything they have received under such transaction be transferred to the state budget or, if the transaction was carried out by one party, the court must order that everything the other party has received be transferred to the state budget and that everything the other party owes be transferred to the former party by court judgment as a recovery for everything so received. Where it was the intention of one party only, everything such party has received under such transaction must be returned to the other party, and everything that has been received by, or owed to, the latter must be transferred to the state budget by court judgment."

973. The experts were agreed that the effect of Article 228(2) is that a transaction which is considered to be contrary to public policy (or what in its literal translation is also called public order) in the circumstances identified in Article 228(1) is void. They also agreed that, in order to violate Article 228(1), the transaction in question either must infringe the constitutional rights and freedoms of an individual and citizen (which was not the way in which the Bank put its case) or must destroy, damage or misappropriate the property of amongst others an individual or a legal entity (which was).

974. As all of the experts accepted, the language of Article 228(1) focuses on the aim of the transaction sought to be impugned, which requires consideration of the intent of one or both of the parties to the transaction. It is therefore necessary for one or more of the parties to the transaction to have known that it was contrary to public policy and to have intended or willingly accepted those harmful effects. This would include a transaction directed at one of the listed aims, namely the misappropriation of the property of a company or an individual, or as Mr Alyoshin put it, a "transaction aimed at taking somebody's possession in an illegal way".

975. In light of the way that Mr Kolomoisky's case was advanced in his written closing, I should record that, on the question of intent, I am satisfied that what is required for a transaction to be void as contrary to public policy is for "one or more of the parties to have known (actually or constructively) that the transaction was contrary to public policy and to have intended or willingly accepted those harmful effects". It is confirmed in a number of cases in the Supreme Court (see e.g., the facts of case No. 910/1734/19, *MTIBU* v. *Alfa-Garant Insurance Co* ("*MTIBU*") and case No. 924/588/20, *Tigerfish LLC v. Free Energy LLC* ("*Tigerfish*") and most recently the statements of principle in case No. 580/5634/22, *State Tax Service v. Prezenta Premium LLC* ("*Prezenta Premium*") at [1.2]) that at least one party must have the requisite intent – there is no requirement that it is more than one, and the authorities demonstrate that this is the case.

976. The experts were also agreed that, whether a transaction violates public policy is determined on a case-by-case basis, a proposition established by the resolution of the Supreme Court in case No. 911/2574/18, *JSC Chornomornaftogaz v. Ukratomenergo LLC* ("*Chornomornaftogaz"*). In their joint statement, the experts said that, what the court is considering when asked to determine whether a transaction is contrary to public policy is (i) the purpose of the transaction, (ii) the state or public interests which the transaction violates, (iii) the danger which the transaction poses to such interests, and (iv) the intentions of the parties.

977. The fact that a transaction contrary to public policy in the sense described above will be void is to be contrasted with a failure to satisfy the requirement that a transaction must meet state or public interests or public morals. The language of Article 228(3) makes clear that, where that is established, any such transaction may be held invalid. The evidence established that this meant that any such transaction would then be voidable and (as I have already explained) where the court declares it to be contrary to public interests or public morals will be invalid *ab initio*.

978. At the outset of the trial, there was disagreement between the experts as to whether it would be open to a Ukrainian court to conclude that the parties to the Relevant Loans intended to breach public policy in the absence of a criminal conviction. Initially Mr Alyoshin maintained a position which was expressed in slightly different terms during

the course of his evidence, but which can be summarised as being that "nothing short of evidence of guilt in committing crimes suffices for holding contracts void under Article 228(1)". Having then been taken during the course of his oral evidence to a number of resolutions of the Supreme Court which appeared to be impossible to reconcile with this conclusion (*Kakhova*, *MTIBU* and the resolution of the Grand Chamber dated 2 November 2021 in case No. 917/1338/18, *Person 1 v. Private Enterprise Agrofirma Slavutych* ("*Agrofirma Slavutych*"), the latter two of which were resolutions of the Grand Chamber), he modified his opinion so that the principle which he said applied was that the following was the general practice of the Ukrainian court:

> "As soon as the issue comes to the embezzlement, misappropriation of money from banking -- banks, from financial institutions, Article 228 apply in a way that it should be preceded with the verdict of the criminal court."

979. Although this point had fallen away by the time of closing submissions, it is another example of an instance in which Mr Alyoshin adopted a rather adversarial position in his evidence, which seemed to me to have more in common with an advocate arguing his client's case than it did with an expert explaining to the court his dispassionate view of the law of Ukraine. As I have already explained earlier in this judgment (see paragraph 810 above), I also agree with the Bank's description of his evidence as evasive when he was asked about which of the relevant authorities on the point he had considered before his reports were prepared. In the event, in the closing submissions prepared on behalf of Mr Kolomoisky, it was said that he accepted the Bank's argument that, like the similar issue I discussed in paragraph 850 above, the issue was only an evidential one, and therefore conceded that any Ukrainian rules in this regard would not apply in English proceedings.

980. This concession meant that the point was not pursued as a matter of substance in closing, but it was still asserted on behalf of Mr Kolomoisky that there was unfairness in the fact that he has been deprived of the opportunity even to argue the point as a result of the Bank's decision to engage in what he described as an extreme form of forum-shopping. In the light of that comment, I should say that, even if that concession had not been made, I would still have preferred Mr Beketov's evidence to the effect that Mr Alyoshin's description of what he said was the general practice of the Ukrainian court was not an accurate reflection of Ukrainian law, and that no criminal prosecution or verdict is required. I can explain why quite shortly.

981. In my view the resolutions of the Grand Chamber in *MTIBU* and *Agrofirma Slavutych* support the proposition that no criminal prosecution or verdict is required, and the approach has recently been followed in *Tigerfish* and *Prezenta Premium* at [4.1], amongst others. Mr Alyoshin relied on the resolutions of the Supreme Court dated 8 August 2019 in case No. 2a-12868/12/2670, *State Tax Inspectorate v. Ant Yapi LLC* and 17 August 2023 in case No. 904/3100/21, *State Innovative Financial and Credit Institution v. JSC Commercial Bank Concord*, which on one view contain statements which appear to go the other way. However, I agree with the Bank's conclusion, based as it is on Mr Beketov's evidence, that they are explicable on the grounds that the claimant relied on the very existence of a criminal investigation to establish a violation of public policy. In that context, and in the absence of an allegation of civil unlawfulness, it is not surprising that the Supreme Court held that a conviction was required.

982. I also think that Mr Beketov was right to conclude that *Chornomornaftogaz* establishes that there is no requirement for an impugned transaction to involve the state or other public entity, or for it to threaten the social and economic foundations of the state, in order for it to be contrary to public policy within the meaning of Article 228(1). I accept that he is right in his conclusion that a sufficient public or state interest will arise when the transaction involves an infringement of property rights. As the Supreme Court explained in case No. 0907/17918/2012, *Bank Zoloti Vorota PJSC v. Person 1*, a case concerned with a fraudulent extraction of funds for the benefit of its former employees:

> "Taking into account the above circumstances, the loan agreement dated 7 May 2008 was concluded for the purpose of taking illegal possession of bank funds
>
> […]
>
> In view of the foregoing, loan agreement No. 02/355, dated 7 May 2008, and made between Zoloti Vorota Bank (a commercial bank and a joint-stock company) and PERSON_2 is void as it is contrary to the public order, given that it was aimed at misappropriating the bank's funds."

983. The Bank also relied on Article 52 in support of its case on invalidity. This article provides that, with effect from 8 March 2015 "agreements concluded by the bank with related parties on terms that are not current market terms shall be declared invalid from the moment of their conclusion". Before that date the language was slightly different and provided that "agreements concluded by the bank with related parties on terms more favourable than usual are declared by the court as invalid from the moment of their conclusion".

984. It was common ground that the earlier version of Article 52 provided for agreements in breach of its provisions to be voidable but not void. The issue between the experts was whether the amended version changed the law and rendered such agreements void without any need for intervention by a court. Mr Beketov said that this was what the amendment achieved by the removal of any reference to the court. Mr Alyoshin said that it did not, because the language still required a declaration.

985. There was no case law on this point, but Mr Beketov's opinion was supported by Maryna Sayenko in an article published in Yuryst & Zakon Issue No 12 in which the author said:

> "The lawmakers changed slightly the approach to the evaluation of transactions and agreements carried out by related parties. Although the pre-amended version of the Ukrainian Law on Banks and Banking specified that transactions entered into between the bank and related parties on the terms, which are more favourable than ordinary terms, could have been invalidated by the court *ab initio*, meaning that they could be challenged, the new wording of Article 52 of the Law says that transactions entered into by the bank and related parties on the terms, which are not current market terms, are invalidated *ab initio*. Thus, the above wording can be construed by the regulator as voidance of such agreements as provided by the Law, resulting in a new wave of actions brought by interested parties."

986. Mr Alyoshin said that the retention of the phrase "shall be declared invalid" in the new version of Article 52 demonstrated that Mr Beketov was wrong on this point, because

"the court is the only organ that can declare a transaction invalid". In his opinion, this was made clear by Article 215(3) which provides that "where invalidity of a transaction is not expressly established by law, but the parties thereto or third party challenges its validity on the grounds prescribed by law, a court may declare such transaction invalid (voidable transaction)".

987. I do not accept this part of Mr Alyoshin's analysis. In my view, his opinion fails to give sufficient weight to the use of the word "shall" which removes the new version of Article 52 from the ambit of Article 215(3) which by using the word "may" is plainly dealing with situations in which the court has a discretion to grant a declaration of invalidity. I also do not consider it is particularly surprising that the legislature determined that transactions between a bank and its related parties should be void *ab initio* unless they are on current market terms.

988. I therefore prefer Mr Beketov's evidence that the removal of the reference to the court is a significant amendment and, combined with the use of the word "shall", reflected an intention by the legislature to change the status of related party transactions on non-market terms from voidable to void. In my view Mr Beketov is correct in his opinion that the effect of the amended version of Article 52 is that a transaction to which it applies is declared invalid by the statute, a result which is consistent with the legislative intent as explained in his supplemental report, which is to strengthen the liability of persons related to a bank for making decisions that affect its financial standing.

989. It was also submitted by the Bank that Mr Beketov's construction was confirmed by the language of Article 38(3) of the DGF Law. This makes provision for a series of reasons for the invalidity of related party transactions when the DGF is taking steps to ensure the preservation of a bank's assets. It opens with the phrase "Transactions, including those concluded with the persons related to the bank, in which the Fund carries out temporary administration and / or liquidation procedure, are void for the following reasons". It then goes on to describe ten circumstances in which related-party transactions are treated as void, number (8) of which is:

> "the bank entered into a transaction with a person related to the bank or in the interests of a person related to the bank, or in favour of a person related to the bank in violation of the requirements of the law, including the invalidity of which is established by Article 52(6) of the Ukrainian law "On Banks and Banking Activity" had referred to transactions, the invalidity of which is established by Article 52(6)".

990. This is consistent with Mr Beketov's opinion, but is not determinative that it is correct. It is also possible that the phrase "the invalidity of which is established by Article 52(6)" is itself a reference to what occurs when the court grants a declaration of invalidity. Nonetheless, I think it gives some support for Mr Beketov's view which I prefer to Mr Alyoshin's on this point. I find that with effect from 8 March 2015, agreements between a bank and a related party "on terms that are not current market terms" will be void pursuant to Article 52.

991. As to the meaning of "terms more favourable than usual" and "terms that are not current market terms", the two different versions of Article 52 both include a list of the circumstances in which an agreement will include terms that fall foul of these provisions. Mr Hunter submitted that the key question when considering these lists is whether the terms are more advantageous to the related party than the terms offered by

the bank to the market generally or possibly by other banks to the market generally. Although the detail of the law changed in March 2015, I agree with that submission.

992. Prior to 8 March 2015 a related party transaction was deemed to be on preferential terms and voidable if less security was accepted than that required from other clients or if the property acquired was of a low quality or at an inflated price. It was also voidable if investment was made in the securities of the related party that would not be made in another enterprise or if payments were made for goods or services at a higher price than the ordinary price or in circumstances where such goods or services would not be acquired from another party.

993. After 8 March 2015 the categories of preferential transaction, now described as "not on current market terms" was expanded to include the following additional categories: the sale of property to a related party at a price lower than that which the bank would receive from selling the property to another, the accrual of interest or commission services provided by the bank to a related party at a lower than ordinary rate and the accrual of interest on deposits received from a related party at a higher than ordinary rate.

994. As to the identity of a related party, Mr Beketov explained that the effect of Article 52 was as follows until March 2015:

> "….if a person 'A' held, directly or indirectly, 10% or more of a bank's shares or voting rights, or was otherwise able to exercise significant influence over that bank's management or activities, then that bank's related parties would include any other company in which A also held, directly or indirectly, 10% or more of that company's shares or voting rights, or was otherwise able to exercise significant influence over that company's management or activities. Such companies would be 'horizontal affiliates' of the bank."

995. After that date the first category of related parties are the bank's controllers. Article 2 of the Law on Banks ("Article 2") contained the following definition of "controller", which was in force at the material times:

> "an individual or legal entity that is not under the control of individuals and that is able to exercise decisive influence on the management or business of a legal entity through the direct and/or indirect ownership (whether alone or jointly with others) of a shareholding in such legal entity that is equivalent to 50 per cent or more of the authorised capital and/or votes in such legal entity or that is able to exercise such influence contractually or otherwise, regardless of formal ownership".

996. It was Mr Beketov's unchallenged evidence, which I accept, that the key characteristic of a person being a controller is their ability to exercise "decisive influence" on the management or business of the entity concerned. One way in which the law contemplates that decisive influence may be exercised is through the ownership (whether alone or jointly with others) of 50% or more of the entity's authorised capital. Another way is through the ability of a person to exercise decisive influence, regardless of formal ownership of the bank's authorised capital, either through a contractual right to do so or as a result of any other circumstances. It was Mr Beketov's evidence that the use of the word "otherwise" encompassed, amongst other circumstances, a situation in which a person, when acting together with one or more other persons, is able to exercise decisive influence over a bank's management or business.

997. Apart from controllers, related parties post-March 2015 also included others with a significant participation in a bank (more than 10%) and persons through whom those persons indirectly hold any significant participation in the bank. They also include executives of the bank and the bank's committees, the banks horizontal and vertical affiliates, and persons with a significant participation in those affiliates and their executives. They also extended to associated parties of such people, legal entities in which any such individuals indicated are executives or in which they hold a significant participation and:

> "any person though whom an operation is carried out in the interests of the person indicated herein, and upon whom persons indicated herein exercise influence when conducting such operations, whether through employment, civil or other relations."

998. A further provision relating to avoidance and voidability on which the Bank relied was Article 70 of the JSC Law ("Article 70"). This Article is concerned with significant transactions, being one the value of which exceeds 10% of the value of a company's assets according to its most recent annual financial statements. It was common ground that a separate resolution of the corporate body concerned must approve any significant transaction, and that body will be the supervisory board.

999. Article 70(5) contains what Mr Beketov called an anti-circumvention rule, prohibiting the division of a transaction into smaller parts with the aim of circumventing the relevant approval procedure for significant transactions. Mr Alyoshin accepted that this meant that, if there is a single transaction in the form of a loan, it is not permitted to divide that single transaction into a smaller number of component parts in order to avoid the requirements for the transaction to be approved by the supervisory board. The language of Article 70(5) is: "It is prohibited to divide the subject of the transaction in order to evade the procedure for making decisions on conducting a significant transaction". He also accepted that the rules for which Article 70 provided could not be avoided by splitting what in substance was (e.g.) a loan to a single enterprise into a number of smaller loans to a number of different nominees acting for the same concern. In other words, the court will look at the substance of the transaction taken as a whole.

1000. It was also common ground that, until 1 May 2016, the consequences of non-compliance with Article 70 was that the relevant significant transaction was voidable. It was also common ground that it is open to a company to ratify a significant transaction made in breach of these provisions at a later date. However, there was a disagreement between the experts as to whether significant transactions entered into in breach of Article 70 after a change in the law which came into effect on 1 May 2016 are merely voidable or are of no legal effect at all and are therefore void. Mr Beketov said that, in the absence of later ratification by the company, they are void. Mr Alyoshin said that they are only voidable, as was the case prior to the amendments. This issue therefore relates only to the New Loans because the Relevant Loans and the Intermediary Loans were all concluded before the date on which the change of law came into effect.

1001. The answer to this question depends on the meaning and effect of the amended Article 72, the relevant parts of which are as follows:

> "1. Significant transaction … concluded in violation of the procedure for making a decision on granting consent to its execution creates, changes, terminates the civil

> rights and obligations of a joint-stock company only if the company further approves the transaction in the manner established for making a decision on granting consent to its completion.
>
> 2. Subsequent approval of the transaction by the company in the manner established for making a decision to grant consent to its conclusion, creates, changes, terminates the civil rights and obligations of the joint stock company from the moment this transaction is completed."

1002. Mr Alyoshin relied on a resolution of the Supreme Court in case No. 911/3039/1, *NPP ASU LLC v. Fakel PJSC* ("*Fakel*") in support of his opinion that, where the execution of a contract is subject to compliance with corporate procedures (such as obtaining the supervisory board's approval under Article 70), a failure to follow the procedures may make the contract voidable, but not void. He also said that a company seeking to invalidate a contract on this ground must prove that its agent acted in breach of the company's internal procedures and therefore exceeded his or her powers, and that the counterparty had actual or constructive knowledge of the limitations on those powers.

1003. Mr Beketov's response was that *Fakel* was not a case which established that the original transaction was only voidable. The Supreme Court's decision was that, in the particular circumstances of that case, the supervisory board did not subsequently approve a transaction so as to validate the transaction when it should have done so. It analysed the case as one about abuse of rights (Article 13, which I have already considered when explaining what is capable of constituting unlawful conduct for the purposes of Article 1166). It said:

> "62. The Supreme Court finds reasonable the appellant's allegations concerning the need to apply the principle of prohibition of contradictory conduct to the disputed legal relations, which is based on the fact that no one can act contrary to their previous conduct, as well as Art. 13 of the Civil Code on the prohibition of abuse of rights.
>
> 63. The Supervisory Board has the right to approve transactions, but disapproval of the transaction by this body must have a reasonable explanation, motives. The failure to approve an executed and partially performed transaction without any reason is an abuse of the claimant's right, which was intended to cause harm to the counterparty. The Court considers that the only motive for such a disapproval is a refusal to discharge the obligations arising under the agreement at issue."

1004. The effect of Mr Beketov's evidence is that the Supreme Court has held that the starting point is that a significant transaction is void if in breach of Article 72. Stage two is to ask whether the transaction has later been ratified by the appropriate corporate body. If it has not, it will still be void because it has not been ratified, unless the court is satisfied that the transaction should have been ratified. In that event the abuse of rights doctrine might kick in (as it did in *Fakel*), so that the transaction is treated as if it had been ratified because not to do so would be an abuse of the company's right not to approve a void transaction intended to cause harm to the counterparty

1005. I prefer Mr Beketov's evidence on this point, because it is more consistent with the language which the legislature has used. In my view, Mr Beketov was correct to say that the structure of the wording is that a transaction in breach of Article 70 only creates,

changes or terminates a company's civil rights and obligations if there is a further approval by the company which complies with the applicable rules for granting consent. This means that, absent any abuse of rights such as that held to have occurred in *Fakel*, the transaction is of no effect unless that approval is given by a compliant consent which can be later than the time at which the company purported to conclude the transaction. If no such approval is given any purported creation, change or termination of the company's civil rights and obligations is of no effect, and is therefore void.

Were the Relevant Loans, RSAs, Intermediary Loans and New Loans void?

1006. The Banks submitted that all of the Relevant Loans, the RSAs, the Intermediary Loans and the New Loans were transactions contrary to public policy pursuant to Article 228(2), in that they were concluded for the purpose and with the aim of "misappropriating any property of a company" as that phrase is used in Article 228(1)(ii). In assessing that case, the court is required by Article 235 to focus on the true nature of the transaction, if the words of the relevant agreement do not reflect the parties' true intent. I am satisfied that they do not. The Relevant Loans were not loans at all; they were simply a paper exercise purporting to record what was in fact the transfer of money by the Bank to the Borrowers pursuant to the Relevant Drawdowns for a worthless consideration and without any genuine security. As Mr Hunter put it in closing submissions, the promise to repay was illusory.

1007. He made the same submission in relation to the Intermediary Loans and the New Loans. The Intermediary Loans and the New Loans represented further illegitimate sham lending, which was part of the process of covering up the original Misappropriation that had occurred at the time of the Relevant Drawdowns. It follows that for the same reasons as those advanced in relation to the Relevant Loans, the loan agreements for the Intermediary Loans and the New Loans were simply shams recording what was in fact the transfer of money by the Bank to the Intermediary Borrowers and the New Borrowers for a worthless consideration and without any genuine security.

1008. It was submitted that the same conclusion can be reached in relation to the RSAs. The way it was put in Mr Hunter's oral closing submissions was that they were shams, because the true transaction was simply the payment of US$ for no consideration from one shell company in Ukraine (one of the Borrowers) to another shell company out of Ukraine (one of the Corporate Defendants) in order to launder money and cover up the Misappropriation. It was never intended by either the Borrowers or the Corporate Defendants that their terms would be complied with – they were not real supply agreements at all. He submitted that it is clear that this was the true nature of the transactions once unmasked, which is what Article 235 requires to be done.

1009. Having identified the true nature of the transaction, the next step in the analysis was for the Bank to establish that the aim of the Relevant Loans and RSAs, as revealed, was the misappropriation of the Bank's property. It was submitted by Mr Kolomoisky's counsel in their written closing submissions that it was not, broadly for two reasons. The first reason was that the focus of the inquiry must be on the Bank's intention, not only on that of the Borrowers. It was said that if a bank intends a loan to be repaid, it would be surprising if it could be held void simply on the basis that the Borrower did not intend to return the money. It was said that the Ukrainian cases applying Article

228 involve collusive agreements to defraud a third party (frequently a tax authority), not agreements which one party simply intends not to perform.

1010. In the light of the conclusions I reached as to *Tigerfish* and *Prezenta Premium* (see paragraph 975 above), I think that the argument that if only one party to the transaction lacks the requisite intention then the transaction cannot be void under Article 228, is not well-founded as a matter of Ukrainian law. It is also difficult to square with the agreed position of the Ukrainian law experts that "it is also necessary for *one or more* of the parties to have known (actually or constructively) that the transaction was contrary to public policy and to have intended or willingly accepted those harmful effects" [emphasis added]. The words I have emphasised do at least imply that the intention and willing acceptance of one only of the parties is sufficient to satisfy the test.

1011. But, even if that were not to be the case, the Bank contended that, in the context of the present case, the argument fails on the facts. This leads into Mr Kolomoisky's second reason for contending that the aim of the Relevant Loans and RSAs as revealed was not the misappropriation of the Bank's property. In some respects this is one of the central aspects of this part of the case, because it illuminates the nature of the underlying scheme. For this purpose, the parties on which the court must concentrate are the Bank on the one hand and the Borrowers, Intermediary Borrowers and New Borrowers on the other. They were all controlled by the Individual Defendants and it was said by the Bank that the evidence shows that everyone involved both intended and knew that the purpose of the Relevant Loans and the RSAs was to extract money from the Bank and transfer it outside Ukraine to other entities conducting other aspects of the Individual Defendants' businesses, leaving the Bank with a worthless claim for recovery against shell companies.

1012. The position was said to be similar in relation to the Intermediary Loans, where the purpose was to keep the wheels of the fraud turning, while in the case of the New Loans, they were entered into with the apparent aims of deferring the repayment of the existing loans by 8 to 10 years and releasing the existing security (inadequate though it was) over shares in their companies. Like the Borrowers, the Intermediary Borrowers and the New Borrowers, who received the monies drawn down, were entities owned and controlled by the Individual Defendants and participated in the loan recycling scheme (in the case of the Intermediary Borrowers) and the Transformation (in the case of the New Borrowers) as part of the process of and with the aim of misappropriating the Bank's property.

1013. The Defendants submitted that this was not established on the evidence. It was said by Mr Kolomoisky, relying on Ms Montgomery's cross-examination of Ms Pakhachuk, that the Relevant Loans were part of a loan recycling scheme, which appeared to have started in 2009 and had been in place for many years. It was then submitted that the contemporaneous evidence demonstrated that the purpose of advancing Relevant Drawdowns was to enable funds to move from the Bank and to repay existing loans, via the process of prepayments and returns of prepayments I described in the section of this judgment which deals with Relevant Drawdowns.

1014. The way that Mr Kolomoisky described what was happening was that the Bank issued what he referred to as "technical loans" (of which he accepted that the Relevant Loans formed part) to what he called service companies (including e.g., the Borrowers) in

order effectively to extend loans and circumvent foreign currency controls imposed by the NBU. The critical point, which was then made, was that any suggestion that it can simply be inferred that there was a preconceived plan not to return the Unreturned Prepayments is inconsistent with the evidence as to why they could not be returned. It was submitted that the reason for this was the NBU's resolution 540 dated 29 August 2014 (see paragraph 401 above), as a consequence of which those operating the loan recycling scheme within the Bank realised that it would not be possible to allow borrowers to draw down money to make prepayments to Suppliers because they would come under increased scrutiny from the NBU and would be prohibited from doing so.

1015. It was submitted that this then led to letters from the Corporate Defendants to each of the Borrowers explaining that they were unable to supply the goods and promising to repay the Unreturned Prepayments. When the Unreturned Prepayments were not returned, the Borrowers issued claims against the Corporate Defendants in the form of the 2014 Ukrainian Proceedings. It was then submitted that the NBU's intervention prevented any further advances being made as prepayments under Supply Agreements, and that it was apparent from communications at the time that this turn of events had not been anticipated.

1016. The consequence was said to be that this way of advancing funds to Suppliers to enable them to make returns of prepayments could no longer be used and that this explained the occurrence of Unreturned Prepayments. It followed that the court should not conclude that there was any pre-ordained scheme to siphon the money in the form of the Relevant Drawdowns that had been used to fund the Unreturned Prepayments away from the Bank at any earlier stage (viz. three months, or in some cases longer, ago).

1017. The Bank's answer to this submission is relevant both to this issue and to quantification of the compensation to which it claims to be entitled for the harm it says was caused to it by the Defendants' unlawful acts. It was said that the fact that the Borrowers may have taken the Bank's money with the intention to use it to pay off some other liability from a previous round of loan recycling, designed to avoid foreign currency controls imposed by the NBU, does not exonerate those responsible (including the Defendants) for authorising, consenting to and participating in the transactions. It will still be a misappropriation of the Bank's property if is taken for no valid consideration because the covenant to repay pursuant to which it was taken is of no value and it was still the aim of those involved that this should occur.

1018. I agree with this submission. I accept that the transactions which took place pursuant to the Relevant Loans were all aimed at taking the Bank's property and then laundering the money through the RSAs. They did not constitute genuine or proper lending and the covenants to repay were always known to be worthless. As I have already explained, the Borrowers lacked substance, they were all owned and controlled by the Individual Defendants (as were the Corporate Defendants), all but the loans to the Cypriot Borrowers and Prominmet originated from within BOK, there was no genuine approval process and the security was either worthless or illusory.

1019. Similarly, the RSAs were not genuine contracts and neither the relevant Borrower nor the relevant Corporate Defendant ever had any intention that they would deliver the specified goods, nor could they ever have done so given the vast and unrealistic quantities of commodities they purportedly agreed to provide. In my judgment, the RSAs, like the Relevant Loans, Intermediary Loans and New Loans, amounted to

transactions aimed at misappropriation of the Bank's property within the meaning of Article 228(1) and, as a matter of Ukrainian law, are therefore void.

1020. The Bank also submitted that those of the Intermediary Loans which were granted after 8 March 2015 and all of the New Loans were void as contrary to Article 52, because they were transactions with related parties on non-market terms. This was said to be the case because the terms in the relevant agreements were more advantageous to the Intermediary and New Borrowers than those offered by the Bank to unrelated parties and/or the terms offered by other banks to equivalent customers. The basis for this submission was that the relevant Intermediary Borrowers and the New Borrowers were all shell entities with no assets and no incomes, but the Bank was still prepared to grant them billions of US$ in loans without any valid security at rates of interest which were substantially below those prevailing in Ukraine in 2015-16. The interest payable to the Bank under the New Loans was a fixed rate of 10.5% per annum, which was substantially below prevailing market rates.

1021. In my judgment the Bank has established this way of putting its case as well. The Individual Defendant were together controllers of the Bank, within the definition I have explained in paragraphs 994ff above. When they acted together they held in excess of 90% of the Bank's equity and both separately and together they were able to exercise a decisive influence on the Bank's management and business. They were also persons with a significant participation in the Bank and were both members of the Supervisory Board. This meant that they were therefore related parties to the Bank for the purposes of Article 52. It also meant that the control they exercised over and the relationship they had with the Borrowers, the Intermediary Borrowers and the New Borrowers confirmed that, through horizontal affiliation, those entities were related parties to the Bank as well.

1022. It follows that the post-March 2015 Intermediary Loans and the New Loans were void as well, because they were plainly "not on current market terms" within the meaning of Article 52. They were on terms more advantageous to the relevant Intermediary Borrowers and the New Borrowers than the terms offered by the Bank to the market generally because the Bank was still prepared to grant them very large loans without any valid security at rates of interest which were substantially below those prevailing in Ukraine in 2015-16.

1023. The final issue relating to those of the Bank's loans said to be void arose out of Article 70. This issue applies only to the New Loans which were granted as part of the Transformation. It is said by the Bank that they were part of a coordinated scheme for replacing the existing indebtedness of Borrowers with new loans to the New Borrowers, which were also companies owned and controlled by the Individual Defendants. In October and November 2016, the Bank issued New Loans with a total face value of UAH 126.9 billion, at a time when its latest financial statements, for the year ending 31 December 2015, showed total assets of UAH 274 billion. The New Loans, assessed in aggregate, therefore exceeded 10% of the value of the Bank's assets, and if aggregation is required for these purposes would therefore be "significant transactions" subject to the authorisation regime set out in Article 70. Aggregation is required if the anti-circumvention provision in Article 70(5) is engaged, which it will be if there is a single transaction which is divided into a smaller number of component parts in order to avoid the requirements for the transaction to be approved by the Supervisory Board. It will also be engaged if the making of the New Loans also involved the splitting of what in

substance was a loan to a single enterprise into a number of smaller loans to a number of different nominees acting for the same concern, or if what occurred can be characterised as a single transaction because the individual loans were, in reality, part of a single scheme.

1024. I am satisfied that, if the anti-circumvention provision applies, the New Loans were not the subject of formal approval by the shareholders or the Supervisory Board as required by Article 70, and the New Borrowers (as entities owned and controlled by the Individual Defendants) will have known that that was the case. On that hypothesis, the New Loans would therefore be void pursuant to Article 72(1). The issue which remains is whether Ukrainian law would indeed treat the New Loans on an aggregated basis by reason of Article 70(5), because the Bank does not suggest that any of the individual New Loans exceeded 10% of the value of the Bank's assets so as engage the avoidance.

1025. This point was not addressed in the Individual Defendants' closing submissions and Mr Kolomoisky submitted that it did not arise. But in any event, I do not think that the Bank has proved its case on this particular point. Although there is no doubt that the Transformation and the issue of the New Loans were part of the same process for replacing with the New Borrowers, the Borrowers and Intermediary Borrowers then recorded as debtors in the Bank's books, the test which must be applied is whether what would otherwise have been a single transaction was divided in order to evade the procedure for making decisions on conducting a significant transaction (i.e., the approval processes required by the Charter or otherwise in accordance with Article 70(1)). The Bank did not identify any evidence to justify a conclusion that this was the reason that the New Loans were divided in the way they were.

1026. Indeed the evidence points to the contrary. It is the Bank's case, which I have already accepted, that the Transformation plan was never agreed with the NBU and that the way in which the whole exercise was carried out amounted to an attempt to present the NBU with a *fait accompli* (see paragraph 556 above). In my view this supports a conclusion that the issue of the New Loans in the way that they were divided was more likely to have been driven by the Individual Defendants' intention to present the NBU with something which they might have been persuaded to accept, artificial and deficient though it was, than it was by any desire to avoid having to comply with Article 70.

The Repayment Defence: Outline

1027. Mr Kolomoisky made the running on the Repayment Defence. In essence it was a defence that any harm caused by the Defendants' unlawful conduct was no longer harm for which the Bank was entitled to compensation under Article 1166, because the loan or drawdown which caused the original loss was repaid. The way in which it was pleaded on his behalf was that, save for a loan to Tamersa in the amount of US$19.2 million and a loan to Prominmet in the amount of US$55.7 million, the Ukrainian Borrowers' obligations under all of the Relevant Loans were discharged by three different categories of repayment. His case was pleaded as one of automatic extinction of the Bank's loss by reason of the repayment of the Relevant Loans, whether or not they were void.

1028. The first way in which this was said to have been done was that, during the period when Relevant Drawdowns were being made, and thereafter until February 2016, Cash Repayments totalling UAH 10.9 billion (UAH 7.125 billion before 10 September 2014 and UAH 3.755 billion thereafter) and US$1.2 billion (US$1.15 billion before 10 September 2014 and US$45 million thereafter) were made. I have already made this point but, although called Cash Repayments, these amounts were in fact the proceeds of loans derived from other Relevant Loans and Intermediary Loans transferred by way of accounting entry in the Bank's books. Mr Kolomoisky then contended that, once those Cash Repayments had been taken into account, the outstanding balance on Relevant Loans was UAH 4.39 billion and US$976 million.

1029. The second category of repayment for which Mr Kolomoisky then contended was that UAH 1.296 billion and US$538 million outstanding under the Relevant Loans was repaid between March and September 2016 by way of the Asset Transfers. This was achieved by the transfer of assets by third-party transferors under mortgage agreements, after which the Bank applied the value of the Transferred Assets (which were subject to negotiation with the NBU) in reduction of the outstanding balance on loans including Relevant Loans and Intermediary Loans. He also contended that the amounts outstanding under Intermediary Loans which were not also Relevant Loans was reduced by UAH 1.276 billion and US$123 million as part of the same process.

1030. After completion of the Asset Transfers, the remaining outstanding balances on the Relevant Loans totalled UAH 3,075.4 million and US$405.6 million. These amounts were then said to have been discharged by the third category of Cash Repayment: the proceeds of New Loans to New Borrowers advanced between October and November 2016 as part of the Transformation.

1031. So far as the Relevant Loan to Tamersa is concerned, it is said that, since nationalisation, the Bank has treated it as valid and in full force and effect. It did so by obtaining judgment on 8 January 2019 from the Commercial Court for the Dnipropetrovsk Region enforcing its right to accelerate the date for repayment and declaring that the sum of US$24,063,107.03 (UAH 627,353,209.73) including accrued interest and penalties for late payment was then due. As to the Cypriot Borrowers, Mr Kolomoisky pleaded that the Relevant Loans (which in those instances gave rise to Relevant Drawdowns totalling US$118 million) were repaid on 5 March 2014 which was only two days after the drawdowns had been made.

1032. The consequence of these categories of repayment was said by Mr Kolomoisky to be that, save for an admitted shortfall of between US$19 million and US$25 million (the difference is immaterial for present purposes), all of the Relevant Loans, including the amounts advanced pursuant to the Relevant Drawdowns, were repaid in full. Mr Kolomoisky then pleaded that the Bank cannot ignore repayments funded by Intermediary Loans or New Loans and that any loss caused by the Relevant Drawdowns was extinguished to the extent that it was repaid. It was also said that the Bank was not entitled to ignore the credits granted to Borrowers in return for the Asset Transfers, having taken no steps to set aside the transaction by which they were given effect. There was therefore no compensation payable under Article 1166.

1033. This continued to be the Defendants' case in circumstances in which the Relevant Loans were held to be valid. However, in his closing submissions, it was alleged by Mr Kolomoisky for the first time that the position was different if the Relevant Loans were

void. It was said that the effect of the expert evidence (including most particularly that from Mr Beketov) was that the Bank has suffered no loss in respect of the Relevant Loans, if and to the extent that it chose to accept payments as discharging the relevant Borrowers' liabilities to return the sums drawn down under the Relevant Loans, which on the basis that the Relevant Loan was void would be a liability in restitution, as opposed to other liabilities in respect of later loans. In making this argument, Mr Kolomoisky relied not on the fact that the Bank initially credited the Borrowers with repayment while it was owned and controlled by the Individual Defendants, but on what was said to have been a decision made by the Bank's new management when they signed off the Bank's financial statements for 2016 on 25 May 2017.

1034. The Bank contended that this case was unpleaded and cannot be substantiated, either as a matter of fact or as a matter of Ukrainian law. It depends on establishing that decisions and acts made and committed by the Bank were choices which have relevant legal consequences, which the Bank argued they did not. I shall come back to the detail of the way the Defendants' case is now put and to the Bank's answer to it. Before doing so, I think it is necessary to explain the way the Repayment Defence was originally pleaded and argued, and the Bank's answer to it, because it helps to put the Defendants' current case in its proper context.

The original Repayment Defence and the Bank's answer to it

1035. The starting point was that the unlawful conduct in which the Defendants are said to have participated, was the agreements to make the Relevant Loans together with the consequence of permitting and authorising the Relevant Drawdowns to be made. I have already made findings on these points, but it is worth reiterating that the Bank's case in its pleading and its opening, which I have concluded is correct, was that it then sustained immediate economic harm when each of the Relevant Drawdowns was made. As it explained, the concept of harm "encompasses the transfer of a claimant's funds to third parties", i.e., in this case the Borrowers.

1036. The reason the Bank suffered harm at the time that each Relevant Drawdown was made, rather than at any later date, was that this was the time that it was deprived of its property. It did not matter that the deprivation was accompanied by the execution of an agreement for a Relevant Loan, because each of those further loan agreements was a sham, intended to misappropriate funds from the Bank and therefore was void under Ukrainian law. It followed that the Bank did not receive the benefit of a genuine promise in return for the transfer of its funds and, even if it had, the promise would have been worthless because it was given by a shell company as part of a fraudulent scheme. The Bank's submission in opening, which continued to be its case throughout, was that "that harm was not reduced by the Borrowers' purported promises to repay the Relevant Loans … because those promises were legally void and/or factually worthless."

1037. Against that background, the essence of the Bank's answer to the Repayment Defence as originally pleaded in the various versions of the Defendants' Defences was that no genuine repayment of principal or interest was made in relation to any of the Relevant Loans, including those made to the Cypriot Borrowers (para 18(c)(iii) and 18A(b) of its Re-Re-Re-Re-Amended Particulars of Claim). It developed this plea when dealing with loss and damage by explaining that purported repayments of capital advanced

under the Relevant Loans were themselves made from funds advanced by the Bank to the Borrowers and the 34 Intermediary Borrowers. It is said that these purported repayments were therefore funded by drawdowns under either the Intermediary Loans or further Relevant Loans.

1038. I shall come back to this in a little more detail, but it follows that I do not accept the submission which underpinned much of what Mr Howard had to say in his closing submissions on the Repayment Defence, that what has never been in dispute is the question of whether the Borrowers' obligations to repay the Relevant Drawdowns have in fact been discharged. It is not in issue that the Bank recorded in its books that the Relevant Loans had been repaid, and it is also clear that the Bank challenged the question of whether or not the Relevant Loans had been repaid (it was careful to use the concept of "purported" repayment throughout) in the context of what it treated as the separate question of the loss it sustained as a result of the Defendants' tortious conduct. Nonetheless, it is plain to me that the Bank has never accepted that the impact of payment being made from monies drawn down under further loans is properly to be characterised as repayments extinguishing the Borrowers' liabilities to the Bank.

1039. After a number of amendments, the final version of the Bank's pleaded case was that "there has been no repayment of any of the funds transferred out of the Bank's control pursuant to the Misappropriation", which was then particularised by reference to what the Bank called the "purported" repayments relied on by Mr Kolomoisky as follows:

> "Such purported loans and repayments were made for the purposes of disguising the Misappropriation. They do not amount to legitimate lending or the repayment of capital and stand to be ignored. To the extent necessary, the Bank will contend that such further purported loans are (i) shams and/or (ii) transactions that are contrary to Ukrainian public policy and/or (iii) (insofar as Intermediary Loans were purportedly entered into on or after 8 March 2015) they constitute void related-party lending on non-market terms (contrary to Article 52) 16 and/or (iv) (insofar as Intermediary Loans were purportedly entered into on or after 1 May 2016) they together constitute an unauthorised (and therefore ineffective) significant transaction contrary to Article 70 of the JSC Law."

1040. The way that the Bank pleaded its case in the various iterations of its Particulars of Claim was then confirmed in its Reply. It expressly denied that the Relevant Loans were the subject of genuine repayment. It then pleaded that the "so called" Cash Repayments were made using funds derived from Intermediary Loans, being defined as "purported" repayments of the capital advanced under the Relevant Loans, made for the purposes of disguising the Misappropriation. It also pleaded that "the purported repayments fall to be disregarded and, in any event, did not in fact reduce the Bank's loss". In my judgment the form of words used to plead the Bank's case in its Reply made quite clear that the so called repayments could not properly be characterised as such and did not in any event reduce the Bank's loss. The two points are separately pleaded and the Bank's case to that effect is clearly articulated.

1041. In dealing with the Repayment Defence in opening, the Bank's position was consistent with its pleading. It said that the "so-called 'cash repayments' were all sourced from further fraudulent lending", and then went on to say that its position was that *purported* 'cash repayments' do not constitute a genuine recovery for the Bank so as to reduce the Bank's loss. The Bank's case as to the Repayment Defence continued to be clear. It

submitted that what the Defendants called the repayments were not in fact to be treated as such and did not reduce the loss sustained by the Bank from the Defendants' unlawful conduct.

1042. The Bank then continued its analysis by submitting that it would be remarkable if, in a situation in which the Intermediary Drawdowns, the Intermediary Loans and the New Loans were found to be fraudulent, they could nevertheless amount to a recovery by the Bank which extinguished liability in respect of the Misappropriation. This submission was focused on liability in respect of the loss sustained as a result of the tortious act, but it was clear that the Bank was also submitting that it took issue with the way in which the Defendants characterised the recovery which the Bank was said by them to have made. It is clear that it continued to challenge their characterisation as genuine repayments of a genuine loan, and it concluded this part of its written opening by summarising its position as follows:

> "For these reasons, as a matter of first principle and Ukrainian law, the Repayment Defence (insofar as it relies on Intermediary and New Loans) is wrong in principle: there were no genuine repayments and, in any event, purported repayments using further fraudulently obtained sham loans do not reduce the Bank's loss."

1043. Mr Kolomoisky's pleaded case was that this was wrong. His argument started from the propositions that the Relevant Drawdowns involved actual transfers of money by the Bank, and that the liabilities under the Relevant Loans pursuant to which those Relevant Drawdowns were made were extinguished by actual transfers of money back to the Bank, whatever the source from which those transfers were funded. He said that this was the case irrespective of whether the Relevant Loans were valid or void, because, in the event they were valid, any contractual obligation was discharged by repayment and, in the event they were void, any restitutionary obligation was discharged when the Bank chose to treat the Borrowers as having repaid all they owed.

1044. It was a central part of Mr Kolomoisky's argument that the origin of the funds used to discharge the original liability in respect of the Relevant Loans was irrelevant. If and to the extent that the Intermediary Loans or the New Loans were unlawfully obtained, the Bank might have a separate claim in respect of that wrongdoing, but that fact did not affect the discharge of the Borrowers' original liabilities. It was said in his closing submissions that this appeared to be common ground.

1045. The analysis was that the return to the Bank of the funds advanced under the Relevant Drawdowns meant that the Borrowers no longer had any liabilities in respect of them, because their obligation to repay had been fully performed. It was said that, in those circumstances, the tortious loss arising from the Relevant Loans (as opposed to any separate wrongdoing) was extinguished. It was said that it was fallacious for the Bank to contend that its loss had not been extinguished. When it made that argument, it can only have been referring to its overall or net loss arising from a series of torts rather than the loss it sustained as a result of the Relevant Drawdowns. In short the only loss that it claimed had been extinguished by repayment, even if the circumstances of the repayment were themselves tortious and caused the Bank a further loss which is not the subject of the claim.

1046. This argument reflects the way in which Mr Kolomoisky's case had always been advanced, and in particular that the Relevant Loans were themselves actually repaid by

the Cash Repayments, the Asset Transfers and the Transformation. As his current pleading makes plain, the consequence is said to be that, for that reason, it can now be seen that the making of the Relevant Drawdowns caused the Bank no loss. Mr Bogolyubov also adopted this position, pleading that the Relevant Loans were actually repaid and were recognised by the Bank as having been repaid in its transactional data and financial statements and denies that in those (amongst other) circumstances the alleged Misappropriation caused any loss to the Bank.

1047. Mr Howard also submitted in closing that the Bank's pleading only operated at what he described as a second level, by which he meant that the Bank was simply alleging that the repayment of the capital advanced under the Relevant Loans stood to be ignored for the purposes of the Bank's allegation that it had suffered loss as a result of the unlawful acts constituting the Misappropriation. He said that it did not extend to an allegation that, as between the Bank and the Borrowers, repayments were made which discharged their liabilities to the Bank. I do not agree. A proper reading of paragraphs 18(c)(iii), 18A(b) and 62 of the Bank's pleading does not limit it in that way. The Bank was careful to plead that what occurred was not a genuine repayment without limiting the context in which the plea was made.

1048. Nor do I think that Mr Howard gets the assistance on this point that he sought from the List of Issues. There is agreement between the parties that the Bank's transactional data recorded repayment of the Relevant Loans in a particular form, i.e., by the Cash Repayments, the Asset Transfers and the Transformation. But the phrase "Cash Repayments" was defined by reference only to what was recorded (Issue 32) rather than by reference to their agreed nature, and is explicitly said in Issue 37 to be a phrase which describes (on the Bank's case) only *purported* repayments. Indeed, throughout the relevant section of the List of Issues, the references to repayments are all references to what was recorded in the Bank's transactional data, and it is clear that the Bank's case was that their characterisation as such was not accepted.

1049. Mr Howard also submitted that, because Issue 36 asked whether "the (on the Bank's case, purported) repayments stand to be ignored in assessing the Bank's loss?" that shows that the Bank somehow accepts that the repayments had in fact been made but stood to be ignored for loss purposes and those purposes alone. Mr Howard said that the wording of Issue 39.3 also supported this reading, because it provided for something (i.e., repayment), which everyone accepted had happened, to be ignored:

> "Were the Intermediary Loans shams and/or transactions contrary to Ukrainian public policy and/or void related party lending contrary to Article 52 of the Law on Banks? If so, do the repayments of Relevant Drawdowns by Intermediary Drawdowns stand to be ignored?"

1050. I do not agree with this submission. I think it is clear from a fair reading of the List of Issues that the Bank only ever accepted that the repayments that were recorded in its books were "purported" repayments and were not properly to be characterised as such. On a proper reading of the Bank's case, the treatment of the Cash Repayments as repayments was to be ignored, not because the starting point was that, although they were repayments they should be ignored for a particular purpose (i.e., loss in the context of the tort claim against the Defendants), but because they were not properly to be treated as repayments at all. In short, the List of Issues does not provide that they are

to be ignored only for the limited purpose of assessing the Bank's claim to have suffered loss in consequence of the Defendants' tortious conduct.

1051. The Corporate Defendants approached the Repayment Defence from a slightly different perspective. They said that, if and in so far as the Individual Defendants succeed in showing that all or any part of the Relevant Loans were repaid (and therefore that the Bank has suffered no loss), the Bank cannot succeed in its claim in unjust enrichment against them without proving that the source of any Unreturned Prepayment received by any one of the Corporate Defendants was not a Relevant Drawdown made under a Relevant Loan that was in fact repaid.

1052. The evidential basis for the Bank's argument that, notwithstanding what was recorded in its own books and records, there were no genuine repayments and, in any event, that purported repayments using further fraudulently obtained sham loans did not reduce the Bank's loss, can be traced back to the statement given by Mr Beketov for the purposes of the Defendants' jurisdiction challenges in 2019: *JSC Commercial Bank Privatbank v. Kolomoisky and others* [2019] EWCA Civ 1708, [2020] Ch 783. In its judgment at [230], the Court of Appeal explained the point as follows:

> "An important strand in the Bank's contentions on this point is the proposition that, as a matter of Ukrainian law, a purported repayment of a Relevant Loan can be disregarded if the repayment was made with funds derived from another fraudulent loan. In this respect, the Bank relies on evidence from Mr Beketov, who expressed the opinion in his report of 6 July 2018 that, "where monies purportedly used to repay an unlawful loan are themselves referable to other, unlawful lending, as a matter of Ukrainian law the repayment would not be considered to operate to reduce the Bank's loss ([15])."

1053. This evidence was reiterated for the purposes of the trial in [137] of Mr Beketov's main report. He explained that, where monies purportedly used to repay an unlawful loan, which he called "loan 1" (in this case the Relevant Loans) are themselves referrable to other unlawful lending, which he called "loan 2" (in this case the Intermediary Loans or the New Loans), the purported repayment of loan 1 would not operate to reduce the lender's loss caused by loan 1 for which the lender would remain entitled to be fully compensated.

1054. In expressing this opinion, Mr Beketov relied on his earlier evidence that, if loan 2 was unlawful and for that reason void, it would be void *ab initio* and would have no legal consequences save for those associated with its invalidity (such as restitution or damages pursuant to Article 216). In his view, it followed that a Ukrainian court would not uphold its purported effect in discharging the liability in tort arising from the making of loan 1. He further said as follows:

> "Putting the point another way, in my view where a tortfeasor causes harm to a victim, the tortfeasor cannot be allowed to eliminate that harm by stealing money from the victim at a later date then returning it to the victim in purported compensation for the earlier tort. Whilst, perhaps unsurprisingly, I have not found any caselaw on this point, I am confident that a Ukrainian court would reject any such suggestion. It would create a perverse incentive for the tortfeasor (who could, for example, eliminate liability for a discovered tort by committing a further tort

that might not be discovered) and in my view would be contrary to principles of justice, reasonableness and fairness (Article 3(6) of the Civil Code)."

1055. It was also Mr Beketov's evidence that the loss from each of loan 1 and loan 2 would be (for each tort) the amount of that loan less any genuine compensation received in relation to that tortious loss, from which he explicitly excluded purported loan repayments referable to other unlawful loans. He said that there was no rule of Ukrainian law that would oblige the victim to sue the wrongdoer in relation to one instance of misappropriation rather than the other, and the victim could choose which instance of misappropriation to sue upon (but would not be entitled to make double recovery).

1056. In his supplemental trial report, Mr Beketov confirmed that he would reach the same conclusion in a situation in which the court determines that the Relevant Loans were not void, but nevertheless found that they were the product of the Defendants' unlawful and tortious conduct causing harm to the Bank. He said that, in this scenario, there would be an earlier misappropriation and a later misappropriation, both of which involved unlawful and tortious conduct and both of which caused loss in the amount of the funds misappropriated less any genuine recovery by the victim. The victim could then sue in respect of either misappropriation, but would not be permitted to recover in respect of both.

1057. He accepted that in the case of repayments, the payment itself was not void, but said that the transaction pursuant to which the payment was made was void and that a Ukrainian court would not permit a void transaction, in the form of loan 2 to have the legal consequence of reducing a person's liability to pay compensation for a prior tort. He reached this conclusion, having first said that he was doing so on the basis that the purported repayment of the Relevant Loans using funds from the Intermediary Loans and the New Loans did not discharge any contractual repayment obligations because, if the original Relevant Loans were void as alleged by the Bank, then they created no contractual obligations which could be discharged.

1058. The difference between Mr Beketov and Mr Alyoshin on this central point was summarised in paragraph 46 of the experts' joint statement as follows:

> "46.1 OB's view is that, on an application of first principles, where monies purportedly used to repay an unlawful loan are themselves referable to other, unlawful loans, then the purported repayment of the earlier loan would not operate to reduce the Bank's tortious loss caused by that loan. It would be contrary to principles of justice, reasonableness and fairness if a tortfeasor could eliminate the harm caused by stealing money from his victim by stealing more money from his victim and returning that money to the victim in purported compensation for the earlier theft. In OB's further view, the victim in such a scenario can choose which unlawful loan (i.e., which tort) to sue upon, with the loss caused by each tort being equal to the amount of the unlawful loan less any genuine compensation received in relation to that tortious loss; however, the victim would not be permitted to double recover.
>
> "46.2 OA disagrees: in his view, the effect of the repayment of the first loan is that any loss arising from the first loan is extinguished together with any tortious claim in respect of the making of that loan. OA believes that the contention that the lender

> can "disregard" or "ignore" the repayment of the first loan lacks any sound support in law, court practice or sound policy."

1059. In his cross-examination, Mr Howard explored Mr Beketov's evidence as summarised in paragraph 46.1 of the joint statement. He did so by putting to him a number of hypotheses, based on whether each of the first loan and the later loan used to repay the first loan was (a) valid, (b) valid but unlawful or (c) void. In closing argument on behalf of Mr Kolomoisky it was submitted that Mr Beketov's answers in cross-examination established that, if the Relevant Loans were valid, and they were repaid by the proceeds of later valid lending, each Borrower's liability to repay a Relevant Drawdown was discharged and any third party's tortious liability for procuring the Relevant Drawdown was extinguished. I agree that, in that situation, Mr Beketov's answers in cross-examination were that, there was no distinction to be drawn between the effect of the repayment on the Borrowers' contractual liability under the Relevant Loan and its effect on the harm caused by the loss of the proceeds of the Relevant Drawdown which would otherwise be recoverable in tort: both are extinguished.

1060. However, the evidence that Mr Beketov gave orally was not explicitly qualified in the way that he had expressed matters in his reports. In his reports he had said that, where there were two unlawful but valid loans, both caused by the unlawful conduct of a third party, the latter of which was used to repay the former, the lending bank could choose to sue in respect of either so long as it did not make a double recovery. He had also said that there needed to be a genuine recovery by the victim, not sourced from his own resources, for the tortious loss in respect of loan 1 to be extinguished.

1061. The same line of reasoning as that referred to in paragraph 1059 above was then put to Mr Beketov where the Relevant Loans were void. In that situation, Ukrainian law does not regard the transferee of the monies received from the Bank as a borrower with a contractual obligation to repay, but treats it as a recipient of monies under a restitutionary obligation (pursuant to Article 216) to return them or their value as damage suffered in connection with the execution of the invalid transaction. In that situation, Mr Beketov accepted that, if the recipient pays back the amount transferred under the void transaction, his liability to make restitution to the original payer (in this case the Bank) will then be extinguished.

1062. Mr Beketov was then asked about the impact of this restitution on the Bank's claim in tort against a third party who procured the original transfer. Initially he explained (correctly) that the tortious harm may exceed the amount of the restored transfer because (e.g.,) the transferor may have sustained a loss of profit or incurred expense. However, when he was asked to leave aside those types of harm, he accepted that, "The claim would not be extinguished but the loss under the claim" would be. This appeared to be an unqualified answer and as such seemed to be inconsistent with the position espoused by Mr Beketov and summarised by the evidence he gave in paragraph 46.1 of the joint statement.

1063. However, when Mr Howard sought to summarise the effect of Mr Beketov's evidence, it became clear that his answer to the question of whether the transferor's loss was extinguished by the mere receipt of monies in discharge of the restitutionary obligation to repay, was affected by the question of whether or not what he called the victim's "own resources" were the source of repayment. This became apparent during the following exchange on the question of whether a tortious loss that would otherwise be

claimed against a third party arising out of both a valid and an invalid loan was extinguished both by repayment if the original loan was valid and by restitution of the monies transferred if the original loan was invalid:

> "Q. So I think where we get to, the position actually of whether the loan that is being repaid is valid or void is actually the same, but the question is - or if there is in fact repayment of the loan, if it is a valid loan, or restitution of the monies taken, the bank's loss in respect of the taking of the monies pursuant to the loan, whether valid or void, would be extinguished and so any liability or any loss that could be claimed against the tortfeasor will also be correspondingly extinguished?
>
> A. It would be right if again this extinguishing took place with not, I would say, victim's own resources.
>
> Q. Well, the whole of the questions, Mr Beketov - every single question that I've asked you about this - and you know that - has been based upon the source of repayment being another unlawful loan from the bank. Every single question has been on that basis and I've made that clear.
>
> A. Mr Howard, but in your proposed scenario -- actually you did not. When you put me those questions about discharge by restitution of loss, actually you did not say that this is because money were taken from the victim of tort to do so.
>
> Q. I did, and the transcript will show that and I'm not, Mr Beketov, going to go back over ground that we have trodden.
>
> A. Mr Howard, but I should put it also on record that my answers to these questions were in relation to the scenario where the money repaid in restitution were taken from proper sources but not from the victim's own resources.
>
> Q. Well, Mr Beketov, I'm not going to go back. We'll see what the transcript shows."

1064. Mr Beketov continued to maintain that position during the next part of his cross-examination, protesting that Mr Howard had not made clear that his earlier questioning was based on the hypothesis that, even if the subsequent loan used to repay the earlier loan was wrongful, it was not put on the basis that the source of the monies used to make the subsequent loan was the Bank's own monies. He said:

> " … some questions which you put to me, I should say, were on a narrow proposition and I repeated several times that's in a narrow sense. I took it as we are not discussing the situation of where discharge of restitutional obligation under the loan 1 was via money obtained under fraudulent loan 2 as you put it with Mr Hunter. I thought that this situation were actually money were obtained from other source and I thought it is a matter of principle. And as a matter of principle, if you can repay money from another source and this is only damage which you suffer - I mean victim suffer with those monies, then it is right, these were right answers. But, you know, a very different answer would be if money come from victim's own resource."

1065. In that situation, Mr Beketov's evidence was that there would be no genuine repayment and the bank can elect whether to bring a claim in respect of the loss caused by loan 1 or loan 2. Mr Alyoshin disagreed in the sense that he asserted that, if void loan 2 is used to repay void loan 1, then the tortious liability of the individual who procured void loan 1 is extinguished and he insisted that there was a "consistent practice of Ukrainian courts that sources of the funds [for repayment] practically doesn't matter". However, he did not refer to any cases which concerned void lending and his position on the point seemed to me to be unprincipled, not least because its premise was that the Bank's loss for the purpose of a claim under Article 1166 is coterminous with the contractual liability under the valid loan, an opinion which I agree is wrong because the contractual liability of the borrower may be extinguished without the lender receiving full compensation for the tortious loss. I preferred the evidence of Mr Beketov on the point.

1066. It follows that Mr Beketov's evidence continued to be consistent with what the Bank has always submitted was the essential fallacy in the Repayment Defence. That defence presents a series of further fraudulent loans, purportedly made out of what Mr Beketov's called the Bank's own resources under which no assets were contributed to the Bank, as a genuine repayment and/or the full compensation to which it is entitled under Article 1166. I agree that, in advancing that case, the Individual Defendants have not established that what they characterise as repayments were anything other than steps to cover up what had been done before, nor that the Bank has received any genuine value by way of compensation.

1067. I also think that the Bank is correct to submit that the Defendants' cases on this point confuse full compensation for the purposes of the Bank's claim under Article 1166, with the quite different question of what is recorded by book entries made to cover up what occurred, including, in relation to all of the Relevant Loans, the Intermediary Loans and the New Loans, the absence of any real value. I also agree that the Repayment Defence can only succeed if and to the extent that the so called repayments were in truth what they purported to be. I am satisfied that they were not. Unlike a genuine repayment of a loan, what occurred did not in any meaningful sense constitute a repayment nor did it provide compensation for the harm which had been caused to the Bank by the Defendants' unlawful acts.

1068. As Mr Hunter put it in his oral closing submissions for the Bank: "The Intermediary and New Loans provided no benefit to the Bank. … They cannot possibly be regarded as compensation. … If one looks at the substance of these, nothing comes in and all you end up with is one set of purported but void loans being replaced with another." I agree and I also agree that the true position can be summarised as follows:

i) The Relevant Drawdowns were recorded as repaid in the Bank's books by a combination of other Relevant Drawdowns (which have been taken into account in reducing the Bank's right to compensation in order to avoid double recovery), the Intermediary Drawdowns, New Loans and the attributed value of Transferred Assets.

ii) The Intermediary Drawdowns under the Relevant and Intermediary Loans constituted void transactions because they were authorised and procured by the Individual Defendants for the purpose of concealing the harm which had been caused to the Bank by unlawful acts in the form of the authorising and procuring of the Relevant Drawdowns. The Intermediary Borrowers were worthless shell

companies controlled by the Individual Defendants with no assets and no prospects of repaying the Intermediary Drawdowns. A promise from an Intermediary Borrower to repay a loan or a restitutionary obligation owed by an Intermediary Borrower was worthless.

iii) The New Loans also constituted void transactions because they were authorised and procured by the Individual Defendants for the purpose of concealing the harm which had been caused to the Bank by unlawful acts in the form of the authorising and procuring of the Relevant Drawdowns. The New Borrowers were also shell companies controlled by the Individual Defendants with no assets and no prospects of repaying the New Loans. Indeed the experts were agreed that only around US$2.2m of principal has ever been paid in respect of the New Loans. The New Loans are now fully impaired in the Bank's financial statements and the experts are agreed that the New Loans were and are worthless.

iv) As I shall explain in more detail later in this judgment, the Individual Defendants procured the transfer of the Transferred Assets to the Bank at inflated values. This was done for the purpose of disguising the true nature of what had occurred.

1069. In my judgment, even where the contractual debts purportedly created by the Relevant Drawdowns are *recorded* as repaid by Intermediary Drawdowns, Transferred Assets or New Loans, Ukrainian law does not automatically reduce the amount for which the Bank is entitled to be compensated for the harm it was caused by the unlawful conduct in permitting or procuring the Relevant Drawdowns. In other words, the fact that the Individual Defendants authorised and procured the Intermediary Drawdowns, the New Loans and the transfer of the Transferred Assets at inflated values, and the fact that they then authorised and procured the Bank to record those transactions as reducing or extinguishing the amounts payable as a result of the Relevant Drawdowns, does not reduce the Bank's loss.

1070. Part of the reason for this is that I do not accept that the Borrowers' liability in debt or restitution is co-extensive with Individual Defendants' liability in tort. This is one of the consequences of Mr Beketov's evidence, which I accept, that, if the source of the so-called repayment is the Bank itself, the elimination of the former will not of itself eliminate the later. As a matter of Ukrainian law, an individual who procures a fraudulent loan has a liability in tort which subsists even if the borrower has settled its contractual (or restitutionary) liability to the lender, unless that settlement provides full compensation for the tortious harm, which it will not do if the source of the settlement is the lender's own funds. It was submitted by the Bank, and I agree, that the fact that the tortfeasor's liability is initially measured as the same sum as that extracted under the fraudulent loan is nothing to the point.

1071. The fact that Ukrainian law does not treat the two liabilities as co-extensive is also consistent with *Ukoopspilka*, the relevant aspects of which I have already identified in paragraph 951 above. The Grand Chamber found that, on the facts of that case, there would have been no point in the DGF pursuing claims against the sellers of the bonds and that, even if such claims had been made, they would not have mitigated the loss. It is difficult to see why the same reasoning would not be applicable if the DGF had pursued restitutionary claims but had failed to make a recovery or had settled for a small amount for pragmatic reasons. I agree with the Bank's submission that what is clear

from the decision is that the right to compensation under Article 1166 is treated as different from the restitutionary claims, and falls to be assessed as a matter of fact.

1072. I also do not accept the Defendants' submission that this articulation of the Bank's claim confuses what might be characterised as the Bank's 'overall' loss (i.e., that which was caused by the net effect of the Relevant Drawdowns, the Intermediary Drawdowns and the New Loans) with the particular loss caused to the Bank by the Relevant Drawdowns alone. This has some significance because the Defendants all claimed that the Bank had quite deliberately structured its claim to sue for the harm it was caused by the Relevant Drawdowns (and only the Relevant Drawdowns) in order to bolster its case for English jurisdiction based on the role of the English Defendants, a point to which I have already alluded and to which I will revert. I agree that there is no such confusion. The Bank's claim is for the loss caused by the Relevant Drawdowns, while it says that the Intermediary Drawdowns and the New Loans were no more than a means of disguising that misappropriation. In those circumstances, I accept that it cannot be said that the Intermediary Drawdowns and the New Loans extinguished the Bank's loss for the harm it suffered from the Relevant Drawdowns because they provided no new money and no real compensation.

1073. The Defendants also submitted that the Intermediary Loans and the New Loans cannot be treated as if they never existed because funds were in fact advanced under them and in the case of the New Loans they resulted in the repayment of US$ loans with UAH loans. I do not think that this submission is correct, because, as I have already explained, the Intermediary Loans and the New Loans were always void. Of course on one view it is not possible to airbrush them out of history (as Mr Howard put it), but as a matter of Ukrainian law, the consequence is that they are to treated as if they had never existed (subject only to the legal consequences associated with their invalidity, such as restitution and liability in damages pursuant to Article 216(2): see paragraph 970 above).

1074. The Defendants also submitted that, if the Bank is right, it would cause a problem with double recovery, because the Bank could claim against the Individual Defendants for the tortious loss caused by the Relevant Drawdowns, but it could also then sue the Intermediary Borrowers or New Borrowers on their restitutionary (or if not void contractual) obligations under the New Loans. Mr Beketov's answer to this, which I accept, is that a Ukrainian court would deal with this by ensuring that a claimant does not double-recover:

> "There is no rule of Ukrainian law that would oblige the victim in such circumstances to sue the wrongdoer in relation to one instance of misappropriation rather than the other; the victim could choose which instance of misappropriation to sue upon, but would not be permitted to double recover."

1075. He later explained that "the mere existence of a risk of double recovery will not operate as a bar to a claimant pursuing multiple claims" but that Ukrainian law adopts a number of different techniques to ensure that double recovery does not occur. This is a coherent response to a common problem where a claimant has right to sue multiple wrongdoers on multiple causes of action and I am satisfied that Mr Beketov's view represents the law of Ukraine. In any event, as the Bank pointed out, it is fanciful to suppose that the Bank will make any meaningful recovery from the Intermediary Borrowers or the New Borrowers (see paragraph 1068.iii) above). They are shell entities owned and

controlled by the Individual Defendants, and no claims have been brought against them in any event.

The Repayment Defence: genesis of the Defendants' case on choice

1076. A little later in his cross-examination of Mr Beketov, Mr Howard tried a slightly different tack. He posited two void "loans" of US$1 million each (loan A and loan B) and a payment back to the lending bank of US$1 million. In that situation, Mr Beketov agreed that the hypothetical lending bank was then entitled to choose whether to treat the US$1 million which came back as repaying the restitutionary liability that arose in respect of loan A or the restitutionary liability that arose in respect of loan B. He also agreed that, in the situation where the bank choosee to treat the US$1 million as repaying the restitutionary liability in respect of loan A, the bank would then no longer have any rights to restitution in respect of loan A because it has recovered the monies which were originally transferred pursuant to loan A.

1077. It was then put to him that it must follow that, in this example, the lending bank would no longer have any claim in tort against the person responsible for procuring loan A, because it no longer had any loss in respect of loan A. This can now be seen to be the source of the Defendants' new case on free-choice. Mr Beketov's answer to this was as follows:

> " … if it may be taken as a true fact that in such way bank decided that it has to be compensated, in other words that the bank is fine that it is repaid with its own money for this tort and there is evidence that that in fact happened, there was the will of the bank to do so, then I believe any lender in such situation would have difficulty to claim this loss. I'm saying that the bank would have difficulty to claim such loss."

1078. In giving this answer, Mr Beketov appeared to be saying that the hypothetical lending bank needed to have consciously chosen to discharge the liability in tort with its own money in order for the repayment to have that effect. There continued to be some confusion in the answers as to whether the bank needed to have intended to treat the repayment of loan A not just as discharging the liability of the borrower but also as extinguishing the liability of any third party against whom the bank had a claim in tort. Even the final exchange on this point resulted in answers which did not produce a very clear answer, because it did not clearly distinguish between the bank's restitutionary claim against the borrower and the bank's claim in tort against the third party for procuring the original payment or loan to be made. That exchange took the following form:

> "Q. If the facts show that the creditor has in fact made its choice, so it has chosen in fact that, on my example, the US$1 million that came in should be treated as crediting against the liability of borrower A for instance - if it does that, it can't then ignore that and say, "Well, actually, although I credited borrower A's liability, I now want to sue the tortfeasor in respect of loan A", because it's too late, isn't it? Once you've made that choice, any loss in respect of loan A has been extinguished?

> A. Mr Howard, I believe it's a matter of fact to decide, but, you know, as we discussed before, if the borrower A made it explicit that it was his intention to treat repayment for the fraudulent loan A in such way, I believe it would be difficult for him to sue for the same loan in the court, if he accepts on some factual patterns that this is actually discharge of his claim in tort which he had.
>
> Q. The bank - you mean if the bank has done that, so if the bank has treated the payment as discharging the liability of a borrower in respect of loan A, he couldn't then come along and either sue that borrower in respect of loan A or sue a party who procured it, claiming the loss, because there is no loss; correct?
>
> A. Again, you know, if you please be more clear what you refer to the loss because, you know, I said we have three items of loss.
>
> Q. Yes, the loss in category one.
>
> A. The loss in category one, yes."

1079. This last exchange opened up the Defendants' new case on choice. It seems to me that, taken in isolation, Mr Beketov's very last answer might be thought to have accepted that the choice by the bank to treat the US$1 million repayment as a discharge of the borrower's restitutionary liability in relation to loan A, in and of itself extinguished the bank's claim in tort against the third party for the loss sustained in the amount of loan A. The reason is that he accepted Mr Howard's proposition that, in that situation, the bank could not then sue a party who procured loan A, "claiming the loss", because (ignoring any compensation for loss of profit or expenses incurred) there is no loss.

1080. However, I do not think that this was in fact the case, because in the preceding answer he seems to have said that what the bank chose to do must relate to the discharge of the actual claim which the bank had, by which it is clear that he meant the claim in tort against the third party. In my view, Mr Beketov's opinion continued to be that the evidence must show that a payment in discharge of a borrower's liability to the bank (whether in contract if loan A was valid, or in restitution if it was not) was accepted by the bank in repayment or discharge of that liability to the borrower in what he called a "factual pattern" which also amounted to an acceptance that it actually discharged the bank's claim in tort against the third party. In many cases that will amount to the same thing, but I do not think that he accepted that that would always be the case and in my judgment it is not.

1081. In my judgment, the essential substance of Mr Beketov's evidence on the effect of the repayments on the Bank's claim under Article 1166 in circumstances in which the Relevant Loans were (as I have held them to be) void, was as follows. In each instance, I accept that this evidence reflects the law of Ukraine:

i) Whether the source of what was said to be a repayment was an Intermediary Drawdown made under a Relevant Loan or an Intermediary Loan, or the value of a Transferred Asset, or one of the New Loans issued as part of the Transformation, it will not serve to reduce or extinguish the Bank's claim in tort if it was improperly paid out of the Bank's own resources.

ii) The mere choice by the Bank to treat what is said to be a repayment of a void loan as a discharge of the borrower's restitutionary liability in relation to that loan, does not in and of itself extinguish the Bank's claim in tort against the third party for the loss sustained in the amount of the loan.

iii) The position may be different if the Bank chooses or consents to the use of what is said to be a repayment as a discharge of its claim in tort.

1082. It is important to note that what would be required to establish choice or consent by the Bank was never explored in the evidence either by way of application to the facts of the present case or by reference to general principles of Ukrainian law.

The Repayment Defence: the Defendants' case on choice

1083. As a starting point, it is now clear that there has been a material shift in the way in which the Defendants approached the Repayment Defence during the course of the trial, although the extent of the shift and its potential significance was not fully apparent until the service of the Defendants' written closings. As I have already explained, it was Mr Kolomoisky's case in opening that, whatever the harm or loss that the Bank may have sustained in respect of the Relevant Drawdowns, it is extinguished to the extent of any repayment of a Relevant Loan. He relied on the Bank's transactional data to prove the repayments for which he contended that credit is to be given. This disclosed (as the forensic experts all agreed) that all but two of the Relevant Loans and all of the Intermediary Loans were recorded as having been repaid by the various means I have just described. His case was that these repayments had the effect of both discharging the Borrowers' liabilities to the Bank and extinguishing any tortious liability the Defendants' may have had in relation to the making of the Relevant Loans in the first place. If any of the Defendants had any tortious liability to the Bank flowing from the harm caused by the making of the Relevant Loans, that liability was extinguished by performance of the Borrowers' obligation to repay the Relevant Drawdowns.

1084. The way that the Repayment Defence was articulated in the various iterations of Mr Kolomoisky's Defence and his opening submissions was that, when a Relevant Drawdown was repaid (by whatever means that was achieved), any loss caused by it was reduced or extinguished. It did not matter whether the Relevant Loan was valid, voidable or void. That simply went to the question of whether the Relevant Drawdown gave rise to a debt which was repaid or a restitutionary obligation which was then performed on repayment. In both instances, the cause of action in tort for harm caused by the Relevant Drawdown was automatically extinguished by the repayment because the loss constituting an essential element of the claim under Article 1166 was also extinguished.

1085. It was submitted on Mr Kolomoisky's behalf in opening that it did not matter if the source of the repayment was an Intermediary Loan or a New Loan itself obtained unlawfully and procured in breach of duty by a third party. If that were to have been the case, the Bank may have a claim against that third party in tort for procuring the Intermediary Loan or the New Loan to be made, but that would be for the loss it sustained caused by the making of the Intermediary Loan or the New Loan, not the loss it sustained by the making of the Relevant Loan because that loss would have been

extinguished by the repayment. Mr Kolomoisky has always said that the reason the Bank has never put its case on the basis that it sustained any loss from the making of the Intermediary Loans or the New Loans is because the Bank would have run into jurisdictional difficulties in suing in England if it had done so. It has therefore both elected to confine its claims to loss caused by the Relevant Drawdowns, which on the Defendants' case have been repaid, and eschewed any claim in relation to the transactions which were the source of the repayments.

1086. In opening its case, the Bank made clear that its answer to this fundamental point was that recorded repayments of the Relevant Loans by Intermediary Drawdowns and New Loans did not reduce the Bank's loss and did not constitute a genuine recovery because they involved unlawful extractions of the Bank's money and therefore no credit was to be given for what are described as "such purported repayments". The reason that there was no genuine recovery was that there was no genuine repayment in the form of external funds paid back into the Bank; they were to be disregarded, because they were made with funds derived from another fraudulent loan. It said that, as a matter of fact, it has not received anything of real value which would make it whole. It still has a worthless fraudulent loan on its books. In my judgment, that answer was plainly a good one as a matter of Ukrainian law. It reflects the reality of the position which is that the Bank never received full compensation for the harm which it suffered at the time the Relevant Drawdown was made.

1087. In Mr Kolomoisky's closing submissions, there was a substantial change in the way he sought to put his case. Choice entered into the equation for the first time. It was said in a part of his written closing submissions that was specifically adopted by Mr Bogolyubov and the Corporate Defendants that, where a Relevant Loan was void with the consequence that the Bank's claim for recovery was in restitution, the creditor can choose whether to apply a repayment in discharge of the relevant Borrower's restitutionary liability or some other liability. The way it was put was that:

> "such a liability is not automatically extinguished by a repayment: instead the creditor can choose whether to account for the payment as a discharge of the restitutionary liability, or of some other liability. It is a question of fact what choice the creditor has made."

1088. This made clear that it was no longer Mr Kolomoisky's case that where the loan was void, repayment automatically extinguished any liability in tort for harm caused by the original transfer. It is then said that, if that choice is made, not only is the liability of the Borrower discharged but also any tortious loss caused by third parties such as the Defendants, is extinguished. This was said to be justified by Mr Beketov's evidence which was said to be to the effect that if the creditor makes a choice to accept a repayment as discharging the liability of a borrower in respect of the earlier of two void loans, it cannot later make a claim in tort against a third party who procured the void loan.

1089. Therefore, the ultimate significance of the Bank's choice when applying a payment in discharge of the Borrower's restitutionary liability, together with the relevance of that choice to the extinction of any tortious loss, was only explicitly introduced into Mr Kolomoisky's case in his written closing. The importance of this point from the perspective of Mr Kolomoisky was summarised in his written closing submissions as follows:

> "If the Relevant Loans are void then the effect of Mr Beketov's evidence is that the Bank has suffered no loss in respect of the Relevant Loans if and to the extent that it has chosen to accept payments as discharging the Relevant Borrower's liabilities to return the sums drawn down under the Relevant Loans, as opposed to other liabilities in respect of the later loans.
>
> "The key question on this analysis is therefore a factual one, namely whether the Bank has indeed made that choice. The answer to that that is self-evidently 'Yes': …"

1090. Mr Kolomoisky then went on to make clear that he did not rely for the purposes of establishing the Bank's choice as a matter of fact on the initial credit of the relevant Borrower's account with repayment while the Bank was owned and controlled by him. Rather he relied on the fact that the Bank had an opportunity, when new management was appointed following nationalisation at the end of 2016, to decide which loans to treat as valid and repaid. It was said that, at that stage, the Bank consciously decided to treat the New Loans as valid and outstanding and the Relevant Loans to the original Borrowers as having been repaid. It did so at the latest when its new management signed off the Bank's 2016 financial statements on 25 May 2017.

1091. The Bank strongly objected to this way of putting the Defendants' case. It said that no such case was pleaded and no application to amend had been made by the Defendants. Mr Hunter took me through the pleadings with some care and I agree that the case was always pleaded on the basis that purported repayments of Relevant Loans funded by Intermediary Loans, New Loans and Asset Transfers automatically extinguished any loss caused by the Relevant Transfers for which the Defendants would otherwise have been liable in tort. The very fact of what the Defendants said were repayments, effected by the cash funded by the Intermediary Loans, the Asset Transfers and the Transformation, was all that was relied on. There was no mention of a post-nationalisation consent. The Bank is also correct to submit that the List of Issues for the trial (of which there were many) made no mention of a post-nationalisation free-choice argument.

1092. I also agree that, although the Defendants pleaded some post-nationalisation conduct by the Bank, this pleading was advanced for the quite different purpose of articulating what was then their case on preclusion. Those pleas were made in order to explain the Defendants' case on abuse of rights and *venire contra factum proprium* in the context of the Bank's case that the Relevant Loans, the Intermediary Loans and the New Loans were all void, a plea for which proof of bad faith by the Bank and detrimental reliance would have been required. The allegation was that because, as against the relevant counterparties, the Bank had treated the Relevant Loans, the Intermediary Loans and the New Loans as valid and had treated them as having been wholly or partially repaid, it was precluded from asserting that they were in fact void. I agree that this is a quite different argument from the free-choice argument, not least because the free-choice argument takes as its premise that the loans are void and that the Bank is not precluded from making a case to that effect.

1093. It was also said that, in making that submission, the Bank was not relying on a mere technicality. The Bank submitted that, if the Defendants had sought permission to amend, they should and would have been required to plead out (a) the Ukrainian law basis for what it called the Defendants' new free-choice extinction of loss case, (b) the

conduct on which they relied as amounting to a free choice by reference to the knowledge required for the choice to be free, (c) how unequivocal the choice would have to be and (d) who would have been authorised to choose (given the evidence already adduced as to the restrictions on authority contained in the Charter and the Law on Banks). The Defendants would also have been required to plead who at the Bank they say made the choice freely and when, what knowledge such persons had of the true facts and what acts are said to amount to the free choice or the manifestation of it.

1094. The consequence of the Defendants' case not being pleaded, or even articulated in this way in its opening submissions, is that the Bank did not adduce any expert evidence as to what a free-choice might be in the circumstances, what knowledge the persons responsible for making the choice would need to have had and what formalities in relation to that choice would need to be fulfilled. Mr Hunter also submitted that, if the case had been pleaded in this way, he would have explored the Ukrainian law points which arose in cross-examination of Mr Alyoshin and his clients would have adduced evidence from the individuals who are said to have made the choice on behalf of the Bank. I accept this submission. If the Defendants' case on the significance of post-nationalisation conduct now sought to be advanced had been pleaded, it is inevitable that the Bank would have wanted to put in expert evidence on the point and the court would not have been faced with the unsatisfactory extraction of somewhat ambiguous evidence from Mr Beketov. In my judgment, even if an application to amend had been made, which it was not, it would have been refused on the grounds that to allow the Defendants to advance this unpleaded and unheralded argument at a very late stage would have caused real prejudice to the Bank.

1095. The Bank also submitted that such evidence as there was as to what in fact happened was that nobody at the Bank exercised a free choice to give up the claims it had started to investigate arising out of the Misappropriation. This would have required a fully informed decision by the Bank to accept wholly impaired loans to shell companies as compensation in place of the compensation to which it would otherwise have been entitled as a result of the claims it was then investigating. This is a wholly improbable scenario, so that, even if permission to amend had been sought, which it was not, it would not have been granted. In my judgment these are all powerful reasons why the Defendants should not be permitted to argue the Repayment Defence in the way that they now seek to do.

Facts on which the Defendants rely to establish the Bank's choice

1096. One of the many problems with the Defendants' submissions on the facts is that they were made in a context which required, but did not have, a proper focus on the applicable underlying legal principles. The whole thesis was founded on what was said to have been critical evidence from Mr Beketov, the difficulties with which I have already explained in paragraphs 1077ff, and as I have also already explained there was no evidence as to what a free-choice might look like in the circumstances, how it needs to be manifested and to whom, whether there are any requirements for reliance and so on. These kinds of question are well-illustrated by the parties' submissions (now no longer relied on for this purpose) on the issue of whether an application of the Ukrainian law doctrine of *venire contra factum proprium*, and the equivalent English principle that a party cannot approbate and reprobate, means that the Bank is prevented from

contending that the Relevant Loans, the Intermediary Loans and the New Loans were all void.

1097. In that context, the Bank accepted that there are principles of English law which limit a party's ability to pursue inconsistent conduct, including (i) election between mutually inconsistent rights (e.g. the doctrines of waiver and election); (ii) election after judgment between inconsistent remedies (e.g. the choice between damages and an account of profits); and (iii) the equitable doctrine of election which prevents a person from taking the benefit of a disposition under an instrument while rejecting other conditions contained in the instrument (as described in Snell's Equity, at [6-015ff]). However, these all have different requirements and it is submitted with some force that Mr Kolomoisky has not pleaded or particularised his reliance on any of those principles and they could not sensibly be invoked to preclude the Bank from bringing its claim against the Individual Defendants in these proceedings. The fact that the Bank (and the court) have been put in this position by the manner in which the Defendants have sought to change their defence, combined with the absence of any application to amend their Defences in order to do so, is of course a very good reason for the court to conclude that they should not be allowed to run the point in this way at this stage.

1098. Nonetheless, counsel for Mr Kolomoisky made a number of submissions on the point during the course of their written and oral closing arguments and I think it is still appropriate to make a number of findings about the submissions that were made. In particular, I should explain why I agree that the factual basis for the allegation that the Bank made the choice alleged is not established by them on the evidence, which is a further reason why it is not open to Mr Kolomoisky to pursue the point in the manner he has.

1099. In support of their unpleaded claim that the Bank consciously decided to treat the New Loans as valid and outstanding and the loans to the 193 Borrowers as having been repaid, the Defendants relied on evidence relating to the Bank's post-nationalisation conduct, and in particular the extent of the new management's knowledge of the allegation that had been made in relation to the loan recycling scheme and the Misappropriation. Some of this evidence was also said to be relevant to part of the Limitation Defence, but for present purposes the focus is on how what occurred is said to support the Defendants' case that the Bank made the conscious post-nationalisation choice alleged. It falls into two parts: the information of which the Bank's post-nationalisation management was aware and the steps taken by them which are said to have amounted to a choice.

1100. The first document on which the Defendants relied for that purpose was the EY November 2016 report, which concluded, amongst other things, that some of the assets transferred to the Bank to repay outstanding loans had been overvalued and that, by the end of 2016, almost all of the Borrowers and Intermediary Borrowers had been categorised by the NBU as companies used to "transit funds" on behalf of the Individual Defendants. This had been reported to the Bank in the NBU's 14 December 2016 report on related parties (see paragraph 581 above). It was then said that, by the end of January 2017, the Bank's new management had been briefed on these matters by the NBU, with reference amongst other things to the claims which appeared to be available to the Bank.

1101. In support of their submission that all of this information was available to the Bank's new management, the Defendants relied on Ms Rozhkova's evidence to the effect that,

at the time of nationalisation, it was very important for the new management to be informed of the NBU's conclusion that the allegations originally made in the Glavcom Article were true. She also said in her evidence that she believed that the new management of the Bank did understand the real situation, because of the materials which had been submitted by the NBU to the Bank (including the EY November 2016 Report, the Restructuring Plan and the NBU's stress testing results), all of which were available for their review. The availability of this material was confirmed by Mr Oleksiyenko and Ms Pakhachuk in cross-examination.

1102. Furthermore, it was clear from the evidence given by Mr Oleksiyenko that one of the first things the Bank's new management was told was that the Bank's management had been making management decisions which were designed to benefit the Individual Defendants as the Bank's shareholders, and that the documents available to them included the NBU's two July 2016 audit reports, one of which included a finding that "the Bank [had been] an instrument for raising funds for lending to a wide range of parties related to the Bank. Most of the corporate loan portfolio is scheme-based and sham".

1103. From or immediately after the time of their appointment, the extent of the understanding of the Bank's new management of the allegations made in these proceedings was established by the following exchanges during the course of Mr Oleksiyenko's cross-examination:

> Q. … Stage one, we agree, you probably saw the [NashiGroshi] articles in February 2015; correct?
>
> A. Yes.
>
> Q. Stage two -- let's see whether we agree with this –those articles made allegations that Mr Kolomoisky had misappropriated $1.8 billion-odd from the Bank via arrangements with borrowers and suppliers who he controlled with sham supply contracts; correct?
>
> A. Correct.
>
> Q. Those were allegations which I imagine you, as somebody at that stage in February 2015 who wasn't -- you weren't involved in Privat, but they were allegations which I imagine you would have found of interest, bearing in mind that PrivatBank was a bank of systemic importance and so on.
>
> A. That's correct.
>
> Q. Yes. So this is not something that -- when you come to November/December 2016 and you're being invited to join this board, the supervisory board, you hadn't forgotten about that, had you?
>
> A. With the -- I didn't remember details of the legal entities, size of the contracts and details of the individual loan and supply agreements, but in general the scheme was in the recollection and I remembered it.

> Q. Yes. Perfectly understandable that you would not remember the specific details of the companies and the agreement numbers and so on, but the thrust of what had been said, namely that Mr Kolomoisky had misappropriated or procured the misappropriation of 1.8 billion via this scheme, you had that well in mind; right?
>
> A. Yes.
>
> Q. Yes. So you also knew -- even if you couldn't remember the detail, you knew that the detail was set out in that [NashiGroshi] article?
>
> A. Yes, and I think most likely this article in the original also had a cross- reference to it.

1104. The Defendants also referred to the NBU's Audit Report dated 27 January 2017, which was therefore available to the Bank's management from shortly after their appointment. It addressed a number of matters relating to the means by which loans to the 193 Borrowers (including as they did some Relevant and Intermediary Loans) had been repaid including concerns about the overvaluation of Transferred Assets, concerns about the Bank's title to the Transferred Assets, specific concerns relating to Hotel Zirka, Hotel Mir and the terms on which aircraft had been transferred to a Cypriot company called Dilorsano Consulting Limited ("Dilorsano"), concerns about the security for the New Loans, consisting as they did of the pledge of rights to the supply of goods and concerns that the New Loans had only artificially improved the Bank's position. The Defendants relied on the fact that this audit report also recited that:

> "the main achievement of the transformation is the currency restructuring and elimination of groupings of counterparties that are associated both with one another and with the Bank. However, the nature of the transactions performed and the inadequacy of the scope of activity of new borrowers, which are generally newly created companies, testify to the artificiality of the above and the fact that the transformation does not actually reduce the Bank's risks".

1105. The Defendants also pointed out that Ms Pakhachuk had accepted in cross-examination that, from 16 January 2017, she had fully appreciated that the New Borrowers could not be relied on to repay the New Loans, because they were not creditworthy, they had no recognisable business and no recognisable means, as far as she understood it, of repaying them. The Defendants then submitted that, in the light of what the Bank's new management knew about the Relevant Loans, the operation of the scheme and what was called the artificiality of the Transformation and the issue of the New Loans, the Bank had what was described as an entirely free choice. The Bank could simply have treated the New Loans as null and void and left the 193 Borrowers' loans (including Relevant Loans and Intermediary Loans) as outstanding, or it could have reversed them.

1106. The Defendants then submitted that, armed with the knowledge I have summarised above, the Bank made a decision to treat the New Loans as creating liabilities which were outstanding but impaired, and to continue to treat the 193 Borrowers' liabilities as discharged. This decision was made at the latest when the Bank's 2016 financial statements were signed on 25 May 2017. It was submitted that this was probably done because there were commercial benefits to be obtained by the Bank from the Transformation, which it did not wish to relinquish. The suggestion was made that these benefits were that the Bank was now dealing with a smaller number of debtors

(36 rather than 193) and that all the New Loans were in UAH which, as Ms Rozhkova confirmed in oral evidence, protected the Bank from any further depreciation in the currency.

1107. I should say straightaway that I have already addressed and rejected the Defendants' suggestion that there were currency-related commercial benefits to be obtained by the Bank from the Transformation in paragraphs 579 and 580 above. I am equally sceptical that there was any material commercial benefit to the Bank in having a smaller number of debtors, particularly given the obvious issues as to the New Borrowers' creditworthiness that I have already described. In the context of a case such as the present, that seems to me to be a largely irrelevant consideration.

1108. In any event, and leaving aside what might be the test under Ukrainian law, there was no proper analysis of how it was said that the Bank's 2016 financial statements evidenced an irrevocable free choice to treat obligations arising in relation to the Relevant Loans as wholly discharged, let alone to extinguish the tort claims against those involved. The notes simply recited the fact that in October and November 2016, part of the loan portfolio to the value of UAH 137,082 million was restructured, leading to a change in currency, a lowering of the interest rates, an extension of maturity dates, a conversion of some of the loans into finance leases and a change in the collateral pledged under the loans. It was also recorded that, as at 31 December 2016, an allowance for impairment of the overwhelming face value of this portfolio was recognised. This was no more than an accounting recognition of what the Transformation had purported to achieve and its financial consequences. In my view none of this comes anywhere near an election, anyway as that concept applies as a matter of English law, to take any particular steps going forward or a choice to treat anything done in respect of the New Loans as discharging the Borrowers' liability to return sums drawn down under the Relevant Drawdowns, let alone extinguishing any liability in tort arising out of the circumstances in which they were drawn down.

1109. However it was said that the Bank has continued to maintain its position on the New Loans by its continuing conduct throughout 2017 up until the commencement of these proceedings. Thus, it has sought to enforce the New Borrowers' liabilities while seeking to negotiate the provision of security by the Individual Defendants, it has been accepting small repayments and it has been charging interest to the New Borrowers since the date of the drawdown of funds under the New Loans. Furthermore, the Bank has issued notices to the New Borrowers, relying on events of default to accelerate debts owed under the New Loans.

1110. Particular reliance was placed on the fact that the Bank had begun to issue proceedings against New Borrowers in late 2017 before the Bank's legal department was told to stop doing so (see paragraph 609 above); the Defendants said that this stop instruction was likely to have been given because of concerns about establishing English jurisdiction for the claims which the Bank had by then determined to pursue against the Defendants. The Defendants also said that, in disputes with New Borrowers which have reached the Ukrainian Courts, the Bank has continued to treat the New Borrowers as liable under the New Loans, and referred to a number of reported decisions of the Ukrainian Commercial Court in which that has been done. It was therefore said that the commencement and continuation of proceedings demonstrated that the Bank had chosen in a binding manner to proceed, such that their claims for compensation against the Defendants were extinguished. However, it is worthy of note that the specific

proceedings actually relied on in Mr Kolomoisky's closing submissions all reached the Ukrainian courts long after the commencement of these proceedings, and all but one of them (proceedings against Tamersa in relation to the validity of its Relevant Loan) were themselves commenced after December 2017.

1111. The Defendants also drew attention to the fact that, consistently with its decision to treat the New Loans as creating actionable liabilities, the Bank has treated (largely by inaction) the liabilities of the Borrowers and the Intermediary Borrowers as fully discharged, whether by the Asset Transfers or the Transformation. They said that no claims have been made against the Borrowers or the Intermediary Borrowers in connection with the Relevant Loans or the Intermediary Loans as the case may be. They also asserted that the Bank has never contended that the Borrowers or the Intermediary Borrowers continue to owe it money (either in contract or in restitution) and has taken no steps to bring any claims against Mr Kolomoisky or any third party in relation to the over-valuation of the Transferred Assets. They also said it is significant that the Bank has been content to acknowledge in full the credits granted to the Borrowers and the Intermediary Borrowers in return for Transferred Assets.

1112. The position on this aspect of the case was said by the Defendants to have been accurately summarised in the following evidence given by Mr Oleksiyenko:

> "Q. Generally -- is this right? -- save insofar as there is some mistake about collateral or something like that having been misapplied, the position is -- I think this must be right -- the Bank has not sought repayment from the 193 borrowers and has accepted that their liabilities were entirely extinguished by the repayments that were made out of the proceeds of the loans to the new 36 borrowers; correct?
>
> A. That's correct. Furthermore, the new borrowers, before nationalisation and immediately after nationalisation started to service the new loan agreement.
>
> Q. Yes. And insofar as they serviced the new loan agreement, the Bank, as it were, has accepted any money that they have paid and credited it to the account of that borrower; correct?
>
> A. That is correct. It is not to the account of the borrower but as a service vis-a-vis the obligation of the borrower."

1113. The Defendants then submitted, relying on all of the factors I have just summarised, that there could be no doubt that the Bank has made its choice as a matter of fact to treat all repayments of Relevant Loans as effective in full, whether the source of those repayments was void Intermediary Loans, overvalued Transferred Assets or void New Loans. It was said that it is only in these proceedings that the Bank is forced to adopt what was said to be an inconsistent and incoherent position that the repayments of the Relevant Drawdowns were somehow invalid or could be disregarded, in order to contend that the loss in respect of which it has chosen to bring claims against the Individual Defendants has not been extinguished.

1114. The Defendants further submitted that the choice to sue for that loss on the false basis that it had not been extinguished as a matter of Ukrainian law was dictated by the Bank's desire to sue the Individual Defendants in England, rather than Ukraine. But, as a matter of fact, repayments did take place and the Bank has accepted them as

discharging the liability of the Borrowers in respect of the advances made to them, whether that liability was in contract or in restitution, with the consequence that, in Ukrainian law as in English law, any tortious loss in respect of those advances has also been fully and conclusively extinguished, and they are not therefore liable to the Bank in respect of it.

1115. There was no challenge to the general description given by the Defendants of the information which was available to the Bank's new management at and shortly after nationalisation. However, the Bank did challenge the Defendants' submission that the steps which were taken by the Bank with the benefit of that information amounted to any form of free-choice election (whatever the correct formulation under Ukrainian law might be) to treat the claims it had against the Defendants as extinguished or to choose a claim against the New Borrowers as its sole remedy for compensation for the harm it suffered as a result of the Defendants' unlawful acts.

1116. The Bank's starting point was that, in both English and Ukrainian law, a party which has sued on an agreement in order to recover debts (or has in fact recovered money under a loan) is not thereby precluded from seeking to protect their rights by subsequently invalidating the loan agreement and suing wrongdoers for loss. I agree that this is correct:

i) In Ukrainian law this is apparent from *Chornomornaftogaz* at [5.4.2] in which the Supreme Court explained that the "existence of a court judgment recovering debts from the Respondent under the Agreement does not restrict their right to sue for the invalidation of the Agreement and does not preclude the possibility of litigation in such a case, but on the contrary, indicates the need for this as the only possible way for the Claimant to defend their rights and interest, which they consider to have been violated".

ii) In English law the same principle was explained by Nourse LJ in *Jyske Bank (Gibraltar) Ltd v. Spjeldnaes* (CA, 29 July 1999 at p.24 of the transcript) when he said that "the suggestion that a bank, which, suspecting or even knowing that its moneys have, with the connivance of the borrowers, 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 in order to achieve that end."

1117. The Bank then submitted that the overriding answer to the Defendants' case on this area was that, as a victim of a fraud, it had been doing all it could to mitigate the losses it was caused by the Defendants' unlawful conduct. All the events relied on by the Defendants were simply short-term attempts to make recovery from the New Borrowers and nothing came close to manifesting an election or an unequivocal decision to waive claims, which, on the unchallenged evidence of Ms Hryn and Mr Bondarenko ended shortly before these proceedings were issued. It was said in the Bank's closing submission that this "stop instruction" was given at that stage because by then the English solicitors instructed by the Bank, Hogan Lovells, had begun to fully understand the subject of the claims, which may or may not (as the Defendants suggested) have included concerns about jurisdiction; an inference which it is appropriate to draw. Nothing which occurred amounted to an unequivocal election to do anything.

1118. I accept that it might have been possible (anyway theoretically) for the Bank to have elected to pursue the New Borrowers on the New Loans in a manner which meant that, as a matter of fact, it can be seen to have chosen to treat the Relevant Loans and the Intermediary Loans as discharged and/or the loss caused by the unlawful conduct of the Defendants in procuring or participating in the making of the Relevant Drawdowns as extinguished. But I do not agree that the Defendants can point to clear evidence as to whether any other conditions have to be satisfied for that conduct to have the legal effect for which they contend, and if so what they might be. However, whatever the legal principles to be applied to establish irrevocable choice or consent (and as I have said the Defendants have been very vague as to what they are said to have been), I am satisfied that nothing done by the Bank in its pursuit of the New Loans comes anywhere near establishing that that is what occurred.

1119. A similar issue was examined in the parties' written submissions in some detail in the slightly different context of the Defendants' original argument that the Ukrainian law doctrine of *venire contra factum proprium* applied with the consequence that the Bank was prevented from contending that the Relevant Loans, the Intermediary Loans and the New Loans were all void. There was an issue on the expert evidence as to whether or not this doctrine applied to void transactions at all, but it was plain that it could not have been applied in that context in any event, because at least one of the essential elements of the defence was not present. Thus, there was no evidence that any of the Defendants reasonably relied to their detriment on any of the statements made by the Bank in the Ukrainian proceedings. But I also consider that the evidence adduced in that context shows that, even if the Bank had treated the loans or mortgages as valid in those Ukrainian proceedings, in pursuing them it acted reasonably and in good faith with a view to mitigating the harm for which it was entitled to compensation from the Individual Defendants. This is consistent with my conclusion that it is not possible to spell any form of consent of the type alleged by the Defendants out of the way in which those proceedings have been pursued by the Bank.

1120. As to the proceedings actually relied on in Mr Kolomoisky's closing submissions, the facts that all but one of them dated from after the commencement of these proceedings and that they all reached the Ukrainian courts long after that date, means that, on the current issue, the Defendants' argument is a particularly weak one. Whatever the principles that may apply in relation to the *venire contra factum proprium* defence, it is particularly difficult to see how the timing of the commencement and progress of those Ukrainian proceedings can point to any form of freely given consent to abandon or extinguish the claims made in these proceedings, which were commenced before any progress had been made in pursuing them.

1121. In any event, there was very detailed evidence in Mr Beketov's 11th report which dealt with why the *venire contra factum proprium* defence was not engaged by the Bank's conduct of any of those proceedings. This only goes so far, because the issues were slightly different, relating as they did to the Bank's ability to pursue its claim that the Relevant Loans were void, but it was not challenged and demonstrates that Ukrainian law treats any question relating to whether conduct may have the effect of causing an otherwise available claim to be abandoned, extinguished or discharged, whether through some form of doctrine of election, waiver, inconsistent conduct, consent, free choice or otherwise, is highly fact specific. It also requires proof of bad faith by the Bank, and (despite Mr Alyoshin's view to the contrary) reliance by the Defendants on

what was said to be the conduct having preclusive effect, neither of which are alleged for this purpose.

1122. Against this background, a simple reliance on what Mr Beketov said is in my view a wholly inadequate basis for explaining precisely how what actually occurred in any of the Ukrainian proceedings gave rise to the making of a free choice by the Bank with the legal effects for which the Defendants contend. It does not seem to me that their mere pursuit can have had that effect, a point which also applies to the proceedings in respect of which Ms Hryn gave her evidence. The same can be said about the other circumstances on which the Defendants relied. In my judgment, and looking purely at the factual question, unsatisfactorily divorced as it is from a pleading or proper analysis of the legal context, I think that what occurred falls well short of the Bank making the choice for which the Defendants appear to contend. In short, the Bank was doing no more than that which the courts in both *Chornomornaftogaz* and *Jyske Bank* contemplated as being steps which were available to it in order maximise its recovery of the compensation to which it claims to be entitled.

1123. It follows from these conclusions that, even if it had been appropriate to permit the Defendants to advance an unpleaded case on free choice at this stage, I am satisfied that they have not proved that anything done by the Bank post-nationalisation amounted to a choice by the Bank to accept payments as discharging the Borrowers' liabilities to return the sums drawn down under the Relevant Loans, so as to preclude it from continuing to allege that it suffered the loss claimed in these proceedings. I therefore conclude that, in so far as it relies on what were called the Cash Repayments, the Defendants' Repayment Defence fails.

The Use of Funds Defence and the bigger fraud argument

1124. I shall come on a little later to the Asset Transfers as part of the Repayment Defence, but I think that it is more logical to consider first what has been called the Use of Funds Defence. The way that the Individual Defendants pleaded this defence was that the Bank suffered no loss to the extent that funds advanced were transferred back to the Bank.

1125. The nature of the Use of Funds Defence and the Ukrainian law principles which apply to it are described in the experts' joint statement as follows:

> "[Mr Beketov] and [Mr Alyoshin] disagree as to whether it makes any difference to the Bank's claim if the funds received by a particular Borrower under a particular Relevant Loan were circulated back to the Bank to repay earlier loans:
>
> [Mr Beketov's] view is that, on an application of first principles (in particular the principles of full compensation for tortious loss, justice fairness and reasonableness, and consistent with the approach of the English courts in *National Bank Trust v. Yurov* [2020] EWHC 100) the Bank's claim for tortious loss caused by the Relevant Loan should be unaffected by such repayment. It would be obviously wrong if a fraudster could steal from a bank to repay his own indebtedness and then claim the bank suffered no loss as a result of his theft.

> [Mr Alyoshin] agrees that, in principle, the Bank's loss caused by non-repayment of Relevant Loans would not be reduced in these circumstances. However, if (contrary to his view) a claim in tort arises in respect of a Relevant Loan which has been repaid then the use to which the Relevant Loan has been put would also need to be taken into account in assessing the Bank's loss."

1126. Mr Alyoshin also agreed that, as a matter of principle, the use to which stolen money is put does not reduce the Bank's loss caused by the theft. He also accepted that the analysis in *Yurov* is compelling and "supports Mr Beketov's opinion (which I agree with) that the use to which any Relevant Loans were put is not relevant when determining the amount of loss caused by the Relevant Loans". The essential point which was agreed by all experts was that the use of the proceeds of a misappropriation by a wrongdoer is collateral to the wrongdoing and falls to be ignored as a matter of principle.

1127. As Mr Beketov and Mr Alyoshin have both accepted that the position described in *Yurov* at [1193] is both logical and reasonable and would be likely to be followed in Ukraine, it is worth citing the relevant passage in full:

> "As the Bank points out, the Shareholders' argument involves the acceptance of the proposition that a fraudster could steal from the Bank to repay his own indebtedness and then claim that the Bank has suffered no loss as a result of his theft – such an argument is obviously (and demonstrably) wrong as can be illustrated by adapting the Shareholders' own examples. In this regard, assume that that the Bank has a non-performing loan to Borrower A of £1,000; and that A is an individual who is entirely and irretrievably unable to pay, so that the Bank has provisioned the loan as to 100%. On the Shareholders' premises, this represents an actual, incurred loss to the Bank of £1,000. Now assume that A successfully deceives the Bank into handing over to him £1,000 in cash, which A uses (as he planned all along) to settle his original debt. When the Bank discovers the fraud and sues him, A's defence (like the Shareholders' in this case) is that the Bank has suffered no loss because it had already lost £1,000; and its loss remains the same after the fraud. That cannot be right. The position would be no different if the fraudster was a different individual, B, who dishonestly obtained the money and passed it to A (whether as a conspirator or a benevolent bystander) so that he could repay his debt."

1128. To similar effect was what Toulson J said in *Komercni* at [171], as cited by Bryan J in *Yurov* at [1195]:

> "Consider next the position if the fraudster decides to use the proceeds of his fraud to discharge a liability owed to the bank by a third party. I reject the argument that he would be entitled to have that matter taken into account as a relevant benefit to the bank when calculating the loss resulting from his fraud. As before, his use of the funds would be the result of his independent choice how to use the opportunity created by his fraud. Just as it would be wrong that a customer who could not repay his overdraft should be able to pay off the overdraft with funds obtained from the bank by deceit, and then defeat the bank's claim for deceit by saying that there had been no loss from his deceit (since the money obtained from it had been used to repay a debt that he could not have otherwise have paid), so also it would be wrong that a similar result should be achieved by a customer and an accomplice - as would

> be the case if the accomplice were able to obtain money from the bank by fraud, use it to discharge the customer's indebtedness and then defeat the bank's action in deceit by the plea that there had been no loss."

1129. However, Mr Kolomoisky's answer to this point was qualified by Mr Alyoshin's evidence to the effect that the position would be different if the court were to analyse the case as one in which a claim in tort arises in respect of a Relevant Loan which has been repaid (i.e., if the repayment of the Relevant Drawdown did not extinguish the Bank's loss to the extent that Relevant Loans have themselves been repaid using the proceeds of another unlawful loan). He said that in this situation, the court should consider the net financial position of the Bank when assessing its loss. He said that "it would be necessary to have regard to the use to which the proceeds of Relevant Loans had been put, otherwise there would be scope for problems of double recovery and/or unjust enrichment to arise."

1130. Connected to this point was the second of two consequences said to flow from an argument made by counsel for Mr Bogolyubov that the Bank had been engaged over an unspecified period in loan recycling of which the Relevant Drawdowns formed part. The first consequence was said to be that there was no misappropriation as a result of the Relevant Drawdowns, because it can be seen that they went back to the Bank. The second was that the Bank sustained no compensable loss because there was no overall increase in the Bank's loan book as a result of the Misappropriation. These two consequences are intimately interlinked and the evidence which was said to support them was essentially the same.

1131. The position was summarised in Mr Bogolyubov's closing submissions where it was submitted that Relevant Drawdowns that are simply recycled to repay other loans have a neutral effect on the Bank and can cause no loss. A drawdown recycled to repay a debt under the same loan has a neutral effect on the Bank, whether the drawdown is recycled to repay the same loan, or a different loan of the same Borrower or a loan to a different borrower. Examples were given of situations in which, on a funds flow basis, a Relevant Drawdown by AEF was 'round-tripped', leading to the repayment of the same amount on the same loan account by the end of the same day and Relevant Drawdowns by Tseris LLC ("Tseris") were recycled to repay a different loan of the same Borrower were repaid by Tseris later the same month. Reliance was also placed on Mr Thompson's acceptance in cross examination that, adopting a funds flow basis, where a drawdown by one borrower was recycled to repay a loan of a different borrower the recycling taken as a whole had a neutral effect on the Bank:

> "Q. So the net position of the Bank in terms of its ledgers remains the same. There's simply a change in the name of the borrower.
>
> A. Yes"

1132. In support of this proposition, Mr Bogolyubov relied on Mr Steadman's evidence on the issue of whether Relevant Drawdowns contributed to an increase in the size of the Bank's lending compared to the position prior to the period in which Relevant Drawdowns were being made. He concluded that, ignoring the increase in the lending to the Borrowers, there was no increase in the value of lending to 466 of the Bank's customers during the active period of the Misappropriation. He did so having looked at the relative size of the Bank's loan portfolio for the borrowers he looked at the day

before the first Relevant Drawdown was made and on the day of the last Relevant Drawdown. He determined that there was an overall net increase in outstanding principal on the loan book of only US$72 million and that the remainder of the increase represented accrued interest of US$618.3 million.

1133. It was submitted that this was consistent with the Relevant Drawdowns being a series of ledger entries and corroborated the findings from the funds flow exact matching and bridging loan methodologies, which showed the Relevant Drawdowns being looped around in the Bank. It was submitted that it followed that the increase in the size of the Bank's loan book during the period in which Relevant Drawdowns were being made was almost entirely driven by the accrual of interest, rather than an increase in the level of lending. This was said to be inconsistent with the occurrence of a misappropriation during this time period. The data which he analysed was therefore said to be indicative of a loan recycling scheme with no loss caused to the Bank.

1134. The Bank said that there were a number of problems with the exercise carried out by Mr Steadman. As a matter of pure mathematics based on the ledgers he had looked at, his analysis was not wrong, but the loan books he analysed were composed of entities which had been identified for another purpose. As he explained he was not selective in his choice of the relevant customers, but had understood they were selected by the parties and the court for disclosure, and that it was the "widest list of parties that are connected in some way to the events". They therefore comprised not just Borrowers, but also the Intermediary Borrowers, the New Borrowers, and a significant number of other entities identified as being customers through whose accounts funds from the Relevant Drawdowns allegedly passed, as well as other customers whose loan balances were repaid through the Transformation, Share Pledgors and companies transferring assets to the Bank in the course of the Asset Transfers. They totalled 446 in all. Mr Steadman said that the data:

> "depicts the movement of Relevant Loan Drawdowns, the Intermediary Loans, the repayment of the Relevant and Intermediary Loans, including the Asset Transfer and the Transformation, as well as the destination of the Relevant Loan Drawdowns":

1135. However, the problem with his evidence was that taking the selective approach that he did does not help in establishing the Bank's net loss; it was ultimately based on an arbitrary customer selection methodology which meant that it was both too narrow and too broad to support any meaningful conclusions on this issue. It is too narrow because it is far from clear that it covers a complete universe of all entities related to the Individual Defendants; there is no way of saying that it takes proper account of ledger entries in respect of all companies through which payments funded by the Relevant Drawdowns might have passed. But it is also too broad, because it does not even help on the net loss on the loan books of just the Borrowers and the loans associated with them; if it had, Mr Steadman accepted that it would have shown a substantial increase on that net loss during the period in which the Relevant Drawdowns were being made.

1136. Another way of looking at the problem is that, considering only the net change in the portfolio does not tell you how Relevant Drawdowns were used or how Relevant Loans were repaid. Mr Steadman explained that tracing the use of Relevant Drawdowns was not the purpose of this particular exercise. It was simply to provide a different way of looking at the question of whether there has been a misappropriation. As Mr Steadman

said in his 3rd report: "if the Bank's loan portfolio had increased during this period by an amount equivalent in size of the Relevant Drawdowns, then it would follow that these amounts may have been misappropriated, rather than used to repay other loans of the Bank". Mr Bogolyubov submitted that this also explains why looking at a wider population than just, say, Borrowers or Intermediary Borrowers was appropriate.

1137. That may be the case, but the difficulty with this answer is that it does not address the more substantial aspect of the Bank's case, which was that some of the Relevant Drawdowns were in fact used to repay loans made by the Bank to or for the ultimate benefit of the Individual Defendants' operating companies. Mr Bogolyubov's response to this argument was that it was inconsistent with the Bank's own methodology and that the Bank has not pleaded any case that it suffered loss on the basis that bad loans were used to repay good loans. He also relied on the fact that the essence of the Bank's case was that the Relevant Drawdowns were stolen and had disclaimed any claim that its loss was caused by loan impairment. For reasons I shall come on to, I do not think that this answers the Bank's point.

1138. Also on this theme, Mr Steadman carried out another analysis, which was said to show that no sums from the Relevant Drawdowns were transferred by the Borrowers or Intermediary Borrowers to accounts outside the Bank. It was therefore said on behalf of Mr Bogolyubov that that they did not leave what Mr Steadman had called "the Bank's eco-system" and were just ledger entries on the Bank's balance sheet. It was said that, for the Bank to have parted with any money, this would require a transfer to a third-party bank or an extraction in cash. Mr Bogolyubov then relied on Mr Steadman's oral evidence that:

> "[…] if one is looking for misappropriation, the first question should be to ask, "What happened to the money?". The quickest way to look at that is to say, "Has any of the money left PrivatBank directly?", and by "directly", from the borrowers and the intermediary borrowers."

1139. It was also submitted that there was no analogy with the situation posited in Mr Hunter's oral opening submissions in which a thief goes into a bank vault and comes out with the money. The reality of what occurred was that a series of ledger entries were made recording the notional creation and discharge of debt obligations between the Bank and the Borrowers. The only effect of this exercise was to change the identities of the persons owing money to the Bank (i.e., from other borrowers to Borrowers to Intermediary Borrowers to New Borrowers) and the instruments under which the debts were recorded as owing. In short, the core of the submission was that there was no movement of value outside the Bank, no 'appropriation' and, so far as can be established, no net loss to the Bank during the relevant period. It was then positively submitted on behalf of Mr Bogolyubov that the lack of any extraction of value from the Bank, taken together with Mr Steadman's analysis of the Bank's loan book, strengthened the inevitable conclusion that what was really going on was loan recycling. On one level that is common ground.

1140. It was also said that this exercise went hand in hand with the assessment of whether the Unreturned Prepayments in fact left the Bank with the consequence that both points at which the Bank has variously said money was "stolen" or "extracted" have been considered. As Mr Steadman explained:

> "To my mind there's two important groups of customers to look at. One are the borrowers and the intermediary borrowers and the other one are the defendant suppliers. Now, Mr Thompson has done the analysis of payments out of the defendant suppliers and I have done the analysis of payments out of the borrowers. The exercise involving all 466, however many it is, relevant customers it seemed to me is best covered by the tracing exercise which is following the actual funds."

1141. The evidence which was said to justify Mr Bogolyubov's submission that there was no Misappropriation because nothing left the Bank's eco-system was contained in Mr Steadman's report under the heading "Absence of indications of misappropriation". The limitations on what this evidence would be able to prove was apparent at the outset because Mr Steadman recognised (and explained) that he was only giving evidence in relation to what he called the "available information in relation to the alleged Misappropriation". The Bank called this an extraordinarily partial exercise, although I think that a more appropriate description of it is that it was incomplete and fell far short of proving this aspect of Mr Bogolyubov's case.

1142. Mr Steadman's work was accurate so far as it went but it was very limited. It demonstrated that the Borrowers and Intermediary Borrowers made no more than *de minimis* direct transfers to accounts outside the Bank, but for reasons which are wholly unclear (and inconsistently with the other exercise he carried out in relation to loan book ledgers) it ignored the thousands of transfers made to accounts outside the Bank by the remaining c.400 customers from the cadre he had chosen. As Mr Thompson explained, this left four categories of payment which Mr Steadman excluded from his analysis and which therefore rendered it incomplete. They were: a) payments from accounts other than those of Borrowers and Intermediary Borrowers; b) payments to accounts which have 'PrivatBank' or the Ukrainian equivalent in their name; c) payments to trading companies the Bank alleges were owned or controlled by the Individual Defendants; and d) a large number of additional payments made by Named Customers to accounts outside the Bank.

1143. The Bank submitted that only looking at direct payments out of the Borrowers' and Intermediary Borrowers' accounts was a pointless exercise given the way money circulated within the Bank. I think that there is real substance in this submission, which was well-illustrated by the following exchange during the course of Mr Thompson's cross-examination by Ms Montgomery, which demonstrates that the exercise came nowhere near establishing that Relevant Drawdowns did not fund or enable payments made outside what he called the "Bank's eco-system":

> Q. The other thing that Mr Steadman says is that there are no signs of payments going outside -- I think he likes to call it the "Bank ecosystem" -- but outside the Bank. That's right, isn't it?
>
> A. Well, I write at length about this. It depends how you look at it. I would say that Mr Steadman has missed quite a large number of payments that leave the banking system in a number of ways. So he's looking at the 1500 and 1600 accounts. He doesn't consider other PrivatBank entities and he doesn't consider MFOs, which is basically sort codes of external banks. So I would say that if you are going to go down that route, there are actually a large number of additional payments outside the Bank that he hasn't considered.

> Q. Right. If you're not going to go down that route, if you're just going to look at the borrowers, as you want to in relation to the loan book, you can confirm that there are no payments to accounts outside the Bank in relation to the borrowers?
>
> A. Yes."

1144. On this point I accept Mr Thompson's view of the limitations on the work done by Mr Steadman. In my judgment, and despite the very detailed work carried out by him, it comes nowhere near establishing on the facts that the Relevant Drawdowns were not used as part of the process of funding the repayment of loans made by the Bank to the Individual Defendants' operating companies or indeed the making of other payments to them. The evidence simply does not establish that no (or only *de minimis*) payments funded by the Relevant Drawdowns went outside the Bank's eco-system.

1145. Quite apart from his criticisms of the evidential basis for this line of defence, Mr Hunter made three general submissions about what he called "this whole loan recycling thesis". The first was that, far from being exculpatory, Mr Bogolyubov's case was really an attempt to assert that the specific fraud on which the Bank relies (i.e., the making of the Relevant Drawdowns) was part of a much bigger fraud. He said that, even if it is right to use the label loan recycling, it was important to recognise that that the very act of replacing one shell company loan with another to avoid default by the first is itself a fraudulent and dishonest practise. I agree with that observation, which is also reflected in the views of Bryan J when describing in *Yurov* at [738] what in that case was called "the balance sheet management exercise", which was intended to and did mislead the relevant regulator.

1146. Furthermore, Bryan J goes on to explain at [770] why the loan recycling explanation may not help Mr Bogolyubov on the issue of loss either. He said the following, the essential elements of which are equally applicable to the present case:

> "The second example … is the Bank providing funds to companies in the off-balance sheet structure by making a loan to company X which has fallen due for repayment and the Bank lends money to company Y, which transfers the money to company X, which then repays its loan. It is said that the Bank has suffered no financial loss as the money will have returned to the Bank and the debtor has simply been changed from one off-balance sheet company to another. Quite apart from the Shareholders having been unable to prove all the links within the chain (the reality is far more complicated than this simplistic example), this example ignores all the other reasons that have already been addressed as to why "balance sheet management" is inappropriate, why each of the loans should not have been made and why it was not in the interests of the Bank to do so, the fact that more and more (larger loans) are needed to service interest and principal (in each case to companies where lending was neither justifiable nor justified), and the fact that at some point (as occurred) the music stops and the Bank faces a mass of defaulted loans. … I am satisfied that this is another reason why "balance sheet management" is not reasonable, or in the best interests of the Bank, and is in fact not in good faith and dishonest, as it not only exposes the Bank to the risk of financial loss, but actually results in financial loss to the Bank."

1147. Mr Hunter's second submission was that it is not right to use the label loan recycling, at least for the purported loans used in the Misappropriation, including those which

were said to document the entitlement of Borrowers to make the Relevant Drawdowns. He characterised it more as "theft recycling" on the basis that misappropriated money (i.e., some of the Relevant Drawdowns) were used to pay back other misappropriated money in circumstances in which the Relevant Loans themselves were void, and therefore did not give rise to the normal relationship of lender and borrower. He also pointed out that it was unclear whether Mr Bogolyubov's case was that this form of recycling was going on before the making of the Relevant Loans, or whether it was a form of recycling that could more accurately be called loan recycling similar to that which was described in *Yurov*, on the grounds that the loans themselves were not void.

1148. Thirdly, Mr. Hunter made what he described as the most fundamental of his three points, which was that it is no answer for a wrongdoer to say that he should have been sued on a bigger fraud of which the particular wrongs relied on are only part, unless that wrongdoer takes on the task both of proving the bigger fraud and of demonstrating that the loss from the bigger fraud is lower than that which flows from the specific wrongs on which he has been sued. Put another way, it is necessary for the wrongdoer in that context to demonstrate that the election which the victim of the fraud is entitled to make to choose the act of wrongdoing on which it sues, is likely to have led to an over-recovery.

1149. In my judgment, this last submission is an accurate statement of the approach which would be taken by an English court. It is well illustrated by *Re JD Group Ltd, Bhatia v. Purkiss* [2023] EWHC 775 (Ch), an appeal from an ICC judge in a case brought by the liquidator of a company in the mobile phone business against its director for losses sustained by the company as a result of a missing trader fraud. The claim focused on a single VAT quarter and 12 fraudulent transactions, even though the background included 530 transactions over a longer period extending both sides of the chosen quarter. The grounds of appeal included one on quantum to the effect that the judge should have assessed damages on the basis of the difference between the actual position of the company and the position it would have been in if it had decided not to enter into the mobile phone business at all. The argument was based on what was said to be the judge's finding that the whole of the business was illegitimate.

1150. Sir Anthony Mann dismissed the appeal on two bases. The first was that he was not satisfied that the ICC judge had really made the finding of illegitimacy on which the submission was made and the second, which is the one which matters for present purposes, was that the point failed as a matter of principle in any event. He explained the position at [67] of his judgment as follows:

> "For the purposes of the misfeasance claim each transaction which was entered into which was done as part of a fraudulent scheme was a separate breach of duty. They are each capable of supporting a separate damages claim, and can be aggregated, as here, to see what damages have accrued in a particular period. Unless the defendant somehow seeks to say that it is artificial to do that because the transactions were part of a much bigger fraud which has yielded some overall profit, so loss was not caused by these individual transactions (an argument which would be very difficult to run in any event), then it is appropriate to take the fraudulent and wrongful transactions in this case and to see what damages flow from them. Of course, the defendant in this case is not alleging some wider fraud which protects him from the consequences of the narrower one, so the point does not arise."

1151. I agree with this statement of principle and am satisfied that Ukrainian law is to the same effect. As Mr Beketov explained, where there are two separate tortious acts, such as the making of two separate purported loans, there is no rule of Ukrainian law that would oblige the victim to sue the wrongdoer in relation to one instance of misappropriation rather than the other. The correct approach is that the victim can choose which instance of misappropriation to sue upon, but would not be permitted to double recover. This is consistent with Mr Beketov's view that, under Ukrainian law, where tortfeasors jointly cause harm to a victim, he may elect to sue either of them separately or both of them for the full amount, provided that they do not ultimately double recover. He says that this is clear from Article 543 of the Civil Code and I agree with the opinion he has expressed.

1152. This is entirely consistent with English law's approach to election as between different causes of action arising out of the same events, which itself underpins the principle expressed in Sir Anthony Mann's decision in the *JD Group* case. Thus, where goods are misappropriated from a victim and pass through the hands of multiple parties, each of the intervening recipients of the goods is liable in conversion for the value of the goods (i.e. the loss suffered by the victim) even if such a person has not caused any additional loss over and above that caused by the original thief (*Kuwait Airways v. Iraqi Airways (No 4 & 5)* [2002] 2 AC 883 at [81]-[82]) and, as Bryan J explained in *Lakatamia* at [938], where there are successive torts:

> "So far as causation is concerned, as a general principle of tort law, it is no answer for the defendant to say that, but for his wrongdoing which has in fact resulted in loss, the same loss would have been suffered because of some other tort or legal wrong was or would have been committed at a later point in time whether by the defendant or someone else. The principle in summarised in McGregor on Damages, 21st ed., at paragraph 8-007 as follows:
>
> > "the "but for" test is usually applied by asking whether but for the wrongdoing the loss would have been lawfully suffered. This qualification ensures that a victim is not made worse off by further wrongdoing" (original emphasis)"

1153. The Bank then submitted that, even if it were true that the Relevant Drawdowns were all part of a much larger fraud, involving fraudulent extractions from the Bank all committed in breach of duty and all causing the Bank harm, it is entitled to take only the Relevant Drawdowns and sue for full compensation for the harm they caused. I agree with that submission. I also agree with the Bank's further submission that, if the Defendants wish to advance the argument that the election to sue on those breaches of duty is artificial as it would lead to over recovery on the basis that it was part of some wider fraud and looking at matters as a whole there is a lesser loss or profit, that is a matter which the Defendants themselves must prove. In *JD Group*, Sir Anthony Mann rightly described that as a very difficult argument, because it would require the Defendants to demonstrate with proper particularity what the bigger fraud was from start to finish, and show that the loss from that bigger fraud was less than the part on which that the victim has elected to sue.

1154. It is also an answer to Mr Steadman's suggestion that the court should consider the net financial position of the Bank when assessing its loss, and for that reason should have regard to the use to which the proceeds of Relevant Loans had been put; his concern

being that otherwise there would be scope for problems of double recovery and unjust enrichment to arise. For the reasons I have already explained, any question of double recovery is quite separate from the question of the Bank's entitlement to elect to sue for compensation for some but not all of the harm that it might have sustained by the Defendants' unlawful conduct. If the Defendants had wished to allege that the compensation should be limited to some form of net loss, or reduced because some other tort or legal wrong was or would have been committed at a later point in time whether by the defendant or someone else, and no such case of a bigger or more extensive fraud is pleaded, it will run into the difficulties of principle explained and applied by Bryan J in the *Lakatamia*.

1155. The evidential difficulties which any such defence would face is readily apparent from the fact that the Bank did, in any event, collapse with a huge accounting loss, which was far bigger than the compensation for which the Bank sues in the present case. It follows, so the Bank submitted and I agree, that the Use of Funds Defence does not work as a matter of principle because it requires the Defendant to plead and prove that the Relevant Drawdowns on which the Bank has elected to sue are all part of a bigger fraud which caused a total loss which was lower than the loss for which compensation is claimed as a result of their unlawful acts. Not only was this not pleaded, but the evidence on which Mr Bogolyubov sought to rely in the form of Mr Steadman's report was both selective and limited in its reach. Indeed, it does not really even purport to support the width of the case required to be proved in order to get such an argument off the ground.

1156. In my judgment, this argument is wrong as a matter of Ukrainian law, which can be summarised by reference to two principles which were agreed by the experts:

i) The unlawful taking of the Bank's money pursuant to a Relevant Drawdown under a void Relevant Loan is harm in the form of the taking of the Bank's property, which occurred when the Relevant Drawdowns were made. That is properly to be characterised as a misappropriation under the law of Ukraine because an unlawful act has caused the Bank's property to be taken by another (the Borrower).

ii) The use of the funds by a wrongdoer (the Borrower) to repay other liabilities, if and to the extent that this occurred, cannot as a matter of Ukrainian law have reduced the *prima facie* loss for which the Bank is entitled to compensation under Article 1166. To the extent that Mr Alyoshin's agreement was qualified on the basis that what was said in *Yurov* at [1193] (see paragraph 1127 above) does not represent the law of Ukraine where the repayment of the Relevant Loans have themselves been repaid using the proceeds of another unlawful loan, I have already explained why that is not an answer, anyway on the facts of this case.

1157. The Bank also submitted that one of the problems with the analysis put forward on behalf of Mr Bogolyubov was that it proceeded on the erroneous basis that Relevant Drawdowns were just ledger entries, involving nothing more than a simple change in the name of the borrower, and that for that reason there was no theft from the Bank and nothing has been appropriated. The way the point was put by Ms Montgomery was that the Relevant Drawdowns did not amount to a deprivation of the Bank's property giving rise to harm under Article 1166. They were said just to be ledger entries which created

new money in the hands of the Borrowers but without depriving the Bank of any of its money. This was essentially the same point as Mr Bogolyubov's answer to the thief-in-a-bank-vault analogy to which I have already referred.

1158. I agree that this argument cannot be sustained in the light of the agreed expert evidence. While what occurred was undoubtedly the making of a series of ledger entries, the experts agreed that the movement of money (recorded by ledger entries) from the Bank to the bank account of a customer is a deprivation of the Bank's funds. This was the agreed position because, as the experts said in their joint statement, money, whether in the form of cash or in a bank account, is a form of property and in appropriate circumstances (and provided that all other elements are present) loss of money is actionable under the Ukrainian law of tort. They confirmed that "it makes no difference to the Bank's claim that at all times the monies involved in the Misappropriation remained in accounts held at the Bank".

1159. Mr Beketov's crisp explanation of the position, with which I agree, was that "an electronic transfer of funds from one person to another is thus capable of constituting harm to the transferor." He then went on to explain, by reference to Article 1066 of the Civil Code, that the funds so transferred became the funds of the customer with the consequence that "The Bank has no right to determine or control use of funds of the client and to establish other than prescribed by the agreement or the law, limitations of its [client's] right to use funds in its own discretion". This is also the case where a bank's money has been transferred to a customer's account pursuant to a void transaction (such as a fraudulent loan agreement). He said that, unless the customer agrees that it may do so, the bank cannot at its discretion transfer those funds out of that customer's account, without first obtain a court judgment entitling it to do so.

1160. It was also suggested on behalf of Mr Bogolyubov that there was therefore no loss. In my view this too is a submission which does not work as a matter of Ukrainian law. What matters for the Bank's claim is the amount of compensation required to effect *restitutio in integrum* for the harm caused by the unlawful conduct in the form of the Relevant Drawdowns. Even if there was no accounting loss because, in accounting terms, the position is what might be characterised as flat in the sense that the Bank has lost by a misappropriation, but has then gained through the repayment of an impaired debt is irrelevant. This is because, the use of funds principle means that the use to which misappropriated money is put is ignored in assessing the loss caused to the Bank by the breach of duty or other unlawful act committed in effecting the misappropriation in the first place.

The Repayment Defence: Asset Transfers

1161. The Asset Transfers were also advanced by the Defendants as part of the Repayment Defence, although the analysis was slightly different from the way in which the case was put in relation to the making of the Intermediary Loans and the New Loans. The Defendants contended that, between March 2016 and September 2016, a credit value attributable to each of the Transferred Assets was applied in the Bank's books to reduce the balances outstanding on the Relevant Loans. I have summarised what happened during that period, and how it related to the Bank's Restructuring Plan, together with

the actual mechanics of the Asset Transfers in those sections of the judgment which start at paragraphs 485 and 528 above.

1162. Against that background, the Defendants also submitted that the Bank had always accepted that the amount outstanding under the Relevant Loans was reduced or discharged to the extent of the applied credit value of the Transferred Assets. This last submission was wrong. As with the Cash Repayments, it was always the Bank's pleaded case that the Asset Transfers only reduced the loss claimed against the Defendants arising out of their unlawful conduct in procuring the Relevant Drawdowns, and only reduced the balances on the Relevant Loans, to the extent of the true value of the Transferred Assets. It was always its case that the applied credit value was to be ignored, and that for the purposes of assessing both the amount outstanding under the Relevant Loans and the extent of the loss sustained as a result of the unlawful conduct, Ukrainian law only required a reduction to the extent of the true value of the Transferred Assets.

1163. Thus, it appears from paragraph 28K of the Bank's Reply that its case is that the purported reduction of the outstanding balances under the Relevant Drawdowns were only "purported" and, to the extent that Transferred Assets were improperly overvalued, their receipt by the Bank had no effect either on the amount outstanding under the Relevant Loans or on the loss which the Bank sustained as a result of the unlawful conduct which procured a Relevant Drawdown. To this extent, the Bank's case in answer to the Repayment Defence as it applies to the Asset Transfers is the same as the Repayment Defence as it applies to the Cash Repayments.

1164. However, the Bank does accept that, according to its own transactional data, between March 2016 and September 2016, the Original 2016 Values attributed to each of the Transferred Assets was applied to reduce the balances outstanding on Relevant Loans (to the extent of US$538 million and UAH 1.296 billion) and Intermediary Loans which were not also Relevant Loans (to the extent of US$123 million and UAH 1.276 billion). Its case is that it is only required to reduce the loss for which it claims in these proceedings by the true value of a Transferred Asset, and only to the extent that the true value is properly attributable to the repayment of a Relevant Drawdown.

1165. The Individual Defendants dispute this approach. It was Mr Kolomoisky's case that the Bank is required to give full credit for the value of each Transferred Asset, either as stated in the mortgage agreement under which it was transferred or as stated in its accounts with each Relevant Borrower or Intermediary Borrower, if different. He denied that the Bank was entitled under Ukrainian law to give credit by reference to any smaller sum which it may now regard as the true value of a Transferred Asset. The way the point was put in argument by Mr Howard was that, if the assets were overvalued and that caused the Bank to give too much credit to the Borrowers, then the Bank would have a claim in tort against whoever was responsible, but that would be a different claim in respect of a different wrongful act and a different loss.

1166. It was also submitted on his behalf that this was the case even if the mortgage was void because, in those circumstances, the Bank was under a duty to give restitution of the assets transferred under what was an invalid transaction pursuant to Article 216 (as to which see above). Not having done so, it was not now open to the Bank to assert the invalidity of the Asset Transfers or the terms on which they were made.

1167. In his evidence, Mr Beketov accepted that, as a matter of Ukrainian law, in the case of a valid loan, once a mortgagee enforces the mortgage and credits the borrower's account with the value of the asset as set out in the mortgage document, the loan is discharged (anyway *pro tanto*) by virtue of the bank having exercised its rights as mortgagee. He also accepted that any liability of a third party in tort for procuring that loan will be extinguished because (and to the extent that) the loss caused by his tortious conduct is coextensive with the liability of the borrower.

1168. It was also essentially common ground that the position under Ukrainian law is different where the loan is void. It was agreed between the Ukrainian law experts that, in that situation, a mortgage agreement securing, or rather purporting to secure, the invalid loan is also invalid and any terms, including valuations within it, are not binding on the parties. This view was justified by Article 548(2) of the Civil Code. Mr Beketov's view was that this also applied to any inflated values recorded in the Bank's transactional data, both because the agreement, being void, is of no effect, and because any reduction to the Bank's loss by such inflated value would result in the Bank not being fully compensated for its loss.

1169. Anyway by the conclusion of the trial, it was not suggested by the Defendants that, where the loan was invalid, the mortgagee was bound by the valuations in the mortgage agreements. However, the issue which did not appear to be agreed between the experts was the consequence of the Bank's decision to credit the Borrowers with the amounts that it did. In this context the Bank's failure to give restitution was said by the Defendants to prevent the Bank from denying that the amounts recorded in the Bank's books continued to bind the Bank to those credit values for the purposes of assessing the amount of the Bank's claim for compensation for the losses it says that it suffered from the Individual Defendants' unlawful acts.

1170. As to this, Mr Beketov accepted that, where the Relevant Loan and any mortgage granted as security for it are void, the starting point is that the parties (and in the current context the party which matters is the Bank) are *prima facie* under an obligation to give restitution of any property transferred under it. It is not in issue that the Bank has not taken any steps to give restitution of the Transferred Assets, but Mr Beketov gave evidence that this did not have the consequence for which the Defendants contended. He said that, if the Individual Defendants were acting in bad faith or seeking to cause harm to the transferee by reason of the transaction of transfer, the restitution to which they would otherwise be entitled would be refused as an abuse of right contrary to Article 13(2) and (3) (a provision which I have considered earlier in this judgment).

1171. In Mr Beketov's opinion, a sufficient abuse would be established if the Bank were to prove that the Relevant Loans and Intermediary Loans were purportedly secured by pledges of no (or insufficient and/or overstated) value, and that the pledgors acted in bad faith or did so in order to give a false impression that valuable security had been provided in order to facilitate the Misappropriation or to conceal the harm caused to the Bank by the Misappropriation. The Bank accepted that, for this argument to prevail, it could not both deny restitution and retain the benefit of the relevant Transferred Asset. It must therefore credit those assets at their true value in partial discharge of both the Borrowers' liability under the Relevant Loans and the Defendants' liability as tortfeasors for procuring those loans. I do not think that Mr Alyoshin had a credible answer to this evidence.

1172. Mr Beketov also agreed that, as a matter of Ukrainian law, it is still open to a mortgagee to choose to accept a mortgaged asset in discharge of the borrower's liability secured by the mortgage, even where the mortgage and the loan agreement in relation to which the mortgage was granted are both void. Put another way, he accepted that, if the mortgagee bank chooses to accept an asset which had been valued in the mortgage, and credits the agreed value of that asset to the borrower's account, this will have the effect of discharging the borrower's liability to make restitution, anyway to the extent of the value attributed to that asset in the mortgage document.

1173. Thus, where a bank has made a choice to take that course, and credits the account of the borrower to which a void loan has been made with the value of the asset charged by the void mortgage, the liability of the relevant borrower will be discharged pro tanto and the liability of the third party tortfeasor who procured the arrangement of the relevant loan and any loss will have been eliminated. The evidence did not address the question of how that choice might be made, but as I understood it, the argument was simply that the entry of the credit value of a Transferred Asset in the books of the Bank by way of reduction in the outstanding balance on the Borrowers' loans was sufficient for this purpose.

1174. That seem to me to be an ambitious submission. There was no assistance from the experts on the way it needed to put as a matter of Ukrainian law and, even looked at through English eyes, the circumstances would have to be such that the Bank thereby committed to not reversing the entry in due course if and when it became apparent that the asset was overvalued. That will all depend on the surrounding circumstances. In this case, I have real difficulty in seeing how, on the facts, there is any basis for alleging an irrevocable commitment to accept the credit value (and only the credit value) figure in discharge of all or any part of the amount outstanding from the Borrower. There was no real explanation as to why an irrevocable election of that sort might apply, whether as against the Borrower or as against the Defendants as tortfeasors. In any event, the point is inconsistent with the fact that, from the start of the process of making the Asset Transfers, the NBU had always made clear that the values the Bank was seeking to attribute to the Transferred Assets seemed to them to be grossly overinflated: see the description of what occurred in paragraphs 485 to 532 above and my conclusion that the evidence does not support a conclusion that what are described as "NBU verified values" were in fact accepted by the NBU as correct for capital adequacy purposes.

1175. In their closing submissions, counsel for Mr Kolomoisky also submitted that, if there were to be any scope (which they said there is not) for the Bank to ignore the credits it gave to the Borrowers in respect of the Transferred Assets so as to claim damages from the Individual Defendants on the basis that the Borrowers' liabilities somehow remained outstanding, this would be a clear case for the application of the principle of *venire contra factum proprium*. I have already considered this doctrine in paragraphs 1119 to 1121 above, from which it can be seen that there are a number of requirements for its application.

1176. But, quite apart from the fact that the Defendants did not formulate a case of unfairness or bad faith on the part of the Bank, the point which requires emphasis in this particular context is one of reliance. I think that Mr Beketov's evidence that reasonable reliance to the detriment of the Defendants is required for the *venire contra factum proprium* to apply (supported as it is by the resolution of the Supreme Court in case No. 390/34/17 *Person 2 v. Satori-S LLC*) is more compelling than Mr Alyoshin's opinion that it is not.

1177. It was then said in Mr Kolomoisky's closing submissions that:

> "… even if there is a need for detrimental reliance it is clearly satisfied in this case to the extent that [Mr Kolomoisky] allowed assets to be transferred to the Bank on the understanding that the Relevant Loans would be repaid to the extent of the valuations in the Bank's books, at any rate insofar as [Mr Kolomoisky] did not dishonestly cause the assets to be overvalued."

1178. In the light of what occurred, I do not accept that it would have been reasonable for the Individual Defendants to rely on any such credit in the outstanding balance on the Borrowers' account in that manner. In the absence of evidence to the contrary, as to which there is none, it is not possible to make any finding that Mr Kolomoisky (or indeed the other Defendants) had the understanding alleged, or relied to their detriment in the manner suggested. Even if there were to be such evidence, it is far from clear that, in light of the Individual Defendants' knowledge that they were not fully complying with the NBU's requirements for recapitalising the Bank while the Asset Transfers were taking place, it would have been reasonable for them to rely on the credit value applications in the manner alleged. In my view, the way that the process proceeded is inconsistent with any suggestion that the offer of further security as part of the capitalisation process had anything to do with the suggested understanding.

1179. It follows from this, that I have concluded that the loss for which the Individual Defendants are liable is only capable of being reduced or discharged to the extent of the true value of the Transferred Assets. It was only to that extent that the claims made against the Borrowers in respect of the Relevant Drawdowns were reduced or extinguished.

1180. I also consider that this argument fails for another reason. It was Mr Beketov's evidence that the defence would not be available if the Individual Defendants were not themselves acting in good faith by being a party to some form of fraudulent overinflation of the security in which the overstatements were made to give a false impression that valuable security had been provided in order to facilitate the Misappropriation or to conceal the harm caused to the Bank by the Misappropriation.

1181. This was not seriously challenged by the Defendants, although Mr Howard said that, as a matter of evidence, that could only be the case in relation to the particular assets where significant overinflation had occurred because otherwise, an inference as to bad faith could not properly be drawn. I do not agree with this last submission. In my view, inferences of dishonesty, bad faith and overinflation may well be appropriate when looking at the Asset Transfers as a whole, even though some parts of the over-inflation were significantly more egregious than others. In my judgment, that is the situation in the present case.

1182. Before considering the expert valuation evidence on the Transferred Assets, there are two preliminary points of substance which go to the bad faith of the Individual Defendants in the context of the Asset Transfers. The first is the evidence which deals with the ownership of the Transferred Assets. If established it would be important corroboration of the Bank's case that the Individual Defendants were themselves involved in the Asset Transfers. This would both further undermine the Repayment Defence for the reasons I have just considered. As will appear I have reached the conclusion that neither of them have been truthful or straightforward in relation to this

aspect of the case, a conclusion which is also capable of further evidencing the Individual Defendants' likely role in the Misappropriation. The second relates to the valuation of the Share Pledges, which was an issue in the proceedings but no longer is. However, what occurred in that context has affected my assessment of the likelihood of a deliberate manipulation of the values of the Transferred Assets and to that extent is relevant to an overall assessment of the Defendants' approach to the implementation and subsequent attempts to evade the consequences of the Misappropriation.

The ownership of the Transferred Assets

1183. It was at the heart of the Bank's case that all of the Transferred Assets belonged to one or other of the Individual Defendants or were assets in which one or both of them had a significant direct or indirect ownership interest. I cannot rule out the possibility that neither of the Individual Defendants had any interest in a small number of the Transferred Assets, but the evidence points to that being improbable. There are a number of reasons why, applying the balance of probabilities, I am satisfied that the Bank has established that, whatever the identity of the Asset Transferor, all of the Transferred Assets were in the ultimate beneficial ownership of both of them, and in large part their ultimate beneficial ownership was held in equal shares.

1184. The first reason is the extent of the Transferred Assets in respect of which the Individual Defendants have admitted an interest. They made these admissions in an annex to Mr Kolomoisky's response dated 30 July 2021 to a request for further information served by the Bank. On 22 June 2022, Mr Bogolyubov asserted through his solicitors that he had not been able to verify the information in Mr Kolomoisky's response in order to provide confirmation that the extent of his beneficial ownership of the Transferred Assets was in fact accurately recorded, but he accepted that they were accurate for the purposes of these proceedings.

1185. Thus six of the seven items of real estate (Hotel Mir, Hotel Zirka, the Training Centre, the Pidgorodnye Airfield situated at 2 Druzhby Street, Sloboshansky Settlement, Dnipropetrovsk Oblast (the "Airfield"), an office building at Muzeinyi Lane, Kyiv (the "Kyiv Office") and the Stadium) are admitted to have been wholly beneficially owned by the Individual Defendants immediately prior to the transfer. They were owned by them in the proportions 50/50 apart from the Stadium, which was owned as to 54.5% to Mr Kolomoisky and as to 45.5% by Mr Bogolyubov. The only real estate asset which is not admitted to have been wholly beneficially owned by the Individual Defendants is the Okeanmash office building in Dnipro which is said to have been wholly owned by Petro Klymenko.

1186. The Defendants deny that the nine aircraft, two manufactured by Airbus, four by Boeing and three by Embraer, were owned by the Individual Defendants at the time of the Asset Transfers. It is their pleaded case that they were owned at the time of the transfer by Viktor Shkindel. However, it is admitted that the majority of the petrol stations and OSFs were owned at the time of transfer by companies in which the Individual Defendants beneficially owned a majority stake. Of the 246 petrol stations, the Individual Defendants had an admitted majority stake in 180 of them; there were 28 in which they deny having had any interest. Of the 74 OSFs, the Individual Defendants had an admitted majority stake in 44 of them; there were 26 in which they deny having

had any interest. Apart from some *de minimis* outliers and interests held by Igor and Gregoriy Surkis who are said to own more than a *de minimis* interest in a few of the petrol station and OSF owning companies, two individuals and their families (Iurii Kiperman, and Igor Palytsia) are said to be the owners of almost all of the remaining interests.

1187. The second reason is that it remained the case that the Individual Defendants continued to hold more than 90% of the Bank's shares, and it was those interests which would have been most adversely affected by non-compliance with the recapitalisation requirements of the Restructuring Plan insisted on by the NBU. In other words, the Individual Defendants had substantially the greatest economic interest in recapitalising the Bank in accordance with the NBU's requirements.

1188. The third reason is linked to the second. There is no obvious reason, and none is suggested in any evidence adduced by the Individual Defendants, as to why any third party would consent to their assets being used as part of the Asset Transfers, in any event without being compensated for doing so. As to compensation, there is no evidence that any of the third parties said by the Individual Defendants to have had interests in the Transferred Assets acquired any rights against the Bank or the Individual Defendants in exchange for the contributions to the Bank's capital that they would have made if they had been the true owners of the assets concerned.

1189. The fourth reason is that, at a General Meeting held on 28 August 2016, the Bank's 2015 financial statements were approved by the Bank's shareholders including the Individual Defendants. The agenda for the General Meeting, including items for the approval of the financial statements, was set at a meeting of the Supervisory Board held on 10 August 2016 at which both of the Individual Defendants were recorded as taking part. Those financial statements made clear in the following passage that the Transferred Assets emanated from both of the Individual Defendants, being described as "their own assets":

> "As a response to the NBU's requirement on improvement of credit quality of the Bank's assets, the Bank repossessed collateral to settle certain outstanding loans and advances to customers. In addition, the Bank's major shareholders, aiming to support the Bank's compliance with the regulatory requirements, contributed their own assets in the form of repossessed collateral to partially or fully settle loans issued to related and third parties. Negotiations on collateral repossession with the Bank's borrowers and the major shareholders commenced in 2015 and were generally completed by the end of June 2016, when the Bank became the owner of the respective assets and recognised them at the fair value of approximately UAH 31,845 million in its balance sheet as repossessed collateral."

1190. The fifth reason is that the whole of the contemporaneous documentation is consistent with the fact that Mr Kolomoisky was representing to the NBU that the contributions being made to the Bank's capital from the Asset Transfers came from him and Mr Bogolyubov as the Bank's existing shareholders. The Individual Defendants must have known that the NBU would have been interested in the involvement of any third party ultimate beneficial owners of assets to be transferred. No indication was given to the NBU (and no evidence was called by either Mr Kolomoisky or Mr Bogolyubov) that they were.

1191. I also accept the Bank's case that there are specific reasons relating to the aircraft, the Dnipro Office / Okeanmash office building and the interests in such of the petrol stations and OSFs as were not admitted by the Individual Defendants to be held by them, as to why the evidence points to their ultimate beneficial ownership being held by the Individual Defendants at the time they were transferred to the Bank.

1192. As to the nine aircraft, the evidence discloses an elaborate series of transactions involving a number of separate entities all of which, both as original transferors to the Bank and as ultimate transferees from the Bank, are likely to have been controlled by the Individual Defendants. The next paragraphs of this judgment explain my findings as to what occurred.

1193. Each of the nine aircraft was owned until the end of August 2016 by one of three Portuguese companies, Teide Servicos de Consultoria LDA ("Teide"), Goiania Comercio e Servicos Internacionais LDA (" Goiania") or Pennylane Comercio Internacional LDA ("Pennylane"). It is not in issue that at various times both before and after the time of the Asset Transfers the ultimate beneficial ownership of each of these companies was held by the Individual Defendants in equal shares. Thus, the shares in each of the companies were pledged to the Bank pursuant to the Share Pledges and in that context the Individual Defendants both admitted that, throughout the period April 2013 to September 2014, all three companies were owned and controlled by them. All three companies also appear in their lists of assets disclosed in response to the WFO, which therefore reflected the position as at the point of issue of these proceedings.

1194. On 23, 24 or 25 August 2016, Teide, Goiania and Pennylane each executed two or more bills of sale transferring all its rights, title and interest in such of the nine aircraft it then owned to a Belize company, Perser Holding Limited ("Perser"). The Defendants' pleaded case is that, anyway when held by Perser, the ultimate beneficial owner was Mr Shkindel, although the bills of sale do not evidence the terms on which that beneficial interest came to be transferred out of the Individual Defendants' ownership, as previously held through Teide, Goiania and Pennylane. However, Perser did not own the aircraft for more than a fleeting moment because in each instance, there was then an immediate transfer on to the Bank's Cyprus Branch. Indeed, on 22 August 2016, the day before the bills of sale were executed, the nine aircraft were recorded in the Bank's transactional data with an Original 2016 Value of US$163 million, which was then applied to reduce the recorded balances on a number of loans, including seven of the Relevant Loans.

1195. On the same day that each aircraft was transferred by Perser to the Bank, the interest the Bank had received in the relevant aircraft was transferred on again by bill of sale to Dilorsano. The total price payable under all nine Dilorsano sale agreements was US$163,891,088.30, which reflected the amount of the credit value applied by the Bank in reduction of the balances under (amongst others) the seven Relevant Loans. However, the striking aspect of this part of the series of transactions was that, even leaving aside any discrepancy between the price itself and the true value of the nine aircraft, the terms of the transfer were so uncommercial from the Bank's perspective that I think that it was justified in describing them (as it did in its closing submissions) as a shockingly bad deal.

1196. There were a number of reasons why the deal was so bad for the Bank, starting with the fact that the bulk of the agreed price under each sale agreement was only payable as a

bullet payment (US$104.4 million) after 120 months. For the remainder of the period very small payments were to be made by Dilorsano to the Bank (for the most part less than 1% of the amount outstanding (described as the buyout price)), part of which was to be applied in reduction of the buyout price and part of which was in effect equivalent to a very small interest payment. Deferred payment on such terms was very much more advantageous to Dilorsano than it was to the Bank, but this was exacerbated by what was to occur in the event of non-compliance by Dilorsano with its obligations under the sale agreement. This was a likely eventuality in light of the age of the aircraft and the reduction in their value over the course of the 10 year deferral period.

1197. On such non-compliance by Dilorsano, it was open to the Bank to withdraw from the agreement and take over and sell the aircraft at a price not less than that stated by an independent appraiser chosen by the parties. However, if the proceeds were insufficient to cover Dilorsano's liabilities to the Bank, including the buyout price, Dilorsano would not be liable to the Bank for any shortfall and would be released from any further liability under the sale agreement. Dilorsano executed a pledge agreement as security for its obligations under the deferred price sale agreement, described in the pledge as credit facilities extended by the Bank to Dilorsano in a maximum principal aggregate amount of US$163,891,088. However, the pledge agreement did not affect the release and did no more than secure the Bank's ability to sell the aircraft in due course when entitled to do so. In the event, I did not understand it to be in dispute that, as at 16 June 2023, the net amount of principal paid by Dilorsano to the Bank under these arrangements was US$12.3 million, and there is no evidence that any further payments have been or are likely to be made to the Bank.

1198. There are some documents which evidence that Dilorsano was recorded at the time of the Asset Transfers as being in the ultimate beneficial ownership of Ms Kravchenko. As I have explained earlier in this judgment, she was an employee of PBC and a recorded beneficial owner of interests in a large number of Borrowers and Intermediary Borrowers. There is also documentation which evidences a transfer of the beneficial ownership of Dilorsano from Ms Kravchenko to Mr Shkindel in the middle of September 2016. This was an inexplicable transaction, because it would reflect a transfer in which the same individual was the ultimate beneficial owner of both the transferor of the aircraft to the Bank and the transferee of the aircraft from the Bank, both of which transfers occurred within a day of each other.

1199. Although Mr Shkindel does not feature as a nominee for other entities in which the Individual Defendants held beneficial interests to the same extent as Ms Kravchenko, it is most unlikely that he would have held any interest in Dilorsano (or indeed Perser) on his own account. He had a longstanding relationship with entities connected to the Individual Defendants, having most recently been a director of PJSC Aviation Company Dniproavia ("Dniproavia") and was the general director of the airport it operated at Dnipropetrovsk at the time of the Asset Transfers. The salary he was commanding in 2016, by which time he had moved to SV-EZHEN LLC, is wholly incompatible with any real possibility that he was the true beneficial owner of Dilorsano, an entity which had apparently just acquired nine aircraft from the Bank and incurred liabilities of in excess of US$160 million under that transaction. He had a number on the Black and the evidence overall points to him having been an individual who was accustomed to acting in accordance with Mr Kolomoisky's instructions.

1200. The evidence also supports a finding that both before and after the transfer of the nine aircraft from Teide, Goiania and Pennylane to Dilorsano (via Perser and the Bank), the aircraft continued to be operated by the same three lessees: Wind Rose Aviation Company (also known as Windrose Airlines) which operated the two Airbus aircraft, JSC Ukraine International Airlines ("UIA") which operated the four Boeing aircraft and Dniproavia which operated the three Embraer aircraft. There is some evidence that Mr Kolomoisky had a controlling interest in Wind Rose and that the other two are aircraft operators / lessors in which one or both of the Individual Defendants had an interest.

1201. Quite apart from the wholly uncommercial terms of the sale agreement by the Bank to Dilorsano, there is other evidence that, subsequent to the date of the Asset Transfers, the ultimate beneficial ownership of the aircraft remained with the Individual Defendants. Thus, in early September 2016 a list of assets prepared by Primecap continued to treat the aircraft as beneficially owned as to 50% by Mr Bogolyubov, while a month or so later an employee in the Bank's budgeting department (Ms Melnikova) was giving information to Mr Kolomoisky on intra-company transactions as between Wind Rose and Dilorsano in which she described Dilorsano as "aka Teide", thereby indicating that she at least continued to treat Dilorsano as if it were Teide. Mr Kolomoisky continued to be provided with information about Dilorsano's turnover by Mr Novikov and Ms Markova for some time thereafter. There is no explanation as to why he would have an interest in receiving the information that he did if he did not continue to have his beneficial interest in Dilorsano, itself the actual owner of the aircraft.

1202. In my judgment, all of these considerations point to a conclusion that it is more likely than not that the nine aircraft were not just in the ultimate beneficial ownership of the Individual Defendants prior to the transfer to Perser, but continued to be owned and controlled by them after they had found their way into the ownership of Dilorsano via Perser and the Bank as part of the Asset Transfers. In short, taken together with the more general factors I have described above, I am satisfied that the Bank has established that, both before and after the transactions relating to the nine aircraft I have described above, the Individual Defendants were their indirect beneficial owners, such ownership interests being held initially through Teide, Goiania, Pennylane and thereafter through Dilorsano.

1203. The position in relation to the other assets which were the subject of the Asset Transfers is more straightforward. It was the Defendants' case that the Okeanmash office building (also called the Dnipro Office) was not in the ultimate beneficial ownership of either of them. It was transferred to the Bank by Okeanmash LLC and was said by the Individual Defendants to have been beneficially owned by Petro Klymenko. I do not accept this part of their case, which is unsupported by any genuine independent evidence and is inconsistent with the surrounding circumstances.

1204. In particular, Mr Klymenko was a director of Paradiz LLC, which was one of the Borrowers. He was also involved in a different capacity as chairman of an insurance company in which the Individual Defendants accepted that they had an interest (although Mr Bogolyubov pleaded that he was not aware of his indirect interest at the relevant time) and which gave a guarantee to the Bank as purported security for the Bank's Relevant Loan to Prominent. This guarantee was absurd on its face because it

was limited to UAH 10,000, which was effectively useless as security for a Relevant Loan of UAH 134 million.

1205. Furthermore, Okeanmash was a name that was used for other companies in which the Individual Defendants had an admitted indirect beneficial interest. While I do not think that this evidence is as strong a connecting factor as the evidence linking the Individual Defendants to PBC through the original use of the word Privat in its name (see paragraph 263 of this judgment), in the absence of any contrary explanation, it does at least point to the probability that assets including the word Okeanmash in their description belonged to one or other of the Individual Defendants.

1206. As to the petrol stations and the OSFs, most of the interests which were not admitted to have been held by the Individual Defendants were recorded in the annex as being beneficially held by the Kiperman family. Yuriy Kiperman was a longstanding associate of both of the Individual Defendants and both he and his son Mykhaylo Kiperman had extensions on the Black. Mykhaylo Kiperman has already featured in my findings relating to the Corporate Defendants, because was also said to have been a beneficial owner of Milbert and (until March 2014) Ukrtransitservice. It was also accepted that he was recorded as an officer of a number of other companies in which both of the Individual Defendants also held admitted beneficial interests.

1207. There is also evidence that Mykhaylo Kiperman did not make the ultimate decisions in relation to the use to which these assets were to be put, a relevant and significant example of which was that Mr Kolomoisky was able to tell Ms Rozhkova that "if the aforesaid petrol filling stations fail, we will replace them with other ones". An analysis of the replacements offered amounted to a representation to the NBU to the effect that Mr Kolomoisky was able to procure that some of the petrol stations now said to be in the ultimate beneficial ownership of the Kipermans could be made available as part of the Asset Transfers.

1208. Another striking aspect of this part of the evidence is the other side of the coin. As with the other Transferred Assets, there is no evidence that any member of the Kiperman family ever treated any of the petrol stations of which they were said to be the ultimate beneficial owners as assets with which they were entitled to deal as if they were their own.

1209. This was well-illustrated by an analysis of the available evidence in relation to the 28 petrol stations transferred to the Bank as part of the Asset Transfers by Frontlight Media LLC ("Frontlight") and VK Amarant LLC ("VK Amarant"). The Individual Defendants' pleaded assertion (as particularised in an amended annex to Mr Kolomoisky's response dated 30 July 2021 referred to in paragraph 1184 above) was that the ultimate beneficial owners of those assets were the Kipermans. However, Frontlight only became an owner of its transferred petrol stations shortly before the Asset Transfers, having acquired them as a result of an in-kind contribution made by a company called Novel Estate LLC which itself was owned by a number of companies in which both Mr Kolomoisky and Mr Bogolyubov had disclosed an interest in the asset disclosure. There is no explanation for this connection via Frontlight and Novel Estate and, despite what has been asserted by the Individual Defendants, there is no supporting evidence to demonstrate that the Kipermans played any role in what occurred on their account or for their own benefit or to explain why it was in their interests for their assets to be used in this way.

1210. There was a similar story in relation to the petrol stations transferred to the Bank by VK Amarant as part of the Asset Transfers, also said to be assets of which the Kipermans were ultimate beneficial owners. The original owners were Cherkassy-oil-2008 LLC and Yunomi LLC. There is evidence that both Mr Kolomoisky and Mr Bogolyubov had interests in Cherkassy and more generally that Mr Bogolyubov has previously admitted to an interest in VK Amarant. As with the petrol stations transferred to the Bank from Frontlight, there is no supporting evidence to demonstrate that the Kipermans played any role in what occurred on their account or for their own benefit. The same can be said about the only other person said to be the ultimate beneficial owner of anything other than a de minimis interest in the petrol stations and OSFs: Mr Igor Palytsia, formerly the Governor of Odessa and described by Mr Kolomoisky as one of his close associates. There is nothing in the papers to demonstrate that he played any part in the Asset Transfers or to explain why it was in his interests for his assets to be used in this way.

1211. Mr Bogolyubov sought to distance himself from the Asset Transfers, a position which was consistent with his case on the Deeds of Waiver and Indemnity and his case that from July 2014 he had been acting at the sole direction of Mr Kolomoisky. Thus, and as I have already explained, although he was prepared to confirm that he was happy to proceed for the purposes of these proceedings on the basis that the information provided by Mr Kolomoisky's responses dated 30 July 2021 were accurate, he asserted through his solicitors that he was unable to verify that they were. The Bank submitted that his asserted inability to verify was a lie, and that the true position was that he had simply chosen not to verify what he knew was accurate in respect of the admissions made by Mr Kolomoisky and what was inaccurate to the extent that Mr Kolomoisky contended that others, such as members of the Kiperman family, were the ultimate beneficial owners of a Transferred Asset.

1212. I accept that Mr Bogolyubov's answer on this issue was misleading. It gives the impression that he was unable to verify any of the information, even though the Bank had been pressing for an answer for many months before. In my view it is plain that much of it was available to him, as partly evidenced by the disclosure he had given in the Tatneft Proceedings, relating to the period in which the Asset Transfers were taking place. Thus, Mr Bogolyubov said in his Tatneft disclosure that he had a 15% interest in VK Amarant while, as I have explained above, Mr Kolomoisky's case in these proceedings, said by Mr Bogolyubov to be accepted by him without the ability to verify, is that it was owned as to 100% by the Kipermans. There was a similar discrepancy in relation to a holding he had identified in the Tatneft disclosure as being a 29.727% interest in Ukr-Prom-Trade Ltd. In the particulars accepted by Mr Bogolyubov as accurate for the purpose of these proceedings (albeit unverified), Mr Kolomoisky originally listed this interest as being 100% in the beneficial ownership of the Kiperman family, although this was then changed in a re-amended version of Mr Kolomoisky's list to interests held as to 45% each by Mr Kolomoisky and Mr Bogolyubov and as to 10% held by Mr Palytsia and his family.

1213. In answer to Mr Bogolyubov's case that he was by then no longer involved in the affairs of the Bank save by acting in accordance with Mr Kolomoisky's instructions, a case which he was not prepared to support by attending to give evidence on his own behalf, the Bank relied on the fact that, for most of the period in which the Asset Transfers were being planned and implemented as part of the Restructuring Plan, one of the

substantial assets initially proposed to be transferred (Hotel Split valued at UAH 4.44 billion) was in the sole ownership of Mr Bogolyubov. It was only at the beginning of September 2016 that it was excluded from the list of assets to be transferred on grounds which are not entirely clear, but which appear to have related to the funding being provided by Sberbank Zagreb rather than any reluctance by Mr Bogolyubov to allow his assets to be used as part of the Asset Transfers. The Bank also relied on the fact that there was a significant amount of documentary evidence which established that both of the Individual Defendants were directly involved in identifying the assets to be transferred, the majority of which were assets in which they admitted they held an interest. In the case of Mr Bogolyubov that involvement was normally through Mr Anischenko, who (as I explained at the beginning of this judgment) was his personal assistant involved in the administration of some of his personal investments, although others, who were advising Mr Bogolyubov specifically in relation to his own position, included Mr Ruvinskiy. There is also some evidence of direct communication between Mr Bogolyubov and Mr Dubilet.

1214. The significance of my finding that all of the Transferred Assets were in the ultimate beneficial ownership of one or both of the Individual Defendants at the time of the Asset Transfers is that it demonstrates that both of them were much more intimately involved in the whole process of responding to the NBU's attempt to force a genuine recapitalisation of the Bank than they have been prepared to accept. It also makes it much more likely that they had a good idea of the true value of the Transferred Assets and knew that the credit values which were recorded in the Bank's books at the time of the Asset Transfers did not represent their true value. This in turn would give rise to a powerful inference of bad faith on the part of the transferor of the relevant assets, with the consequence as I have already explained that the Bank would not be bound by the credit values which were applied in its books as a result of the Asset Transfers. This is the case, whether or not it gave restitution of the Transferred Assets to the transferor, although if it did not do so, it would be bound to give credit for its true value, a consequence which the Bank accepts.

1215. As a matter of common sense, the greater the discrepancy between the credit value of a Transferred Asset and its true value, the more likely it is that the Individual Defendants as the true owners of the Transferred Assets will have known that the credit value given in the Bank's books was in fact an undervalue. Furthermore, there are a number of instances in which there is good evidence that the Individual Defendants must have known that the true value of a Transferred Asset was materially less than its credit value. I shall refer to the specific instances relied on by the Bank when explaining below my findings in relation to the true value of the relevant Transferred Asset.

Relevance of the Valuation of the Share Pledges

1216. It was always the Defendants' case that the 28 Share Pledges charged shares in 21 companies as security, for amongst other indebtedness, the Relevant Loans. The value of the Share Pledges was recorded in the pledge documentation as at the years ending 31 December 2013 (UAH 10.7 billion), 31 December 2014 (UAH 68.7 billion) and 31 December 2015 (UAH 110 billion) as summarised in tables prepared by the experts. The Defendants relied on this evidence in support of their argument that the Relevant Loans were always fully secured.

1217. It was the Bank's case not only that the Share Pledges were shams put in place as part of the Individual Defendants' efforts to conceal the Misappropriation, but also that the assets over which they were granted as security were grossly overvalued. The allegation of gross overvaluation was always likely to be established because even Mr Kolomoisky's own expert share valuer (Mr Travis Taylor) was of the opinion that their true value was only a small fraction of the values given in the Shares Pledges themselves as at the three chosen valuation dates. In short there was never any expert evidence to substantiate an argument that the values attributed to the underlying assets in the Share Pledges bore any resemblance to their true value.

1218. In the event, at the end of Day 17 of the trial, during the course of a timetabling discussion shortly before Mr Taylor was due to give evidence, Mr Howard announced that he was not going to call Mr Taylor and that he would not be cross-examining the Bank's expert (Mr Mark Bezant) on his evidence as to the value of the shares pledged by the Share Pledges. This meant that Mr Bezant's evidence stood unchallenged and established that (a) the value of the pledged shares as at 31 December 2013 was 3.6% of the value attributed to them in the Shares Pledges, (b) the value of the pledged shares as 31 December 2014 was 9.3% of the value attributed to them in the Share Pledges and (c) the value of the pledged shares as at 31 December 2015 was 11.5% of the value attributed to them in the Shares Pledges.

1219. The discrepancy between the values attributed to the shares in the Share Pledges and their true value does not just demonstrate that the Bank's security was deficient. The amount of the discrepancy is so large that, taken without more, it points to deliberate manipulation of the values which were recorded on the faces of the Share Pledges themselves. In my view this is confirmed by other documentation put in evidence during the course of the trial which establishes that these valuations were simply made up by employees within BOK. I was taken to two examples, the first of which was particularly striking.

1220. This first example was Feyen Consulting Limited's pledge of its shares in Goiania. The Share Pledge value as at 24 March 2014 was recorded as having been agreed between the Bank and Feyen Consulting as UAH 1.2 billion for 24.5% of the company's capital. It was then recorded in an amending agreement as having shrunk to a value of UAH 380 million as at 30 June 2014 (i.e. the value of the company is recorded as having collapsed from UAH 4.8 billion to UAH 1.5 billion in the space of three months). More dramatically still, a further amending agreement for the same Share Pledge dated 29 December 2014 recorded that six months later the same block of 24.5% of Goiania's capital was recorded as having increased in value to UAH 2.3 billion (i.e. a value for 100% of Goiania of approximately UAH 9.2 billion), a six-fold increase from the value given six months earlier.

1221. Just over a year later (on 12 January 2016), there were illustrations of similar wide disparities in the valuation of the same assets pledged under a Share Pledge. In a credit committee presentation supporting a loan to one of the Intermediary Borrowers, Retonga LLC, 100% of Goiania was given a value of UAH 7.35 billion, while on the very same day and apparently for the same meeting, a second credit committee presentation supporting a loan to another borrower, Sigmatreyder LLC, valued 100% of the equity rights in Goiania at UAH 9.26 billion. Two days later there was another credit committee presentation, which seems to have been prepared by the same individual who prepared the Retonga presentation, this time in support of a loan to

another Intermediary Borrower, Starma LLC. This presentation valued what were described as 100% of the profit participation rights in Goiania at UAH 14.27 billion, almost twice as much as the value which had been attributed to the equity interest two days earlier.

1222. I am satisfied that the only possible explanation for these otherwise inexplicable disparities in the declared value of the same security is that the employees within BOK who prepared the relevant documentation included figures which had no relationship to the true value of the underlying asset. I also find that this conduct must have been deliberate, because it is inconceivable that those same employees did not know about the value discrepancies, given the way in which the information was prepared and the identity of the individuals concerned. Despite their knowledge of those discrepancies, there is no recorded explanation for those discrepancies, a fact which gives rise to a clear inference that both those who prepared the information and those within the Bank to whom it was addressed (for the most part the members of the credit committee) must have been aware that the figures so recorded were not a fair or genuine reflection of the true value of the underlying assets.

1223. The second was the pledge by Panikos Symeou of his interest in 49% of the shares in Clendon Holdings recorded as worth UAH 37.6 billion as at 30 March 2016. A further amending agreement was then produced the following day which increased the valuation to UAH 44.5 billion. This conduct is consistent with a simple correction of the wrong figure in an earlier agreement. However it is also consistent with the employees concerned taking an entirely random approach to whatever figure was required for the purpose for which the presentation had been prepared, without any proper regard to what might have been the true value of the asset. In all the circumstances I think that the latter is much the most likely explanation for the discrepancy.

1224. In my judgment the way in which individuals within BOK approached their valuation of the Share Pledges is relevant to an assessment of the probabilities when it comes to analysing the evidence on undervalue of the Transferred Assets. The same department within the Bank was responsible for providing data for the valuations obtained for the purposes of the Asset Transfers. The extraordinary disparity in the Share Pledge valuations between their attributed value and what can now clearly be seen as their true value, the evident manipulation of the figures and the involvement of the same individuals in both exercises supports a conclusion that, when instructed to do so (instructions which I infer ultimately came from Mr Kolomoisky with the approval and consent of Mr Bogolyubov), those same individuals were prepared to act in a dishonest manner to achieve the similar end of giving the appearance that the Bank's capital position was more secure than in fact it was.

Asset Transfers: the expert valuation evidence

1225. A significant part of the trial was spent on the expert evidence adduced by the parties in relation to the value of the Transferred Assets. The Bank's evidence on the valuation of the petrol stations, the OSFs, Hotel Zirka, Hotel Mir and the office buildings was given by Mr Mark Bezant, a UK-based chartered accountant and a senior managing director at FTI Consulting LLP with 30 years' experience of valuing business assets,

including some located in Ukraine. He leads FTI's economic and consulting practice in EMEA. The Bank's evidence on the valuation of the Stadium, the Training Centre and the Airfield was given by Mr Paul Thomas, a valuer with 40 years' experience including over 25 years in Ukraine. He is the President and a partner in IRE USA Inc and IRE Ukraine LLC, which he described as a full-service appraisal firm based in Kyiv. The Bank's evidence on the valuation of the aircraft was given by Ms Olga Razzhivina, a UK-based ISTAT certified senior aircraft appraiser and a director of Oriel Consult Limited ("Oriel"), with over 20 years' experience in the valuation of commercial aircraft and engines.

1226. The expert evidence for the Defendants was all adduced by Mr Kolomoisky. Mr Bogolyubov did not call any evidence of his own, preferring, in order to avoid duplication, to adopt Mr Kolomoisky's submissions on valuation. The Corporate Defendants adopted a similar position, having obtained an order at the first CMC permitting them to rely on Mr Kolomoisky's valuation experts at the trial.

1227. Mr Kolomoisky's expert evidence came from two valuers. The first was Mr Brent Kaczmarek, a US-based chartered financial analyst and partner in the Arlington office of IAV Advisors LLC, with wide experience of valuing business assets throughout the world including in Ukraine. He addressed the value of all of the real property assets: the petrol stations, the OSFs, Hotel Mir, the office buildings, the Stadium, the Training Centre and the Airfield. The second was Mr Philip Seymour, who gave evidence for the Defendants on the valuation of the aircraft. He is based in the UK, is a director of the International Bureau of Aviation Group Limited ("IBA") and an ISTAT-certified senior aircraft appraiser with 28 years' experience in providing aircraft and appraisal services.

1228. All of the experts had relevant expertise, but I formed very different views of the quality of their evidence.

1229. Mr Bezant was an impressive witness. He gave careful and straightforward evidence, expressing his views with clarity and precision. It was obvious that he was experienced in giving evidence, but he did not come across as having been overtrained. Although in general he was on top of the material, there were occasions on which he had forgotten some of the detail. However, that did not impact upon his ability to assist the court on the central questions. There were a few occasions on which he came close to slipping into advocacy, but in the event he never did so and I do not consider that his evidence was ever anything other than a genuine and independent-minded reflection of his own views.

1230. In a judgment I gave in unrelated litigation (*Bank St Petersburg OJSC v. Arkhangelsky* [2022] EWHC 2499 (Ch) at [472]), I had criticised the quality of Mr Thomas' evidence as betraying a marked failure to recognise that his role was to assist the court by an independent and dispassionate statement of his views without descending into the arena to argue the counterclaimants' case on their behalf. Not surprisingly, he was taxed with this in cross-examination and accepted that the criticisms I had made of his evidence in that case were fair. However, his evidence in these proceedings was in marked contrast to his evidence in the *Bank St Petersburg* case. While he was firm in the views that he expressed, he did not cross the line into advocacy and explained the concepts on which he relied with clarity. He was confident in his opinions, and justifiably so. My overall impression was not just that he knew what he was talking

about, but also that he addressed the issues with which he had been asked to deal in a fair and balanced manner.

1231. I did not find Mr Kaczmarek to be a very impressive witness. He was too argumentative about the underlying data and always seemed to want to have a battle. When faced with accurate data that he did not like he tended to question its reliability and there were a number of occasions when he refused to agree the obvious. There were also occasions to which I will come in due course in which his evidence bordered on the misleading. He had a tendency to improvise, seemingly happy to speculate when it suited the case he was advancing on behalf of his client and sometimes thinking up answers on the spot without having thought through their plausibility. Overall, I formed the view that he found great difficulty in giving dispassionate evidence that could properly be regarded as independent.

1232. Both Ms Razzhivina and Mr Seymour gave concise evidence which reflected their honest opinions without straying into advocacy. However, Mr Seymour made a number of basic errors in his original report which were later corrected, but which caused me to have some concerns about the accuracy of what he had to say where he differed from Ms Razzhivina. I must also record that there was one other aspect of Mr Seymour's evidence which caused me real concern as to the seriousness with which he had undertaken his overriding duty to the court. In the ultimate analysis, what I shall now describe does not of itself mean that it was appropriate to disregard his evidence, but it does mean that I have found it necessary to scrutinise the foundation for his opinions with particular care.

1233. In two previous cases, *Pindell Limited v. Airasia Berhad* [2010] EWHC 2516 (Comm) and *ACG Acquisition XX LLC v. Olympic Airlines* [2012] EWHC 1070 (Comm), Mr Seymour's evidence had not been accepted by judges of the Commercial Court. In the second of those cases, *ACG* (at para 50), Teare J had held that Mr Seymour had not given sufficient consideration to his duty to the court not to omit matters which might detract from his stated opinion, having regard to some of the findings made by Tomlinson J in *Pindell*. The consequence of this in *ACG* was that Teare J was unable to rely on his evidence, save when accepted by the other expert.

1234. These criticisms took on a further level of significance in light of the judgment in *Peregrine Aviation v. Laudamotion* [2023] EWHC 48 (Comm) at [22], in which it was noted by Henshaw J that "Mr Seymour ought to have disclosed criticisms of his evidence in two previous judgments as part of or in conjunction with his expert report in that case". Henshaw J's judgment was handed down on 17 January 2023 but, despite this timely reminder of his duties, it was only six months later, a mere three days before his cross-examination in these proceedings, that Mr Kolomoisky's solicitors disclosed to the Bank's solicitors what had been said. In cross-examination, Mr Seymour said that he thought he had forwarded what had been said in *Peregrine* to the lawyers at an earlier stage. I have no means of knowing whether he did in fact do so, but I consider that he should have ensured that this information was made available to the Bank and the court much earlier than he did. In that respect he was in breach of his own personal duty to the court. This failing made an evaluation of the credibility of his evidence a more difficult task than would otherwise have been the case.

Asset Transfers: value of the Petrol Stations

1235. The credit value attributed to the 246 petrol stations (i.e. their Original 2016 Value) was UAH 6,341 million. Their Restated 2016 Value (based on a report prepared by Volyn) was UAH 1,852 million. The value attributed to them by Mr Bezant was UAH 1,869 million, which was very substantially less than their Original 2016 Value and marginally in excess of their Restated 2016 Value. The value attributed to them by Mr Kaczmarek was UAH 8,444 million (the mean between a discounted cash flow ("DCF") valuation of UAH 8,527 million and a market approach valuation of UAH 8,360 million), which was very substantially in excess of both their Original 2016 Value and their Restated 2016 Value. The difference between the parties' respective valuations was therefore UAH 6,575 million and the amount by which the Bank claimed that their Original 2016 Value exceeded their true value was UAH 4,472 million.

1236. The Defendants submitted that the fact that the Original 2016 Value applied by the Bank was less than Mr Kaczmarek's valuation itself gives the lie to the suggestion that these credit values were the result of fraud, or that the Bank has given excessive credit for the value of the Petrol Stations. I do not think that that follows. It all depends on the extent to which any overstatement of value by Mr Kaczmarek was driven by unreliable data and an erroneous application of other valuation inputs.

1237. The instructions given to the expert valuers were different. Mr Bezant was instructed to assess the market value of the petrol stations as at the date they were transferred to the Bank. In expressing his opinion, Mr Bezant used the definition of market value in the 2013 edition of the International Valuation Standards ("IVS"), being:

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

1238. Mr Kaczmarek was instructed to assess whether the Transferred Assets as reported in its 2016 financial statements were valued in accordance with International Financial Reporting Standards ("IFRS") 13, and, if they did not, to explain why that was and to provide his own independent valuation. He was also asked to give his opinion on compliance with IFRS 13 for the Bank's 2017 and 2018 financial statements. Mr Kaczmarek performed his valuation using a fair value standard, which he described as being:

> "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.. […] fair value is a market-based measurement, not an entity-specific measurement, and, as such, is determined based on the assumptions that market participants would use in pricing the asset or liability. The transaction to sell the asset or transfer the liability is a hypothetical transaction as at the measurement date that is assumed to be orderly and considers an appropriate period of exposure to the market.".

1239. In Mr Bezant's view, the choice of market value or fair value should not affect the valuation of the Transferred Assets. In Mr Kaczmarek's view, fair value and market value are very similar standards, although fair value is more prescriptive in its

implementation than market value. However, both experts agreed that the difference in standard of value did not drive any differences in their respective opinions.

1240. The same can be said of the differences between the experts on the chosen valuation date: Mr Bezant used 1 September 2016 being the midpoint in the period over which the Transferred Assets were transferred to the Bank, while Mr Kaczmarek used 31 December 2016, which is the date of the Bank's 2016 financial statements. These differences do not of themselves explain any of the differences between them on their valuations of the petrol stations, although it may affect the value of some of the other Transferred Assets.

1241. Having regard to the fact that Mr Bezant based his valuation solely on a DCF analysis, while Mr Kaczmarek based his as to 50% on a DCF analysis and as to 50% on what he called a market approach, the differences which did arise derived from a number of different factors. As Mr Bezant explained, the DCF analysis involves an estimate of cash flows for a forecast period until the business is considered stable, after which a terminal value is calculated. The terminal value is then intended to capture cash flows into perpetuity based on a long-term growth rate. Cash flows are then discounted back to the valuation date using a discount rate, usually the weighted average cost of capital ("WACC").

1242. The joint statement made clear that the three main areas of disagreement between the experts in their DCF analyses related to the volume of fuel sales, the application of the principles of return on new invested capital ("RONIC") and the application of the appropriate country risk premium ("CRP") in their assessment of the appropriate discount rate.

1243. Of these, the most substantial difference related to the respective assumptions they made about the volume of fuel sales, being the principal driver of a petrol station's value. The impact on their respective valuations was very substantial indeed, amounting to c.UAH 3.1 billion. The reason for the differences in the assumptions made by the experts as to fuel sales volume was that they both relied on different data produced by the Bank for different purposes. Both experts agreed that a reliable DCF valuation of the petrol stations can only be carried out if they are able to work with reliable fuel sales volume data. They also both agreed that the correct fuel volumes to use as inputs for valuation purposes is ultimately a question of fact for the court.

Petrol station valuations: fuel volumes

1244. In reaching his conclusions on the value of the petrol stations, Mr Kaczmarek had particular regard to three of the four reports which underpinned the Original 2016 Values for the petrol stations. The first of these four reports, which was not one which Mr Kaczmarek said he had used for fuel volume purposes, was a report prepared by Baker Tilly dated 12 May 2016 but with a valuation given as of 31 December 2015. There were then two reports prepared by Universal Commodity Exchange ("UCE") which valued all but one of the 246 petrol stations, one dated (and as of) 4 May 2016 using a DCF approach and the other dated (and as of) 12 May 2016 using a capitalisation approach. The final report was dated 18 August 2016 (but as of 30 June 2016) and was prepared by Veritas Property Management Limited ("Veritas"). It

valued 216 of the 246 petrol stations transferred as part of the Asset Transfers. The data provided to BT related to 2015 only, while the data provided to UCE and Veritas also related to the first half of 2016. For the purposes of his valuation, Mr Kaczmarek used the data provided to UCE and Veritas.

1245. Mr Bezant did not use these reports or the data contained within them for the purposes of his valuation. He used a combination of a later valuation report produced by Volyn in March 2019 and market data cross-checks. The Volyn report (together with other later reports prepared by Expert+) was the basis for the Restated 2016 Values as a result of which the Bank's 2016 balance sheet was restated in its 2018 financial statements. Volyn was not provided with historical operational data, but instead relied on the results of field studies and an estimation of fuel sales volumes from comparable petrol stations, an approach which Mr Bezant accepted in cross-examination was unusual.

1246. The reason Mr Bezant did not use the reports which underpinned the Original 2016 Values for the petrol stations was that he considered that there were fundamental problems with the data provided to the valuers, which had emanated from within the Bank. He explained how this was apparent from major discrepancies in the sales volume data, which was apparent from a comparison of the data provided to BT on the one hand and the data provided to UCE and Veritas on the other. The data purported to reflect the actual fuel sales volumes for the same petrol stations during the same period in 2015. It should therefore have been the same when presented both to UCE / Veritas and to BT, but that was not the case. This was illustrated by a detailed appendix exhibited to Mr Bezant's supplemental report, which bears out the fact that there are fundamental inconsistencies in the data for all categories of fuel (A-92 petrol, A-95 petrol and Diesel) which UCE / Veritas and BT were informed had been sold in the petrol stations and which were the subject matter of their reports. If the figures were genuine, they should have been the same, but they were not.

1247. The Bank submitted that the consequence of these discrepancies was that the fuel volume figures on which UCE / Veritas and BT all based their conclusions were highly unreliable. Indeed, it went further and challenged the authenticity of the data not just by comparing what was provided to UCE / Veritas on the one hand and to BT on the other, but also on the basis that there was clear evidence that the data had been deliberately manipulated by employees within BOK. To explain why that is the case, it is necessary to go back to early 2015.

1248. On 19 March 2015, Archem Chernyshov, a lending specialist for monitoring credit and leasing operations within BOK, prepared a document referred to at the trial as the Topchy spreadsheet. This was prepared for security valuation purposes and recorded two sets of monthly fuel volume data for 994 petrol stations (including 243 of the 246 transferred as part of the Asset Transfers) for the period January 2014 to February 2015 (inclusive). It was called the Topchy spreadsheet because one of the two sets of data for each petrol station was in a series of columns entitled TOPCHII. The other set of data was in a series of columns entitled Valuation.

1249. The title TOPCHII was almost certainly a reference to Yuri Topchy, a senior employee of Oil Ukraine, the company responsible for administering the Individual Defendants' oil and gas interests. Mr Topchy also had an extension on the Black and had in the past provided information to the Bank about the petrol station interests held by the Individual Defendants. Mr Kaczmarek accepted as a fair assumption the Bank's

suggestion that the inference to be drawn from this spreadsheet is that the columns entitled TOPCHII were derived from data supplied by Mr Topchy. He gave that evidence with the benefit of his previous knowledge of the Individual Defendants' oil and gas interests obtained during the course of two ICSID arbitrations in which he gave evidence for Mr Kolomoisky. I find that this was indeed the case.

1250. Across the 994 petrol stations listed in the Topchy spreadsheet, the overall sales of three categories of fuel, A-92 petrol, A-95 petrol and diesel, was recorded in the TOPCHII columns as being 371 million Kg, 286 million Kg and 404 million Kg respectively. Across the 994 petrol stations listed, the overall sales of A-92 petrol, A-95 petrol and diesel was recorded in the Valuation columns as being 666 million Kg, 448 million Kg and 1,545 million Kg respectively. It follows that, taken across the board, the fuel sales volumes recorded in the Valuation columns of the Topchy spreadsheet were substantially more than twice as much (by an average increase of 241%) as the volumes recorded in the TOPCHII columns.

1251. I think it is right to infer, both from the form of the spreadsheet itself and from the matters which I shall explain shortly, that the TOPCHII columns contained data which broadly reflected the true position as reported by Mr Topchy, while the columns headed Valuation reflected the data intended to be supplied to valuers. In other words, the clear inference is that the fuel sales volume data to be supplied for valuation purposes was deliberately increased from the real volumes in order to enhance the prospects of achieving a greater value for the underlying assets (i.e. the relevant petrol stations). Furthermore, a careful analysis of the Topchy spreadsheet discloses other indications that the figures in the Valuation columns bore no resemblance to reality. Thus, the same percentage increases in the three categories of fuel were applied month after month throughout the period January 2014 to February 2015 to the TOPCHII sales volume figures for the same petrol station.

1252. The Topchy spreadsheet was not prepared for the purposes of providing data to valuers for the Asset Transfers (it was produced some time before then). Rather it was prepared in order to provide data to BT for a valuation report it had been instructed the previous day to produce in response to a request from the Bank's auditors, PwC, relating to the valuation of security which had been pledged to the Bank. As Mr Kaczmarek accepted in cross-examination, the data in the Valuation columns was then used by BT for the purposes of calculating a daily fuel sales volume for that report, which was finalised on 22 April 2015. The Bank established this was the case, not just through Mr Kaczmarek's opinion but also by a comparison of the BT report's analysis of the average daily fuel volume sales for each fuel type sold at each petrol station with the monthly fuel volume sales recorded in the Valuation columns for the Topchy spreadsheet. The comparative data matched. It follows therefore that, in this context, BT's use of the figures derived from the Valuation columns in the Topchy spreadsheet seriously distorted its 2015 valuation because they purported to record fuel sales volumes which were substantially more than twice the real position. The arbitrary manner in which this was done gives rise to a strong inference that this exercise was deliberately designed to mislead PwC as the Bank's auditors and the NBU.

1253. It is apparent that the figures in the Topchy spreadsheet were then used again in 2016 as a base to underpin the fuel volume input for the valuation reports produced by BT and UCE / Veritas in relation to the Asset Transfers. The way it worked was different for UCE / Veritas on the one hand and BT on the other. The overall increase in the fuel

sales volume data for each of the reports was similar, a fact to which Mr Kaczmarek pointed when explaining why it could be relied on, but critically the component elements to make up the final aggregate amounts were very different. More significantly, the evidence in support of a conclusion that it was manipulated from within BOK before it was used by the valuers is compelling.

1254. I can deal first with the use of the Topchy spreadsheet in relation to the preparation of the BT report. BT was instructed in December 2015 to prepare a further valuation report for the 994 petrol stations as at 31 December 2015. As I have already explained, by this stage there was growing pressure from the NBU for the Individual Defendants to procure a very substantial increase in the Bank's capital and I think it is likely that a transfer of assets such as the petrol stations was within their contemplation as one of the means by which this might be achieved. The underlying data was therefore to be provided to BT for valuation purposes less than a year after provision of the comparable data for the purposes of its April 2015 security report.

1255. This further report was then finalised and dated 12 May 2016. As Mr Kaczmarek agreed, the data on which BT relied demonstrated that the petrol stations were selling substantially more diesel than petrol. This was consistent with the position disclosed in BT's earlier 2015 report, a conclusion which the Bank suggested (and I accept) was necessary to ensure that BT were not alerted to inconsistencies between the two reports given that the time periods for which they were prepared were relatively close to each other. However this broad conclusion was wholly inconsistent with the underlying data used by UCE and Veritas for the purpose of preparing their reports.

1256. The UCE report was commissioned on 25 April 2016 and the Veritas report was commissioned on 25 July 2016. They both valued the majority but not quite all of the 246 petrol stations to be transferred as part of the Asset Transfers. But it is apparent from the experts' analysis of the data that UCE and Veritas used radically different fuel sales volume figures from those which were used in the BT report. This is evidenced not just by a comparison of the datasets for individual petrol stations, but also more generally from the aggregate sales volumes they used for the different fuel categories. Thus, the BT figures for diesel sales were significantly higher than those used by UCE / Veritas and significantly exceeded total petrol sales, while the UCE / Veritas figures were the reverse: their figures for petrol sales were significantly higher than those used by BT and significantly exceeded diesel sales.

1257. The circumstances in which the arbitrary nature of the sales volume figures used by UCE and Veritas came to be used can be pieced together from some of the surviving documentation. What happened can be ascertained from a further spreadsheet prepared by Mr Chernyshov which purported to record fuel sales for the period January 2015 to June 2016. The version in the trial bundles was dated 2 August 2016. As Mr Kaczmarek accepted, this was the same data as that which was used by UCE and Veritas to prepare their reports, and was therefore the data on which Mr Kaczmarek relied in preparing his report for the purposes of these proceedings.

1258. However, it is certain that the data purporting to record the fuel sales volumes for the two months for which there was an overlap between the period covered by the Topchy spreadsheets (January 2014 to February 2015) and the period covered by the August 2016 spreadsheets (January 2015 to June 2016) was significantly inflated on a wholly arbitrary basis. This is clear from a comparison of the two spreadsheets which

establishes that, in the vast majority of cases, the figures included in the August 2016 spreadsheet for the two months' period of overlap were based on the TOPCHII columns of the Topchy spreadsheet which were then simply increased by a uniform 300%. While I cannot be certain that the August 2016 spreadsheet fuel sales volumes (then used by UCE, Veritas and Mr Kaczmarek) were inflated to the same extent, I infer that they probably were, not least because, if they were not, inconsistencies would have become apparent to the valuers.

1259. In my view, Mr Kaczmarek's evidence on the significance of the different datasets which were used for the purposes of the UCE, Veritas and BT reports was unsatisfactory. In one of his reports he expressed the view that there was no evidence that would lead him to conclude that the volumes upon which he relied were the product of an information systems error or of fraud. He modified this opinion in his oral evidence when he accepted that the differences I have explained led to fundamental inconsistencies which he could not resolve or explain, but nonetheless remained of the opinion that Mr Bezant's rejection of the data was an overreaction and unjustified. He did so on the basis that the data on average fuel sales volume per station provided to BT was "effectively identical" to the data provided to UCE and Veritas, i.e., that when all fuel sales (petrol gas and diesel) are aggregated per station, the same essential volumes were provided to each valuer.

1260. I agree that, in most instances that is the case, but Mr Kaczmarek's opinion does not engage with the gravamen of the point to which he had no answer: the component elements of the aggregated figures were very different and he was unable to say that it was appropriate to offset one type of fuel against another for these purposes. More importantly still, the evidence demonstrating manipulation by deliberate and unjustified increase of the volumes above the amounts actually sold was very strong. I do not therefore accept that one of the basic datasets for Mr Kaczmarek's valuation was sufficiently reliable for the purpose for which it was used.

1261. In my view, both the very substantial size of the unexplained increase and its uniformity reflects deliberate manipulation of the underlying data within BOK. I consider that the only explanation for both the increases applied and their uniformity is that the fuel volume data fed to UCE and Veritas by employees within BOK was produced to the valuers without any belief that it reflected the true position, and with the deliberate intention of procuring an increase in the figure for which those valuers might properly value the petrol stations concerned. In these circumstances, I find that the fuel sales volumes data provided to UCE, Veritas and BT was an inaccurate and unsafe basis for determining the value of the petrol stations included in the Asset Transfers.

1262. I should also add that, after Mr Bezant's first report on the value of the petrol stations had been prepared and filed, Mr Kolomoisky disclosed a further set of fuel sales volume spreadsheets, which were said to have come from the custodianship of the original owners of the petrol stations. These have been referred to as the IK volume spreadsheets and disclosed the same data as that which appears in the August 2016 spreadsheet prepared by Mr Chernyshov. Mr Kaczmarek said they supported his conclusion because of their source. To the extent that these were said by Mr Kolomoisky to support the authenticity of the August figures I do not think that they do. The metadata shows that they were prepared very shortly after the August 2016 spreadsheet and there is no documentary or other evidence to indicate that they were anything other than a simple copying exercise. I agree with Mr Akkouh's closing

submissions that this conclusion is unaffected by what amounted to no more than speculation that there were any underlying Excel files which verified the data independently from the August 2016 spreadsheet. In the light of the conclusions I have reached as to the true owners of the petrol stations at the time of the Asset Transfers, the fact that they are said to have emanated from them as custodians after Mr Bezant's asset valuation evidence had been produced does not serve in any way to undermine my conclusion that the August data on which the reports were prepared was manipulated for the purpose I have just identified.

1263. The fact that I am satisfied that Mr Bezant was justified in not using the fuel sales volumes data which underpinned the UCE, Veritas and BT reports does not mean to say that he was necessarily correct to use the data in the Volyn report. The Bank must establish that the data used by Mr Bezant is sufficiently solid to form the foundation for a reliable DCF valuation, having regard to the fact that it must show on the balance of probabilities that the transfer of the petrol stations to the Bank was at an undervalue to the extent of its pleaded case. The Defendants submitted that the Bank cannot do this. It said that Mr Kaczmarek's approach which relied for his DCF valuation on the data from those reports, provided, together with his market approach (to be applied 50/50), a more accurate value.

1264. The Volyn report was prepared in 2019 for the purposes of restating the bank's financial statements as at 31 December 2016. It did not rely on any historical operational data but instead used data derived from the results of field studies and an estimation of fuel sales volumes from comparable petrol stations. The characteristics of the petrol stations being valued were identified by reference to the region in which the petrol station was located, the number of petrol stations located in that region, the total area occupied by the petrol station, the traffic flow-throughs and the proximity to main highways. There was also detail of the types of fuel sold and the number of tanks on the site. This was all assessed in great detail and led the Bank to submit that it was this which enabled Volyn to apply the results of their field studies to the particular characteristics of each petrol station.

1265. The Defendants mounted a sustained attack on this submission. They contended that, given that the results of the Volyn field studies are wholly unknown, the fact that the characteristics of the petrol stations to be valued were described by Volyn in great detail does not assist because there is no means of cross checking how they applied the results of their field studies or why the data from those studies could properly be regarded as comparable to the likely throughputs for the petrol stations to be valued. In short, they challenged the extent to which Mr Bezant was himself able to verify the similarities which the authors had relied on.

1266. In response to that challenge, Mr Bezant accepted that the description of the field study petrol stations as similar to those which he was valuing relied on third party assessments. He also accepted that he did not ask the Bank if they could ask Volyn to provide their data relating to the field studies and more specifically to the turnover of the similar petrol stations so that the exercise carried out by Volyn could be validated.

1267. As Mr Bezant also accepted in his evidence, the Volyn report relied on hindsight to perform a valuation, because it utilised volumes data from years subsequent to 2016 and then rolled back the volumes based on the change in overall regional volumes of fuel sold over the interim period. It was Mr Kaczmarek's evidence that, quite apart

from the deficiencies which flowed from the use of data other than the historic data applicable to the actual petrol stations being transferred, this was an illegitimate approach, because it is generally prohibited when conducting a fair value or market value calculation to use information that is not known or knowable with reasonable due diligence at the valuation date. He also said that he found it odd that Volyn had opted to monitor fuel sales volumes at comparable petrol stations rather than a subset or sample of the actual petrol stations to be valued. The difficulty with this second point is that it ignores the unreliability of the available data for the actual petrol stations to be valued.

1268. More generally on hindsight, I think that Mr Bezant was correct to say that in circumstances in which the contemporaneous underlying data is as unreliable as it is in the present case, it is appropriate to rely on information from after the valuation date so long as it is treated as informative of the position as at the valuation date. The question from a valuation perspective is whether the subsequent information on which reliance is placed reflects information that would have been available as at the valuation date. In my view, this approach is consistent both with common sense (see e.g. *Bwllfa & Merthyr Dare Steam Collieries v. Pontypridd Waterwork* [1903] AC 426 at 431) and continues to reflect established principles of English law (per Popplewell J in *Ageas (UK) Ltd v. Kwik-Fit (GN) Ltd* [2014] Bus LR 1338 at [34], who said, in the context of assessing damages for breach of contract where the valuation date was the date of breach, that there should be no conceptual difficulty in using subsequent events to inform an assessment of value at an earlier date in an appropriate case). It is also consistent with the basic principle that, where a contingency has occurred between the time of a breach and the time of assessment, the impact of that contingency can be taken into account. There was no evidence that Ukrainian law is any different on this point.

1269. A further reason advanced by Mr Bezant for using the Volyn data was its consistency with figures derived from two other sources, namely Ukrstat (the national statistics service of Ukraine) and Naftogaz (Ukraine's state-owned oil and gas company). Ukrstat reports on the total number of petrol stations in Ukraine and the volumes of both wholesale and retail sales of light petroleum oil and gas from petrol stations. Mr Bezant analysed sales volume data collected by Ukrstat for 2015 and 2016, and then worked out an annual implied per petrol station volume. The 2016 figure for retail sales (419 tonnes per year) came in at slightly below the volume amounts in the Volyn report (548 tonnes per year), but very substantially below the volume amounts used for the purposes of the UCE reports (1,333 tonnes per year). Even including the figures for wholesale fuel sales, the Ukrstat figure of implied volumes per petrol station was substantially less than half the volume used in the UCE and Veritas report but was broadly equivalent to the volumes used in the Volyn report.

1270. Mr Kaczmarek's response was to query the accuracy of the data recording by Ukrstat, and said 'garbage in, garbage out', a comment which is obviously true if it really is 'garbage in', but is no reason to reject the evidence in the absence of anything to indicate that misreporting or non-reporting by enterprise owners to Ukrstat is commonplace. He accepted that he had no specific reason to believe that the Ukrstat figures were either reliable or unreliable, but contended that their reliability depended on the willingness of petrol station operators to report their statistics accurately and continued to assert that they did not justify what he called "wholesale rejection of the data provided by the enterprise owners". As there is a legal obligation on petrol station

owners under Ukrainian law to report to Ukrstat on a monthly basis, there is no reason to consider that their data is unreliable for the reasons suggested by Mr Kaczmarek, which in my view were more speculation than evidence. In light of the conclusions I have reached about the manipulation of the figures within BOK, it is materially more reliable as data from which the actual sales made by the 246 petrol stations can be corroborated than was the data fed to UCE and Veritas from within BOK.

1271. Mr Bezant carried out a similar exercise to compare the volumes disclosed in Naftogaz' 2016 annual report which disclosed an implied per petrol station volume for sales by Ukrnafta, which was c.180 tonnes per year more than the volumes disclosed in the Volyn report but c.600 tonnes per annum less than the volumes disclosed in the UCE report. The Naftogaz 2016 annual report also recorded 2016 fuel sales volumes for the Privat group of 1,021 petrol stations of which the 246 to be transferred were a subset amounting to c.25% of the total. However, Mr Bezant demonstrated that, if the fuel sales volumes (a) disclosed for all the Privat group petrol stations in the Naftogaz annual report and (b) disclosed for the 246 petrol stations transferred as part of the Asset Transfers in the UCE and the BT reports were both accurate, this would have meant that almost all of the Privat group's fuel sales for 2016 were achieved through the 246 transferred petrol stations and almost nothing was achieved through the remaining 75%. The Bank was right to describe this result as nonsensical, and in the absence of a challenge to what was recorded in the Naftogaz 2016 annual report is consistent with the Volyn report being based on accurate data, while the UCE and Veritas reports were not.

1272. Mr Kolomoisky challenged the significance of the data in the Naftogaz 2016 annual report, but only in a limited manner. It was submitted on his behalf that the data did not include sales into the wholesale market which were said to incorporate what were described in the annual report as 'corporate sales'. It was said that these sales would or might cover that element of 'retail sales' which were achieved through arrangements such as block purchases by employers whose employees would then be able to use coupons or cards to acquire the fuel which had already been purchased by their employer. This suggestion was not explicitly supported by Mr Kaczmarek who was unable to say whether or not it had any foundation. In my view it does not, largely because the Bank established that this category of sale is required to be treated as a retail sale for tax purposes, which makes it unlikely that Naftogaz would then record it as wholesale sale for corporate reporting purposes.

1273. Mr Kaczmarek also performed his own reality check. He calculated the number of vehicles a petrol station would have to service per day and per hour in order to sell the 1,332 tons of fuel per year reported as having been sold for the UCE report and the 557 tonnes of fuel per year reported as having been sold for the purposes of the Volyn report. He said that this demonstrated that the UCE report was based on figures which he did not consider to be high performing (69 vehicles per day) but that the Volyn figures would have meant that all of the petrol stations must have been significantly underperforming (29 vehicles per day). It was Mr Bezant's evidence that he was not meaningfully able to interpret this conclusion. I understand why Mr Bezant took the view that he did and consider that Mr Kaczmarek's cross-check was not of material evidential value. The assumptions on which it was based (the size of an average fuel tank for a Ukrainian car, the amount refilled at every visit and the number of hours the station was open) were speculative.

1274. There is little doubt that the data with which each of the experts chose to work was unsatisfactory in a number of respects. However, taking into account those deficiencies, I am satisfied that, although the fuel volume sales figures utilised by Mr Bezant are far from perfect, they are the best available evidence for the petrol station turnover as at the time of the Asset Transfers. In particular they are materially more reliable than those which were based on the manipulation of the actual figures which I am satisfied took place. In my judgment they are also sufficiently accurate to provide a sound, albeit not conclusive, basis for conducting the DCF valuation which Mr Bezant was instructed to carry out.

Petrol station valuations: RONIC

1275. The next significant point on which the experts disagreed was RONIC. As I have already explained, this is an acronym for 'return on new invested capital' and operates as a measure of the profitability of new capital investments. As Mr Bezant explained it is a computational device to reflect the fact that there are a series of economic forces which make it hard for companies to make either excess or ever-increasing returns, in other words returns substantially in excess of the cost of financing, in the long run. It is of course predicated on competition in the industry. In Mr Bezant's valuation model it had an impact of UAH 500 million on his valuation of the petrol stations. The significance of this adjustment has to be assessed against the fact that both experts agreed that, for the purposes of their DCF valuations of the petrol stations, they could be expected to have achieved a net margin on sales of 10%.

1276. It was Mr Bezant's view that, if a company is achieving a RONIC greater than its cost of capital, its returns will be in excess of those required in light of the risks of the relevant investment. What will then happen is that in the long run competition or regulation will act to eliminate or constrain those excess profits. This therefore requires an adjustment to be applied to reflect additional capital expenditure which it is necessary to incur over and above the expenditure required simply to maintain the petrol station.

1277. In their joint statement, the experts agreed that most businesses are unable to achieve returns in excess of the costs of capital over an extended period. In Mr Bezant's view this principle ought to be applied to the petrol station valuations. However, Mr Kaczmarek said that businesses which depend upon their physical location and first mover advantage can sustain excess returns for an extended period of time and that this is something which all businesses strive to achieve. In his view these factors would allow the petrol stations to achieve the excess returns which most businesses would not make.

1278. I do not think that the evidence establishes that physical location or first mover advantage would enable the petrol stations in the present case to achieve excess returns that most businesses would not make. The Bank established in cross-examination of Mr Kaczmarek that he had not carried out any analysis comparing village petrol stations with those on the highway or in a more urban area in order to determine if there was any difference between the locations. He also accepted that the petrol station market in Ukraine was both mature and competitive. The evidence is that there are plenty of different companies owning and operating petrol stations. Although Mr Kaczmarek

insisted that all businesses that are located in a particular area and physically attached to an area will have a first mover advantage as a matter of general economic concept, he did not point to any specific evidence as to how that economic concept might apply in the present case.

1279. The consequence of Mr Kaczmarek's position was said to be that the petrol stations were in a position to earn returns in excess of the cost of capital in perpetuity. He suggested that, if an existing company in a particular market is servicing the entire demand in a given physical location and making a return in excess of its cost of capital, a rational competitor would not enter and compete in that location. This was said to be because the consequence of it doing so would be that prices and profits would fall and the demand would be split between the two competitors. He said that the position would only be different if an existing entity could not meet the full demand for its services within a given physical location. In that situation a competitor might be drawn to enter the market to fulfil the excess demand in circumstances in which it could also make profits in excess of its cost of capital.

1280. I found this evidence surprising, because the logical consequence of what Mr Kaczmarek had to say was that a potential competitor would never enter the market, where an incumbent service provider was satisfying the entire demand, whatever the level of profit which the existing provider was making. On the face of it, this is not how a market economy works, and despite the challenge which was made to Mr Bezant's evidence on this point in cross-examination, I found it more convincing that the evidence given by Mr Kaczmarek. In short, I think that Mr Bezant was right to say that the reason that the petrol stations were unlikely to be able to maintain returns in excess of the cost of capital in the long term is that they did not possess a recognisable competitive advantage. They supplied what Mr Kaczmarek accepted was a homogenous product and they did not have what Mr Bezant called many of the features which allowed them to differentiate themselves from their competition. They were operating in a mature and developed market in which there were multiple competitors with sufficient resources to be able to build petrol stations near to the petrol stations subject to the Asset Transfers in order to offer competitive prices to compete for business.

1281. Furthermore the only specific barrier to entry referred to by Mr Kaczmarek was the ability of an existing service provider to lower prices temporarily in order to make a new competitor's entry unviable. That is no more than the consequence of competition in a mature market and does not in my view affect the underlying question. It is also apparent that, despite a recent dip in the market, by 2016 the trend in Ukrainian petrol station development was upwards which itself demonstrated that this would be the right way in which to describe this market.

1282. Mr Kaczmarek also expressed the view that it would be illogical for the petrol stations to have to make investments which did not result in direct economic returns but were simply made in order to stave off competition. He considered that the only required investment would be for maintenance. The Defendants also submitted that the evidence showed a decrease in the number of petrol stations in Ukraine during 2014-15, and that the evidence did not establish that the market overall was competitive, anyway in the sense put forward by Mr Bezant.

1283. I do not agree that the evidence established that Mr Bezant made erroneous assumptions as to the state of the Ukrainian petrol station market at the time of the Asset Transfers. I also accept the Bank's submission that the Defendants' case was difficult to reconcile with evidence which had been given on behalf of companies beneficially owned by the Individual Defendants in arbitrations arising out of the expropriation by Russia of groups of petrol stations belonging to Ukrnafta and Stabil (in which Mr Kolomoisky had a beneficial interest) when it annexed Crimea in 2014 ("the Crimean Arbitrations"). In that context it had been accepted that investment in the petrol stations being valued for those purposes was in order to stay ahead of the competition.

1284. More significantly, however, Mr Kaczmarek accepted that the normal formula when calculating terminal values or discount rates for a DCF valuation required RONIC to be set at a figure equal to WACC. He also accepted that this reflected the fact that competition will eventually eliminate abnormal returns. However, his answer to this was that it all presupposed that it was contemplated that new investment was going to be made and that this was inconsistent with Mr Bezant's own assumptions that the growth in profits would be based on GDP and crude oil price forecasts, which did not require new investment. I accept the Bank's submission that this is not correct. Increases in GDP are fuelled by new investment while the increase in the price of crude oil will not of itself lead to equivalent increases in profit because the experts both made assumptions that only 50% of the increase in crude oil prices would be passed onto consumers, with the consequence that either costs for the business would be increased therefore depressing profitability, or demand will be depressed therefore requiring further investment to sustain profits.

1285. It follows that in my opinion the approach taken by Mr Bezant is to be preferred. The underlying point is that I am satisfied that at the valuation date the petrol station market in Ukraine was both mature and competitive. Mr Bezant's use of RONIC to reflect this was just one of the valuation tools which were available to the valuer, and I am satisfied that the competition which undoubtedly existed was required to be reflected one way or another. In testing the appropriateness of the use of RONIC as a computational measure, it is relevant to bear in mind that, if the existing petrol stations did not respond to potential competition by investing in their businesses, the entry of new competitors into the market was likely to have had the effect of reducing the achievable net profit margins below the level of 10% assumed by both of the experts. Put another way, in adopting a 10% net margin model, Mr Bezant assumed an application of RONIC. If RONIC were not to be applied, as Mr Bezant confirmed in re-examination, the evidence is consistent with the need to reduce the net profit margin by an appropriate amount. As to that there is some contemporaneous evidence which would have justified a reduction from 10% to 7%. This would have had a greater impact on the DCF valuation than the effect of Mr Bezant's RONIC adjustment.

1286. As to the appropriate amount of the RONIC adjustment, Mr Bezant's DCF valuation has used a discount rate of 17.5% for the purpose of discounting future cash flows to 1 July 2016. He then added a premium of 1% to the 17.5% cost of capital based on the views of Professor Damodaran to reach a long term RONIC of 18.5%. He assumed that there would be four years during the course of which capital expenditure would progressively increase and the RONIC would progressively reduce until the RONIC of 18.5% would be reached at the beginning of the terminal period. I am satisfied that this aspect of Mr Bezant's valuation has been established to be correct.

Petrol station valuations: country risk premium

1287. The third disputed factor is the adjustment required to the cost of equity calculation in the discount rate methodologies in order to reflect the incremental risk of the petrol stations being located in Ukraine. This is called the country risk premium or CRP. It is not in issue that some adjustment is appropriate, but the experts disagree on the level. Mr Bezant says that the proper figure is 7.6% while Mr Kaczmarek says that it is 3%.

1288. Mr Bezant's assessment of the appropriate CRP was based on the sovereign yield spread of Ukrainian government bonds in March 2016 as published by Duff & Phelps. Mr Kaczmarek said that this was an artificial starting point and based his CRP on an assessment of currency risk (in respect of which he assessed the UAH as being stable with some but not much exposure to currency risk), macroeconomic risk, also known as local market risk (i.e. a risk reflecting the overall health of the economy, which he assessed as moderate) and social risk (which he assessed having regard to the petrol stations having no significant labour problems during his projection period).

1289. In support of his conclusion, Mr Bezant expressed the view that the petrol stations were especially exposed to country risk because of their immovable, asset-heavy operations. He accepted that there were different methodologies for assessing the appropriate CRP but noted that his conclusion was consistent with (and lower than) the average premium of 8.7% adopted by valuers preparing contemporaneous valuation reports of the petrol stations and was also consistent with an average figure of the premia adopted by investment analysts covering large public companies operating in Ukraine. There are a number of reasons why I have concluded that Mr Bezant's opinion on this issue is to be preferred.

1290. The first is that, although Mr Kaczmarek agreed that CRP is comprised of six factors associated with doing business in particular countries (namely currency risk, local market risk, social risk, political risk, regulatory risk and legal risk), he only identified the first three, in their application to Ukraine, as bases for his conclusion that a CPR of 3% was appropriate. He did not discuss any of the other three in that context. He cited some academic papers which indicated that, while accounting for political risk is important, simply applying the full sovereign yield spread as a proxy for political risk can lead to what were described as "severely biased" net present value estimates. However these citations were general and he did not apply them to the position of Ukraine as at the relevant time.

1291. Mr Bezant explained in his supplemental report why it was that political risk, regulatory risk and legal risk ought to have been recognised as CRP components by any valuer assessing the true value of the petrol stations in 2016. In summary the risk of conflict between Ukraine and Russia was high, Ukraine suffered from a very low level of confidence in the trustworthiness of the Ukrainian judicial system and the judiciary's willingness to overcome corruption and the World Bank's Worldwide Governance Indicators indicated that Ukraine's regulatory quality ranking was low. In my judgment it is clear that each of them was a risk which ought to have been properly assessed in reaching a decision as to the appropriate CRP.

1292. Mr Kaczmarek was pressed in cross-examination to explain why he made no reference to political risk, regulatory risk and legal risk in what he said was a comprehensive analysis to identify the country risks faced by the petrol stations and quantify their impact. He accepted that those risks were relevant, but did not accept that the fact that he had made no mention of regulatory risk or legal risk in his report and the fact that his discussion of political risk was generic without application of its impact in the Ukrainian context, did not mean that he had not taken those risks into account.

1293. Mr Kaczmarek's explanation for why his reports did not discuss those three risks in the same manner that he had discussed currency risk, local market risk and social risk was very difficult to follow. He seemed to be saying that he did not specifically mention them because they were not unique to petrol stations, but nonetheless they were taken into account in his assessment of the appropriate level of CRP. In its closing submissions, the Bank described his oral evidence on this point as "dissembling, evasive and totally incoherent". I regret to say that I agree with that submission.

1294. In any event, I think that his approach to the appropriate weight to be given to those risks was clearly flawed. This was apparent from the fact that at that stage it could not properly be said, as Mr Kaczmarek represented that "the risk of an outright war between Russia and Ukraine was very remote in most anyone's estimation" (I was shown a press report to the contrary). I also think that he was wrong to characterise the risk of conflict between Russia and Ukraine not as a political risk but only as a macro-economic risk, which he said he had taken into account and that he significantly underplayed the widespread mistrust of the Ukrainian judiciary in 2016, which was something he said that he would not be surprised about but had not specifically looked at. He said that he had more than fully accounted for all of the elements of country risk already in his 3% CRP.

1295. The second reason for concluding that Mr Bezant's evidence on this point is to be preferred is that Mr Kaczmarek had no coherent explanation for how he reached the 3% figure CRP. The closest he came to this was to explain that a CRP of 3% resulted in a decrease in the value of the petrol stations of 18% which amounted to 66 days of lost revenue per year. He said that this appropriately captured the level of incremental country risk faced by the petrol stations, but there was no hard evidence to justify why this was the appropriate figure.

1296. In any event, I found Mr Bezant's answer to this to be persuasive. He explained that, in order to assess the sufficiency of such a reduction, it would be necessary to compare the value of an asset in Ukraine with the value of a similar asset in another country. What Mr Bezant accepted was a very rough and ready way of doing that would be to compare the value of Ukrainian companies to companies in other countries adjusted for their relative scale (i.e. by comparing valuation multiples). His evidence was that the median multiples of Ukrainian listed companies in 2016 were around 80% to 90% lower than the multiples of companies listed on the FTSE 100. He correctly accepted that there may be many factors which explain those differences, but I agree that in broad terms it demonstrates that the effect on a company's value of its location in Ukraine can be very substantial.

1297. The third reason is that I was unpersuaded by Mr Kaczmarek's criticism of Mr Bezant's use of the sovereign yield spread as a guide for the assessment of an appropriate CRP. Mr Bezant was straightforward in his recognition of the fact that an assessment of

country risk is not a precise exercise and that the sovereign yield spread does not perfectly correlate with it. However, I think he was correct to say that it is a very useful guide, which is commonly used as a reference point. I also agree that there is good academic evidence to justify a conclusion that it does not give rise to a bias one way or the other when set against other recognised methods of quantifying CRP.

1298. Fourthly, I accept Mr Bezant's evidence that his conclusions are consistent with other CRP assessments. He has ended up with a lower CRP than the average premium adopted by valuers preparing contemporaneous valuation reports of the petrol stations. His CRP is also at the lower end of the average figures produced by Duff & Phelps and academics such as Professor Damodaran and is consistent with an average figure of the premia adopted by investment analysts covering large public companies operating in Ukraine. Furthermore in the Crimean Arbitrations, in which Mr Kaczmarek gave evidence, a comparison was made between the appropriate CRP for Russia and the appropriate CRP for Ukraine calculated on the basis of credit default swap spreads. The tribunal appointed expert said that adopting that approach while Russia's CRP was in the vicinity of 2%, the CRP for Ukraine was approximately 8.8%. Taken together these factors are all strongly corroborative of Mr Bezant's evidence and undermine that of Mr Kaczmarek.

1299. Fifthly, Mr Kaczmarek's evidence on this aspect of the case was a clear example of his tendency to unreasoned intransigence on points when logic led to a conclusion contrary to the one he had advanced. It became increasingly clear that the figure of 3% was a figure to which he was determined to adhere, notwithstanding the evidence which undermined its appropriateness. While Mr Bezant was frank as to the uncertainties in the exercise he was required to carry out, the same could not be said of Mr Kaczmarek.

1300. In my view, if he had given proper weight to those factors, and I do not think that he did, Mr Kaczmarek would have reached a materially higher CRP figure than 3%. In these circumstances I find that the best evidence of the appropriate CRP is to be found in the evidence of Mr Bezant. An adjustment of 7.6% is required to the cost of equity calculation in the discount rate methodologies in order to reflect the incremental risk of the petrol stations being located in Ukraine.

Petrol station valuations: the market approach

1301. The final aspect of the dispute between the experts in relation to the value of the petrol stations was the market approach calculation provided by Mr Kaczmarek. As I explained a little earlier, Mr Kaczmarek based his petrol station valuation as to 50% on an income-based DCF analysis and as to 50% on a market approach. As I have already explained, the Defendants submitted that it was very significant that his market approach valuation, which they described as thorough and robust, indicated a figure of UAH 8.360 billion, which was comparable in broad terms to his DCF valuation of UAH 8.527 billion. The relative equivalence of these two amounts was said to demonstrate a probability that each figure was likely to reflect a market value or fair value for the petrol stations transferred under the Asset Transfers.

1302. I agree that in many cases there will be benefit in comparing a market valuation to the results of a DCF valuation. As Mr Bezant accepted in cross-examination, in principle

a market approach is not an inferior valuation technique to an income approach. This is more particularly the case if the market valuation is free-standing and is unaffected by such deficiencies as there may be in the data available for conducting a DCF valuation. But it seems to me to be self-evident, as Mr Bezant went on to say, that the validity of such an exercise depends on the availability of proper comparables, together with such other inputs as may be required to produce a market valuation which itself is sufficiently robust.

1303. Mr Kaczmarek produced two tables of what he contended to be comparable petrol station sales: one for the period 2008 to 2016 and another for the period 2017 to 2022. He also said that in the two years prior to the 31 December 2016 valuation date only 3 transactions yielded an average value per petrol station of less than US$1 million. Mr Kaczmarek also referred to the Crimean Arbitrations in which values of 9 times Mr Bezant's valuations were awarded in respect of the Ukrnafta petrol stations and 4 times his valuations in respect of the Stabil petrol stations.

1304. Some of these sales were plainly not properly comparable, and I think that Mr Kaczmarek was wrong to advance them as if they were. In the event the Defendants placed little reliance on the figures to be derived from them in their closing submissions. They simply said that the sample of c.940 from which an average price of US$1.25 million per station could be extrapolated was very much closer to the US$ DCF valuation advanced by Mr Kaczmarek (US$1.3 million) than it was to the US$ DCF valuation advanced by Mr Bezant.

1305. In my view, the Defendants were right not to place much reliance on these comparables. It became apparent during the course of Mr Kaczmarek's cross-examination that he did not know the level of throughput of the petrol stations or where they were located (city centres or agrarian backwaters), both of which are important inputs for valuation purposes and likely to have a significant impact on the valuation and marketability of the asset. It also became clear that in a number of instances, the figures on which Mr Kaczmarek relied included other assets over and above the petrol stations themselves, including tankers, OSFs and what the Bank called land plots in various stage of development. He also made no adjustment for the fact that many of the comparables on which he relied in his report were in countries other than Ukraine, most of which were in the EU. He refused to accept in his cross-examination that most of the countries in respect of which he used comparables in his report were economically and politically more stable than Ukraine, with much lower CRPs. He also downplayed the significance that some of them (e.g., Hungary) had higher population densities and levels of car usage on the basis that these types of considerations did not indicate that a petrol station was necessarily going to be worth more in Hungary than in Ukraine. I did not find his answers on the challenges to these parts of his evidence to be very convincing.

1306. These reasons also featured in Mr Bezant's evidence as to why the awards made in the Crimean Arbitrations were an unhelpful comparator. Mr Bezant produced evidence which illustrated very considerable differences in the average turnovers of the petrol stations operating under the Ukrnafta brand and those operating under the brands applicable to the 246 petrol stations transferred under the Asset Transfers. There were a number of specific reasons for this including their location and their condition. It was also the view of the arbitration panel in the Crimean Arbitrations that the effect of the expropriation by Russia was to increase the value of the petrol stations the subject of their award because of the respective economic climates in the two countries.

1307. The Bank also relied on the fact that a sensitivity analysis described in Mr Bezant's report, demonstrated that if the valuations in the Crimean Arbitrations were to be adjusted to reflect (i) the devaluation of UAH in 2014-2016, (ii) the higher fuel volume sales in Crimea and (iii) the different CRPs in Russia and Ukraine, the average value per petrol station was UAH 9.9 million (Ukrnafta) and UAH 6.1 million (Stabil). As the Bank submitted in its closing submissions "Those values bookend Mr Bezant's average valuation of the Petrol Stations (UAH 7.6m); and are far lower than Mr Kaczmarek's average of UAH 34.3m." I agree that these considerations reduced the extent to which the values reached in the Crimean Arbitrations could properly be treated as a robust comparable without the adjustments put forward by Mr Bezant.

1308. One of those adjustments related to the devaluation of the UAH against the US$ during the period 2014 to 2016. This is of more general relevance to Mr Kaczmarek's market valuation and it is necessary to say a little more about it. Mr Bezant criticised the manner in which Mr Kaczmarek used his chosen comparables because of the way in which he dealt with the impact of the UAH's depreciation against the US$ over the period between 2012 and 2016, with the most substantial reduction happening during the course of 2014 and 2015. He said that Mr Kaczmarek's approach distorted the true position and was fundamentally wrong. This requires a little explanation.

1309. In his presentation of the average price per petrol station achieved in the transactions he used as comparables, Mr Kaczmarek converted the local transaction prices into US$ using the exchange rate as at the date of completion. He then converted them back from US$ to UAH as at the chosen valuation date (31 December 2016). In every case, if the conversion from the transaction currency to UAH had been effected at the date of the transaction, the value of the petrol stations sold in that transaction would have been significantly lower in UAH than the value attributed to them for comparability purposes by Mr Kaczmarek.

1310. Mr Bezant explained how Mr Kaczmarek's approach therefore implied that "all else constant, a Ukrainian petrol station can be worth over three times more in UAH in 2016 than 2013, despite the economic conditions that would have contributed to the extreme currency depreciation." In his view this consequence was simply not plausible. If Mr Bezant's approach of converting sales prices of the comparable petrol stations to UAH at each transaction date was adopted, the impact would be to reduce the weighted average price per station expressed in UAH from UAH 30 million to UAH 18 million, which he said was closer to his own DCF assessment of UAH 8 million than it was to Mr Kaczmarek's of UAH 35 million.

1311. Mr Bezant also explained how assets might hold their US$ value in a period of UAH depreciation against the US$ if they are capable of being located elsewhere, but where they are immovables such as the petrol stations that cannot occur, depreciation is also indicative of worsening economic conditions which is likely to have an adverse impact on living standards and consumer confidence, thereby adversely affecting demand for petrol.

1312. Mr Kaczmarek disagreed. He said that Mr Bezant had produced no evidence that the devaluation of the UAH between 2012 and 2016 had resulted in a deterioration of the US$ value of Ukrainian petrol stations. He said that the primary reason that this would not have happened was that the value of a petrol station is inextricably linked to the price of oil which is incurred in US$. It followed from this that fuel prices in Ukraine

evolve with foreign exchange rates such that any devaluation in the local currency results in a corresponding increase in UAH denominated petrol product prices with a corresponding impact on the value of the petrol stations.

1313. Mr Kaczmarek's evidence therefore assumed that the petrol stations would be able to pass on the entirety of their US$-based costs to their customers, thereby increasing not just their revenues but also their profitability on the basis that they could charge the same percentage markup on their higher revenues. Mr Bezant said that this was wrong because it was unnatural to suppose that there would be a full pass-on of their rising costs to consumers whose purchasing power would be denominated in UAH. He said that such evidence as there was (derived from the Ukrainian Ministry of Energy and Coal) demonstrated that a pass-through assumption of 50% is to be expected, meaning that the petrol stations will themselves absorb a significant percentage of the cost increase. This view was corroborated by a decline in the demand for petrol in Ukraine between 2014 and 2016, which was a period of significant depreciation in the value of UAH as against the US$. Demand declined by 11% in 2014 and as much as 27.6% in 2015.

1314. I prefer Mr Bezant's evidence on this point. As the Bank put it in its closing submissions "In the end this is a simple point. A Ukrainian petrol station generates [UAH] revenues and [UAH] profits. Between 2014 and 2016, the Ukrainian economy shrank by 8%; demand for petrol fell; and the country was fighting a war against Russia. It is unrealistic to suppose that a petrol station would be three times more profitable and therefore valuable in 2016 compared to 2014."

1315. Taken in the round I think that the comparables adopted by Mr Kaczmarek for his market valuation analysis are far from robust, but leaving aside the averages to be derived from his full sample, there was one comparable on which Mr Kaczmarek and the Defendants placed particular reliance and which merits particular consideration. This was a sale of 240 petrol stations in Ukraine by a Russian company (Lukoil) to AMIC Energy in 2014 – 2015 for US$300 million, i.e., an implied price per petrol station of US$1.25 million. The fact that this 2014/5 transaction included a sale of a similar number (240) of Ukrainian petrol stations to the 246 transferred as part of the Asset Transfers means that it is more likely to have provided a robust comparable than the others included in Mr Kaczmarek's list. But on closer analysis there are still serious problems with applying the price achieved to the true value of the 246 petrol stations which were the subject of the Asset Transfers.

1316. The Lukoil deal completed after the Russian invasion of Crimea. The Defendants relied not just on the fact that this was a Ukrainian deal but also on Mr Bezant's acceptance that it was possible that the price might have been affected by the difficulties which a Russian company would have had in trading in Ukraine during that period. They submitted that this was an indication that the sale was analogous to a distressed sale and was unlikely therefore to be overpriced because it would not have achieved as good a price as a sale in normal market conditions. However, set against that was Mr Bezant's evidence that AMIC was a premium brand with average petroleum volumes around 25% higher than the Privat brand to which the 246 petrol stations belonged. These factors strike me as fairly obvious demonstrations, each in their own way, of the caution with which a valuer should approach their true comparability even though they were all located in Ukraine.

1317. In any event, there are a number of reasons why I consider that reliance on the Lukoil transaction does not give very much assurance that Mr Kaczmarek's market valuation can be relied on as a suitable cross-check or as a free-standing valuation of the petrol stations at the relevant time. The first and striking point is that none of the contemporary valuers (Veritas, UCE and BT) used a market valuation based on comparables, despite the fact that the Lukoil transaction had completed only a year or so earlier. This was dismissed in the Defendants' closing submissions as not relevant, but I think it is. If it were really to have been the case that "it is difficult to imagine a more appropriate comparator" (as it was put in Mr Kolomoisky's closing submissions) it is to be expected that at least one of the three would have picked it up and used it at least as a cross-check.

1318. Secondly the source of the information on which Mr Kaczmarek relied was not very scientific, because it came from a short press report of a statement made by the head of Lukoil (Vagit Alekperov) which only gave an approximate price for the transaction. It also described the transaction not as a sale of the petrol stations themselves, but as being one by Lukoil to AMIC of its 100% stake in Lukoil Ukraine "which owns a network of 240 stations and 6 depots in Ukraine". When the transaction was reported in the AMIC and Lukoil financial statements no price was given.

1319. It follows from this that it is not possible to tell from the data on which Mr Kaczmarek relied what the impact was on the price per petrol station of the fact that the deal also included 6 OSFs. Mr Howard suggested that the impact was likely to be "peanuts", but it is difficult to draw that inference in circumstances in which Mr Kaczmarek accepted that he had no idea of the size of the OSFs and no way of allocating any value to them. There is also no way of telling the extent to which the price of the interest in the relevant company directly reflected the price of its underlying assets. I also see force in the submission that a short press report must rank relatively low in any assessment of reliability of the source.

1320. Thirdly, the exchange rate point I have already explained may well have been applicable. It is unclear whether the transaction was denominated in UAH or US$, although it was referred to in US$ in the press report. Whichever it was, by the time of the valuation date the US$ value of the deal would have reduced significantly for the reasons I have already explained above. I accept the Defendants' submission that this consideration alone would only have reduced the value of each petrol station in the Lukoil transaction to a figure in the region of US$600,000 per station, which still shows a comparable well above Mr Bezant's DCF valuation. But that is still much closer to Mr Bezant's valuation than Mr Kaczmarek's and does not take into account the other potentially depreciating factors I have already described.

1321. In these circumstances, I consider that the best evidence of the market value of the 246 petrol stations transferred as part of the Asset Transfers is the valuation of Mr Bezant of UAH 1,869,327,188 as at 1 September, being the mid-point in time of the Asset Transfers. This is very substantially less than that Original 2016 Value of UAH 6,341 million attributed to them in the Bank's books, which itself was very substantially less than the figure of UAH 8,444 million reached by Mr Kaczmarek. It follows that, based on the evidence I have seen, the Original 2016 Value and Mr Kaczmarek's valuation bear little if any relationship to the true value of these assets.

1322. It also follows that the amount for which the Bank is required to give credit to the Defendants in its claim for the losses which it sustained in consequence of the Misappropriation arising out of the transfer of the 246 petrol stations is UAH 1,869,327,118 million.

Asset Transfers: value of the OSFs

1323. The credit value attributed to the 74 OSFs was UAH 5,891 million (i.e. their Original 2016 Value). Their Restated 2016 Value, assessed as a result of reports prepared by three different valuers (Asset Expertise, Expert+ and Volyn) was UAH 325 million. The value attributed to them by Mr Bezant was UAH 538 million which was therefore very substantially less than their Original 2016 Value, but materially in excess of their Restated 2016 Value. The value attributed to them by Mr Kaczmarek, was UAH 2,499 million, which was therefore substantially less their Original 2016 Value but substantially more than their Restated 2016 Value. The difference between the parties' respective valuations was UAH 1,961 million and the amount by which the Bank claimed that their Original 2016 Value exceeded their true value was UAH 5,353 million.

1324. Mr Bezant and Mr Kaczmarek were both agreed that it was not possible to carry out a DCF valuation or to value the OSFs by reference to valuation multiples derived from comparable companies. However, they had a fundamental disagreement about the alternative methodologies that might be appropriate. In particular, Mr Kaczmarek considered that an income approach could be implemented, while Mr Bezant considered that there was such uncertainty over the operational status of the OSFs in the relevant period that the most appropriate valuation approach was based on the actual transaction prices achieved at an auction of 23 of the OSFs sold in 2019 (further OSFs were sold in 2020, 2021 and 2022).

1325. The Original 2016 Value of the 74 OSFs was based on the contents of a report produced by BT on 11 April 2016. This report valued 149 OSFs (including the 74 which are the subject of the Asset Transfer) for a total appraisal value of UAH 14,619,785,121. Mr Kaczmarek performed a DCF valuation based on his acceptance that what he called "the capacity and throughput data of the OSFs" provided to BT for the purposes of its 2016 OSF report was accurate. This was a critical assumption which Mr Bezant was unable to accept because its reliability was too uncertain. It is clear that, to the extent that there were material inaccuracies in the capacity and throughput data, any DCF valuation based on it would be of little value in attempting to establish a market or fair value for the OSFs at the relevant time.

1326. The core question to which the disagreement between the experts gave rise was therefore the quality of the evidence available to the valuers for the purpose of establishing whether the OSFs were operational. It is the Bank's case that the figures which were used by BT for their 2016 OSF report were not just unreliable but had been falsified within BOK by Mr Chernyshov and Dmitri Plyska, deputy head of client lending in BOK. Mr Chernyshov was also involved in the manipulation of the data originally used for the purposes of valuing the 246 petrol stations, while correspondence in relation to the Topchy spreadsheet confirmed that Mr Plyska worked closely with Mr Chernyshov in relation to those valuations. In the event, Mr Kolomoisky (and by

adoption the other Defendants) accepted in his closing submissions that the throughput data given to BT did not appear to have been true, although he went on to assert through his counsel that he "had no involvement in the provision of, and no knowledge of, the data provided". Nonetheless, it remains important to explain my findings as to what happened.

1327. Although the Original 2016 Value of the 74 OSFs was based on BT's 2016 OSF report, it is revealing to consider first the evidence as to how the data for a series of OSF valuation reports produced by BT in 2015 had been compiled. The copies of these earlier OSF reports in the trial bundles were all dated 7 August 2015 and were prepared in relation to each owner of the 74 OSFs (amongst others) for the benefit of the OSF holding entity, the Bank and the NBU. The purpose of each report was recorded as a pledging of the relevant OSFs to the Bank. The valuation date was 1 April 2015 and each report recorded that it had been provided with data on "the release and residuals of petroleum products on a monthly basis" for the whole of 2014 and the first two months of 2015. The source of the data was said to have been the relevant OSF-owning entity.

1328. The precise source of the underlying data is not confirmed by any explicit communication between the Bank and BT, but the Bank has established that it is very likely to be a spreadsheet (of which Mr Chernyshov was custodian) last saved in June 2015, which gives monthly volumes for each of the 149 OSFs. The exercise the Bank carried out to show that this was the source was by comparing the annual volumes per OSF in BT's 2015 OSF reports to the aggregate of the monthly volumes recorded in the June 2015 spreadsheet. They matched exactly and I am satisfied that it is likely that this was the document on which BT relied as its source the relevant data for OSF throughputs when preparing its earlier 2015 OSF reports.

1329. However, the Bank has also identified another version of the same spreadsheet (for which Mr Chernyshov was also responsible) last saved in March 2015, which tells a very different story. Unlike the June 2015 spreadsheet, which was the source of the data used by BT, the March 2015 spreadsheet had a further column which identified whether the relevant OSF was operating or not operating in the relevant month. It disclosed that, of the 74 OSFs, only seven were operating during the relevant period; the rest were described as not operating. The figures for throughput were also dramatically different because the March 2015 spreadsheet showed a throughput of zero for 64 of the OSFs during the period January 2014 to February 2015, while the June 2015 spreadsheet shows a positive throughput for the same period of all but one of the 74 OSFs.

1330. Equally telling is the result of an exercise carried out by the Bank to ascertain the way in which the throughput data relating to the seven OSFs which were recorded in the March 2015 spreadsheet as being operational was manipulated for the purposes of the June 2015 spreadsheet. Those within BOK responsible for the spreadsheets (most likely to include Mr Chernyshov) carried out an exercise which echoed what was done when the same percentage increases in three categories of fuel were applied month after month throughout the period January 2014 to February 2015 to the TOPCHII sales volume figures for the same petrol station. Thus, the June 2015 version of the OSF spreadsheet recorded a fixed percentage increase in throughput figures (both inflows and outflows) for each of the seven OSFs which was the same for each of the 14 months between January 2014 and February 2015 (inclusive), albeit by a different percentage

increase for each of the OSFs. In my view this is compelling evidence that the data from the June 2015 spreadsheet bore little if any resemblance to reality, and was a wholly unreliable source of data from which BT could have produced a proper DCF valuation.

1331. There were also other discrepancies which cast doubt on the veracity of the June 2015 spreadsheet. Thus, the data included (in a separate table) figures for nominal storage volumes in tonnes for each OSF. This volume was the regulatory capacity figure for the tanks in each OSF, imposed amongst other reasons to avoid tank overflows. An exercise carried out by the Bank demonstrated that, in respect of 35 of the OSFs whose data was recorded in the June 2015 spreadsheets, the recorded opening balance of fuel volume at the beginning of one or more of the months between January and March 2014 exceeded (sometimes by a very significant tonnage) the nominal storage volume for that OSF. In other words, it was simply not possible for the facility on the relevant site to have stored the tonnage of fuel recorded. This of itself established that the throughput figures for those OSFs cannot have been accurate and casts significant doubt on the reliability of the data used by BT to prepare its 2015 OSF reports.

1332. Having prepared these reports in 2015, BT were then further instructed by the Bank on 21 December 2015 (with a supplementary instruction on 11 March 2016) to prepare a further appraisal of the 149 OSFs with a valuation date of 31 December 2015, i.e., some nine months after the valuation date for BT's 2015 OSF reports. When the BT 2016 OSF report was produced, it was dated 11 April 2016 and had 38 annexes grouping each of the 149 OSFs by owning entity. It identified that 70 of the 74 OSFs which were the subject of the Asset Transfers were operating in the sense that it contained a table of throughput data by tonnage for each of them over a period of "11 months of 2015".

1333. There is no spreadsheet in the trial bundles which evidences the precise source of the throughput figures by OSF, but there is a spreadsheet in the trial bundles which was last modified by Mr Chernyshov on the same day as the December 2015 instruction was given to BT. It is entitled "Petroleum Storage Depots. March-November 2015 Petroleum Products Distribution". It has over 6,700 line entries, recording the figures for receipts and distribution at each of the 149 OSFs of four different types of petroleum product (A-80, A-92, A-95, Diesel and a total) for each of the months, March to November 2015. It also marked whether each OSF was operating or not operating. In marked contrast to what was set out in the table in BT's 2016 OSF report, only four of the 74 OSFs which were the subject of the Asset Transfers were marked as operating. The remaining 70 were marked as not-operating and with one single exception (diesel distributed from the Brilevka OSF in September 2015) disclosed a zero figure for distribution throughout the period.

1334. The data in this spreadsheet was far more consistent with the March 2015 spreadsheet which I have found to have been manipulated for the purposes of the BT 2015 OSF reports than it was to the data which was eventually used for the purposes of showing that 70 of the 74 OSFs were operating for the purposes of BT's 2016 OSF report. Indeed, there were striking similarities between what seems to have been done with the throughput data for OSFs and the manipulation of the data for the 246 petrol stations. The Bank submitted that it is to be inferred that this clearly demonstrated that BT had been provided with inaccurate data by the Bank which had been made up by individuals within BOK and then inserted in the data sheets eventually used by BT for its OSF valuations.

1335. The possibility of some form of manipulation seems to have been suspected by BT at the time, even though they did not know what it was. Thus, shortly after it received the supplementary instruction, BT wrote to the Bank asking it to provide written clarification regarding the oil products sales volumes of the OSFs. BT said that it required this information because a number of OSFs had been identified where petroleum products sales volumes significantly exceeded average industry indicators. BT then went on to express concerns that this might have been caused by double counting. This then led to the following request in a Skype exchange between Mr Plyska and Mr Chernyshov concerned with how to respond to BT's question, which gives a clear indication that individuals within BOK were prepared to invent reasons for what appeared on their face to be improbabilities in the extent of OSF turnover:

> "There is a question from Bakers in the mail, please write that this is happening because these oil storage facilities are making do not sell through the petrol station retail chain, but sell to major wholesale buyers (agricultural producers, companies providing harvesting services to agro producers, etc.) if there are any other ideas you can also write them, and then we will discuss, well, firefighters or army!"

1336. BT continued to express concerns, because 3 days later (on 21 March 2016) it wrote again to the Bank explaining that its internal technical control had identified a number of issues relating primarily to the source data with which it had been provided, the use of which may lead to what it called a "non-objective assessment". BT explained that a non-objective assessment is an assessment that is based on knowingly false data. It said that, where that is the case, the assessor is required to ask its customer for comments, and if the customer is unable to comment or to confirm information that may be biassed or untrue, the assessor must refuse to perform the work.

1337. The issues on which it expressed concern can be summarised as follows:

i) An analysis of the total transshipment volumes of petroleum products in Ukraine for 2014 demonstrated that the national total was 7.66 million tonnes of which 5.65 million tonnes passed through oil bases outside the Privat group (i.e., other than the 149 OSFs). This left a maximum possible figure of 2 million tonnes for the 149 OSFs. The data which had been provided to BT claimed that the throughput for the 149 OSFs was in fact 5 million tonnes.

ii) The fuel transshipment volumes for a number of the OSFs significantly exceeded the volume of the tank farm, in some instances by very substantial percentages indeed. This was similar to one of the points which has been identified by the Bank in relation to BT's 2015 OSF reports.

iii) Two examples were given to illustrate BT's concern that data from Ukrainian railways demonstrated that the volume of petroleum products from rail transport in 2014 for some OSFs did not correspond to the volume specified in the data supplied by the Bank.

1338. BT then asked that the following be done "in order to address the risks associated with source data":

> "1. Please promptly check/recheck the source data provided on the transshipment volumes for all oil bases, and confirm them with the source documents (associate

> the data of fuel accounting logs with the source transport documents). Provide us with transhipment information and copies of source documents confirming the specified transshipment volumes for working documents.
>
> 2. To provide an information response on the technical condition of the oil bases with the indication of primary information sources, which will be sufficient justification of the possibility to perform their activities for the main purpose of transshipment and storage of petroleum products.
>
> Please note that these facts and information request points are critical to the completion of work to address the project risks associated with the reliability of the source data."

1339. The evidence does not disclose what happened next, but whatever it was must have satisfied BT that it was able to proceed and complete its work, because its 2016 OSF report was produced 3 weeks later on 11 April 2016. As well as the capacity and despatch tonnage for each of the 149 OSFs I have described in paragraphs 1331 and 1332 above, the report described the technical condition of each of them as being either satisfactory or good. The report stipulated that it was produced solely for the internal use of the Bank and restrictions on its use were provided for by the "Technical Assignment and the conclusion about the value". It was to be solely for the internal use of the Bank and was "not intended to be transferred to any third parties, including, but not limited to, state organisations, regulatory authorities, financial institutions or clients" of the Bank. It also listed under "Restrictions" that BT did not conduct a personal review of the OSFs and that in its conclusions and opinions on the condition of the OSFs, based itself only on the information provided by the Bank.

1340. BT's 2016 OSF report then set out a series of assumptions on which its conclusions were based. These assumptions set out an extensive series of qualifications as to the nature of the task which BT carried out. In particular BT made a series of generally applicable assumptions that all documents and information, including oral information, provided by the Bank or the relevant OSF-owning company was deemed to be accurate and stated that BT "did not conduct legal expert review, inventory, construction and technical review of the assets and related property rights;". It was also assumed that the OSFs had no defects affecting their value except for those described in the report. The report also identified a series of special assumptions which appear to have been specifically necessitated by the particular task of valuing the 149 OSFs. These included the unsurprising assumptions that each OSF was managed by an effective operator and that the tanks complied with all technological requirements and regulations for the storage of fuels.

1341. More significantly, however, BT included in their 2016 OSF report, the following two special assumptions, more in the form of limitations on the work they had been able to carry out:

i) BT "did not verify the compliance of market demand and consumption of actual data on fuel transfer provided by the Customer and proceeds only from the Technical Assignment"; and

ii) BT reiterated that it "did not conduct a personal review of the Subject Property and believes that the Subject Property is in working condition and that the petroleum tank farms themselves work in their own working mode as intended."

1342. The reference to the Technical Assignment is itself an important qualification to the nature of BT's 2016 OSF report, which was made clear in its description of the Evaluation Base on which it had proceeded. This part of the report stated as follows:

> "According to the terms of the Technical Assignment and the contract, the appraisal base is the appraised value, which is a non-market base … As part of the Appraisal, the Customer establishes specific requirements for the Report and cost determination procedures, which do not reflect the general market principles of cost formation, in the form of a Technical Assignment."

1343. The report then included a table which included a clear statement that the sales volumes were issued by the Bank and "were not checked for compliance with the market due to the lack of statistics on petroleum tank farms". It then explained the consequence of these limitations on BT's work in the following terms:

> "Thus, the Technical Assignment is intended to conduct an appraisal in accordance with the specific conditions established by the Customer, which are not market-based. This applies, first of all, to the appraisal model and sales volumes, which in turn are the most sensitive parameters in relation to the value of the Assets. The expert did not conduct a special check of the market demand and the possibility of selling on the market the volume of fuel specified by the Customer in the Technical Assignment and cannot assert that a potential buyer, if he wishes to conduct a market transaction for the acquisition of a petroleum tank farm, will not lay down other sales forecasts and use a different business management model. So, the value determined in the report does not take into account the most efficient use of the Assets and in no case can be considered as market value, but is only an interpretation of the Technical Assignment established by the Customer.
>
> The methods for establishing the appraised value in accordance with the Technical Assignment also do not correspond to other appraisal bases, namely: depreciated replacement (reproduction) value, value in use, liquidation value and residual value."

1344. This made quite clear that, because the Bank had established specific requirements for the report which did not reflect general market principles, the report did not reflect market value, but was simply to be treated as an interpretation of the technical assignment established by the Bank. On the face of it, the level of qualification to the accuracy of the underlying data used for BT's 2016 OSF report made it an unsuitable starting point for any valuation, which seems to have been the reason for which BT so heavily qualified the report in the first place. In these circumstances, I do not accept the submission made on behalf of Mr Kolomoisky that because BT provided the Bank with the report on which Mr Kaczmarek relied, they "must have been satisfied that it was reasonable", anyway for the purposes for which Mr Kaczmarek relied on it. Far from it, BT made quite clear that the inadequacies in their underlying data (on which Mr Kaczmarek later relied) were such that a reliable market value of the OSFs could not be based upon it.

1345. As I have explained earlier in this judgment (see paragraph 514 above), the concerns about the reliability of the underlying data were confirmed by what occurred after the report had been made available to the NBU, whose initial response was that the qualifications included by BT meant that it could not be used for the purpose for which it had been produced. Ms Rozhkova explained that the NBU had not objected to the appointment of BT as an internationally recognised firm, but said that the appointment proved to have been made on what she called a clearly inappropriate basis. The NBU also made clear that, because the report was designated exclusively for the Bank's internal use and could not be used by "state organizations, regulatory authorities, financial institutions and Customer's clients", a new assessment would be required if the NBU were to be able to rely on it.

1346. By the end of June 2016, the NBU had determined that it needed to carry out its own inspection of a selection of the OSFs referred to in BT's 2016 OSF report. The results of that inspection were (as Ms Rozhkova explained in her evidence) that the concerns the NBU already had about the robustness of the BT report proved to have been well-founded. In particular the inspections of more than 20 of the OSFs demonstrated that several of them had not been working for a long period of time. Indeed Ms Rozhkova said that some of them were found to have been in ruins. This led to an explanation drafted by Ms Koryak and Mr Plyska, both working within BOK, in which they gave the following explanation for why a number of the OSFs appeared to have been inoperative:

> "Prolonged downtime of the tested real estate is primarily due to organisational conditions, namely transfer of ownership of real property units during mortgagor substitution, pre-trial foreclosure by the bank, registration of financial leasing. Accordingly, it was difficult to ensure business operations and solve administrative and managerial issues for a long time. Social security of employees due to suspending work of enterprises was partly decided by employers through establishing part-time. Incomplete working hours amounted to the agreed number of hours per week. We also pay special attention to the fact that the abnormal high air temperature occurred in the territory of Ukraine and therefore the petroleum tank farms were forced to shorter the day-light working hours in order to reduce the fire hazard, works for acceptance and shipment of petroleum products were carried out at night. Night work is also due to high traffic intensity of long-distance state routes during the day and the requirements for the transportation of petroleum products."

1347. This explanation bore the appearance of having been made up. Ms Rozhkova gave evidence that, at a meeting with Mr Kolomoisky on 7 July 2016, which was also attended by Ms Gontareva, she reiterated to him that the NBU was serious about the real need for the Bank to restore its capital position to acceptable levels, and that she remained of the view that the overvaluation was not accidental. At that meeting, the NBU presented documentation including a table which demonstrated that of the 33 OSFs which had by then been checked by the NBU, only 7 were operating and that the majority had not been functional for a long time (by which was meant 5 to 6 years). The table confirmed that for the NBU's purposes it was not possible for any value to be attributed to them because their value was inflated and did not correspond to market value, BT having proceeded on the basis that they were functional. It was shortly thereafter that Mr Kolomoisky gave the personal undertakings that I have already

described in paragraph 517 above. At about the same (on 6 July 2016), Mr Bogolyubov was given the warning by Evgeniy Ruvinskiy I have already described in paragraph 509 above.

1348. The next thing that happened was that the NBU (jointly with the Bank) commissioned a further valuation report of 36 of the OSFs, which had by then been taken onto the Bank's balance sheet, from Veritas. This report was produced on 18 August 2016 and valued the 36 OSFs as at 30 June 2016. The market value was said to be UAH 1.314 billion, a figure which was 42% less than the valuation given for the same OSFs in BT's 2016 OSF report (UAH 2.2 billion). In reaching that figure, there are a number of significant discrepancies as against the data recorded by BT. Thus, Veritas described only five as being operational, while, in BT's 2016 OSF report, 34 of the same 36 were said to have throughput volumes (i.e., tonnage despatched during the applicable 11 months of 2015) which indicated that they were in active working order. It also appears that the tonnage capacity figures which should have been the same in both the BT 2016 OSF report and the Veritas report were recorded as materially different in the two reports (in each instance a smaller capacity was disclosed in the Veritas report).

1349. The Bank submitted that there is good reason to think that even the Veritas figures for the 36 OSFs it valued were based on over-optimistic assumptions as to their operational status. Thus, it pointed out that a column on the relevant table describing the operational status of the 31 currently non-operational OSFs indicated that they were all "ready to operate". I agree that this is difficult to square with the evidence obtained by the NBU when it carried out its own inspections at the beginning of July 2016.

1350. It is also difficult to square with inspections carried out by officers from a number of different Bank branches subsequent to the time of its nationalisation. During the course of March 2017, 52 OSFs were inspected of which only one was said to be operational and one was said to have been potentially operating. The remainder were described as not functioning or not operated. Of itself, this does not establish that they were not operating at the time of the original valuations carried out by BT or Veritas, but in relation to many of them the detailed descriptions given in the inspection reports are only consistent with a conclusion that the period for which this had been their condition and status had often been many years.

1351. The most extreme example was an OSF in Poltava Region, which was valued by BT in its 2016 OSF report at UAH 149 million on the basis of a 2015 despatch volume of 75,102 tons and a condition recorded as satisfactory. Its true status was recorded in the relevant 2017 Bank inspection report as having been out of operation for over 23 years and being in the following condition:

> "There is only a watchman on the territory. The facility is not in a satisfactory condition, the sheds where the petrol trucks were stored are dilapidated (the roof has fallen off, trees and bushes are growing in the middle). Pumping station - all pumps and gearboxes have been dismantled, and some pipes are missing. Generator room - there are no windows or doors in the room, transformers and electrical wiring have been dismantled. Filling station - all equipment is rusty, the pipeline is partially missing, and the iron and water coating has been dismantled. Casemates, inspection and distribution wells are also partially dismantled. There is no centralised water/gas and electricity supply. The watchman's house is heated with firewood."

1352. In his oral evidence, Mr Kaczmarek initially continued to maintain the view he had expressed in his reports to the effect that the operational data on which BT had based its 2016 OSF report was reliable. He said that operating status was established if an OSF was simply storing fuel for customers, but accepted that he had no basis for concluding that this is what any of them were in fact doing, and had no real answer to the point that his valuation like BT's was based on throughput not storage. Furthermore, as he was taken through the underlying materials I have described above, he accepted that BT had made clear that they had not verified any of the data on demand and consumption, which meant that they had not be able to verify the throughput figures which they had derived from the individuals at BOK acting for the Bank.

1353. Mr Kaczmarek also said that one particular reason he considered that the OSFs were likely to have been operational was because that was the status of the petrol stations. In summary he said that, as a matter of what he called logical necessity and economic rationality, it was more reasonable to assume that the OSFs which were the subject matter of the Asset Transfers were operational rather than non-operational, given that the 246 petrol stations required intermediate storage facilities.

1354. This argument had a superficial attraction, but in the event it did not stand up to scrutiny, because the OSFs and the petrol stations were geographically dispersed and there was no evidence that the 246 petrol stations in fact relied on the OSFs for supplies. In other words there was no evidence that the OSFs and the petrol stations were vertically integrated trading enterprises. Furthermore, Mr Kaczmarek accepted that a very much smaller number of OSFs (even as few as five) might have been sufficient to service the 246 petrol stations. It was also the case that no exercise had in any event been done to establish the extent to which the 246 petrol stations in fact required the service of an intermediate storage facility in the form of an OSF, whether because of the extent of their own on site storage being resupplied from the refinery at Poltava or otherwise. In these circumstances, I do not think that Mr Kaczmarek's argument based on logical necessity and economic reality had any sufficient evidential foundation, and it certainly does not undermine the more compelling evidence of the non-operational status of the OSFs which I have already described and which I find to have been a more accurate reflection of the true position.

1355. Mr Kaczmarek also said that he never used the term 'Special Assumption', which as I have already explained had real significance to BT's 2016 OSF reports, because of the qualifications which it conveyed. Initially he said that he did not know what was meant by this phrase. This was surprising evidence because the way the phrase was presented by BT indicated that it had a technical meaning, as indeed it does in the IVS Definitions. It means "... an assumption that either assumes facts that differ from the actual facts existing at the valuation date or that would not be made by a typical market participant in a transaction on the valuation date." Mr Kaczmarek then suggested that BT may not have been using the phrase in its technical sense. This came across as a rather defensive explanation, driven I think by a recognition that the technical meaning of the phrase emphasised the importance of what was being said by BT. But in any event it was obvious from the substance of what BT was saying that they were very unhappy with what they were being told about the underlying data and I found it surprising that Mr Kaczmarek did not seem to recognise that was the case.

1356. By the end of his cross-examination, Mr Kaczmarek had been driven to accept that it was not accurate for him to have said, as he did in his initial report, that there was no

reason to doubt that the OSFs valued by BT in its 2016 OSF report were operational. He explained that he still thought that this was an accurate thing for him to have said on the basis of the information known to him at the time, but I am afraid that the reluctance with which he acknowledged that the evidence advanced by the Bank was inconsistent with this belief, undermined the extent to which I was able to treat his evidence as genuinely independent.

1357. In my view, the evidence taken as a whole gave overwhelming support to the Bank's case that a very substantial proportion of the 70 OSFs, which were said in BT's 2016 OSF report to have been operating with substantial volumes of throughput, were not in fact operational at all and, to the extent that they were operational, the throughput figures were fabricated. I have formed the clear view that the underlying data was a wholly unreliable foundation for the DCF valuation of the OSFs conducted by Mr Kaczmarek. As I have already explained, the Defendants go some way towards acknowledging that is the case by their acceptance that the throughput data given to BT does not appear to have been true.

1358. The Bank also criticised some of Mr Kaczmarek's other assumptions when making his DCF valuation. They related to EBITDA margins and capital expenditure, the appropriateness of his CRP and the absence of a RONIC adjustment. The EBITDA margins and capital expenditure assumptions were based on Mr Kaczmarek's evidence in the Crimean Arbitrations and the Bank's criticisms were based on the inability to make a proper comparison between the OSFs which were in issue in those proceedings and the 74 OSFs which formed the part of the Asset Transfers. Its criticisms of the latter two assumptions were based on similar submissions to those made in relation to Mr Kaczmarek's valuation of the 246 petrol stations. I have decided that in light of the fundamental flaws in Mr Kaczmarek's use of the underlying operational data, there is little purpose in exploring these criticisms in more detail, not least because neither party developed their submissions on any of these points.

1359. Of greater potential significance was Mr Kaczmarek's evidence in relation to what can be characterised as four cross checks to his DCF valuations. In Mr Bezant's view, they were of limited utility because they all reflected the value of OSFs which were operational. This is certainly the case in relation to the first of these cross checks, which involved a comparison of what Mr Kaczmarek said was his implied multiple of 8.1 based on the OSF's projected EBITDA of US$10.8 million, with an industry average EV/EBITDA multiple of 10.5 in 2016 for the oil/gas distribution sector, based on the work of Professor Damodaran. The problem with this cross-check was that its utility depends on the figures for BT throughput which I have concluded are wholly unreliable. Indeed, in the course of his cross-examination Mr Kaczmarek accepted that, if the BT throughput figure were wrong, there were no earnings that could properly be included in his DCF calculation with the consequence that this cross-check did not work.

1360. The second cross check was Mr Kaczmarek's evidence that the average per-OSF value of US$1.21 million was consistent with the range he had previously calculated when valuing oil storage facilities in the Crimean Arbitrations, where he had come up with an approximate value of US$1.17 million per facility. The way that this evidence was given was very surprising because, although it was accurate in so far as it went, it gave a very misleading impression. The reason for this is that he failed to go on and disclose that the arbitration tribunal did not accept his evidence on this point; it rejected his approximate value of US$1.17 million per facility and instead awarded US$871,000

for each of the two facilities he had valued (i.e., more than 25% less). At the time he submitted his report on this point in these proceedings, the arbitration award had been made, Mr Kaczmarek had read it, but it was not publicly available. His explanation for his omission to disclose what was plainly a relevant fact was that he did not agree with the tribunal's ultimate decision.

1361. I do not regard that explanation as at all satisfactory in light of the fact both that Mr Kaczmarek was advancing his own evidence as an appropriate and objectively credible cross-check and that other parts of his report in relation to the petrol stations did refer to the award itself rather than merely his own evidence. His original evidence gave the impression that there was only a difference of less than 4% between the current valuation and the chosen comparable, whereas on the tribunal's findings the differential was in fact 28%. I also think that the way he dealt with his cross-examination on this point demonstrated a misunderstanding of his duty to have regard to all material facts including those which might detract from his opinion. This of itself undermined my confidence in his ability to appreciate the nature and extent of his duty as an independent expert to assist the court.

1362. Mr Kaczmarek's third cross check was that he noted that BT had used what he called the comparable transaction approach when valuing two assets for which no throughput data was provided. He said that BT had determined (by reference to five comparables) that buyers of comparable assets could be expected to pay US$136 per tonne of storage tank capacity, that 72 of the OSFs had a total capacity of 522,775 tonnes and that this therefore implied an aggregate value of US$71.1 million which was within 18% of the fair value he reached using his DCF approach. Although advanced as a cross-check by Mr Kaczmarek, it was then put forward in submissions on behalf of Mr Kolomoisky as an alternative valuation basis in its own right.

1363. This figure of US$136 per tonne of storage capacity, derived as it was from the five comparables, assumed that the characteristics of the OSF to which the comparables were to be applied included a location in Kyiv, accessibility by railway and a storage volume of 9,000 tonnes. These characteristics did not therefore bear very much similarity to the 74 OSFs. In short, US$136 per tonne was calculated as the median in a range for the five comparables used, but, as Mr Kaczmarek accepted, without any adjustments to recognise the differences.

1364. Quite apart from the impact of the fact that the comparables being used assumed a notional 9,000 tonne facility in Kyiv with railway tracks available, I agree with the Bank that the difficulty with this analysis is that the basic information on which BT based its comparables was limited. As Mr Kaczmarek accepted, there was no information on whether or not they were operational and if they were not, whether work was required to put them into an operational state. There was also no data on their throughput and it appears from other evidence that the offer prices described for each of the five comparables were in fact sales listings of assets which had been on the market for more than a year and do not appear to have led to a concluded transaction. In his evidence, Mr Bezant summarised the position as follows:

> "this is a set of five offers that never resulted in an actual transaction price and so, to that extent, notwithstanding that Baker Tilly is trying to allow for that, they're not actual transaction data, they're guide prices. I would say that there's five of them. They hadn't sold in the last year or so, based on an earlier report. I would say

> that you then need to take the median and, as I said, re- perform this exercise -- and this is what Baker Tilly do, I think -- for each of the other subject assets to recalibrate. The median is as applies to Kyiv. It's not as applies to all of the other subject assets where you have to go through the same exercise. So that's what you would need to do rather than use the 136."

1365. Furthermore, in applying the figure of US$136 per tonne capacity to the OSFs, Mr Kaczmarek made no allowance for any differences in the condition of the particular OSF to which it was being applied. It seems to me that, on that ground alone, the cross check is not very robust, even less so if it is being used as an alternative valuation basis in its own right. In my judgment, the problems with the data in relation to condition are so wide ranging that Mr Kolomoisky was wrong to submit that the US$136 per tonne storage capacity provided a reasonable basis for an approximate value of the OSFs as a set. In particular the evidence does not justify a finding that, because some of the OSFs will be more valuable than the average and some less so, the US$136 per tonne capacity figure will give a relatively robust indication of the overall value of the OSFs.

1366. Veritas carried out a similar exercise in its June 2016 report and appears to have come up with numbers in relation to the seven facilities it looked at which were said by the Defendants to support their submission that BT's comparables figure of US$136 per tonne was not unreasonable. This was not relied on by Mr Kaczmarek in his report and for that reason alone is of no real assistance. However, on the face of it, the use of these particular facilities as comparables suffers from some of the same problems as those I have identified in relation to the BT comparables. Indeed, the wide range of offer values per tonne (with the lowest at US$75 per tonne and the highest at US$259 per tonne) demonstrates the extent to which location, condition, size and nature of the facility can have a significant impact on the right figure.

1367. In his cross-examination, Mr Kaczmarek accepted that it was appropriate to eliminate his fourth cross-check, although he said that it remained something which he felt it was fair to point out. The starting point was that the figure of UAH 2.370 billion which he arrived at for the OSFs was 58% lower than the figure of UAH 5.685 billion figure for their Original 2016 Value. In his report he said that this was comparable to a 52% downward adjustment made by EY in a pre-nationalisation audit status report dated 22 November 2016.

1368. The EY exercise had involved (amongst other exercises) a desktop review of the fair value of 391 collateral and intangible assets held by the Bank including 119 OSFs. However EY in fact referred to an adjustment of between UAH 1.28 billion and UAH 4.38 billion, amounting to a substantial range of 50% to 85%. It is therefore obvious that an adjustment anyway in the upper end of EY's range gives little comfort that Mr Kaczmarek's 58% reduction in the OSFs' Original 2016 Value was sufficient or appropriate.

1369. Before dealing with Mr Bezant's approach, it is appropriate to explain the conclusions of the valuers (Asset Expertise, Expert+ and Volyn) who were instructed in 2018 to value the OSFs in the context of the Bank's need to restate its 2016 accounts. They assessed their total value as being UAH 325 million, a figure which is obviously dramatically different from the figure of UAH 5,891 million attributed to them as their Original 2016 Value based on the report produced by BT. The valuers instructed for

the restatement were able to conduct site inspections of some of the OSFs and they recorded that 71 of the 74 they valued were non operational. Of those, most were described as capable of being returned to operation with remedial expenditure and the remainder were described as derelict.

1370. Against the background of there being insufficient comparables to adopt a market valuation (which both experts agreed was the case) and the lack of reliable data on the OSFs' operational status sufficient to conduct a DCF valuation, Mr Bezant's approach was to value the OSFs by reference to the price of a subset of 55 OSFs which were actually sold at auction during the course of the period 2019 to 2021 (23 in 2019, 19 in 2020/21 and 13 in 2021/22). It was his evidence, with which I agree, that it is reasonable to assume that the result of each auction reflected the market value of each OSF as at the date of sale. In this context, his evidence was that the bidding for each auction began at an initial starting price, suggesting that the seller was motivated, at least in part, to secure a reasonable price, rather than simply seeking a quick sale; that some auctions contained multiple participants, making multiple bids, indicating an active market; and that the auctions were spread over several years (between July 2019 and October 2021), suggesting that the OSFs were not sold with undue urgency.

1371. The total realisations from the auction sales of these 55 OSFs over the period 2019 to 2021 was UAH 157 million, which compares to Original 2016 OSF Values attributed to the same 55 OSFs at the time of the Asset Transfers totalling UAH 3,389 million. Mr Bezant's essential initial approach was then to calculate an appropriate figure for the median price per unit capacity multiple implied by these auction sales, so that this figure could then be applied to those OSFs for which auction data was not available. However, he was concerned about the possible impact of the Covid-19 pandemic on the prices achieved at auctions in 2020 and 2021, and considered that it was therefore appropriate to use only the 23 auction sales achieved in 2019 as his base data. They were also closer to the valuation date. Using the capacity data from the BT 2016 OSF report, Mr Bezant then calculated a median price per unit capacity multiple implied by the auction sale prices achieved for the 23 OSFs of UAH 212 per tonne.

1372. However, an important further adjustment was required because it was apparent both from BT's 2016 OSF report and the Restated OSF reports that the 23 OSFs sold at auction in 2019 were likely to have been in a worse condition than the remaining OSFs. Using the data in the Restated OSF reports, a simple comparison of the median value per unit capacity implied on the one hand in respect of the 23 OSFs and on the other hand in respect of the remaining OSFs disclosed a 470% difference. Mr Bezant therefore considered it was necessary when valuing the remaining OSFs to apply a 470% premium to the median price per unit capacity multiple implied by the auction sale prices achieved for the 23 OSFs to ensure that those remaining OSFs were not undervalued. This gave a higher value than the Restated 2016 Values and also a higher value than the amounts which would have been attributed to the remaining OSFs if he had simply applied the auction prices achieved for those sold during the course of 2020 and 2021, when, as he explained, there was likely to have been a distortion from their 2016 values caused by the pandemic.

1373. Mr Bezant accepted in both his written and oral evidence that the approach he had adopted was subject to important limitations. However, he did not agree that this should have led to him looking at and working into his calculations more of the data to be derived from the 2016 OSF reports prepared by BT and Veritas. He regarded the actual

prices achieved from the auction sales as a materially more appropriate starting point for his assessment than any computation infected by the unreliable data, which I am satisfied was fabricated to a material extent. I think that he was correct about this, even though this involved the application of hindsight. I have reached the conclusion that an application of hindsight in valuing the OSFs is not objectionable for similar reasons to those I have explained in relation to the petrol stations (see paragraph 1268 above). It would only be necessary to exclude hindsight if the evidence indicated that the OSFs were operational and in a materially better condition as at the valuation date in 2016 than they were as at the auction sale date in 2019. For the reasons I have already explained, the evidence supports a conclusion that this was not the case because in large part they were non-operational throughout. Putting aside the fabricated data, as I must, there is no material evidence to support a conclusion that there was a material deterioration in or reduction in the value of the OSFs between those two dates.

1374. Having analysed the evidence, I have reached the very clear conclusion that neither a DCF valuation nor Mr Kaczmarek's comparable cross-check which was elevated to a valuation basis in its own right in Mr Kolomoisky's closing submissions, provides a sound basis for assessing the market or fair value of the OSFs at the time of the Asset Transfers. While Mr Bezant's approach has to be treated with care as well, most particularly because he had no information on whether the condition of the 23 OSFs deteriorated between 2016 and 2019, I think that it is materially more reliable than the approach adopted by Mr Kaczmarek.

1375. I am therefore satisfied that the valuation advanced by Mr Bezant is to be preferred and that on the balance of probabilities the fair market value of the 74 OSFs was UAH 538,341,346 when they were transferred to the Bank's books at the time of the Asset Transfers. It follows that this is the OSF-related amount for which the Bank is required to give credit to the Defendants in its claim for the losses which it sustained in consequence of the Misappropriation.

Asset Transfers: value of Hotel Zirka

1376. The credit value attributed to Hotel Zirka was originally UAH 3,601, based on two reports prepared by UCE in December 2015 and May 2016, but was then reduced four months later in early October 2016 to UAH 1,617 million on the basis of a Veritas report dated 17 August 2016. It seems that the NBU then accepted a higher value of UAH 1,693 million, although the parties and their experts were unable to assist on how that figure was reached. Both UCE and Veritas used a combination of an income and a market approach for their valuations. The Restated 2016 Value of Hotel Zirka was assessed as at 31 December 2016 in a report prepared by Asset Expertise in July 2019 at a figure of UAH 874 million.

1377. The value attributed to Hotel Zirka by the Bank's expert (Mr Bezant) was UAH 1,072 million who assessed its value using a DCF approach. The value attributed to it by Mr Kolomoisky's expert (Mr Kaczmarek), was UAH 1,321 million. The difference between the parties' respective valuations was therefore UAH 249 million and the amount by which the Bank claimed that the credit value exceeded its true value was UAH 545 million.

1378. Hotel Zirka is a 5 star hotel complex with 252 rooms operating under the Radisson Blu brand at the Bukovel ski resort in Ukraine, comprising a main hotel building covering an area of 30,578 m^2 on one land plot and a separate building which is used to accommodate staff together with ancillary facilities covering 8,678 m^2 on another land plot. The two land plots operate as a single integrated hotel.

1379. In its opening submissions, the Bank said that its primary case was that it was not required to give credit for the value of Hotel Zirka because of ongoing challenges to its title in Ukraine. It was said that it followed from this that its loss had not been reduced by reference to the value of Hotel Zirka at all. This remained its case at the time it put in written submissions on valuation issues on 11 July 2023 and at the stage at which Mr Bezant and Mr Kaczmarek were cross-examined. However, by the time of its closing submissions the point was no longer in issue and the Bank had confirmed that it would give credit for the true value of Hotel Zirka at the time of the Asset Transfers.

1380. Both Mr Bezant and Mr Kaczmarek agreed that the Veritas 2016 report on the basis of which the Bank attributed it a reduced credit value, contains errors in the valuation analysis leading to an overstatement of value, a view which was also shared by EY. The experts both agreed that Mr Bezant's valuation and supporting assumptions in relation to the main hotel building being worth UAH 1,072 million was reasonable. However, they disagreed on whether the value of the hotel as a whole should be increased to reflect the value of its secondary building or whether the value of this building is already reflected in their valuation of the main building. This was the only substantial issue which arose in relation to Hotel Zirka and was the sole reason for the valuation difference of UAH 249 million between the two experts.

1381. The basis for Mr Bezant's opinion was that the DCF approach he adopted for the purposes of valuing the hotel as a whole employed historic revenue and cost information contained in Veritas' 2016 report, the report prepared by Asset Expertise in 2019 and publicly available information. Crucially, he said that there was no evidence that there was any basis for attributing a separate income stream to the secondary building and ancillary facilities which was not already reflected in and absorbed by the conclusions he had reached based on a discounted cash flow for the hotel as a whole.

1382. Mr Kaczmarek's attribution of an additional UAH 249 million to the value of Hotel Zirka does not reflect a challenge to Mr Bezant's DCF model, because he considers that Mr Bezant's methodology and assumptions are reasonable. His evidence is that the additional figure is attributable to the income generating potential of the secondary building and ancillary facilities which he assumes are likely to have generated rent from the housed employees. Even if there was no direct income generation from that source, it is his view that it is likely that that the benefit of on-site accommodation for the employees would be reflected in a reduced wage bill by reason of the value of the benefit in kind to which they would have been entitled. His evidence was to the effect that this would in itself feed through to a compensating increase in the net income capable of being generated by the asset as a whole.

1383. In my judgment, the evidence does not justify Mr Kaczmarek in making that assumption. If the employees paid rent by way of a reduction in their wages, then that would be accounted for in lower operating costs which, based on historic costs figures, were already accounted for in Mr Bezant's valuation. Therefore the question of fact

for the court is whether the employees who occupied the secondary building paid rent, which was then capable of being reflected as a distinct income stream in Hotel Zirka's accounts. There is no documentary evidence to indicate that they did, and there is no separate revenue line for rental income from the secondary staff building in those financial statements. I accept the Bank's submissions that it is inherently unlikely that the auxiliary building generated a revenue stream which was not included in Hotel Zirka's financial statements. I also accept that it is common for remote hotels to offer free accommodation to staff, a view which, together with its consequences was well summarised in the following passage from EY's November 2016 audit status report:

> "It should be noted that in the market practice, hotel complexes located in resort areas distant from large cities (which are sources for workers) very often include auxiliary premises or buildings for employee accommodation. In our understanding, the employee accommodation building in this case is an integral part of the hotel complex, without which it would be more difficult to operate the hotel, potentially entailing higher operating expenses. Therefore, we consider that the result obtained as part of the income approach is the value of the whole hotel complex."

1384. I also accept the Bank's submission that, leaving aside the differences in the valuation figures ultimately assessed by the various valuers who looked at Hotel Zirka between 2015 and 2019, there was a heavy weight of opinion that it would be wrong as a matter of principle to apportion a separate value to the auxiliary building. While the Veritas report records a separate value for the building, it was the only other report which took that approach and was a shaky basis for Mr Kaczmarek to follow suit given his overall view that the report as a whole was unreliable in light of the errors in the valuation analysis that it contained. This is well illustrated by the fact that the Veritas assessment attributed value to the ancillary building by considering comparables which were themselves hotels rather than by reference to its status as staff accommodation. Furthermore the experts' joint statement records that the first-listed author of the Veritas report was also an author of the report prepared by Asset Expertise (prepared in 2019 but as at July 2016), which attributed no additional value to the ancillary building because it and the main hotel "operate as a single, high-level hotel service facility". This fact taken alone erodes to a considerable extent the submission made on behalf of Mr Kolomoisky that there is no basis for the Bank to seek to undermine what is called the "clear evidence" from Veritas.

1385. It follows that in my judgment the valuation advanced by Mr Bezant is to be preferred. The Hotel Zirka-related amount for which the Bank is required to give credit to the Defendants in its claim for the losses which it sustained in consequence of the Misappropriation is UAH 1,071,767,313.

Asset Transfers: value of Hotel Mir

1386. The Original 2016 Value (i.e., the credit value) attributed to Hotel Mir was UAH 449 million, based on a report dated 31 July 2015 valuing it as at 30 July 2015. Hotel Mir's Restated 2016 Value was UAH 226 million, based on a report dated 1 January 2019 by Expert+. The value attributed to it by Mr Bezant was UAH 252 million. The value attributed to it by Mr Kaczmarek, was UAH 259 million. The difference between the

parties' respective valuations was therefore UAH 7 million. Hotel Mir was also the subject of two other valuations as at the time of the Asset Transfer: a report by Colliers International ("Colliers") which valued it at UAH 259 million as at 27 February 2015 and one by Expandia LLC, CBRE International's local subsidiary ("CBRE"), which valued it as at 1 July 2016 as UAH 270 million. It can therefore be seen that the amount by which the Bank claimed that the credit value exceeded its true value was (at UAH 197 million), a difference that was very substantially more than the difference between all of the other contemporary valuations. This caused Mr Kaczmarek to describe the UCE report as a "significant outlier".

1387. Hotel Mir is situated in the Holosiivskyi area of Kyiv and comprises a 3 star hotel with 138 rooms, separately leased office space and two warehouses. Mr Bezant explained why he was of the opinion that the office space generated a substantially greater EBITDA than the hotel space, which lead to him allocating the majority of the value to that part of the asset. He ascribed no separate value to the warehouse space on the basis that it was required for the operation of the hotel and generated no separate income for its own account.

1388. As I explained in paragraph 531 above there is a preliminary issue which arises in relation to this asset. The Bank's pleaded case is that it has lost title to Hotel Mir following a complicated series of proceedings brought in Ukraine. The Bank therefore submitted that its loss has not been reduced by any recovery made from that source. At the commencement of the trial, the position, as explained in part in the Bank's opening submissions and in part by Mr Beketov in his report, was as set out in the following paragraphs.

1389. On 10 June 2016, Hotel Mir, which was owned as to 40% by Ardena LLC and as to 60% by Artis LLC, two companies ultimately owned by the Individual Defendants, had been pledged to the Bank by Ardena in order to secure its Relevant Loan to AEF. On 13 June 2016, in apparent reliance on the pledge (rather than any absolute transfer of title), the Original 2016 Value of Hotel Mir was applied to reduce AEF's debt under its Relevant Loan. After nationalisation, the Bank then took steps to foreclose against Hotel Mir and became its registered title-holder on 4 August 2017.

1390. Meanwhile, in September 2016, the shares in Artis and Ardena were sold to two Belizean companies, Rivage Limited and Sanbian Investment Limited, said by the Individual Defendants to be in the ultimate beneficial ownership of two employees of PBC, but in fact in the beneficial ownership of the Individual Defendants. On 8 November 2019, AEF brought a claim against the Bank and Ardena (with Artis later joined as a third party) to invalidate the mortgage by which Hotel Mir had been pledged and then acquired by the Bank on the grounds that Ardena had lacked authority to pledge Artis' interest. AEF's claim failed at first instance, but an appeal by both AEF and Artis was allowed by the Northern Commercial Court of Appeal on 9 July 2020 following which the Bank's registered title to Hotel Mir was cancelled and Artis and Ardena re-acquired title. This decision was then overturned by the Supreme Court on 14 January 2021 and a re-trial was ordered, but in the meantime Artis and Ardena had disposed of Hotel Mir to a company called Promyslova Korporatsiiya Prom Export LLC.

1391. This led to a further round of proceedings, in which both AEF and Artis were claimants. On 28 July 2021, the mortgage of Hotel Mir was declared invalid at first instance by

the Commercial Court, a decision which was upheld in a judgment of the Northern Commercial Court of Appeal on 18 January 2022 and by the Supreme Court on 16 August 2022. This complicated series of events, the essence of which was not disputed by the Individual Defendants (save for the beneficial ownership of the two Belizean companies which was not admitted) meant that as at the commencement of the trial the Bank had not recovered title to Hotel Mir.

1392. In the closing submissions made on behalf of Mr Kolomoisky it was explained that the position had moved on since the commencement of the trial. It was said that in December 2022, the Cabinet of Ministers of Ukraine submitted their own appeal against the July 2021 decision of the Commercial Court. On 13 September 2023, the Northern Commercial Court of Appeal closed that appeal on the basis that the decision of the Commercial Court had already been confirmed by the Cassation Court. However, that decision has also been appealed by the Cabinet of Ministers of Ukraine, and on 12 October 2023 the Supreme Court formed a panel to consider that appeal, together with a cassation appeal filed by the Bank. The Defendants submitted that it was therefore clear that the proceedings in relation to the ownership of Hotel Mir were ongoing, and that the Court should consider and determine the issues relating to the valuation of Hotel Mir, as the proceedings in Ukraine may ultimately result in the Bank's ownership of Hotel Mir being established, with the consequence that the Bank would be required to give credit for that value. In its oral closing submissions, the Bank suggested that the issue be parked.

1393. Although the difference between the valuations advanced by Mr Bezant and Mr Kaczmarek is only UAH 7 million (the US$ equivalent of which is approximately US$300,000), I still think it is appropriate to express my conclusion on the right value on the grounds that it is still possible that the Ukrainian proceedings may result in the Bank owning Hotel Mir and being required to give credit for it. However, it would not be proportionate to devote a significant amount of time to explaining the conclusion I have reached.

1394. In reaching his conclusions, Mr Bezant carried out his own valuation, and reached his figure of UAH 252 million as an aggregate of the office space at UAH 219.9 million and the hotel space at UAH 32.4 million. He had insufficient data to carry out a DCF valuation but valued both parts using comparable valuation multiples i.e., in the case of the office space, the value per square metre of comparable properties located in the same part of Kyiv as Hotel Mir and in the case of the hotel space by an analysis of the three core inputs, viz. the number of rooms, the average daily rate and the average occupancy rate.

1395. Mr Kaczmarek said that, in the light of the number of contemporary valuations "within a reasonably focused range" (apart from the UCE Report), it was not necessary to develop a *de novo* valuation analysis of Hotel Mir in order to arrive at his own view of its fair market value. He then went on conclude that the best of the contemporary reports was what he called the value approved by the NBU of UAH 259 million in 2015. This was a reference to the report prepared by Colliers which valued Hotel Mir as at February 2015 and which the EY November 2016 Report indicated had been approved by the NBU. Quite apart from the timing discrepancy (this was almost 18 months before the Asset Transfer), I think that there was substance in Mr Bezant's view that one of the problems with the Colliers' report is that it assumed that the hotel space could be converted into offices without accounting for any costs of that conversion. This then

enabled it to proceed on the basis that all of the buildings were already operating as offices rather than a proportion being hotel space.

1396. In my view, although the difference between the experts is not very substantial, the valuation advanced by Mr Bezant is to be preferred for three principal reasons. The first is that it contains a thorough and logical analysis by the expert who actually gave evidence; the substance of Mr Kaczmarek's view was second-hand. The second is that Mr Bezant's is more reliable because it did not proceed on the basis that all of the buildings were already operating as offices rather than a proportion being hotel space. The third is that it assessed a value as at the time of the Asset Transfers, rather than a year earlier, which was the date of the Colliers report on which Mr Kaczmarek relied. As to this third point, I think that the Bank was justified in criticising an inconsistency in Mr Kaczmarek's approach given that he had expressed the view elsewhere that early 2015 valuations of other real estate assets (offices in Dnipro and Hotel Zirka) were too outdated for inclusion in the Bank's 2016 financial statements.

1397. It follows that, on the basis that the Ukrainian proceedings result in the Bank owning Hotel Mir and on the basis that the Bank is required to give credit for its true value in its claim for the losses which it sustained in consequence of the Misappropriation, the amount for which it is required to do so is UAH 252,332,499.

Asset Transfers: value of Kyiv Office

1398. The Kyiv Office is located at 10 Muzeinyi Lane, in the Perchesky district of Kyiv. It was transferred to the Bank on 6 June 2016.

1399. The credit value attributed to the Kyiv Office (i.e., its Original 2016 Value) was UAH 321.7 million, which was based on a UCE valuation dated 18 June 2015. The Restated 2016 Value was UAH 193.7 million. The value attributed to it by Mr Bezant was UAH 194.2 million, which was a mid-point in his assessed range of somewhere between UAH 186.3 million and UAH 202 million. The value attributed to it by Mr Kaczmarek was UAH 245 million, which was based on a value said by the Defendants to have been verified by the NBU. The difference between the parties' respective valuations was therefore UAH 51 million (which the experts said was "small relative to some of the other assets") and the amount by which the Bank claimed that the credit value exceeded its true value was UAH 128 million.

1400. The experts referred to one other report which was produced at the time of the Asset Transfers. In October 2016, CBRE valued the Kyiv Office as at 1 July 2016 at an overall figure of UAH 207 million, having first assessed it at UAH 93 million on an income approach and UAH 236 million on a market approach. There were also two later reports, one dated January 2019 prepared by Expert+ which valued the Kyiv Office at UAH 193.7 million as at 1 October 2016 and one prepared by Colliers in November 2017 which valued it at UAH 186.3 million as at 25 November 2017. Having considered two unidentified reports, one of which seems likely to have been the CBRE report and the other of which was said to have assessed the value of the Kyiv Office at UAH 268 million, the EY November 2016 Report came up with a range of between UAH 201 million to UAH 235 million.

1401. Mr Bezant used a market comparables approach and an income approach for his valuation. In carrying out that exercise he derived his inputs both from the other reports and from his market research. His market comparables approach produced an implied value range of between UAH 186.3 million and UAH 235.5 million, while his income approach produced a range of between UAH 104.2 million and UAH 202 million. The range which overlapped an assessment based on the market comparables approach and the income approach was therefore between UAH 186.3 million and UAH 202 million. Mr Bezant then took the midpoint of UAH 194.2 million as his valuation, a figure which he correctly identified as being consistent with the other valuations I have described above, apart from the original UCE valuation which was an obvious outlier and on which neither of the experts relied.

1402. Mr Bezant was criticised by Mr Howard for taking this approach on the grounds that it was "pseudoscience". He was also criticised for not using the valuation figure that was used by the NBU. He disagreed because there was no underlying valuation report and said that there was therefore no evidence or analysis available as to how or why the NBU had 'verified' this value. In short, unlike the other reports which he was able to interrogate, examine and compare with his own assessment, he could not do anything with the UAH 245 million figure because there was no information behind it. In any event, even though the source of this value was described in the EY November 2016 Report as being a figure verified by the NBU, EY were not prepared to confirm that they considered it was a fair value, because the EY November 2016 Report recorded its own desk review as requiring a value range correction to between UAH 201 million and UAH 235 million.

1403. Mr Kaczmarek took a different approach. He did not carry out his own valuation exercise, but simply relied on what he described as the "value approved by the NBU", explaining that this was what he regarded as the most relevant figure, a point which he developed in cross-examination by describing it as a "contemporaneous valuation that was done and approved by the NBU outside of this dispute context". He maintained that position, even though he accepted that there was no available valuation which supported UAH 245 million and that EY's desk review of that valuation corrected it to a value range the top of which was significantly less and the bottom of which was only UAH 7 million greater than Mr Bezant's valuation.

1404. I prefer Mr Bezant's assessment. He carried out his own valuation which was carefully reasoned and derived from a range of legitimate inputs. I also think that the characterisation of his approach to the overlap in the range he derived from the market comparable approach and the income approach as "pseudoscience" is unfair. In my view, Mr Bezant's opinion that, in the circumstances of this case, the most justifiable approach was to look for a figure within the overlap between two different but legitimate valuation techniques, on the basis that he considered that both methods had force, is preferable to the line taken by Mr Kaczmarek.

1405. By contrast, I think that Mr Kaczmarek's approach was unhelpful, in the sense that it boiled down to little more than faith in what he called the NBU's verification process. I agree that, like many valuations, there is no precise science to any assessment of the value of the Kyiv Office at the time of the Asset Transfers. But simply to say (as he did) that, based on his experience of working with bank regulators, it would have been rigorously reviewed, is a thin justification for saying that carrying out a proper valuation of his own was not necessary.

1406. In some respects this is the starkest example of an asset valuation in which Mr Kaczmarek placed real weight on the verification of asset values by the NBU. Similar issues arose in relation to the value of the Stadium, the Training Centre, the Dnipro Office and the Airfield. I accept that the fact that the NBU agreed in 2016 to accept that Transferred Assets such as the Kyiv Office had a particular value for regulatory or capital adequacy purposes is capable of being relevant to the question of whether the Bank is now bound as against the Defendants by the values which were then attributed to those assets. However, it is less obvious why the NBU's acceptance of those values should, in and of itself, have very much weight for the purposes of establishing their true value as between the Bank and the Defendants. The NBU was not itself an expert valuer and, if it is not possible to identify a valuation on which the NBU might have relied, and which is itself capable of being scrutinised for the purpose of identifying any flaws, the evidential weight which can be attached to the mere fact that the NBU accepted that value is limited.

1407. In my judgment the evidence points to the best estimate of the value of the Kyiv Office at the time of the Asset Transfers as being UAH 194,183,249.

Asset Transfers: value of the Dnipro Office

1408. The Dnipro Office has been described as an engineering laboratory building located in the Zhovtnevy district of Dnipro at 32 Naberezhna Peremohy Street. Although it had been an engineering laboratory and a warehouse it was reconstructed as administrative office premises at some stage after 2010. It was held in the name of Okeanmash LLC and like the Kyiv Office was transferred to the Bank on 6 June 2016.

1409. The original credit value attributed to the Dnipro Office by the Bank was UAH 453 million. This value was based on a valuation from UCE as at June 2015, but that credit value was then reduced to the recognised Original 2016 Value of UAH 212 million on 26 September 2016. This figure was the amount described in the EY November 2016 Report as the NBU verified value, and seems to have been based on a valuation report from Kreston dated 4 August 2016 assessing the Dnipro Office's value as at 1 July 2016. Unlike the Kyiv Office, the Dnipro Office was not given a Restated 2016 Value at the time of the Bank's 2018 financial statements.

1410. As with the Kyiv Office, Expert+ also produced a report valuing the Dnipro Office dated January 2019. It assessed the value of the Dnipro Office at UAH 183.4 million as at 1 October 2016. There was also a non-specific valuation paper from Synex LLC which came up with a figure of UAH 184.2 million as at 31 October 2017. EY's desktop review which led to the EY November 2016 Report considered two reports, which were not specifically identified, one of which had assessed a value of the Dnipro Office at UAH 377 million and the other of which had assessed a value of UAH 212 million. It is tolerably clear that the second of these was the Kreston report but the first has not been identified. Having regard to what EY considered to be methodological errors, the EY November 2016 Report produced a potential fair value range of between UAH 181 million and UAH 194 million.

1411. The value attributed to it Mr Bezant was UAH 175 million. The value attributed to it by Mr Kaczmarek, was UAH 212 million, i.e., the ultimately recognised Original 2016

Value. The difference between the parties' respective valuations of the Dnipro Office was therefore UAH 37 million, the same figure as the amount by which the Bank claimed that the credit value exceeded its true value. Mr Bezant said that although the Original 2016 Value for the Dnipro Office of UAH 212 (which was adopted by Mr Kaczmarek) lies above his valuation range it did not do so significantly. Both experts agreed that the other's valuation was not unreasonable, Mr Kaczmarek said that "I certainly don't believe it's [sc. Mr Bezant's valuation] unreasonable" and Mr Bezant said the UAH 212 million value "is high but may still be reasonable".

1412. As with his valuation of the Kyiv Office, Mr Bezant used a market comparables approach and an income approach for his valuation of the Dnipro Office. In carrying out that exercise he derived his inputs both from the other reports and from his market research. His market comparables approach produced an implied value range of between UAH 147.4 million and UAH 266.5 million, while his income approach produced a range of between UAH 113.1 million and UAH 202.6 million. The range which overlapped an assessment based on the market comparables approach and the income approach was therefore between UAH 147.4 million and UAH 202.6 million. Mr Bezant then adopted the same approach he had taken to valuing the Kyiv Office and took the midpoint of UAH 175 million as his valuation, a figure which he correctly identified as being consistent with the other valuations I have described above, apart from the original UCE valuation on which neither of the experts relied.

1413. Mr Kaczmarek justified his approach on the basis that Kreston valuation was IFRS compliant and that, although he might not have used the same parameters as those used by Kreston if he had conducted his own valuation, any differences would have been no more than the types of difference which are commonplace amongst valuers. As with the Kyiv Office Building, he also relied on the fact that the NBU had approved the valuation.

1414. Although the differences between the experts are not very significant, I prefer the approach which was taken by Mr Bezant for reasons which are very similar to those which apply in relation to the Kyiv Office. He carried out his own carefully reasoned valuation and reached conclusions derived from a range of legitimate inputs. His methodology based on the midpoint of the overlap in the range he derived from the market comparable approach and the income approach was justifiable.

1415. Both Mr Bezant's and Mr Kaczmarek's conclusions are consistent with other contemporaneous valuations, but one of the flaws in Mr Kaczmarek's approach is that he relied on work which he did not himself carry out and could not be fully interrogated. I also think that he was wrong to give the weight that he did to what he characterised as the NBU's approval. This was no more than a limited acceptance of the Kreston valuation, which as I have already explained was subject to the review process carried out by EY, who were not prepared to confirm that they considered it was a fair value, because the EY November 2016 Report recorded that a value range correction to between UAH 181 million and UAH 194 million was required. While the bottom of this range was UAH 6 million above Mr Bezant's valuation, the top of it was UAH 18 million below Mr Kaczmarek's. It follows that, as with the Kyiv Office, one of the factors on which he placed particular reliance was not properly understood by him.

1416. In my judgment, it also follows that, while neither expert's evidence of value of the Dnipro Office was itself unreasonable, the evidence points to the best estimate of the

value of the Dnipro Office at the time of the Asset Transfers as being UAH 175,000,280.

Asset Transfers: value of the Stadium

1417. The credit value attributed to the Stadium was UAH 1,517 million (i.e. its Original 2016 Value), which was based on a combined market and cost approach to valuation assessed by UCE in a report prepared in 2015. Its Restated 2016 Value was assessed as at 31 December 2016 in a report prepared by Sinex Firm LLC ("Sinex") in January 2019 at a figure of UAH 16 million. Sinex adopted an income approach to its valuation, but neither of the experts relied on it. The value attributed to the Stadium by Mr Thomas was UAH 125 million as at a valuation date of 6 June 2016, being the date of transfer to the Bank. The value attributed to the Stadium by Mr Kolomoisky's expert (Mr Kaczmarek), was UAH 1,544 million. He based his opinion on (and adopted the figures contained in) a report prepared by Veritas dated 18 August 2016, which valued the Stadium as at 30 June 2016 and applied a cost approach. The Veritas figure was the same as the amount described in the EY November 2016 Report as the NBU verified amount. The difference between the parties' respective valuations was therefore UAH 1,418 million and the amount by which the Bank claimed that the credit value exceeded its true value was UAH 1,392 million.

1418. As at the date of the Asset Transfers, the Stadium, which was completed in 2008, was the home of FC Dnipro. It was a 31,000 seat stadium which was originally built to comply with the requirements for holding UEFA and FIFA games. The evidence demonstrated that the per capita use of the Stadium had dropped off quite sharply over the previous five years. Although the number of games was holding relatively steady at between 15 and 20 per annum, the average attendance per game was in steady decline dropping from 19,509 in 2012 to 7,307 in 2016. Consistently with this evidence, no European football club games were played at the Stadium after the Russian invasion of Crimea in 2014. Although the FC Dnipro team itself continued to participate in the Europa League, it played its games in Kyiv because UEFA had taken the view that it was too dangerous to allow the Stadium to host European games.

1419. The experts took completely different approaches to valuation of the Stadium, which explained the dramatic differences in value which they arrived at. Mr Thomas took an income approach, i.e., a DCF valuation. He did so because he considered the Stadium to be an income-generating asset. Mr Kaczmarek considered that there was insufficient information to conduct an income based DCF valuation and that there were no appropriate comparables to which suitable adjustments might be applied in order to enable a market approach. He therefore said that a cost approach to valuation was the correct way of reaching a fair or a market value and to that end he simply adopted the conclusions of the Veritas report which stated that the construction costs in euros was €65 million. This implied a UAH cost of UAH 696 million at a December 2008 exchange rate and UAH 1,755 million at a December 2016 exchange rate.

1420. There was no real issue that a cost approach involves ascertaining the current cost to replace the relevant asset. It is described in the following way in IFRS 13:

> "From the perspective of a market participant seller, the price that would be received for the asset is based on the cost to a market participant buyer to acquire or construct a substitute asset of comparable utility, adjusted for obsolescence. That is because a market participant buyer would not pay more for an asset than the amount for which it could replace the service capacity of that asset. … Obsolescence encompasses physical deterioration, functional (technological) obsolescence and economic (external) obsolescence..."

1421. Mr Kaczmarek also said that an assessment of fair value does not prioritise the cost approach over any other approach but instead requires the valuer to utilise the technique that is most objective and least subjective, by maximising the use of observable market based inputs when executing each valuation technique. Put another way, he said that a valuer should make use of the approach that maximises the use of observable inputs and minimises the use of unobservable inputs. In his view this means that the cost approach is most appropriate for the Stadium because it best achieves that end. The Defendants relied on the fact that this was the methodology which they said that the NBU's 2016 validation of Veritas' valuation accepted was appropriate.

1422. Mr Kaczmarek's preference for the cost approach used by Veritas was also based on what he said would be the reluctance of a willing seller to sell the Stadium at a price less than the cost of its construction, less depreciation if applicable. In relying on the Veritas 2016 report he noted that it (a) employed historical cost data taken from the agreements and contracts used to construct and equip the Stadium indexed to 2016, (b) calculated the accumulated depreciation to be deducted by reference to depreciation tables and (c) valued the usage rights of the land underlying the Stadium by reference to the adjusted price of comparable land plots.

1423. For his part, Mr Thomas said that a cost approach was unsatisfactory because a knowledgeable and willing buyer will pay for a real estate asset an amount based on what they can earn from the operation of the asset. He said (and on this he was supported by IVS 2013) that the cost approach is normally used where there is no evidence of transaction prices for comparable property and no identifiable actual or notional income stream accruing to the owner of the relevant interest. He did not consider it appropriate to adopt the cost approach in this case, not just because the Stadium was capable of generating income, but also because there were sufficient observable inputs to undertake an income based valuation.

1424. Mr Thomas' general criticism that the cost approach was inappropriate to value an income generating asset was illustrated by a passage in IVS 2013 (p.67 para C22) which said the following about the costs approach:

> "This approach is generally applied to the valuation of real property interests through the depreciated replacement cost method. It is normally used when there is either no evidence of transaction prices for similar property or no identifiable actual or notional income stream that would accrue to the owner of the relevant interest."

1425. This was said by the Bank to be more particularly the case where the reason for adopting it was what the Defendants advanced as a presumed refusal by the seller to sell the Stadium for less than the amount it cost to build. It was also said by the Bank that it was inappropriate to assume that the hypothetical buyer would be a person who already

owned a Dnipro-based football club for whom the Stadium would have a value over and above the income it can generate. This criticism was developed in the Bank's closing submissions by focussing on the fact that it was common ground between the experts that a fair market value is concerned with a hypothetical transaction between a willing seller and a willing buyer. It was said by the Bank that the Defendant's hypothetical seller is not a willing seller because it would not be motivated to sell the asset at market terms for the best price attainable in the open market after proper marketing, whatever that price may be (the IVS 2013 definition of a willing seller).

1426. The Defendants submitted in closing that Mr Thomas agreed that, in addition to ticket sales a football club would also earn revenues from such things as TV rights and merchandising which would not be reflected in a bare income analysis of the Stadium alone. They extrapolated from that an argument that it was illogical for Mr Thomas to ignore the intangible benefits which might accrue to the owner of the Stadium on the grounds that they would not accrue to a bank which was not itself operating a football team, because it would be able to sell on to a purchaser who wanted a football team to play at the Stadium. It was said that this meant that the Stadium's value needed to include those valuable intangible benefits derived from the fact that a purchaser would be a person who wished to make money not only out of the income stream which flows directly from the Stadium but also indirectly from those other intangible benefits as well.

1427. The Bank said that, even if this was correct so far as an occupying football club was concerned, this was not relevant to a valuation of the Stadium itself. The pool of potential buyers was not limited to football clubs. It also included property development companies, local authorities or other third parties who might wish to rent out the Stadium to a football club or for other sporting events. On the other side of the equation, TV rights for games played and merchandising were available to a football club independently of the Stadium. While there might in principle be a revenue stream of what Mr Howard called intangible benefits, they flowed from the business and activities of the club itself not the Stadium it occupied, and if those were to be taken into account it would be necessary to take into account what a club has to pay (such as wages to players) as well as what it can earn from such benefits. None of the valuers had taken any of that into account.

1428. I was persuaded that, as a matter of principle, Mr Thomas was correct on these points. I do not accept Mr Kaczmarek's evidence that a willing seller as defined will hold onto an asset in the hope that someone will turn up and pay the cost price for it. He might be motivated by a desire not to sell at less than cost price if he can, but that does not make him a willing seller – it just makes him the holder of an asset which is now worth less than the amount it cost him to build. I also note that Mr Thomas' view is consistent with the way that EY explained the position in the EY November 2016 Report. They had carried a desktop review of the Stadium, but recommended a revaluation: "From our point of view the value calculation must include the income base approach, as the cost approach for a stadium does not reflect the property's market value."

1429. As to the Defendants' submission that the hypothetical buyer would be a person who already owned a Dnipro-based football club for whom the Stadium would have a value over and above the income it can generate, I agree with the Bank's submission that this was another way of saying that synergies from the ownership of a club might mean that an enhanced price may be obtainable from a special purchaser. On that basis, I think

that the Bank was correct to submit that what such a purchaser might be prepared to pay is not market value because it does not disregard all elements of special value to a particular willing buyer and does not limit itself to the value to an assumed willing buyer, who is not a special purchaser and who will therefore (as Mr Thomas put it in cross-examination) "want to recover their investment by earning income".

1430. In Mr Kolomoisky's closing submissions, reliance was placed on some of Mr Thomas' answers in cross-examination in support of a suggestion that a willing buyer of the Stadium might pay more than a valuation which only reflected the Stadium's direct income earning potential. It was asked rhetorically: why in those circumstances should it nevertheless be valued solely on that basis? I did not read Mr Thomas' evidence in the way contended for by the Defendants. Nothing which Mr Thomas said detracted from the basic proposition that, whether or not a particular category of purchaser might be able to enhance its total return by combining a club with the Stadium does not affect the appropriate valuation of the Stadium itself, which was the only asset which the Bank took on to its balance sheet in 2016.

1431. Mr Thomas also criticised another of Veritas' explanations (likewise adopted by Mr Kaczmarek) for why it had refused to apply the income approach. In some respects it amounted to another way of putting a similar point. It had said that an income approach was extremely time consuming to compute because it is necessary to take into account a multitude of different nuances and details specific to football stadiums. It also did not account for the social consequences of an asset like the stadium including "growth of national pride, solidarity, happiness, joy and harmony", an increase in the number of those going into sports and the consequential increase in the overall health of the nation, improvement of the sports results of the host team and the increased interest in the city. These of course are social consequences which may enure to the benefit of Dnipro generally, but as Mr Thomas pointed out (and I agree), the income generating capacity of the Stadium is more relevant to a potential buyer than social benefits of that type.

1432. Mr Kaczmarek criticised Mr Thomas' income approach on the basis that he also had used unobservable inputs, because the "notional" data for some of what he had taken into account when calculating his EBITDA figure was highly uncertain. Mr Thomas did not dispute that there was indeed some uncertainty in relation to some of the figures he had put forward, but said that his inputs were in fact sufficiently observable from the public sources from which they were drawn. Mr Kaczmarek also objected to Mr Thomas' valuation on the basis of the disparity between it and the valuation conducted by UCE in 2015 and Veritas in 2016, a criticism which the Bank said was unfounded not least because Mr Kaczmarek himself had identified a number of flaws in UCE's valuation, including the fact that it did not explain the assumption that the highest and best use of the Stadium was as office space for rent rather than as a football stadium.

1433. For his part, Mr Thomas also criticised the quality of the evidence on which Veritas had relied as to the historical construction costs of the Stadium. He said that there was no analysis to substantiate or verify those costs and that they therefore had to be treated as unobservable, which Mr Kaczmarek himself had said were unsuitable as inputs when carrying out a valuation based on a cost approach. In particular, it became apparent during the course of the evidence that some of the costs which were included in Veritas' base figures were highly unreliable and in some respects significantly overinflated. Thus one of the exercises which Veritas carried out in order to arrive at its cost based valuation was to index the actual construction costs by 370% over the period 2008/9 to

2016 to reach its notional present construction cost of UAH 1.125 billion, which Mr Thomas said was unreliable because too much of the value came from the indexation process. This seems to me to be a fair criticism as was the rather more obvious point that some of the figures for the costs of equipment which were included in the construction costs were absurd – the evidence contained schedules itemising costs to be taken into account such as potato peelers said to have a 2016 indexed cost of UAH 120,000 and a Samsung TV said to have a 2016 indexed cost of UAH 2.8 million

1434. Mr Thomas also said that no proper adjustment had been made to account for depreciation and that the Marshall & Swift tables which had been used by Veritas appeared to relate to garages, industrials and warehouses, which were inappropriate for an asset such as the Stadium. I agree that the approach adopted by Veritas made little sense because the same depreciation was applied to all of the assets being valued as component parts of the whole on the basis that Veritas assessed the standard service life of the whole of the Stadium as 50 years. This then led to a figure of 5% for physical, functional and economic depreciation without any attempt to depreciate the various elements of the cost included in the original construction figures by reference to a realistic assessment of their true service life. This too seems to me to be a point which is well-founded.

1435. However, Mr Kaczmarek's more fundamental point in answer to Mr Thomas' valuation was that nobody would construct a stadium for a capital sum which was at least twelve times more (the sum quoted in euros was €65 million) than the value it might ultimately achieve based on an income approach (the sum quoted in euros was €5 million). While Mr Kaczmarek accepted that it is not unusual for a real property development to sell for less than the amount it cost to build, the gravamen of his criticism of Mr Thomas' evidence was that the disparity in the present case is very significant indeed. I agree that the disparity is indeed striking, but I also think that it becomes much more explicable when taking into account the substantial reduction in attendance and the attendant revenues since 2012, together with the inability to use the Stadium for the UEFA-related purposes for which it was constructed (with the high tickets prices that might then have been anticipated) because of the security situation following the invasion of Crimea. The considerations I outlined in paragraph 1418 above point to a probability that, even if the Stadium might have been worth its cost price immediately after construction based on anticipated attendance and usage as at 2008 (for which figures were not available), there would have been a dramatic fall off in value in the light of its prospects for profitable use some eight years later.

1436. It is evident that measuring the impact of these kinds of consideration is very difficult if a cost approach alone is used to value an asset. But I accept the Bank's submission that the way in which this should have been approached from a valuer's perspective was to give proper consideration not just to the extent to which the elements within the construction costs of the Stadium should have been depreciated at a much greater rate, but also and probably more significantly to the issue of economic depreciation or obsolescence. Mr Thomas accepted that Veritas referred to economic obsolescence, but he said that even though they had done so, it was apparent from the tables they used that they had not carried out this exercise by using the tables. Mr Kaczmarek accepted that, on a proper reading of the Veritas report, its authors did not identify that it had had any regard to this important consideration, but he sought to say that the reason they may have done so was simply because they did not think that any figure was appropriate.

1437. I did not find Mr Kaczmarek's evidence on this point to be very satisfactory. I have little doubt that, in so far as the Veritas report did not take into account economic obsolescence, both that report and Mr Kaczmarek's adoption of it, would have been deficient for this reason alone. Mr Kaczmarek suggested that it may have been taken into account, but was not considered by Veritas to be material. I do not think it is possible to make that assumption, because there was no proper explanation that that is what they had done (and that that was their view) but in light of my conclusion that the value of the Stadium was significantly impaired by the economic obsolescence apparent from the kinds of consideration I have identified, some mechanism was required to measure it. In the absence of proper comparables, I agree with the Bank's submission that this throws a valuer back onto taking an income approach for the purposes of estimating the necessary adjustment for economic obsolescence in a cost approach valuation. This is a very similar exercise to the DCF valuation carried out by Mr Thomas.

1438. It was common ground between the experts (anyway after their cross-examinations) that any such exercise should proceed on the basis that the highest and best use of the Stadium was as a sports stadium and that Mr Thomas had identified most of the sources of revenue in carrying out his valuation. Against that background, Mr Thomas analysed the Stadium's annual revenue from ticket sales and the potential rental return from the office and storage space within the Stadium, based on five comparable properties on the market in Dnipro in 2015 and 2016. He also added in the potential income stream from parking spaces, advertising and other events in the Stadium assuming three non football events per year, consistent with a report by a sports consultancy, based on an average hire price of UAH 300,000 per event. He then deducted operating costs of UAH 3.6 million per annum of which 1/3 were staff costs (based on the number of employees, his knowledge of the staff structure of Ukrainian businesses and wage categories for the sports industry), and 2/3 were other operating costs. All of these figures were supported by extraneous evidence. This led to an EBITDA of UAH 18.9 million capitalised by applying a rate of 15% and led to a market value of UAH 125.4 million.

1439. It was not really in issue that all of the inputs on which Mr Thomas relied were based on credible evidence derived from verifiable sources. Mr Kaczmarek also accepted that any TV revenue would not be an intrinsic revenue stream associated with the Stadium itself. However, he said that Mr Thomas had not considered all the potential revenues, because he did not include naming rights of the Stadium and he should have included a higher number of non-football events per year. He said that ten rather than three was a more realistic figure based on the survey relied on by Mr Thomas. The answer given by Mr Thomas to these criticisms was that he had been unable to identify any market in Ukraine for corporate branding of the type suggested by Mr Kaczmarek, and that the market for non-football events was very limited because of the priority which had to be given for football, the competition from another stadium in Dnipro for other outdoor events and the relatively inhospitable climate for some types of outdoor events for up to six months of the year. There was no evidence-based answer to Mr Thomas' view on this aspect of his valuation and I consider that the assumptions he made in relation to them were reasonable.

1440. The principal costs which then went into Mr Thomas' EBITDA calculation for the purposes of his DCF valuation were also accepted by both experts. They were the costs

of employees, maintenance expenses and utilities. Again, there was no evidence-based challenge to the figures which Mr Thomas used for costs or expenses. It follows that the arithmetical exercise undertaken by Mr Thomas to reach his income approach to valuing the Stadium was based on sound foundations and in my judgment adopts the right methodology for valuing the Stadium.

1441. Mr Thomas also put forward a single cross-check for his valuation in the form of the price achieved for the sale of a 34,000 seat stadium in Odessa called the Chernomorets stadium by the DGF in 2020. This stadium had been built in 2011 and was sold at auction to a US company for UAH 194 million. He said that it was slightly newer and slightly larger that the Stadium and was sold three and a half years after his 2016 valuation date. Nonetheless, and although he did not put it forward as a direct comparable, he considered that in general terms it was consistent with his valuation as a general cross-check.

1442. In cross-examination, Mr Kaczmarek did not accept that it was "not a bad cross-check" or that it was "certainly the best cross-check we've got"; indeed he said it was a terrible cross-check, partly because the buyer was thought to be buying into a lot of litigation as the former owner (who was not the actual seller) had refused to give up operational control and partly, if somewhat inconsistently, because the buyer may in fact have been a front for the original owner. Whichever was closer to the truth, there was therefore what Mr Kaczmarek called "a lot involved in this transaction that I think causes me to have some concern about its reliability".

1443. Whilst recognising that the sale of the Chernomorets stadium is far from perfect as a cross check, I accept Mr Thomas' evidence that it is of some assistance. It is not a direct comparable, but I think that the disparity between the price achieved for the Chernomorets stadium in 2020 and the valuation of the Stadium advanced by Mr Kaczmarek is so significant (the Stadium was said by him to be worth almost eight times as much) that it points to him having taken an unrealistic approach to his valuation and supports the Bank's argument that it was based on a flawed methodology.

1444. In all of these circumstances, I am satisfied that Mr Thomas' income approach is the most appropriate methodology with which to value the Stadium at the time of the Asset Transfers and that the inputs which he used for that purpose were both reasonable and founded on sufficient evidence. I am also satisfied that the cost approach adopted by Mr Kaczmarek is unreliable and reaches an unrealistically inflated value for the Stadium. The errors in this approach were made worse by a failure to take sufficient account of an appropriate rate of physical and functional depreciation and what appears likely to have been the absence of any recognition of economic obsolescence.

1445. I therefore find that the best evidence available confirms that at the time of the Asset Transfers a fair market value of the Stadium was the figure assessed by Mr Thomas, i.e. a sum of UAH 125,418,459. That is the figure arising out of the transfer of the Stadium for which the Bank must give credit in its claim against the Defendants for the losses which it sustained in consequence of the Misappropriation.

Asset Transfers: value of the Training Centre

1446. The credit value attributed to the Training Centre was UAH 670.5 million (i.e. its Original 2016 Value), which was based on a combined market and cost approach to valuation as at 9 April 2015 assessed by UCE in a report prepared in 2015. Its Restated 2016 Value, assessed as at 31 December 2016 in a report prepared by Sinex in January 2019 was UAH 142 million; Sinex adopted an income approach for its valuation.

1447. The value attributed to it by the Bank's expert (Mr Thomas) was UAH 105 million, as at a valuation date of 6 June 2016, being the date of transfer to the Bank. The value attributed to it by Mr Kolomoisky's expert (Mr Kaczmarek), was UAH 332 million. This was the figure which was then described in the EY November 2016 Report as having been verified by the NBU. He based his opinion on a report prepared by Veritas dated 18 August 2016 which valued the Training Centre as at 30 June 2016 and applied a cost approach. The difference between the parties' respective valuations was therefore UAH 227 million and the amount by which the Bank claimed that the credit value exceeded its true value was UAH 565 million.

1448. The Training Centre is located at Mykhailo Didevych (Pionersky) Lane 14 and 12, Dnipro, Dnipropetrovsk Oblast and consists of a complex of recreational facilities comprising four training fields, an indoor arena, two main buildings (with offices, living space, a gym, pool, sauna and showers) and additional structures. Its focus is on football and it can used by amateur, semi-professional and professional sports teams for a fee. It was built in 1971, and two additional buildings were constructed in 2005. It was built on two plots of land together amounting in size to approximately 12 hectares.

1449. As with the valuation of the Stadium, the principle disagreement between Mr Thomas and Mr Kaczmarek related to the appropriate methodology for carrying out the valuation. Mr Thomas contended that the Training Centre was an income generating asset and so an income approach was appropriate, while Mr Kaczmarek adopted the cost approach which had been used in Veritas' August 2016 valuation. Veritas adopted a cost approach because it said that:

> "It is impossible to use the income approach in this case because Training ground was developed not for profit purposes, therefore, the concept of its design is based on the values that would meet the achievement of the club's sports goals."

1450. Many of the same interconnected issues which arose in relation to the valuation of the Stadium also arose in relation to the experts' valuations of the Training Centre. The first issue related to the approach which the Defendants took to identifying the correct hypothetical seller and the correct hypothetical purchaser of the Training Centre. They posited that the seller would have to be a person who was not prepared to sell the Training Centre for less than the cost of its construction (whether or not it was responsible for its original construction) and the purchaser would have to be the owner of a football club in Dnipro. It was suggested that, in such a situation, a prospective purchaser would be faced with two alternatives: one to construct its own facility and the other to pay the seller the cost which they would have to incur in constructing a similar facility if they had to do it themselves.

1451. As with the case of the Stadium, I agree with the Bank that this is a false basis on which to proceed. The purchaser contemplated by the Defendants would not be a willing purchaser, because it has special purchaser status which should be (but on the

Defendants hypothesis would not be) disregarded for valuation purposes. Likewise, the seller contemplated by the Defendants would not be a willing seller, because it would be a particular type of seller who has predetermined for extraneous reasons the price at which it is prepared to sell.

1452. The second connected issue related to Mr Thomas' evidence that the highest and best use for the Training Centre (on which he then based his income approach valuation) was as a sports tourism complex with on-site accommodation. The Defendants challenged Mr Thomas' view that the Training Centre fell within the sports tourism sector on the grounds that it was not at the date of valuation being used as a sports tourism business, but rather was being used as a training ground for FC Dnipro. The highest and best use for the Training Centre which had been adopted by both UCE and Veritas in their 2015 and 2016 valuations was as a football club training facility. Veritas said that the reason for this was that the Training Centre was "a unique specialised property which was not intended for gaining a profit". Mr Howard adopted that highest and best use in his cross-examination of Mr Thomas.

1453. Mr Kaczmarek took a slightly different line (although he had referred to the Veritas conclusion on this issue earlier in his own report). He said that he disagreed with Mr Thomas's view that the highest and best use for the Training Centre was as a sports tourism property, but the real extent of any disparity with Mr Thomas' opinion was unclear because in his view the highest and best use would be as what he called "a membership-oriented sports club" where additional income could be achieved through "one time use fees" and leasing fees for the pool and football fields. He therefore differed both from the position which the Defendants appeared to take in challenging Mr Thomas' evidence and from Mr Thomas, describing his differences with Mr Thomas as "very different business models".

1454. Mr Kaczmarek then went on to explain that he considered that far more income could be generated for the training centre if it was marketed to local residents on a membership basis whilst also leasing other assets to both members and non members. He did not consider that tourists to Dnipro were the primary target market. He said that:

> "In this sense, the Training Centre would operate more akin to a private sporting club where the club would supplement its monthly membership fees from non-members for the use of its facilities and members for the use of fees on a reservation basis."

1455. However, although Mr Kaczmarek referred to far more income being generated from the Training Centre if his usage was adopted, he did not then quantify the consequences of the difference in view he had with Mr Thomas. He did not do so because he said that his opinion on usage did not cause him to consider that an income approach to valuation based on that use was appropriate. He said that no studies had been performed whether in 2016 (or at any other time) to develop a potential cash flow model sufficient to enable an income approach to be implemented. On the same point, the Defendants also submitted that Mr Thomas' own approach to an income approach valuation was misguided, because it did not include any actual income data relating to the use of a sports centre as a sport tourism complex.

1456. It is not in issue that the Defendants were correct to say that there was no data evidencing the actual inputs in relation to the Training Centre, although the Bank contended that the only reason it was not available was that it was not provided by the Individual Defendants, notwithstanding that it was ultimately owned and controlled by them. This inevitably meant that there was uncertainty in relation to the inputs to be taken into account, a consideration which was accepted by Mr Thomas as being relevant to his valuation.

1457. Furthermore, Mr Thomas also accepted that, as at the date of valuation, the Training Centre was not being used as part of sports tourism business, but in his view this did not detract from the fact that for valuation purposes the Training Centre's usage was best characterised as a sports tourism complex with on-site accommodation. On that basis, he went on to calculate what he called an anticipated profit in the form of an:

> "operating cash flow generated for a period of 1 year, converted into a capital sum by applying a capitalization rate that reflects an adequate return on invested capital appropriate for the type of commercial operation and location as of the date of valuation. In accordance with this approach, the operating income is defined and considered as the EBITDA of the asset. Accordingly, operating income is equal to gross revenue earned minus all costs incurred in the operation of the assets."

1458. The inputs he used for that purpose were notional figures for the price charged per person per day for the package of services, including accommodation, offered by the Training Centre and the total number of visitors likely to use these services throughout the year. In the absence of actual information he determined a median price per person per day for that package and a normalised annual occupancy rate by reference to comparable properties.

1459. This pricing data was derived from 27 properties in 12 different countries with facilities generally similar to those of the Training Centre and led to a conclusion that the median price per person per day for all 27 was UAH 1,060 It was driven by general market demand for sports training and recreation applicable in all countries including Ukraine, rather than by specific reference to football. He also took into account the income generating value attributable to the on-site accommodation having regard to data relating to occupancy rates, which he assessed at 65%. He then deducted assumed operating expenses by an analysis of EBITDA profit margins for companies operating in comparable emerging markets to reach a 42% EBITDA profit margin which he then capitalised at a rate of 15%. He accepted that there was uncertainty in relation to his inputs but was of the view that his approach was both reasonable and robust given the limited information available to him.

1460. Mr Kaczmarek's reliance on the Veritas valuation was based on what he said appeared to him to be a proper implementation of the cost approach. I shall come on to some of the problems with the way that it was implemented, but I also think that there is real substance in Mr Thomas's principled rejection of the use of a cost approach in the first place. I think he was right to conclude that the cost approach is generally only applicable to the valuation of real property where there is either no evidence of transaction prices for similar property or no identifiable actual or notional income stream and that this was not the case in relation to the Training Centre. Mr Thomas' view on this question of principle was also supported by the EY November 2016 Report. It said about both the valuation used by the Bank when taking the Training Centre onto its books as part

of the Asset Transfers (the UCE valuation) and the Veritas valuation described as "verified by the NBU" as follows: "this value calculation must include an income approach, as the cost approach does not capture the property's true market value".

1461. It was Mr Kaczmarek's evidence that different valuers might have made different assumptions, but said that nothing in his review of the work done by Veritas suggested that their parameters were unreasonable. He also said that Veritas had maximised the use of observable inputs "drawing wherever possible on historical cost information related to the valuation object itself". For this reason he concluded that it was unsurprising that the NBU chose to approve the Training Centre valuation report produced by Veritas. The Bank did not accept that the NBU had approved the Veritas report in the sense assumed by Mr Kaczmarek, and for that reason his reliance on what the NBU had done was inappropriate but, irrespective of that, one of the more striking aspects of Veritas' (and therefore Mr Kaczmarek's) application of the costs approach was that, on its own terms, it provided little certainty in ascertaining the current cost to replace the relevant asset, which as I explained in the part of this judgment dealing with the value of the Stadium, is the principal objective which the cost approach is intended to achieve.

1462. In this context, the Bank mounted a sustained attack on the exercise which Veritas itself had carried out. The figures Veritas had used for the original construction costs were wholly notional and were derived from what Mr Thomas called "cost estimates derived using statistics taken from a Soviet-era cost manual produced by the State Committee of the USSR Council of Ministers for Construction in 1969" known as the UPVV, which were then indexed to the date of valuation in 2016. In Mr Thomas' view there were many problems with this approach. They included the fact that the original costs figures were entirely notional and were based on parameters relevant to a Soviet communist economy in 1969 which bears no relation to a Ukrainian market economy in 2016 (25 years after the collapse of the Soviet Union). Veritas also omitted from their indexation tables a period of six or seven years between 1984 and 1991.

1463. Other aspects of the Veritas cost approach which were criticised by the Bank included the addition of a developer profit of 26% and the manner in which the Marshall & Swift depreciation tables were used to depreciate the assets to which the cost approach was being applied. One example of a surprising approach to depreciation drawn out in cross-examination of Mr Kaczmarek was that there were some assets in respect of which their 44 year actual term of use was 4 years in excess of their 40 year regulatory term of use, but they were only depreciated by 30%. It was also clear from Mr Kaczmarek's evidence that the Veritas report made no assessment of the highest and best use for the Training Centre and did not account for economic obsolescence. He explained this omission on the basis that Veritas may have considered that the facilities were in very good shape, but I find it difficult to accept that evidence (which the Bank criticised as being partisan and self-serving) on the basis that there was no indication in their report that this was a view they in fact took.

1464. Having regard to all of these considerations, I consider that the evidence adduced from Mr Thomas is to be preferred to that adduced from Mr Kaczmarek, based as it was on his adoption of the Veritas report. There is no doubt that there was a significant degree of uncertainty in Mr Thomas's valuation, but I am satisfied that he adopted the correct methodology for estimating a fair market value at the time of the Asset Transfers, and

that the inputs he used were reasonable for the valuation he carried out based on the usage he assumed and sufficiently robust to support his conclusion.

1465. I therefore find that the value of the Training Centre at the date of the Asset Transfers was the figure attributed by Mr Thomas: UAH 104,919,540. That is the figure arising out of the transfer of the Training Centre for which the Bank must give credit in its claim against the Defendants for the losses which it sustained in consequence of the Misappropriation.

Asset Transfers: value of the Airfield

1466. The credit value attributed to the Airfield was UAH 366 million (i.e. its Original 2016 Value), which was based on a report prepared by UCE in 2015 applying a market and income approach to the value of the Airfield as at 18 June 2015. Its Restated 2016 Value, assessed as at 31 December 2016 in a report prepared by Asset Expertise in February 2019 was UAH 3.6 million; Asset Expertise adopted what it called a combined comparable and income approach for its valuation. The value attributed to it by the Bank's expert (Mr Thomas) was UAH 5.7 million as at a valuation date of 6 June 2016, being the date of transfer to the Bank, using a weighted market and income approach. The value attributed to it by Mr Kolomoisky's expert (Mr Kaczmarek), was UAH 34 million. He based his opinion on a report prepared by Kreston GCC Advisors LLC ("Kreston") dated 5 August 2016 which valued the Airfield as at 1 July 2016 and applied a cost approach. This figure was also described in the EY November 2016 Report as the NBU verified figure. The difference between the parties' respective valuations was therefore UAH 28 million and the amount by which the Bank claimed that the credit value exceeded its true value was UAH 360 million. It is striking that the UCE report was wildly in excess of the other valuations, and the valuation it gave was rejected by both experts.

1467. Mr Thomas said that the description of this asset as the Airfield was a misnomer, although he continued to refer to it as such to avoid confusion. He said that the assets which comprise the "Airfield" are a series of 33 buildings situated on two land plots. The buildings were described as being in poor, satisfactory or (in one instance) good condition. The land on which the warehouses were located did not function as an operational airfield at the valuation date and had not done so for more than a decade. The Government land cadastre disclosed that the ownership and property rights in the land belong to the regional government, Dnipropetrovsk District State Administration.

1468. There are two main issues which arise. The first is that Mr Thomas limited his valuation to the buildings and the land beneath the buildings, and excluded the remaining land on the site which was not transferred to the Bank. Mr Kaczmarek took a different approach because his valuation included a figure attributable to the whole of the two plots of land on which the buildings were situated. In large part this difference in approach explains the differences in the valuations of the two experts.

1469. Mr Thomas' explanation for his position was that, although both the buildings themselves and what he called the usage rights of the land beneath them were transferred to the Bank and could be transferred on to a new owner as part of a sale, he considered that it was unlikely that the usage and ownership rights to the additional

land on which the buildings did not sit could be transferred. He drew support for that opinion from his understanding of the mortgage agreement dated 1 June 2016, pursuant to which only the buildings on the Airfield were pledged to the Bank by Agroaviadnipro LLC as part of the Asset Transfers, while the remainder of the land was only used by the mortgagor with the benefit of what he called usage rights under the terms of a lease granted in November 2007. These usage rights were not transferred or transferable to the Bank.

1470. Mr Kaczmarek took a different view, because he said that it was reasonable to conclude that there was inherent value associated with the land plots as a whole, not least because it would appear to be impossible to construct improvements on the land if the land use rights were not owned or possessed. That strikes me as being a rather circular argument. It is not at all obvious why that is the case given the extent of the land not covered with buildings even if they are spread out. It also ignores that what matters for present purposes (and indeed the purposes for which the contemporaneous valuations were carried out) is the extent of the property actually mortgaged to the Bank as part of the Asset Transfers, and in respect of which the Bank as mortgagee would be able to exercise ownership rights on enforcement of its security. He also said that any issue as to the extent of the rights was inconsistent with the contemporaneous valuations in which both Kreston (in 2016) and later in the year EY gave value to those land use rights.

1471. The experts agreed that the ownership of the land other than the land under the buildings themselves is a factual matter, and ultimately not a matter for them. I take the same view. In my view, the best and most relevant evidence is to be found in the terms of the mortgage agreement pursuant to which the Bank acquired its rights over the Airfield as part of the Asset Transfers. This agreement makes a clear distinction between what it calls the Mortgaged Property (clause 7) on the one hand and the two plots of land on which the Mortgaged Property was situated (clause 8) on the other. This other land covered a substantially greater total area (139.1037 hectares divided into 2 separate plots of 137.96 hectares and 1.1437 hectares) than the area of land on which the buildings comprising the Mortgaged Property were constructed. Mr Thomas said that the built land amounted to only 4,520 square metres, i.e. less than half a hectare.

1472. The property charged to the Bank, which is the subject matter of the mortgage agreement, is (as it name implies) the paragraph 7 "Mortgaged Property". It is described as a complex at the Airfield address, registered as separate, demarcated property with its own immovable property registration number. The other land is described in paragraph 8 as being the two land plots with two separate cadastre numbers on which the Mortgaged Property is situated. It is not itself Mortgaged Property as defined. This emphasises the distinction of two separate properties, each with their own separate registrations, only one of which was transferred as Mortgaged Property. It is expressly provided that "no other pledge shall be given hereunder". It follows that the land on the Airfield other than the complex of buildings falling within the definition of Mortgaged Property was not effectively transferred to the Bank as security under the terms of the mortgage agreement.

1473. However, the mortgagor also had rights to use those parts of the land at the Airfield site which were not part of the Mortgaged Property pursuant to the terms of the lease agreements with the local authority. I accept it is possible that there was inherent value in those usage rights, but the evidence does not demonstrate that those rights were

transferred to the Bank, whether by way of security pursuant to the mortgage agreement or otherwise. For that reason alone, the Kreston valuation (and its adoption by Mr Kaczmarek) is deeply flawed because it values an asset which I find not to have been the subject of an effective transfer to the Bank.

1474. In any event, even if that were to be wrong, it is impossible to tell from the Kreston valuation how the valuers went about quantifying the prospective rental stream from the whole of the Airfield, which was the method they used for valuing the land usage rights. While Kreston calculated a rental value per square metre of warehouse space which they regarded as comparable to the buildings on the Airfield, it is not clear how they then quantified the value per hectare of the unbuilt land. Mr Akkouh suggested in his cross-examination of Mr Kaczmarek that the value for the whole site was assessed by reference to the rental value per square metre of warehouse space, which would have been absurd, because only a very small proportion of the total area was built on. I am not convinced that the assumption on which this part of his cross-examination was based is correct, but it is striking that although Mr Kaczmarek had adopted the Kreston report as his own evidence, he was unable to explain what they had in fact done.

1475. The second main issue has a much more limited impact (just short of UAH 2 million) on the valuation. The disagreement was whether to adopt a weighted market and income approach, which is the approach adopted by Mr Thomas having determined that the highest and best use for the buildings was warehouse storage, or a cost approach which is adopted by Mr Kaczmarek, based on the Kreston report. A similar divergence of view in relation to the application of the cost approach arose in relation to the Airfield as had arisen in relation to the Stadium and the Training Centre.

1476. It was Mr Kaczmarek's position that there was insufficient information to implement the income approach and that the cost approach was to be preferred because it was reliant on more observable inputs than the income approach. Mr Kaczmarek gained support from the EY November 2016 Report, because they said that they thought that the cost approach with an asset depreciation test should have been used as the primary basis for the valuation. Indeed they then went on to say that the Kreston report may have substantially understated the fair value of the land use rights, i.e. the full 137.96 hectares and not just the buildings:

> "In our view, the value estimate for the land found by capitalising additional income in Report 2 [Kreston Report], should have been double checked using the sales comparables approach to ensure it matched up to market prices. Our desk review looked at sales prices for similar plots of land on the market. We did not make an assessment and did not make detailed calculations, but we want to note that the market price range for farm land is 1.4 - 4.6 dollars per square metre and industrial use - 1.6 - 3.6 dollars per square metre (for areas with comparable location and size). Considering the above, the value of the land plot alone may be between UAH 40 and 180 million."

1477. Mr Kaczmarek's opinion was that, because there was no historic income or cost date from the property itself, and because there was no evidence as to whether or not property-specific data would cause an increase or decrease in an income based valuation, Mr Thomas's valuation was notional and could not give rise to a sufficient level of confidence to establish what he called a compliant fair value measurement.

1478. Mr Thomas said that the income approach was justifiable because the buildings, which was all he thought it appropriate to value, were capable of generating an identifiable income stream in the form of observable market inputs, while the market approach was also justifiable because the assets being valued were very common and there was a substantial market for their sale and rental, utilising their highest and best use. The market approach assessed the rental stream from five assets with a similar location and in a similar physical condition and, adjusting for matters such as the surface area of the comparable, gave rise to a valuation of UAH 6.15 million. The income approach was derived from a comparables-based median rental value of c.UAH 19 per sq m per month and arrived at a figure of UAH 5.41 million after appropriate adjustments and capitalisation. His final weighted valuation attributed 40% from the results of the market approach and 60% from the results of the income approach.

1479. I think that Mr Thomas' assessment was based on sufficiently reliable input data and I prefer his evidence on this issue. It seems to me that the more commonplace the asset, the higher the level of confidence the valuer can have in the use of market-based input figures, thereby making less significant the fact that actual figures for the historic use of the relevant building may not be available. I also think that it is possible to take into account (without relying on it in its own right) that in the event the Airfield was sold at auction in August 2020 for a figure of UAH 6.2 million.

1480. I also consider that, even if a cost approach were to have been the best way of making a reliable valuation of those parts of the Airfield which were transferred to the Bank as part of the Asset Transfers, the evidence demonstrates that the way in which Kreston (and therefore Mr Kaczmarek) used the cost estimates suffered from the same deficiencies as the costs approach relating to the Training Centre. In short I think that as with the Training Centre, Mr Thomas was justified in his opinion that "I do not consider that the parameters on which the UPVV cost estimates are based provide a reliable comparable to the market costs that would have existed in the (free market) economy in Ukraine in 2016".

1481. I therefore find that the best evidence supports the Bank's case that the value of the Airfield at the date of the Asset Transfers was the figure attributed by Mr Thomas: UAH 5,708,758. That is the figure arising out of the transfer of the Airfield for which the Bank must give credit in its claim against the Defendants for the losses which it sustained in consequence of the Misappropriation.

Asset Transfers: value of the Aircraft

1482. The credit values (i.e., the Original 2016 Values) attributed to the nine aircraft totalled US$163 million. This appears to have been based on nine reports prepared in August 2016 by Veritas, which the experts called by the Bank and Mr Kolomoisky both said were unreliable because of the methodology and data inputs which were used. The value attributed to the nine aircraft by the Bank's expert (Ms Razzhivina) was US$69 million. The value attributed to them by Mr Kolomoisky's expert (Mr Seymour), was US$84 million. The difference between the parties' respective valuations was therefore US$15 million and the amount by which the Bank claimed that the credit value exceeded their true value was US$94 million.

1483. In the section of this judgment concerned with the ownership of the Transferred Assets (see in particular paragraphs 1192ff above) I have already described how the nine aircraft were sold to the Bank by Perser and then immediately sold on by the Bank to Dilorsano. It is the Bank's position that the whole transaction was collusive because both Perser and Dilorsano were companies owned and controlled by the Individual Defendants and the net benefit to the Bank was limited to the sum of US$12,336,440, which was the full extent of the repayment of principal actually made by Dilorsano as at 16 June 2023. The Bank's case is therefore that the transfer of the nine aircraft only reduced its loss by US$12,336,440 and not by the credit value of US$163 million derived from the nine Veritas reports.

1484. I agree with the Bank's submission on this point. I am satisfied that the agreements between Perser and the Bank and between the Bank and Dilorsano were not part of a genuine arm's length transaction but were in fact part of a collusive arrangement between connected parties, which purported to be a genuine mechanism for reducing the indebtedness to the Bank under the Relevant Loans, but which in fact left the Bank with rights against Dilorsano which were never worth more than a fraction of the true value of the nine aircraft themselves. In circumstances in which the terms of the agreement between the Bank and Dilorsano took the form which it did, the true value of that which the Bank received from the transaction as a whole was only ever the value of the rights which it had against Dilorsano. The best evidence of the value of those rights as at the time of the Asset Transfers is the amount of principal which the Bank has been able to recover from Dilorsano.

1485. In case I am wrong about that, I should explain my conclusion as to the true value of the nine aircraft at that time. Of the nine aircraft, two were manufactured by Airbus, four were manufactured by Boeing and three were manufactured by Embraer. By the conclusion of the evidence, there was no dispute as to the value of the four Boeings. Relatively early on (viz., by the time of the expert's second joint statement), the value of Boeing 767 (MSN 25280) had been agreed by the parties at the figure assessed by Mr Seymour (US$5.99 million). Rather later (viz., at the beginning of Ms Razzhivina's cross-examination), Mr Howard announced that Mr Kolomoisky accepted her valuations of the other Boeing 767 aircraft: MSN 28659 at a figure of US$3.75 million, MSN 25533 at a figure of US$8.85 million and MSN 25536 at a figure of US$8.27 million. Each of these valuations was for a higher value than the figure reached by Mr Seymour. The dispute was then limited to the two Airbuses and the three Embraers each of which was valued by Ms Razzhivinia at a lower figure than the figure reached by Mr Seymour.

1486. Before explaining my findings in relation to the true value of the three Embraers, I note that the Individual Defendants must have known that now-agreed value of US$17.12 million for two of the Boeing aircraft (MSN 25533 and MSN 25536) is very substantially less than the aggregate of the Original 2016 Values given to MSN 25533 and MSN 25536, which was US$58 million. The reason for this is that Pennylane's financial statements for the year ended 31 December 2015 disclosed that the average value of its six Boeing aircraft, which included MSN 25533 and MSN 25536, was just over US$12 million each. Although the US$12 million figure, of which the Individual Defendants will have been aware from Pennylane's financial statements, is materially higher than the true value of US$8.85 million and US$8.27 million for MSN 25533 and MSN 25536 respectively, it is very substantially less than the Original 2016 Values of

US$24.9 million given to MSN 25533 and US$33 million given to MSN 25536 (see the two relevant Dilorsano sale agreements referred to in paragraph 1195 above).

1487. Mr Seymour and Ms Razzhivina agreed that the correct methodology for valuing an aircraft has a number of stages. The first is to establish the base value of an aircraft of the age and type being valued on the assumption that it had a base specification. The concept of base value is itself described by the International Society of Transport Aircraft Trading ("ISTAT") as follows:

> "Base Value is the Appraiser's opinion of the underlying economic value of an aircraft in an open, unrestricted, stable market environment with a reasonable balance of supply and demand, and assumes full consideration of its "highest and best use". An aircraft's Base Value is founded in the historical trend of values and in the projection of value trends and presumes an arm's-length, cash transaction between willing, able and knowledgeable parties, acting prudently, with an absence of duress and with a reasonable period of time available for marketing. In most cases, the Base Value of an aircraft assumes its physical condition is average for an aircraft of its type and age, and its maintenance time status is at mid-life, mid-time (or benefiting from an above-average maintenance status if it is new or nearly new, as the case may be)."

1488. Ms Razzhivina described this first stage as requiring the collection and analysis of aircraft transaction data to produce a normalised value for a generic aircraft of the type being valued with a base specification. It also requires the valuer to assume that, as at the valuation date, the aircraft is in what is called "half-life" maintenance condition, i.e., that its major modules (airframe, engines, landing gear and auxiliary power unit) are at an assumed mid-point interval between their next scheduled inspection or overhaul.

1489. The next stage is to adjust that base value so as to reflect any differences as between the base specification and the specification of the actual aircraft being valued. Ms Razzhivina said that this led to a half-life retrospective market value of the aircraft. The third stage is to make a further adjustment to take account of where the major components of the aircraft are in their maintenance cycle.

1490. The differences in value reached by Mr Seymour and Ms Razzhivina are in large part attributable to the first stage of the analysis, i.e., their assessment of the base value of each of the two Airbuses and each of the three Embraer aircraft. There were then relatively small adjustments made by Ms Razzhivina to reach the half-life market values. The figures the two experts reached for the five aircraft threw up an aggregate differential of US$14.53 million for the half-life market values for all five of the aircraft, broken down as follows:

i) Airbus (MSN 2462), manufactured 2005: Ms Razzhivina: US18.1 million. Mr Seymour US$24.01 million. Difference: US$5.91 million.

ii) Airbus (MSN 2682), manufactured 2006: Ms Razzhivina: US$20 million. Mr Seymour US$25.45 million. Difference: US$5.45 million.

iii) Embraer (MSN 145-250), manufactured 2000: Ms Razzhivina: US$1.7 million. Mr Seymour US$2.69 million. Difference: US$0.99 million.

iv) Embraer (MSN 145-290), manufactured 2000: Ms Razzhivina: US$1.7 million. Mr Seymour US$2.69 million. Difference: US$0.99 million.

v) Embraer (MSN 145-394), manufactured 2001: Ms Razzhivina: US$1.7 million. Mr Seymour US$2.89 million. Difference: US$1.19 million.

1491. The remaining differences between the experts flowed from a disagreement as to the appropriate extent of the maintenance adjustment, in respect of which the experts were US$1.15 million apart for all five aircraft and an adjustment to reflect damage done to Airbus (MSN 2462) in respect of which Ms Razzhivina applied a figure of US$1.87 million while Mr Seymour made no adjustment.

1492. One of the issues with the evidence relating to the base value of the five aircraft is that the source of the information on which each of the experts relied for their respective opinions could not be fully tested because of the form in which it was presented. In their joint statement Ms Razzhivina and Mr Seymour explained that they had both relied on confidential and public data points in conducting their valuations, that those data points were available to them as at August 2016 (i.e., as at the valuation date), and that the use of these published values prevented the influence of hindsight.

1493. Both experts also said that, although based in some part on undisclosed confidential information, they or their organisations had both published their initial values in August 2016: Ms Razzhivina via the Oriel online valuation system and Mr Seymour via IBA's Aircraft Values Book. They also both agreed that each expert was individually responsible for collecting market data points and that, because the market data points on which they relied were confidential, they would each have relied on a different set of data which may have led to those differences in values.

1494. The Bank submitted that Ms Razzhivina's evidence on this point was more reliable because she had provided much more information about the data points which underlay her published values. She also explained that she based her opinion on what she called contemporaneous transactional data relating to the sale and leases of specific types of aircraft which then enabled her to plot data points against the age of the aircraft. An appendix to her report gives a detailed analysis of what those contemporaneous data points comprised. She identified eleven for the Airbus aircraft and cross checked them against six post-dated transactional data points, three of which were public and three of which were confidential. She identified four for the Embraer. However, although detailed, much of this data cannot itself be cross checked, because it comes from both public and confidential sources and was therefore anonymised in her report so that it could not be related to an actual sale.

1495. Mr Seymour took a different approach, accepting in his report that he had not provided the same level of detail as to the various data points used for each valuation "since the findings of our research and analysis were published as a single resultant figure in the relevant edition of our Aircraft Values Book". In fact the relevant appendix to his report is in a very abbreviated form, the substance of which was only a single page. He accepted in cross-examination that he had not given any details of the pricing information he had looked at and that there was nothing which the court could interrogate to assess the validity of the data. He also had no real explanation for why he could not have done what Ms Razzhivina did and anonymise the data if, as appeared to be the case, he was concerned about maintaining confidentiality. Instead, he just

presented a generic summary which had limited evidential value because there was insufficient information to correlate the data points to any of the five aircraft.

1496. The closest that Mr Seymour got to any particularisation in relation to the Airbus aircraft was as follows:

> "My colleagues at IBA were in regular communication with the trading community and lessors in 2016 and those opinions were that Airbus A321-200s between the ages of 10 and 12 years were trading for between US$23,500,000 and US$28,000,000 depending on maintenance condition."

1497. This is obviously unsatisfactory evidence for a number of reasons, including the fact that it is hearsay, which could not be tested in cross-examination. He also accepted that what it boiled down to was that he had a good company and the court should trust that he had got it right. I do not think that this is a very compelling basis on which to conclude that his evidence was to be preferred over that of Ms Razzhivina, although I also accept that the confidentiality issues to which I have already referred has an adverse impact on the weight which can be attributed to her opinion as well.

1498. In their closing submissions, counsel for Mr Kolomoisky gave a number of reasons other than the consequences of the underlying data being confidential as to why Ms Razzhivina's data points were unsatisfactory. It was said that the ages of some of the Airbus aircraft to which her data points related were not comparable to those which were the subject matter of the experts' valuations. It was also said that all but one of Ms Razzhivina's data points gave either higher values than those provided in the IBA materials or values which were largely consistent with them. Indeed, she accepted that some of the data points she described were in line with IBA values, and that some of the data points provided a wide range for the age of the aircraft and their values, which made comparison with other transactions very difficult. All of this was evidence which provides some substance to the submission that Mr Seymour's values are to be preferred. It was also said against Ms Razzhivina that the uncertainty around the values for sales in 2016 affected her use of a depreciation curve for the purposes of reaching her Asset Transfers valuation.

1499. Of these points, the most telling challenge to Ms Razzhivina's evidence would have been any correlation between her data points and the IBA valuations relied on by Mr Seymour. However, I do not think that the evidence makes out Mr Kolomoisky's submission on this issue. It would certainly be accurate to say (as Ms Razzhivina accepted in cross-examination) that some of her data points gave values that were higher than or consistent with the IBA values, but it does not demonstrate, as Mr Kolomoisky said it did, that it was "all but one" which fell into this category. Furthermore, Ms Razzhivina always qualified her answer by explaining that market value was supposed to ignore the increase in value attributable to aircraft with a lease attached, which was the case with several of the IBA numbers. The Bank also demonstrated in a paper handed up during the course of its oral closing submissions that the table relied on in support of Mr Kolomoisky's argument on this point was incomplete, in that (a) it did not include a number of data points where it could not be said that they were in line with the IBA values and (b) it sought to treat some of Ms Razzhivina data points as more comparable to the IBA values than was in fact the case.

1500. Turning to the three Embraer aircraft, the differences in relation to the half-life market values are less substantial. In the case of these aircraft as well, it is significant that Ms Razzhivina's data points were more detailed than those given by Mr Seymour, although during the course of her cross-examination it became apparent that two of them were not particularly helpful; one because it post-dated the valuation date and the other because it was a price implied from a lease not a sale. I also agree that, ignoring the impact of a lease (as explained above in relation to the Airbus aircraft) the remaining data points she used were more consistent with Mr Seymour's half-life market values than her own.

1501. However, I also accept that it would be over-simplistic to conclude that Ms Razzhivina's surviving data points were consistent with the IBA figures. That is only partially right because it ignored the fact that for data points two and four the submissions on behalf of Mr Kolomoisky compared the top end of Ms Razzhivina's range to the bottom end of Mr Seymour's. It is also striking that those submissions concentrate on picking holes in Ms Razzhivina's evidence, rather than addressing why it was that Mr Seymour's evidence was intrinsically more reliable. It is said that Ms Razzhivina did not express any disagreement with the base values set out in the IBA Aircraft Value Book, but that is a submission of only limited value because, as she explained in relation to the Airbus and the Embraer aircraft, she was not asked to consider IBA's base values.

1502. All of this illustrates that there is considerable uncertainty in both experts' assessments of the correct half-life market value for the aircraft. But taken in the round, I found Ms Razzhivina's evidence to be more compelling than that of Mr Seymour. In reaching that conclusion I also had regard to the fact (alluded to in paragraph 1232 above) that on a number of aspects of his valuation, Mr Seymour accepted as part of the process of agreeing the joint statement that he had made some fairly basic errors in relation to his original assessment of the half-life value of the aircraft and that to that extent his original figures were wrong. These included a failure to value by reference to the title engines rather than fitted engines of one of the Boeings and two of the Embraer aircraft, and a failure to apply accepted industry practice of assuming that where the condition of an aircraft component is unknown, the valuer should assume that it is in a half-life condition.

1503. These errors, which included a number of other problems with his valuation corrected during the course of agreeing the joint statement, meant that adjustments of several hundred thousand US$ were required to his original opinion. The fact that he had made the errors in the first place undermined my confidence in the reliability of his evidence.

1504. This leaves two other variables. The first is a reduction for stigma of damage in relation to one of the Airbus aircraft (where the difference between the experts was US$1.87 million, Mr Seymour being of the view that no reduction was required). The second is a maintenance adjustment where the difference between the experts is US$654,000 for the Airbus (MSN 2462) and significantly smaller figures for the other Airbus (MSN 2682) and the three Embraer aircraft, all four of which were within what the experts accepted was a reasonable range of difference.

1505. As to the damage, the Airbus was hit by a ramp truck in September 2010 resulting in a 5 metre hole in its fuselage. It was accepted by Mr Seymour that this constituted really serious damage affecting a pressurised area and the primary structure of the aircraft.

He also agreed that anyway in theory major carriers would want to steer well clear of planes with a substantial damage history, although he gave an example of one instance in which a major airline did not take that approach on the grounds that it was not going to impede its ability to earn revenue. He accepted that a normal range of adjustment from the adjusted aircraft value was between 0% and 30% depending on whether the damage was to a pressurised or unpressurised part of the plane, whether it was to a primary, secondary or tertiary part of the structure and whether it was in an area likely to suffer further damage. Although his initial view was that no reduction was appropriate, when pressed, he accepted that a reduction of somewhere in the region of 1% to 2% would be justified.

1506. Ms Razzhivina took a different view. She said that a 10% reduction was appropriate given the nature of the damage as described in an aircraft physical inspection report prepared by Aircraft Management Solutions ("AMS") in November 2018. This is obviously a matter on which views can properly differ, but having read the AMS report, I can see why the damage was characterised as serious. I also take into account the fact that the damage was to the fuselage and a pressurised part of the plane, which Mr Seymour accepted might as a matter of principle lead to a reduction in value. On this point I take the view that Ms Razzhivina's evidence is more realistic. I find that a proper reduction for stigma of damage to this Airbus aircraft was 10%.

1507. As to the maintenance adjustments, the only one of any real significance is the differential of US$654,000 in relation to the negative maintenance adjustment for the Airbus' second engine. Ms Razzhivina's assessment was US1.58 million while Mr Seymour's was US$701,000. There are respectable arguments both ways on this point, but if it were to be the case that the Bank was required to give credit to the Defendants arising out of the value of the Aircraft, I would have preferred Ms Razzhivina's evidence. In my judgment the amount for which credit should have been given if I had not accepted the Bank's submissions in relation to Dilorsano which I have explained in paragraphs 1483ff above would have US$69,270,131.

Unlawful conduct of the Individual Defendants: Article 1166

1508. The unlawful conduct on which the Bank relies is that the Individual Defendants used their control over the Bank to procure the misappropriation of US$1,911,877,385 from the Bank in the form of the Relevant Drawdowns, made under the Relevant Loans. It is said that they caused the Bank to grant the Relevant Loans to the Borrowers, in a manner that was flagrantly contrary to the Bank's basic lending procedures, in spite of the Borrowers' lack of credit or trading history and obvious inability to repay the sums loaned to them, and for the purpose of misappropriating monies from the Bank.

1509. It is also submitted that causing or procuring the subsequent transfer of the Relevant Drawdowns back and forth between Borrowers and Suppliers culminating in the conclusion of the RSAs and the making of the Unreturned Prepayments, together with other measures to conceal the Misappropriation, gave rise to clear breaches of duty under Ukrainian law. These other measures included authorising the preparation of extensive, often backdated sham paperwork, such as the LFSAs, Share Pledges and documents in support of the 2014 Ukrainian Proceedings, the improper grant of the

Intermediary Loans and the New Loans and the alteration of the Borrowers' nominee arrangements in an effort to conceal their affiliation with the Individual Defendants.

1510. This conduct was said to be unlawful because it deprived the Bank of its monies in a manner not provided for by the laws of Ukraine contrary to Article 3(1)(2) and it violated the Bank's rights with an intention to injure the Bank and the exercise of their rights in an abusive manner contrary to Article 13. It also amounted to a breach of what are generally treated in Ukraine as being fiduciary duties: a failure to act in good faith and in the best interests of the Bank by causing the Bank to enter into purported agreements which were not in its best interests contrary to Articles 92, Article 63 and Article 42, a failure to comply with the Supervisory Board Provisions, the Charter and the ECC Regulations contrary to Article 63 and Article 42 and conduct for their own personal gain and for the advantage of their affiliates and related parties contrary to Articles 43 and 52.

1511. I agree that, to the extent that the Individual Defendants procured, assisted or participated in any of the elements of the Misappropriation referred to, they will have committed serious breaches of all of the fiduciary duties, which was the way in which the Bank concentrated in putting its case in closing. In that regard, it is clear that both of the Individual Defendants were 'officers' of the Bank for the purposes of the JSC Law, because they were members of the Supervisory Board throughout the relevant period. They were therefore obliged, pursuant to Article 63(1) to "act in the interests of the company, follow the requirements of the law, provisions of the charter and other documents of the company".

1512. I accept the Bank's case that the evidence supports a clear finding that the Individual Defendants both controlled the Bank and the other Relevant Entities and that the nature and extent of their control was such as to enable them to procure the planning, implementation and operation of both the loan recycling scheme and the Misappropriation should they have wished to do so. The Bank has established its case that the members of the ECC who approved the Relevant Loans were loyal to and in close communication with the Individual Defendants in the relevant period, and have remained loyal to them ever since.

1513. I also accept the Bank's case that it is inconceivable that those directly involved would have approved either the Relevant Loans or the making of the Relevant Drawdowns without the Individual Defendants' instructions to do so, more particularly where the Relevant Entities were all controlled by them as well. The same can be said about the BOK and PBC employees who arranged and participated in the Relevant Drawdowns. I agree that the notion that they were made to the Borrowers without instruction from the Individual Defendants is unsustainable. The findings I have already made about the Individual Defendants' control of the Relevant Entities, and the unlikelihood of the Bank's employees embarking on this scheme without their active approval and consent, means that it is inherently unlikely that any of the steps in the Misappropriation were not known and approved by both of them.

1514. There is little direct evidence to this effect, but the circumstantial evidence is compelling, more particularly when combined with the adverse inferences I draw from their failure to give evidence and attend for cross-examination. Amongst the many other matters I have summarised in this judgment, that circumstantial evidence includes their more than 90% ownership of the Bank, the roles which they both performed in the

Bank, the way in which the Bank was structured, the departure from the Bank of the employees to whom they were closest at the time of nationalisation and the widespread extent of related party lending by the Bank.

1515. I cannot reach such a clear conclusion on the precise extent to which each of the Individual Defendants was consulted on the making of each of the Relevant Loans, but I think it is more likely than not that they were, albeit it is quite possible that they delegated to others the ability to give specific instructions and authority to make Relevant Loans, such to be conveyed to the ECC (or possibly the Management Board) by others. However, the mere giving of the instructions to act in that manner while leaving the detail of what was to be done is itself a breach of duty, albeit without specific consequences until such time as the instructions are implemented.

1516. I have reached the conclusions I have on the Individual Defendants' role, in part because of the findings I have made about the benefits which they and their other businesses ultimately received from the Misappropriation, but it is also clear to me that such a conclusion is justified by the very nature of a loan recycling scheme being operated for the purposes of extracting foreign currency from Ukraine. Decisions about the need for the extraction of money as part of what was on any view a foreign currency related money laundering scheme are likely to have come from them as and when monies were required.

1517. However, even if that were not to be the case in relation to each of the Relevant Loans, I have little doubt that the implementation of the scheme on a day-to-day basis only occurred with their general approval and consent. Every time a Relevant Loan was agreed or a Relevant Drawdown was made, implementation only occurred because the participating individuals within the Bank, Primecap and PBC knew and believed that they were acting with the consent and approval of the Individual Defendants, which they were, not least because the Individual Defendants knew and intended that that would be the case. The liability of the Individual Defendants in those circumstances is established because they have been guilty, in their capacity as members of the Supervisory Board, of a culpable failure to take steps to prevent the Misappropriation effected pursuant to each of the Relevant Drawdowns as and when they occurred (see the conclusions as to Ukrainian law on this issue that I reached in paragraph 848 above).

1518. I make these findings in relation to both of the Defendants, notwithstanding that it is clear that the dominant figure in controlling the Bank was Mr Kolomoisky. I do not accept that Mr Bogolyubov had distanced himself from the affairs of the Bank to the extent that his counsel sought to portray, anyway at any stage prior to the end of what the Bank called the active stage of the Misappropriation in September 2014, which is the most relevant timescale for this purpose. The Relevant Loans would not have been made without his approval and consent in his capacity as one of the two controlling shareholders and chairman of the Supervisory Board. The level of that influence and control was such that he was as much a participant in the making of the Relevant Loans and the authorising of the scheme under which the Relevant Drawdowns were made as was Mr Kolomoisky. Furthermore, he continued to participate in the events which occurred between then and nationalisation in a manner which made clear both that he, like Mr Kolomoisky, knew all about and had approved the Misappropriation, and that he needed to do what he could to assist in ensuring that the Bank could carry on in business without making full disclosure (and rectifying the consequences) of its exposure to related parties.

1519. I am therefore satisfied that, in causing, procuring and approving the Misappropriation, involving as it did the entry into of the Relevant Loans and the making of the Relevant Drawdowns, both of the Individual Defendants acted unlawfully. The Relevant Loans were entered into and the Relevant Drawdowns were made without the formal approval of the Supervisory Board, in contravention of the Charter and the Bank's credit committee regulations and on terms which could never have been validly authorised because they were so obviously contrary to the Bank's best interests. In all these respects, this was unlawful conduct within the meaning of Article 1166. It is clear to me that in causing the Bank to conclude and implement these arrangements with the Borrowers, the Individual Defendants failed not only to act in the interests of the Bank, but also to "follow the requirements of the law, provisions of the charter and other documents of the company", as required by Article 63.

1520. Put another way, procuring the advances to be made to the Borrowers was an unlawful act by anyone such as the Individual Defendants who owed the fiduciary and other duties to the Bank I have described above. The Borrowers were shell companies with no assets and no prospect of repaying the money which had been transferred to them pursuant to the Relevant Loans and no proper security had been given. The inference is overwhelming that the Individual Defendants knew that the scheme in which the Bank was engaged which led to the making of the Relevant Drawdowns would expose the Bank to a very substantial risk that the loans would be irrecoverable, which in the event occurred because of the Unreturned Prepayments (a point to which I shall return). I also have no doubt that, because the Borrowers were all owned and controlled by the Individual Defendants through PBC, there is no conceivable basis on which the nominee directors and UBOs of the Borrowers would have caused the Borrowers to enter into the Relevant Loan Agreements or make and receive the Relevant Drawdowns without the Individual Defendants' instructions to do so.

The liability of the Individual Defendants under Article 1166: harm and causation

1521. The way the Bank puts its case on harm is that it transferred money to the Borrowers under sham loans drawdown pursuant to the Relevant Drawdowns in exchange for which it received (at most) a worthless covenant to repay from a Borrower which was a shell company being used as a vehicle for fraud. I accept that this part of the Bank's claim has been established. The harm it sustained was the amount drawn down which, because of the worthlessness of the Relevant Loan agreements (which were in any event shams) and the absence of any proper security was for the full amounts of the Relevant Drawdowns. How that was caused and how the court should assess full compensation for the harm are two separate questions to be considered once the harm caused by the unlawful act has been identified.

1522. The total of the Relevant Drawdowns was US$2,335,943,519. On the basis of the way the Bank puts its case, this is the correct starting point for identifying the harm for which the Bank is entitled to compensation from anyone who caused that harm by their unlawful acts. However, using the payment references recorded in the Bank's transactional data to link the relevant payments (which was the methodology adopted by the Bank's forensic accounting expert), Relevant Drawdowns in the amount of US$384,214,201 were then repaid by further Relevant Drawdowns. The Bank says that this shows a net total of Relevant Drawdowns not repaid by further Relevant

Drawdowns of US$1,951,729,318. I agree that the c.$384 million figure must be deducted to avoid double-counting. This is close to the figure for Unreturned Prepayments of US$1,911,877,385, which itself is confirmed by the Kazantsev Spreadsheet and the Gurieva Spreadsheet, the significance of which I have described earlier in this judgment and to which the Bank has limited its claim.

1523. The Bank then submitted that the unlawful conduct of the Defendants caused it harm to which it is entitled to full compensation to the extent of at least US$1,911,877,385, being the amount of the Relevant Drawdowns to the extent that they were not themselves replaced by further Relevant Drawdowns. Put another way, procuring the Bank to make the Relevant Drawdowns caused the Bank harm, in the form of deprivation of its money in exchange for no value. The harm suffered at the moment of the Relevant Drawdowns was therefore caused by the Individual Defendants. The consequence is that the Individual Defendants then came under an obligation to provide full compensation for the loss that is referable to the harm caused.

1524. It was submitted that the burden then shifted to the Defendants to demonstrate that the Bank had made genuine recoveries which further reduced its compensable loss. The Bank stressed in its closing submissions that this was the nature and extent of the harm for which it claims to be compensated. In particular, it does not allege that it suffered harm by being induced to enter into a series of bad or commercially impaired (but valid) loans which may have caused loss to the extent of their irrecoverability. I accept that the Bank's analysis is supported by the evidence.

1525. First of all, I agree that the harm was caused by the unlawful conduct of the Individual Defendants. The fact that other participants, such as members of the Management Board who knew what was going on (e.g., Mr Novikov, Mr Dubilet and Ms Gurieva) may also have committed unlawful acts does not break the chain of causation between the Individual Defendants' acts of procurement and the harm suffered by the Bank, nor does the fact that other unlawful acts, such as the approvals by the ECC, were committed between the time of the original approvals given by the Individual Defendants and the suffering of the harm on the making of the Relevant Drawdowns.

1526. The reason for this is that I infer that the approvals and consents which must have been given by the Individual Defendants were continuing throughout the active period of the Misappropriation, and but for the instigation and sanction of the Individual Defendants, none of the individual or corporate participants in the Misappropriation would have acted in the way they did. Ukrainian law does not require the Individual Defendants' unlawful conduct to be the latest cause or the sole cause of the harm, so long as it is a direct cause, the main reason, an objective consequence or equivalent. Individuals such as Mr Novikov, Mr Dubilet and Ms Gurieva were subordinates of the Individual Defendants who were accustomed to comply and did comply with their instructions. The Relevant Entities were corporate vehicles controlled by the Individual Defendants through the medium of PBC and Primecap. In my view, there is clearly a legally significant causal link between the harm and conduct by the Individual Defendants which created the conditions for harm and the actions which turned it into a reality.

1527. I also consider that the evidence establishes sufficient unity of intent as to the interrelated and cumulative unlawful conduct, committed by each of the Individual Defendants, which is sufficient for each of them to be jointly liable to compensate the Bank for the indivisible harm in the form of the Relevant Drawdowns caused by that

conduct. I have explained my findings in relation to Article 1190 and joint liability in paragraphs 927ff above. In my judgment, in this context, there is no distinction between the position of the Individual Defendants in relation to each of the Relevant Drawdowns, because they both owed the Bank the same duties and they both breached those duties so as to engage the provisions of Article 1166 by permitting and procuring the Relevant Drawdowns to be made, which caused the harm in respect of which the Bank now sues. I also think, that whatever may be the limitation of the principles to be derived from the *Gaz Ukrainy* line of authorities, this is a case in which it is impossible to determine as between the Individual Defendants "what action and to which extent" caused the harm in the form of the Relevant Drawdowns whether taken separately or together.

1528. Even, having regard to the possibility that one of the Individual Defendants was more involved in the planning and implementation of the scheme than the other, it would have been sufficient (as it was in *Energobank* and *Ukoopspilka*) if the unlawfulness was no more than a failure to intervene to stop the Misappropriation. They both knew of the essential elements and of the potential for the Bank to sustain loss. Given the need for their consent and approval for the scheme to proceed, Ukrainian law would treat them both as causally responsible for the harm in fact sustained in the form of the Relevant Drawdowns. In my judgment, the conduct of each of the Individual Defendants in connection with the operation of the loan recycling scheme, and the duties they breached as members of the Supervisory Board, were sufficiently inter-connected and sufficiently directed at the same ultimate aim (viz. using a loan recycling scheme to extract money from the Bank), for the causal link between their conduct and the harm sustained to have been established.

1529. In their closing submissions, counsel for Mr Bogolyubov undertook the burden of explaining why this analysis was wrong. It was said to be a fatal flaw in the Bank's case that it cannot show that there was any Misappropriation or that it has suffered any loss because its contemporaneous records disclosed that there was never any intention for the Relevant Drawdowns to leave the Bank and they did not do so. All that happened was that funds were circulated between the accounts of different notional customers. The reality was that there was simply a series of internal credits and debits recorded in the Bank's ledgers and the vast majority of the obligations arising as a result of the Relevant Drawdowns were then discharged by the use of subsequent lending.

1530. I should add that, in reaching the conclusions I have on this part of the case, I have considered the way in which all of the Defendants sought to characterise the Bank's true harm as being limited to what were called Relevant Drawdown Portions. This was a concept introduced into the pleadings as a result of evidence adduced from Mr Davidson, and was said by Mr Kolomoisky (and on this point his case was adopted by the other Defendants), to be correct because the Bank claims that only part of a Relevant Drawdown caused it loss and the balance is not the subject of the claim.

1531. I do not think that this is the right way of looking at what occurred. Quite apart from the fact that it does not reflect the way in which the Bank has identified what it says is the harm that it sustained as a result of the Defendants' unlawful conduct, it does not draw the distinction between the harm which was suffered at the time each Relevant Drawdown was made and the full compensation to which it is entitled in the amount claimed, all of which was said to have been caused by the Relevant Drawdowns, but because of the amount of US$384,214,201 which was repaid by further Relevant

Drawdowns, was not the same figure as the amount for which it accepts it is entitled as full compensation for the harm it sustained.

1532. Having established that the starting point for the harm it sustained was the full amount of the Relevant Drawdowns, I am satisfied that the Bank's methodology, which was then adopted in Mr Thompson's evidence for the purposes of calculating and verifying the figures was an appropriate transactionally-linked means of determining the full compensation to which it was entitled. It adopted an analysis of the links between the Relevant Drawdowns and the Unreturned Prepayments which was based on the Bank's transactional data. One of the several reasons why the Bank's methodology was correct for this purpose was that, recognising that the Bank sues in tort and does not seek a proprietary remedy for recovery of the amounts drawn down, the methodology recognises and responds to the structure of the recycling scheme itself, at the heart of which was the Misappropriation and in respect of which it sues. It follows that, subject to any genuine repayments and the impact of the Limitation Defence, to which I will turn shortly, I am satisfied that the Individual Defendants are both liable to the Bank for the full sum of US$1,911,877,385 claimed.

Unlawful conduct of the Corporate Defendants: Article 1166

1533. The Bank contended that each of the Corporate Defendants procured and assisted in the misappropriation and subsequent concealment of $1,911,877,385 from the Bank. The acts of procurement and assistance committed by the Corporate Defendants were said to be the extraction of monies from the Bank via the Relevant Loans and the subsequent transfer of the proceeds to the Corporate Defendants received by them in the form of the Unreturned Prepayments purportedly pursuant to the RSAs. The RSAs were invalid sham contracts concluded to provide ostensible justification for the transfer of the Bank's money out of Ukraine. The true transactions they concealed were said to be void as contrary to public policy pursuant to Article 228(1)-(2), in that their aim was to facilitate and conceal the misappropriation of the Bank's funds. I think there is no doubt that is the case. The Bank also said that the Corporate Defendants further participated in other measures taken to disguise the Misappropriation, including the preparation of backdated LFSAs and the creation of sham documentation to substantiate the claims made by Borrowers in the 2014 Ukrainian Proceedings.

1534. Because of the way in which the Corporate Defendants advanced their case on causation and harm, the precise nature of what is alleged against them is important. The specific particulars of breach pleaded in the Bank's Particulars of Claim and Reply included the following allegations:

i) that, in order to enable themselves to receive the funds being misappropriated from the Bank, each of the Corporate Defendants created and/or executed at least one RSA, the terms of which were commercially inexplicable and with which none of them had any intention or prospect to comply;

ii) that the Corporate Defendants received the Unreturned Prepayments and thereafter failed either to deliver goods in accordance with the RSAs or to make repayment to the Borrowers;

iii) that the Corporate Defendants procured sham correspondence and agreements between themselves and the Borrowers in relation to the 2014 Ukrainian Proceedings; and

iv) that the English Defendants each created and/or entered into the LFSAs in order that the Misappropriation could be hidden from the Bank's auditors and/or the NBU.

1535. The particulars of breach also included a more general allegation that the Corporate Defendants assisted the Individual Defendants in misappropriating $1,911,877,385 of the Bank's monies in the manner described in an earlier part of the pleading. This allegation is very wide-ranging in its form, and the Bank made clear in its written opening that the conduct which gave rise to liability comprised the Corporate Defendants' participation in the Misappropriation and the subsequent attempt to conceal it as particularised in the Particulars of Claim. This therefore included assisting in the Misappropriation by being party to documentation such as the RSAs and the RSA Pledges which were in fact shams.

1536. In light of the conclusions I have reached on what occurred as part of the Misappropriation, and the fact that the Corporate Defendants were corporate vehicles owned and controlled by the Individual Defendants, I am satisfied that their knowledge is to be attributed to the Corporate Defendants, a state of awareness which extends to all of the essential elements of the loan recycling scheme and the Misappropriation. It follows that the Corporate Defendants knew that the monies they received by way of Unreturned Prepayments were received for an unlawful purpose, the very nature of which had the effect of harming the Bank.

1537. The next question which arises is whether the conduct of the Corporate Defendants was aimed at and facilitated the deprivation of the Bank's property and therefore was in breach of Article 3(1)(2) because the Bank was deprived of ownership of its funds in a manner not permitted by the Constitution or Ukrainian law.

1538. The Corporate Defendants relied on Mr Nahnybida's evidence that the actions of the Corporate Defendants, such as creating and executing documentation for transactions in order to disguise the Misappropriation and allowing the use of the Corporate Defendants' bank accounts did not violate Article 3(1)(2) or Article 13. In my view this evidence does not sufficiently focus on the facts that these Articles are engaged when conduct is aimed at and facilitates the deprivation of the Bank's property in a manner not permitted by Ukrainian law and that there is no requirement for the Corporate Defendants to have taken funds directly from the Bank for the test to be satisfied.

1539. The Bank therefore submitted that the fact that the Corporate Defendants did not take funds directly from the Bank did not mean that their conduct fell outside the scope of Article 3(1)(2). It was said that, by facilitating the onward transmission of the funds, the Corporate Defendants assisted in misappropriating them from the Bank, and assisted in concealing the misappropriation, that being conduct sufficient to constitute a breach of Article 3(1)(2).

1540. I agree. I accept that Ukrainian law has adopted a wide and flexible definition of 'property', and applied the protections afforded to property interests in obviously personal (and not proprietary) claims. The conduct of the Corporate Defendants

facilitated the onward transmission of the funds misappropriated from the Bank, and assisted in the concealment of the Misappropriation. In light of the conclusions I have reached on the meaning and scope of Article 3(1)(2) (see paragraphs 893ff above), I am satisfied that the Corporate Defendants' conduct in participating in the Misappropriation and subsequent attempts to conceal it, is conduct which breaches the prohibition against depriving a person of their ownership of property, is contrary to Article 3(1)(2) and is therefore unlawful for the purposes of Article 1166.

1541. By way of postscript, I should mention that at one stage the Individual Defendants advanced an argument that the claims in tort against them were precluded by what was called the rule against competition of claims. This was not pursued in closing submissions and I need say no more about it.

The liability of the Corporate Defendants under Article 1166: harm and causation

1542. The next question for determination is whether the harm suffered by the Bank on the making of the Relevant Drawdowns was caused by any of the Corporate Defendants' unlawful acts. This is a much more acute issue for the Bank's claim against the Corporate Defendants than it is for the Bank's claim against the Individual Defendants, because the nature of the unlawful conduct they committed and the role that they fulfilled in the Misappropriation and the loan recycling is very much more confined than that of the Individual Defendants.

1543. In my view their position is different from that of the Individual Defendants because, on the Bank's case, they are each directly or indirectly linked to particular Unreturned Prepayments ultimately received by only one of them. Ukrainian law does not provide a freestanding cause of action akin to the tort of conspiracy under English law, they did not owe fiduciary duties to the Bank and, save in the most general sense, their acts of participation were limited to the Relevant Drawdowns which relate to the Unreturned Prepayments which they themselves received.

1544. The Corporate Defendants submitted that the Bank cannot establish a sufficient causal link between the unlawful acts alleged against them and the harm it sustained. This submission is based on the Bank's case that it sustained harm at the point of each Relevant Drawdown, when there was one of 270 separate fraudulent misappropriations of the Bank's money. The Corporate Defendants said that the timing and contemporaneous documentary evidence clearly demonstrated that the unlawful acts pleaded against them by the Bank played no role in causing the Relevant Drawdowns, because they occurred after the Relevant Drawdown constituting the harm had been made. They also relied on the fact that the Bank's own case is that the Corporate Defendants involvement was only in covering up the harm and concealing the fraud.

1545. The Corporate Defendants described the Relevant Drawdowns and their RSAs as falling into three categories, all of which are said to give rise to different categories of causal connection. In each case it is said that the Ukrainian law test for a causal link between any unlawful conduct by any of the Corporate Defendants and the harm sustained on the making of the Relevant Drawdown is not satisfied.

1546. The first category is those Relevant Drawdowns made by a Relevant Borrower who had no RSA at all ("Non-RSA Connections"). They comprised the four Relevant Drawdowns by Prominmet and the Cypriot Borrowers, in respect of which there was never any RSA between that Relevant Borrower and any of the Corporate Defendants. The Corporate Defendants pointed out that the Bank's case is that the contemporaneous communications show that the Relevant Drawdowns of the Cypriot Borrowers took place before the agreements for their Relevant Loans were put in place.

1547. The second category is those 245 Relevant Drawdowns, which were cycled at least once via a different prepayment under a different supply agreement before the Unreturned Prepayment was made under the associated RSA ("Looped Connections"). The Corporate Defendants were correct to submit that the evidence showed that the approval and agreeing of each Relevant Loan under which each Relevant Drawdown was obtained pre-dated the coming into existence of the associated RSAs. This was said to mean that the RSAs necessarily cannot have been used in the process of the approval and agreement of those loans. It was said that, insofar as the approval and agreement of any of those Relevant Loans may have involved reliance by the Bank on the existence of a supply agreement, it cannot have been the associated RSA, because the Relevant Drawdowns were transferred onwards as part of the first loop under other supply agreements. It follows that the RSAs referenced in the final loops of Looped Connections cannot have been a cause of the Relevant Drawdowns.

1548. The third category is those 21 Relevant Drawdowns, which were transferred directly as an Unreturned Prepayment under the associated RSA ("No-Loop Connections"). It is said that, of those, 14 were drawn down under Relevant Loans which had been approved and agreed well before the drawdown and seven were drawn down contemporaneously with the approval and agreeing of the Relevant Loans. It was submitted that the documentary evidence shows that, even in those instances, the executed RSAs did not play a role in effecting those drawdowns.

1549. Although the evidence demonstrates that, in all but a very few instances, the Relevant Loans were agreed before the execution of the associated RSA, that is not the case with the Relevant Drawdowns. However, the Corporate Defendants pointed out that the drawdown requests from Borrower to Bank for the seven No-Loop Connection Relevant RSAs entered into contemporaneously with the approval and agreeing of the associated Relevant Loans did not refer to the purpose of the drawdown nor that it would be used to make (or 'fund') an Unreturned Prepayment. Counsel for the Corporate Defendants sought to illustrate this point by reference to the US$36.8 million Relevant Drawdown made by Uniks on 31 July 2014 (I have already made brief reference to this in paragraph 325 above), with an onward transfer to Teamtrend the following day.

1550. I agree that the documentation shows that the Corporate Defendants did not prepare the draft RSA, but only executed it and only did so after the Relevant Drawdown was made. The only documentation requested by BOK, and actually provided by PBC in advance of the Relevant Drawdown, did not refer to the RSA or to Teamtrend, and the Bank approved the Relevant Loan prior to any mention of Teamtrend or an RSA, (although that is only on the basis that the documentation must have been backdated). The Corporate Defendants also pointed out that the Bank relied on the same evidence to support its submission that the Relevant Loans are shams. Nonetheless in a case such as Uniks, it is my view that given the nature of what was going on, little can be drawn

from the documentary record; it is likely that those directly engaged in operating the scheme on behalf of the Bank, the Borrowers and the Corporate Defendants would have known of the link.

1551. It was also said that the absence of any causal link could be seen from the evidence of widespread backdating of the RSAs relied upon by the Bank. If the documents did not even exist at the time of the Relevant Drawdowns, they could not have had anything at all to do with the Borrowers obtaining those monies. Likewise, it was clear that the Corporate Defendants did not actually create the RSA documentation, but only executed the drafts presented to them by employees of BOK or PBC, while there was evidence that sometimes the provision of RSAs was overlooked altogether. I am not persuaded that this last point is of any real significance.

1552. The Corporate Defendants also relied on the Bank's reference to the Borrowers having pledged their rights to goods or repayment under RSAs to secure some of the Relevant Loans. But they submitted that this did not establish that the Corporate Defendants caused the Relevant Drawdowns, because the RSA Pledges were contracts between the Bank and the Borrowers, to which the Corporate Defendants were not party. It followed, so the Corporate Defendants submitted, that any further use of the RSAs by the Borrowers was not attributable to the Corporate Defendants. Likewise it was said that the RSA Pledges all post-dated the Relevant Drawdowns and so cannot have been causative of the agreement of the Relevant Loans or the making of the Relevant Drawdowns. The Corporate Defendants gave by way of example an RSA Pledge from Inkeriya to the Bank dated 28 August 2014 in respect of which both the Relevant Drawdown and the associated Unreturned Prepayment to Ukrtransitservice were made six weeks earlier on 14 July 2014.

1553. I will come back to the timing point, but the fact that the RSA Pledges were contracts between the Bank and the Borrowers to which the Corporate Defendants were not party does not seem to me to take matters very much further. Subject to identification of the appropriate Supplier, which is really the timing point, the structure of what was proposed was well known.

1554. The Corporate Defendants said that it was also relevant to causation as between any unlawful act committed by it and any harm sustained by the Bank that receipt of the Unreturned Prepayments and their onward transfer and non-repayment under the relevant RSA were not a cause of harm, because all of these events necessarily took place after each of the Relevant Drawdowns had been made, and therefore after the specific harm alleged by the Bank had been suffered. In 36 instances (totalling c.US$933m), the Borrower which had transferred to the Corporate Defendants was also the onward transferee receiving the funds back from the Corporate Defendants. Otherwise, the onward transferees were other non-Ukrainian companies involved in the scheme or were used to repay the loans of other Borrowers.

1555. It was said that, because all onward transfers were to other accounts within the Bank, the net financial position of the Bank was the same pre-receipt, upon receipt and post-onward transfer. It was said that the position both before and after was that there was a credit balance in the amount of the Unreturned Prepayment in an account of a customer of the Bank (whether Borrower, Corporate Defendant or onward transferee). The only change was the identity of the customer but that was said by the Corporate Defendants to be functionally irrelevant as all are said by the Bank to be worthless companies

owned and controlled by the Individual Defendants. I do not think that this point goes anywhere on this part of the case. The question is whether there is a causal link between the outflow on the making of the Relevant Drawdown and the Corporate Defendant's conduct and what happened to the funds after they left their hands. If anything that goes to the compensation to be paid, not to the causal link between conduct and harm.

1556. The Corporate Defendants adopted a similar causation critique of the Bank's pleaded case that the RSAs were used as part of a scheme involving the Corporate Defendants to procure judgments and arbitration awards in the 2014 Ukrainian Proceedings. It was submitted that, even if the purposes of the 2014 Ukrainian Proceedings were to enable the Borrowers to avoid incurring substantial penalties under currency control laws and to furnish the Bank with evidence capable of being supplied to the NBU to explain why the Relevant Loans had not been repaid (which I agree that they were), that is not a cause of the harm relied on by the Bank, i.e., each of the Relevant Drawdowns. In any event, as the Corporate Defendants pointed out, it is not suggested that the judgments and awards were ever provided to the NBU or had any particular effect on any course of action that it took.

1557. As to the 78 LFSAs, 37 of which were executed by the English Defendants and 41 of which were executed by other Suppliers (none were executed by the BVI Defendants), the Corporate Defendants pointed out that the Bank alleged that this purported security was in reality created to disguise the Misappropriation to avoid detection by the NBU, which I am satisfied that it was. They said that the LFSAs executed by the English Defendants either had no functional effect (if they were no more than a paper exercise with no substance, i.e., a sham) or, if they did, cannot have caused the alleged harm.

1558. The reasons for this were that (a) they were agreements between the Bank and the Borrowers to which the Corporate Defendants were not party and (b) they were all dated after both the Relevant Drawdowns and the agreement of the Relevant Loans, and therefore cannot have been used to obtain the Relevant Drawdowns, more especially if as the Bank alleged to be the case many were backdated (the timing point again). Furthermore, Relevant Loans were only ever partially secured by LFSA Pledges over RSAs from the English Defendants, rather than other Suppliers, with the consequence that the recipient of an Unreturned Prepayment and the party to the LFSA pledged to secure the Relevant Loan used to obtain a Relevant Drawdown which 'caused' that Unreturned Prepayment, were often different.

1559. The Corporate Defendants also submitted that the evidence in any event shows that the cover up was ineffective and that nobody internal to the Bank, the new management or the NBU was fooled or deceived by any of these documents. I agree that there are certainly some indications that this was the case, although my description earlier in this judgment of what occurred between the time of the last of the Relevant Drawdowns and nationalisation, and the time that matters took to come to a head, illustrates why it is oversimplistic to conclude that the Corporate Defendants can have no liability for ineffectual or redundant wrongdoing. That can only be based on the likelihood that, even if the Bank had claimed on the basis of harm caused by the alleged cover-up, that claim would have failed.

1560. Part of the Corporate Defendants' answer to the claims against them was that the Bank would have suffered loss in any event, because the harm was caused by the Borrowers who drew down the funds which crystallised at the time of each Relevant Drawdown.

I do not accept that this of itself relieves the Corporate Defendants from liability. The Bank has established that the Corporate Defendants' unlawful conduct was all part of the same scheme executed under common control and direction. Indeed it was a central part of the operation of the scheme as devised. If the Bank was caused harm by the Corporate Defendants it was actionable as much as the harm caused by the Individual Defendants because, without their participation (or that of somebody else fulfilling their role) through the entry into of the RSAs, those parts of the scheme which resulted in the Unreturned Prepayments would not have been carried into effect. Put another way, it is clear from the way in which the scheme operated that the entry into the RSAs by the Corporate Defendants or some other Supplier was an inherent part of the same scheme in which the Relevant Drawdowns which gave rise to the harm sustained by the Bank were made.

1561. That this is capable of being sufficient appears from cases such as *Gaz Ukrainy* and *DTEK*. Thus it is clear from the approach adopted in *Energobank*, *Ukoopspilka* and *Gaz Ukrainy* that it is possible for a person acting unlawfully as part of a pre-planned scheme to still be causally responsible for the harm sustained by the Bank, even if the primary act (in the case of the Corporate Defendants the entry into of the RSAs and the receipt of the Unreturned Prepayment) occurred after the time of the harm (in the present case the making of the Relevant Drawdowns). There are two ways of looking at the reason for this as a matter of Ukrainian law. The first is that they caused the harm because it would not have been sustained by the Bank if they had not pre-agreed to the RSAs, even if their participation in receiving the Unreturned Prepayment occurred later. The second is that their participation was a simple case of assistance in a scheme, which taken as a whole, involved them in committing the unlawful acts I have already described.

1562. The possibility of the first of these two reasons is based on a proper understanding of *Gaz Ukrainy*. As Mr Marchukov pointed out, it may well have been an important point on the facts of that case that it had been pre-agreed that the relevant defendant should receive the monies. It is the Corporate Defendants' case that, in the vast majority of Relevant Drawdowns, they were only selected to receive an Unreturned Prepayment on an *ad hoc* basis well after the Relevant Loan had been agreed and often months after the Relevant Drawdown itself had been made.

1563. In my view, the evidence demonstrates very clearly that the whole scheme was co-ordinated by BOK, but it also shows that it was often not planned and pre-determined that a particular Relevant Loan would be approved and agreed to facilitate a Relevant Drawdown for onward transfer to a pre-selected Supplier. Indeed it was intrinsic to the ongoing management of the loan recycling process that, at the time of approval and agreement of each Relevant Loan, it was not known whether any particular Supplier would have any involvement thereafter. Indeed, as a matter of fact, in the case of Looped Transactions, the process of selecting one of the Corporate Defendants to receive an Unreturned Prepayment often only occurred months after the Relevant Drawdown.

1564. It seems to me that this is a critical factual question. Subject to questions on the application of Article 1190, it is only in relation to Relevant Drawdowns where it is possible to identify that a Corporate Defendant would be a party to the RSA under which an Unreturned Prepayment was to be paid, that it is possible to say that they might have done anything which caused the specific harm to the Bank that occurred on

the making of each Relevant Drawdown. In my judgment, whether "direct cause", "main reason" or "objective consequence" is the appropriate test, an ability to identify the Corporate Defendant to receive the Unreturned Prepayment at the time of the Relevant Drawdown is required to establish causation. If that cannot be done, there is an insufficient causal link to show that any Corporate Defendant caused that element of the harm in respect of which the Bank sued. In my view, merely because a particular Corporate Defendant might have accepted Unreturned Prepayments on previous occasions, or might be chosen at some future date, does not suffice. It seems to me that even though they might have been controlled by the Individual Defendants, and even though, in the events that transpired, they became the recipients of the Unreturned Prepayment in due course, they must be identifiable as participants at the time of the harm.

1565. There was limited evidence on this point but, in assessing the appropriate inferences I have in mind the fact that the scheme was operated as a single whole. In that context, it seems to me that the task for the court is to work out whether any of the Corporate Defendants had been identified by the operators of the scheme, not at the time the Relevant Loan was agreed, but at the time the Relevant Drawdown was made. Given the centralised manner in which the scheme was operated, the time that BOK determined that the money was required to be drawn down is the critical point, not the time that the original Relevant Loan was agreed.

1566. Where that is the situation, it is right to conclude that the harm sustained by the Bank can properly be said to have been caused by the chosen Corporate Defendant's participation as the putative Supplier, even though not yet documented. In my judgment, in the absence of any clear evidence, it will be appropriate to draw that inference where the applicable RSA dates from or about the Relevant Drawdown, but not if it is more than one month later. Any suspicion that an RSA may have been backdated is to be left out of account for these purposes. The backdating is just as likely to reflect a contemporaneous recognition that it had always been intended that the Relevant Drawdown was (and should have been recorded as) associated with the RSA, as it is to reflect the possibility that the applicable Supplier was only chosen some time after the Relevant Drawdown had already been made.

1567. The next question relates to the second way of looking at what happened in *Gaz Ukrainy*. This is whether a simple case of assistance in a scheme, which taken as a whole involved the Corporate Defendants in committing the unlawful acts I have already described, establishes sufficient unity of intent for each of the Corporate Defendants to be jointly liable pursuant to Article 1190. The liability would then be to compensate the Bank for the harm caused by the making of the Relevant Drawdowns, even where the particular Corporate Defendant concerned had not been chosen at the time, or did not itself receive the Unreturned Prepayment referable to the Relevant Drawdown. This also raises the question of whether the harm alleged by the Bank is indivisible.

1568. I have identified the amounts of the Unreturned Prepayments attributable to each of the Corporate Defendants in paragraph 380 above. The Bank submitted that there is sufficient unity of intent, because the actions of each of the Corporate Defendants were all part of a single wider scheme committed for a common (fraudulent) purpose and under common direction. It is said that all of the Corporate Defendants played the same role in respect of different Unreturned Prepayments, and for that reason the Bank

suffered "indivisible harm by interrelated, [cumulative/collective] actions or actions with unity of intent", as the experts put it.

1569. The Corporate Defendants submitted that the Bank's case fails to appreciate that Article 1190 imposes liability for jointly caused harm, not for joint participation in some scheme, one aspect of which, effected by others, is what causes the harm. Put another way, liability under Article 1190 depends upon the Corporate Defendants' acts of having caused the effecting of the Relevant Drawdowns. The mere fact that they may have had a role in the 2014 transactions more broadly is not sufficient because, under both Article 1166 and 1190, the focus must always be on the harm said to have been sustained, i.e. the Relevant Drawdowns. Put another way, the Corporate Defendants submitted that assisting, or being ready to assist, after the event does not render them liable. This was consistent with the experts' agreement that there is no cause of action akin to the tort of conspiracy under English law. The conduct alleged against the Corporate Defendants could have been excluded, and the Relevant Drawdowns would still have occurred.

1570. It was submitted on behalf of the Bank that the evidence demonstrates that the Corporate Defendants were all under the common control of the Individual Defendants and were all participants in a wider scheme under common direction in relation to which they all played a significant role. I agree with that submission so far as it goes, but I do not agree that this gives the answer, because the question is whether the Corporate Defendants have caused harm which is indivisible (which the separate Relevant Drawdowns are not) "by interrelated, [cumulative / collective] actions or actions with unity of intent". The most that can be said about such elements of the harm as did not lead to a Corporate Defendant to commit to accept an Unreturned Prepayment, is that it was potentially there in the background to act as a Supplier if chosen to do so. As I do not think that the component elements of the harm in the form of the 270 separate Relevant Drawdowns are indivisible, I do not consider that the Bank has established sufficient unity of intent as to the interrelated and cumulative unlawful conduct to give rise to joint liability of all of the Corporate Defendants both as between themselves and as between themselves and the Individual Defendants.

1571. It follows from this that I do not find that the Corporate Defendants are liable under Article 1166 for the full amount of the loss claimed. I have attempted to identify the characteristics of Relevant Drawdowns and Unreturned Prepayments which are sufficient to demonstrate a causal connection. Where that is the case, in my judgment, joint liability with the Individual Defendants follows. The liability is that of the individual Corporate Defendant which received the relevant Unreturned Prepayment and will only arise where the RSA pursuant to which it was paid is recorded in the Bank's transaction documents as analysed by Mr Thompson (see the FTI list of Relevant Drawdowns) as having been dated no later than one month after the date of the Relevant Drawdown by which it is recorded as having been funded. I have not however heard argument on precisely which of the Relevant Drawdowns and Unreturned Prepayments satisfy these criteria, or on the extent to which the outcome of the claim against the Corporate Defendants in unjust enrichment (to which I turn shortly), together with any credits to be given for genuine repayments in the form of the true value of the Transferred Assets, might affect the compensation that would otherwise be payable.

Relevance of the English Agency Agreements

1572. One of the defences advanced by the English Defendants (anyway to the claim in unjust enrichment) was that they entered into the RSAs as agents for undisclosed principals, pursuant to the English Agency Agreements. I am not at all sure that this defence was also advanced in relation to the claim under Article 1166, but if it was, I agree with the Bank that it does not assist them. Their acts of participation in the Misappropriation are the same whether they were undertaken on their own behalf or pursuant to the English Agency Agreements. As Mr Hunter submitted in closing, they still participated in and aided and abetted the Misappropriation even if they did so as agents.

1573. A point to which I will revert in the context of the claim in unjust enrichment is that I think this argument is also without merit for a different reason. As I have already explained earlier in this judgment I am satisfied that the ED Principals were, like the Corporate Defendants, ultimately controlled by the Individual Defendants. As such, they were aware of the nature of the scheme and the Misappropriation. The evidence therefore points strongly to the likelihood that the English Agency Agreements were made between two groups of companies owned and controlled by the Individual Defendants and that they had no genuine purpose apart from adding to the concealment. I find that this was indeed the case.

1574. This finding is based on a whole series of circumstances apart from the conclusion I have reached on their ultimate beneficial ownership. They include the fact there was no legitimate commercial reason (and none has been proffered by the Corporate Defendants) as to why the ED Principals should need or wish to conduct a "worldwide export and import trading business" as undisclosed principals (the phrase used in the English Agency Agreements). The commission payable under them was tiny and they provided that the agent (i.e., one of the English Defendants) "shall not, unless expressly authorised by the Principal …, disclose to any third party that the Agent is acting as agent or nominee for the Principal". As the Bank submitted, this would have made any legitimate business impossible, because any legitimate purchaser of ore, heavy machinery or PET was bound to want to look behind a relationship with the English Defendants, given the facts that they had no financial standing, no offices, no website, no staff, and no experience in this industry.

1575. They also include the interconnectivity between the purported beneficial ownership of the English Defendants and the ED Principals which made little commercial sense. I was shown by way of example evidence that the purported UBO of Hangli was said to be Ms Trykulych, but Ms Trykulych is also the purported UBO of Teamtrend, for whom Hangli is said to be the relevant ED Principal. Ms Trykulych is an employee of PBC and is also said to be one of the UBOs of 13 Borrowers, four of which (Ortika, Ribotto, Intorno and Empire LLC ("Empire")) had all entered into RSAs with Teamtrend. The Bank is entitled to characterise this as a farce in which Ms Trykulych's companies (Ortika, Ribotto, Intorno and Empire) entered into contracts with another of her companies, Teamtrend, purportedly acting as undisclosed agent for yet another one (Hangli).

1576. The Bank's case that the English Agency Agreements had no genuine purpose apart from adding to the concealment is further supported by the fact that there has been no explanation as to why, when the ED Principals did not supply goods or return the Unreturned Prepayments under the RSAs, there was no attempt by the Corporate

Defendants to bring claims against them under the indemnities contained in the English Agency Agreements. I accept the Bank's submission that a genuine agent would have been bound to take those steps, either when sued by the Borrowers in the 2014 Ukrainian Proceedings or following the judgments and arbitration awards against them.

1577. I also accept the Bank's submission that it is striking that there is no evidence as to how the Corporate Defendants thought that the ED Principals were going to pay for any of the goods, which the Corporate Defendants (as their purported agents) had assumed obligations to supply. The artificial and essentially dishonest nature of what was going on is illustrated by the fact that what purported to be instructions given by the ED Principals to the Corporate Defendants for the purchase of goods under Supply Agreements were backdated on a number of occasions. In 2015, the English Defendants' new accountants, DJC, started to ask difficult questions relating to the rationale behind a number of aspects of the Corporate Defendants' activities, such as why Collyer and Teamtrend had chosen to use a UK company to act as undisclosed agent for the purchase and sale of minerals where neither the producer, the supplier, nor customer had any connection with the UK. This request was made of Sofocleous and, in response, Primecap prepared a raft of backdated instructions from the ED Principals which I infer was done in an attempt to provide appropriate audit evidence. This was plainly a dishonest attempt to pull the wool over the auditors' eyes.

1578. Finally, but tellingly, there is no evidence from either the Corporate Defendants or the ED Principals themselves substantiating their case that the Corporate Defendants were *bona fide* agents and that the ED Principals were *bona fide* principals. One of the reasons for this was that all of the English Defendants' directors resigned immediately after the Court of Appeal's jurisdiction judgment, but there is no reason to think that their position could not have been verified on oath had they chosen to do so.

1579. In these circumstances, I am satisfied that the ED Principals and the English Agency Agreements were devised as part of the process of disguising the true nature and purposes of the transfer of funds of which their so called agent was a recipient. I am satisfied that this was done for the purposes of the loan recycling scheme, but I am also satisfied that the evidence supports a conclusion that it is not just a question of whether the English Agency Agreements were being used as part of a fraud. This is a case in which, despite their appearance, there was no true agency relationship at all. As such they, and the agency relationship which they appeared to evidence or create, satisfied the conventional test for being a sham, whether:

i) as a matter of English law, being the law said to govern the contract, they were "intended to give to third parties or the court the appearance of creating legal rights and obligations different from the actual rights and obligations if any which the parties intend to create" (*Snook v. London and West Riding Investment Ltd* [1967] 2 QB 786, 802); or

ii) as a matter of Ukrainian law being a transaction concluded by the parties for the purposes of concealing another transaction.

Claims in Restitution

1580. The Bank contends that its claims against the Corporate Defendants in unjust enrichment are governed by Ukrainian law. It relies on Articles 10(1) and 10(4) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), as retained by the European Union (Withdrawal) Act 2018 and amended by SI 2019/834 ("Rome II"). The Corporate Defendants contend that any claims against them in unjust enrichment are governed by Cypriot law and they rely on Article 10(2) of Rome II:

> "1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.
>
> …
>
> "3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.
>
> "4. Where it is clear from all the circumstances of the case that the non- contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply."

1581. The language of Article 10 therefore requires the court first to consider whether the non-contractual obligation concerns a relationship existing between the Bank and the Corporate Defendants, which is closely connected with the unjust enrichment. If it does, the law that governs that relationship must be applied unless Article 10(4) is engaged. In opening its case, the Bank submitted that its restitutionary claim against the Corporate Defendants engaged Article 10(1) because it concerned the relationship arising out of its tortious claim under Article 1166 against the Corporate Defendants. It still relied on the argument in its closing submissions, but without any further development.

1582. Mr Plewman pointed out that this was an argument which had been disavowed by the Bank on its application for a WFO at the outset of these proceedings, when it had accepted (without qualification) that "Article 10(1) does not apply because there is no existing relationship between the Bank and the Defendant Suppliers". He submitted that the Bank was in any event correct to take the position which it then did, both because the claim in tort is not one based on the kind of duty which might establish a relationship with the Bank, and because any such duty would not have been "existing" prior to the events giving rise to the claim.

1583. In *Banque Cantonale de Geneve v. Polevent Ltd* [2016] QB 394 at [16], Teare J was concerned with a claim in deceit in which there was no relationship between the claimant and the tortfeasor before the tort was committed. He rejected an argument that, because it could be said that, after the tort had been committed, there was a relationship between victim and tortfeasor "with legal consequences", that was sufficient to engage Article 10(1):

> "16. … However, if that "relationship" were enough then Article 10(1) would add nothing to Article 4(1) in the context of the tort of deceit. Article 4(1) already provides that where the obligation to provide restitution arises out of the tort, the law of the tort will govern that obligation. I therefore consider that Article 10(1) is not intended to refer to the mere "relationship" of wrongdoer and victim created by the commission of the tort.
>
> "17. Article 10(1) refers to a relationship "existing between the parties". The natural meaning of such a relationship in the context of article 10(1) is, it seems to me, one that is in existence before the facts which give rise to the "claim have occurred;"

1584. I agree with the approach adopted by Teare J. It follows that the Corporate Defendants are correct on this issue. Article 10(1) of Rome II does not apply the law of Ukraine to the claim against the Corporate Defendants.

1585. Nobody argues that Article 10(2) applies, nor for that matter was there any mention of Article 4(1) in the parties' submissions. So the next question is to identify the country in which the unjust enrichment took place for the purpose of determining the effect of Article 10(3). There is no real dispute about this. The relevant country is Cyprus, because the Bank's allegation is that the Corporate Defendants were enriched by acquiring property in the form of prepayments under the RSAs in circumstances in which they have never complied with their purported obligations under the RSAs or returned the Unreturned Prepayments. It is therefore the Bank's case that the enrichment comes from the acquisition of property in the form of money which occurred with the crediting of the Corporate Defendants' accounts at the Cyprus branch of the Bank.

1586. The remaining argument is whether the *prima facie* application of Article 10(3) is displaced by the "manifestly more closely connected" test contained in Article 10(4). The Bank submitted that it is, because the only relevant factor which connects the claim in unjust enrichment to Cyprus is the location of the Corporate Defendants' bank accounts, which adds nothing because that is no more than the justification for applying Article 10(3) in the first place. The Bank also submitted that Cyprus as a location was of no particular significance, because the Corporate Defendants could equally have had their accounts with another non-Ukrainian subsidiary of the Bank (e.g., in Latvia). The only point which mattered was that the destination of the funds should be outside Ukraine.

1587. More positively, Ukraine was said to be manifestly more closely connected to the restitutionary obligation than Cyprus, because the Corporate Defendants received the Unreturned Prepayments as part of a fraudulent scheme controlled by two Ukrainian oligarchs with the purpose and effect of misappropriating funds from a Ukrainian Bank. The Bank also relied on the fact that the scheme was actually implemented by and with the involvement of a number of individuals, including people said to be the UBOs of the Corporate Defendants, who were based in Ukraine (Mr Melnyk, Mr I Pugach, Ms Yesipova, Ms Trkulych and Mr Ivlev). It also relied on the fact that the Corporate Defendants knew that the Unreturned Prepayments were funded by fraudulent loans from the Bank in Ukraine and the whole structure was designed to conceal breaches of Ukrainian currency control regulations.

1588. Mr Plewman submitted that, whatever the connections to Ukraine, it could not possibly be said that the connections to Cyprus were not real and substantial. The Corporate Defendants were not themselves Ukrainian (they were incorporated in England and the BVI) and they were managed by Cypriot professional directors; indeed it was the Bank's own case that the Individual Defendants' control of and influence over the Corporate Defendants was through Primecap, a Cypriot corporate services provider established by Cypriot lawyers. He also said that Cyprus was the country in which the money which was the subject of the Bank's claim continued to be located when it was transferred on by the Corporate Defendants. Another factor which counted against a manifestly closer connection to Ukraine was that the prepayments were received by the Corporate Defendants in US$ rather than UAH.

1589. An important starting point, as explained by the editors of Dicey (at para 36-043), is that the exception in Article 10(4) is only to be applied where there is a compelling reason for displacing the relevant general rule (in this case Article 10(3)). This is clear from the use of the word "manifestly" in the language of the Article. I also agree that the court's task is to ascertain whether there is a country, which has a manifestly closer connection to the restitutionary obligation – i.e., the focus is on the country not the law. In the present case, the exercise required by Article 10(4) is a comparison of the connection between the restitutionary obligation and Cyprus on the one hand and between the restitutionary obligation and Ukraine on the other.

1590. One conclusion which flows from these principles is that the fact that the Corporate Defendants are English and BVI companies is not of much assistance in determining the right answer, nor is the fact that the transfer was in US$ rather than UAH. The comparison is between connections to Cyprus and connections to Ukraine. Connections to third countries may go to show that not every factor apart from the place of receipt points inexorably to Ukraine, but if they do not point to Cyprus, their usefulness is limited.

1591. As to Primecap, although it is a corporate services provider established in Cyprus, my findings as to the control over its activities exercised by individuals in Ukraine, both in relation to the transactions with which these proceedings are concerned and more generally, mean that the connection to Cyprus is in fact and substance more limited than the place of its establishment and operations might otherwise indicate. The enrichment occurred in Cyprus (a factor which will always of course be present where it said that Article 10(4) should displace the *prima facie* rule in Article 10(3)), but the expense was sustained by the Bank in the Ukraine. I also think that, because steps which gave rise to an unjust enrichment were component parts of a fraud practised on a Ukrainian bank, structured in the way that it was to avoid Ukrainian currency control obligations, and closely interrelated to torts governed by Ukrainian law in which the loss was sustained in Ukraine, points to a very close connection to Ukraine.

1592. These are all powerful reasons for concluding that Article 10(4) is engaged. There is, however, real substance in Mr Plewman's point that a transfer out of Ukraine, and (more importantly for the claim in unjust enrichment) a receipt by a recipient outside Ukraine, was an essential element of what all parties accept (for different reasons) was a loan recycling scheme intended to avoid Ukraine's currency control regulations. I agree that the fact that it was necessary for any enrichment to occur outside Ukraine, detracts from any connection between the restitutionary obligation and Ukraine, and makes it more

difficult for the Bank to say that the connection to Ukraine is manifestly closer than Cyprus.

1593. Although I have not found the point an easy one, I have reached the conclusion that the Bank is correct on this issue. Notwithstanding the high bar which it has to overcome, I have concluded that it is clear from all the circumstances of the case, including in particular those to which I have specifically referred, that the restitutionary obligations arising out of the Bank's claims in unjust enrichment are manifestly more closely connected with Ukraine than they are with Cyprus. It follows that the law of Ukraine shall apply.

Unjust Enrichment: Ukrainian law: Introduction

1594. It was common ground between the experts that claims in unjust enrichment under Ukrainian law are governed by the principles set out in Chapter 83 of the Civil Code, of which Article 1212 is the core provision. Article 1212 is entitled "General provisions on obligations in connection with the acquisition or preservation of property without sufficient legal grounds" and provides as follows:

> "1. A person who has acquired or preserved property at the expense of another person (the injured party) without sufficient legal grounds (acquisition of property without grounds) shall be obligated to return that property to the injured party. The person is also obligated to return the property in the event that the ground upon which it was acquired later fell away.
>
> 2. The provisions in this Chapter shall apply irrespective of whether the acquisition or reservation of property without grounds resulted from the conduct of the acquirer of the property, the injured party or other parties, or as the result of an event."

1595. Article 1213 is also relevant. It is entitled "In-kind return of unjustly acquired property" and provides as follows:

> "1. An acquirer must return unjustly acquired property to an injured party in kind.
>
> 2. If it is impossible to return unjustly acquired property to an injured party in kind, its value (as determined at the time when the restitution case is heard) shall be compensated."

1596. The experts described the elements of a claim under Article 1212 as follows:

> "(i) the acquisition (or preservation) of property; (ii) such acquisition is at the expense of the claimant; and (iii) the absence of legal grounds for the acquisition (or if there were such grounds, they have fallen away and ceased to exist)."

1597. The experts also agreed in their joint statement that there is no need for a claimant to show that the acquirer of property is at fault for a claim in unjust enrichment to succeed, that for the purposes of Article 1212 property includes money (whether in the form of cash or in a bank account) and that the length of time for which an acquirer holds the unjustly acquired property is irrelevant. There was also no dispute between the experts that the Civil Code makes no provision for a defence of change of position. It follows

that I accept Mr Beketov's evidence that once a person has been enriched within the meaning of Article 1212, it is no defence that the enrichment has been dissipated, although dissipation may be relevant to the issue of remedy.

1598. An introductory argument advanced by the Corporate Defendants, although limited in its impact to the English Defendants, was that any Unreturned Prepayments they may have received were received for the ED Principals under the English Agency Agreements with the consequence that they themselves did not acquire property for the purposes of Article 1212.

1599. The Bank had two answers to this contention. The first was that the English Agency Agreements were shams and accordingly of no effect. I have already explained my findings to that effect in paragraphs 1572ff above. On that basis, it is self-evident that the English Agency Agreements do not evidence a genuine relationship of agent and principal and they cannot operate to affect the fact that the recipients of the property were the Corporate English Defendants not the ED Principals.

1600. The second argument is that even if the English Defendants held the Unreturned Prepayments on trust for the ED Principals, they still acquired property for the purposes of a Ukrainian law claim in unjust enrichment, because legal title to the Unreturned Prepayments remained with them, Ukrainian law not recognising the notion of a division between legal and equitable title.

1601. In light of my finding that the Agency Agreements were shams, the second point does not arise. However, I think it is another answer to the English Defendants in any event. I accept Mr Anderson's submission that Ukrainian law would recognise that the English Defendants have been enriched by receipt of the monies for the purposes of a Ukrainian law claim in unjust enrichment because they received legal title to the Unreturned Prepayments regardless of where, as a matter of English law, the beneficial interest lies.

1602. In reaching that conclusion, I have considered Mr Nahnybida's evidence that, although the English Agency Agreements were governed by English law, Article 1018 of the Civil Code applied, because the property was acquired by the English Defendants, acting as commission agents for the ED Principals. He said that this meant that the acquirers of the funds paid to the English Defendants were the ED Principals and not the English Defendants themselves. It therefore followed that they would be the appropriate defendants to any claim under Article 1212:

> "The property acquired by the commission agent at the expense of the principal is the property of the principal."

1603. I do not accept that this is the correct analysis. Mr Beketov's answer to this evidence was contained in one of his reports and I agree with it. He said the following in relation to Article 1018:

> "I agree that under this provision where a commission agent receives funds pursuant to his agency agreement, the effect of that provision is that those funds are treated under Ukrainian law as being owned by the commission agent's principal, and the commission agent has no rights of ownership to the funds. I do not, however, see how this rule of Ukrainian law can have any application in the present case, where the Agency Agreements in question between the [English

> Defendants] and [the ED Principals] are alleged by the Bank to be void, which if correct would in my view eliminate any basis for saying that the English Defendants] held the funds they received to the account of [the ED Principals], or that the [ED Principals] held the beneficial interest in those funds."

Unjust Enrichment: Ukrainian law: causation and indirect enrichment

1604. The next disputed issue is whether the Unreturned Prepayments amounted to an enrichment of the Corporate Defendants at the expense of the claimant. The Bank submitted that they were because the Unreturned Prepayments were caused by the Relevant Drawdowns, such that the enrichment was at the expense of the Bank for the purposes of Article 1212. The Bank said that the straightforward analysis was that, but for the Relevant Drawdowns, the Unreturned Prepayments would not have been made. This was sufficient because, as Mr Beketov explained when expressing his view in the joint statement:

> "where A has unjustly acquired property at the expense of B and A has subsequently dissipated its enrichment to C, B may pursue a cause of action under Article 1212 against A or C, although B would not be permitted to double recover … Chains of transfers that are causally linked together are relevant to consider for purposes of determining liability under Article 1212".

1605. He expanded on this analysis of the effect of chains of transfers and causal links in one of his several reports by explaining that in his view, a causative element to a claim in unjust enrichment is inherent to the requirement of Article 1212 that the defendant's enrichment be 'at the claimant's expense'. He said the following:

> "… the proper defendant(s) to an unjust enrichment claim are those who acquired property without sufficient legal grounds and at the Bank's expense. Consistent with this, at Beketov 8/248, 250, I explained that, in my view, where person A has acquired property without sufficient legal grounds at the expense of person B, and A has subsequently dissipated its unjust enrichment to person C, B may pursue an unjust enrichment claim against A or C, or indeed could pursue separate unjust enrichment claims against each of them (although B would not be permitted to double recover). This assumes that the elements of Article 1212 are satisfied in respect of C's acquisition, and in my view this should be the case where there is a causative link between the first and second transfers, because in that case C's enrichment can be said to have been at B's expense.

1606. The Corporate Defendants challenged that analysis on two levels. The first gave rise to a question of law; they submitted that, as a matter of Ukrainian law, indirect enrichment is impermissible. The second was a challenge to the factual basis for saying that there is a causal connection between the Relevant Drawdowns and the Unreturned Prepayments. This is very similar to the question I have already addressed in relation to the claim under Article 1166.

1607. As to the first point, the Corporate Defendants' position was summarised by Mr Nahnybida who said that it was his view that, in the example given by Mr Beketov, "B

only has a cause of action under Article 1212 against A". He expressed his position with some certainty on the causal link analysis as follows:

> "Chains of events causally linked together have no role to play in the Article 1212 analysis. Rather the reduction (or non-increase) of property on the side of the victim and the increase (or preservation) of the same property on the side of the acquirer must be interdependent counterparts, like '*two sides of the same coin*'."

1608. Originally the Bank was able to point to a number of cases in which the Supreme Court had used the language of a causal relationship when describing the increase in the property of one person and a corresponding loss of property by another: see e.g. case No. 910/59/22, *Bionics Lab* at [86] and case No. 903/359/21, *Brandbord LLC v. Communal Enterprise "Lutskreklama"* at [34]). But, by the commencement of the trial, the case on which it placed most reliance was the decision of the Supreme Court in case No. 901/17361/21, *Peasant Farm Ukraine v. State Treasury Service of Ukraine* ("*Peasant Farm*").

1609. In *Peasant Farm* the claimant contended that fraudsters, masquerading as legitimate agricultural companies with whom it would normally transact, had set up bank accounts in the name of those legitimate companies, procured the Peasant Farm to make payments into those accounts and then a day or so later, withdrawn funds from those accounts, using forged cheques, as purported wages for employees. In order to enable the withdrawals under this pretext, tax and other levies on these purported 'wages' had been deducted at source and paid over to the State Treasury Service ("STS"), which received a total of UAH 5,273,500 in payments that were not in reality due, because the funds withdrawn had not in fact been used to pay wages.

1610. Peasant Farm claimed for the return of the UAH 5,273,500. It succeeded in the Commercial Court, the decision of which was overturned in the Court of Appeal but was then restored in the Supreme Court. The Bank submitted (and I agree) that this decision is a clear example of indirect enrichment. The STS did not receive funds directly from the Peasant Farm, but rather from accounts (operated by fraudsters) in the name of third-party companies. Furthermore, the STS's enrichment and the Peasant Farm's loss were not simultaneous, but were separated in time by at least a day. In cross-examination, Mr Nahnybida accepted:

> "there were several transfers of the Farm Enterprise's Funds to a number of recipients, including the State Entity and the enrichment of the State Entity did not involve a simultaneous reduction of the property on the side of the Farm Enterprise … the loss and the enrichment were not independent counterparts arising from the same event. They were not two sides of the same coin".

1611. This therefore undermined Mr Nahnybida's original explanation of the principle that a claim for indirect enrichment is impermissible under Article 1212. It was also wrong to suggest, as was put to Mr Beketov in cross-examination, that *Peasant Farm* was not a case of indirect enrichment at all because "the money was in fact never received by the third parties at all; it was paid into some fraudulently created bank accounts opened by the fraudsters which just happened to use the third parties' name". To the extent that he did so, Mr Beketov was wrong to accept this suggestion, because the money went from Peasant Farm into accounts in the names of third parties, stayed there for one or two days and then went from those accounts in part to the STS and in part to the

fraudsters as fake wages. In the event the point did not seem to be pursued in closing submission by the Corporate Defendants in that form, although Mr Plewman did suggest that the "indirectness" of the receipt of monies by STS was in substance ephemeral because the intervening bank account through which the money passed was an account in the name of an entity which did not authorise its opening to begin with, so that it can never itself have acquired the funds.

1612. In cross-examination, Mr Nahnybida also suggested that *Peasant Farm* was different from this case, because it concerned "an indirect preservation but not an acquisition" of money. The Bank submitted that this was a novel distinction belatedly concocted by him in an effort to evade the clear findings made in that *Peasant Farm* that indirect enrichment was permissible. Mr Anderson submitted that this is not a distinction drawn in Article 1212 itself or in any of the authorities. I agree that both acquisition and preservation are referred to in Articles 1212(1) and 1212(2) collectively and without distinction. The words are also used without distinction in the language of the ruling in *Peasant Farm* itself and Mr Nahnybida did not identify any case in which such a distinction had been drawn. However, I think that the distinction is clear in concept because, as Mr Beketov explained in his report, a person may become enriched by (a) the actual acquisition of another's property or property rights; or (b) preserving or saving his own property at the expense or detriment of another.

1613. But critically on this point, it is clear from the Resolution recording the actual decision in *Peasant Farm* that the Supreme Court had in any event analysed the case as one about acquisition not preservation. In my view the distinction suggested by Mr Nahnybida and its impact on the arguments in this case do not reflect the law of Ukraine.

1614. Mr Nahnybida also suggested that the decision in *Peasant Farm* was inconsistent with the earlier decision of the Grand Chamber in case No. 910/3009/18, *All Ukrainian Joint Stock Bank v. NBU in the liquidation of VAB Bank PJSC* ("*VAB Bank*"). He had relied on this case in an earlier report in support of the following propositions:

> "… that the consequence of further alienation of groundlessly acquired property is to transform the object of the unjust enrichment obligation: instead of returning the property in kind, compensation for this property must be paid to the victim. That was the only alternative envisaged. The Supreme Court did not suggest that relief under Articles 1212-1214 of the Civil Code would be available against the other person to whom the securities had been alienated. The obliged person under Article 1212 of the Civil Code always remains the one who was enriched due to the initial direct groundless acquisition of property, directly connected to the loss of that property by the victim, irrespective of whoever subsequently acquired the property."

1615. I do not agree with Mr Nahnybida's evidence on this point, and I think that Mr Beketov's conclusion that, on a proper analysis, *VAB Bank* is not relevant to the issue in hand reflects Ukrainian law. As Mr Anderson explored in his cross-examination of Mr Nahnybida, VAB Bank was a two-party case involving a direct transfer between the claimant, VAB Bank (claiming through the DGF), and the defendant, NBU. The Grand Chamber was primarily concerned with interpreting two other statutory provisions and its consideration of Article 1212 was expressly obiter. It did not purport to consider the possibility of a claim against an indirect recipient because that was an issue which

simply did not arise. All that it said in relation to Article 1212 was that, if the direct recipient of specific property no longer retained the property it received from the claimant, the claimant should bring its claim against the direct recipient under Article 1213 for compensation for the value of the property rather than the return of the property in kind, which is something that the claimant did not do in that case. The reason the claim actually failed was that the relief actually sought was inappropriate.

1616. I should record that at the end of Mr Nahnybida's evidence on this point, Mr Anderson put it to him that the Grand Chamber does not say in *VAB Bank* that no claim can be brought under Article 1212 against an onward recipient of the securities: "It just does not say that because it wasn't asked to consider the point. Do you agree?". Mr Nahnybida did not agree with that suggestion, but I think he was wrong not to do so. I am satisfied that there is nothing in *VAB Bank* that is inconsistent with the later decision of the Supreme Court in *Peasant Farm*, and that the result in *Peasant Farm* reflects a proper application of the law of Ukraine on this point.

1617. However one aspect of the test, which is also mandatory, is the requirement spelt out in two resolutions of the Supreme Court in case No. 910/9345/17 and case No. 916/2478/20 (only partial translations were in the papers), both of which were referred to by Mr Beketov and picked up Mr Nahnybida: there must be an increase in the property of one party and a simultaneous reduction of it in another. The way that the point was put by the Supreme Court in case No. 916/2478/20 was that:

> "the mandatory condition is the coincidence in time of the increase in property of one party (the acquirer) and reduction of property of another party (the injured party), as well as the lack of sufficient legal ground (a legal fact) for enrichment."

1618. The mandatory closeness of the connection was also articulated in another resolution of the Supreme Court dated 6 February 2020 in case No. 910/13271/18 (only a partial translation was in the papers), albeit not with quite such an emphasis on the issue of coincidence. Mr Beketov had originally included a translation which suggested that the third element for an unjust enrichment claim was "a causal link between the increase or preservation of property by the acquirer and the reduction or absence of increase on the part of the victim". This was subsequently accepted by Beketov as incorrect and he agreed that the correct translation of the Supreme Court's third requirement for unjust enrichment was "(3) conditionality of increase or retention of property on the part of the acquirer by a decrease or absence of increase on the part of the victim"

1619. I can see that there may be good policy reasons for preferring Mr Beketov's evidence. As he pointed out, if Mr Nahnybida were correct, it would mean that a person setting out to unjustly enrich himself at another's expense could avoid liability under Article 1212 by imposing a straw man in a chain of transactions between himself and the victim. He considered that, for reasons of policy, the Ukrainian courts would reject such an outcome and the Bank submitted that this is not a conclusion that a sensible legal system should countenance.

1620. However, it is very difficult for an English court to satisfy itself that Ukrainian law will move further in that direction and I think it is unhelpful, and potentially misleading, to use the language of causation without appropriate qualification as the principal basis for identifying the enrichment element of a claim under Ukrainian law. While it is certainly the case that a causal connection is required, I prefer Mr Nahnybida's view

that this is only part of the test and that there is also a requirement for conditionality or correspondence of enrichment and loss, which has a temporal component in the form of simultaneity or coincidence in time. I therefore agree in large part with Mr Plewman that the requirement for conditionality and correspondence in Ukrainian law, along with its temporal component, is almost always incompatible with liability as a result of the indirect acquisition of property, and inevitably means that the necessary causal connection must be a very close one. It is evident that it will extend to cases such as *Peasant Farm*, but the facts must be that close.

Unjust Enrichment: Ukrainian law: insufficient legal grounds

1621. The next part of the legal analysis is the Bank's contention that the Corporate Defendants received the Unreturned Prepayments without sufficient legal grounds. It is said that they did so because it is common ground between Mr Beketov and Mr Nahnybida that an enrichment will have been received without sufficient legal grounds if the recipient acquires property pursuant to a void transaction and the Relevant Loans and RSAs, pursuant to which the Corporate Defendants obtained the Bank's property are indeed void.

1622. The Bank further submitted that the Corporate Defendants acted abusively in entering into the RSAs and receiving the Unreturned Prepayments under the RSAs, such that they are not entitled to rely upon them as legal grounds for their enrichment. This second point reflects Mr Beketov's evidence (based on the principles explained in paragraphs 862ff above) that, if an acquirer relies upon a legal right as a defence to a claim in unjust enrichment, the court may refuse to protect that right if it is being exercised abusively. In other words, the court may also refuse to enforce an otherwise valid transaction if it concludes that the person relying upon the transaction is doing so abusively. He explained that, if the RSAs were found to have been entered into with the intention of harming the Bank's rights and were therefore abusive, those agreements could not be relied upon as providing the Corporate Defendants with a lawful basis for receiving the Unreturned Prepayments, even if the RSAs were not void on the grounds alleged by the Bank.

1623. In the light of the conclusions I have already explained on voidness (see the section of this judgment starting at paragraph 1006 above), I find that this element of the cause of action is satisfied.

1624. In these circumstances, I am satisfied that a claim in unjust enrichment against the Corporate Defendants is theoretically available to the Bank in the sense that an indirect claim is possible, if but only if the causal link is very close. Under the law of Ukraine, the causal relationship must comply with the requirements of coincidence and simultaneity between the increase in the property of the Corporate Defendants and a corresponding loss of property by the Bank. I also think that Mr Beketov's evidence that chains of transfers that are causally linked together are relevant to consider for the purposes of determining liability under Article 1212 is correct in theory, but it will only be in a situation akin to *Peasant Farm* that a claim will satisfy the test.

1625. It follows that I think that the law of Ukraine does not permit a claim in unjust enrichment under Article 1212 to be made where the enrichment is as a result of a

causally-linked chain of transactions which are not both simultaneous and direct. This leaves open the possibility (as occurred in *Peasant Farm*) that there may be a third party in the chain through whom what would have otherwise been a direct transfer can be seen to pass, but it does not permit the court to circumvent the principles of simultaneity or coincidence. I should add that it is necessary to leave out of account proprietary tracing cases, which are not proceedings under Article 1212: that is not the way that the Bank puts its claim against the Corporate Defendants.

1626. I will deal with the question of whether and how that test is satisfied on the facts of this case after considering the Cypriot law of unjust enrichment. It is appropriate for me to make findings on Cypriot law as well, in case I am wrong in my conclusion that the restitutionary obligations arising out of the Bank's claims in unjust enrichment are manifestly more closely connected with Ukraine than they are with Cyprus.

Unjust Enrichment: Cypriot law

1627. The Bank's claims as a matter of Cypriot law are brought under section 70 of the Contract Law ("section 70"), section 65 of the Contract Law ("section 65") alternatively as a freestanding claim in unjust enrichment under the Cypriot common law.

1628. Both the Bank and the Corporate Defendants adduced expert evidence from Cypriot lawyers. The expert called by the Bank was Stelios Nathanael, who served as a Judge in Cyprus for 33 years, the last 13 of which were spent on the Supreme Court bench (for a period of which he was the President). Mr Nathanael replaced the Bank's original expert, Petros Artemis (also a former Supreme Court judge), who died part way through the proceedings. The expert called by the Corporate Defendants was Andreas Erotocritou, who qualified as a Cypriot lawyer in 2007.

1629. The Bank submitted that, in circumstances where a large part of the dispute between them is how the Cyprus Supreme Court would be likely to interpret various issues if a case such as the extant one were to come before it, the views of Mr Nathanael should carry significantly more weight. It also submitted that this was more particularly the case, given that it was revealed in cross-examination that Mr Erotocritou had breached his duty to the court as an expert by citing a passage from the Indian textbook, Pollock and Mulla: The Indian Contract and Specific Relief Acts, 16th ed ("Pollock & Mulla") (a work which the experts agree is authoritative in Cyprus), in support of his thesis that section 65 did not provide for a claim for indirect enrichment, when another passage from that textbook reached the opposite conclusion.

1630. I will come onto the substance of this particular point in due course, but Mr Plewman said that it was plain that Mr Erotocritou had missed the passage now relied upon (which had not been identified by Mr Nathanael), and the allegation of breach of duty has been made on the basis of a preconceived assumption unsupported by the evidence. Having re-read the passage from his cross examination on a number of occasions, I accept that this is an accurate reflection of what occurred. Nonetheless, the way in which Mr Erotocritou dealt with the point gave me some concerns both as to the thoroughness of his research and to the fact that he seems to have concentrated too much on answering Mr Nathanael's evidence rather than ensuring that all of the points he was required to address were fully ventilated in his report.

1631. It was common ground between the experts that the starting point for interpreting the Contract Law is the wording of the relevant provision and (reflecting section 2(1) of the Contract Law) that a concept or term of the Contract Law should be interpreted in accordance with English law principles of statutory interpretation, provided always that the resulting interpretation is not inconsistent with the Contract Law itself (or another law or the Constitution) or the caselaw of the Supreme Court. It was also common ground that the Contract Law is not considered to be exhaustive, in the sense that it does not preclude the existence and recognition of other principles or developments in the law of contract, provided that such principles or developments do not contradict the content or the meaning of the text of the Contract Law, or any other law. Both experts also agreed that the English common law can be relied upon to interpret the Contract Law to the extent there is no inconsistency and that there are a number of cases in which the Cypriot courts have turned to English law in support of reasoning on specific points of unjust enrichment.

1632. Mr Erotocritou also accepted in cross-examination that as the principles of English legal interpretation develop and evolve, so Cypriot law applying such principles will also develop and evolve and that, in the absence of Cypriot law on a particular point, the Cypriot courts can and will look to English law principles (and this Court is entitled to do the same), saying: there "is nothing wrong with the Cyprus courts referring or quoting English case law … in order to touch [i.e. deal with] a specific point".

Unjust Enrichment: Cypriot law: section 70 of the Contract Law

1633. Section 70 provides as follows:

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered."

1634. It is common ground that the components of a claim under section 70 are that a lawful act must be done, for another person, by a person not intending to act gratuitously and the person for whom the act is done must enjoy the benefit of it. It is also common grounds that a defendant is liable under section 70 even if the benefit was received in its capacity as agent in circumstances where the alleged principal was undisclosed or the defendant was involved in a wrongful act or privy to a fraud or sham transaction by which the benefit was conferred upon him.

1635. The three main areas of disagreement identified by the Bank were (a) whether section 70 can apply in cases of 'indirect' enrichment; (b) the claimant must have intended to enrich the defendant; and (c) whether section 70 can apply in cases where the relevant transaction is illegal. Mr Erotocritou said that the defendant had to have been directly enriched by the claimant, that the claimant must have intended to enrich the defendant and that the remedy was not available where the relevant transaction is illegal. Mr Nathanael took the opposite view on each of those three points.

1636. On the issue of indirect benefit, Mr Nathanael's conclusion was:

> "I have no doubt that the Cypriot courts, like their English counterparts, would recognise that the imposition of liability for unjust enrichment in circumstances of indirect enrichment is a sensible and just legal development, given especially that modern economic transactions are more complex and more readily carried out using electronic means than was the case (or could have been envisaged) back in 1931 when the Contract Law, Cap. 149, was enacted."

1637. Mr Nathanael's reference to "their English counterparts" was to three cases: *Relfo Ltd v. Varsani* [2015] 1 BCLC 14 at [97] (where enrichment through a circuitous route was treated as being in reality equivalent to a direct payment and demonstrated a sufficient causal connection to support a remedy in unjust enrichment); *Menelaou v. Bank of Cyprus UK Ltd* [2016] A.C. 176 at [27] (where the question in each case is said to be whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the Bank and the benefit received by the defendant); and *Investment Trust Companies v. Revenue and Customs Comrs* [2018] A.C. 275 at [48] (in which it was held that a set of co-ordinated transactions can be treated as forming a single scheme or transaction for the purpose of the "at the expense of" inquiry, on the basis that to consider each individual transaction separately would be unrealistic).

1638. Mr Erotocritou disagreed. On the basis of his evidence, the Corporate Defendants submitted that on its plain construction, section 70 cannot apply to indirect transfers generally, and in particular cannot apply to the Looped Connection transactions characteristic of this case. It was said that the person who is bound to restore the benefit is the person who both received it from the claimant and the person to whom it was delivered. It was also said that the claimant must have known at the point of transfer that it was making the transfer to the defendant. I agree that the language of section 70 contemplates an identity between the person who receives the enrichment and the person bound to restore or make compensation for the receipt but, as Mr Erotocritou agreed, it does not spell out whether what is delivered must be direct or whether it is sufficient if it comes through an indirect route.

1639. Mr Erotocritou also said that adopting Mr Nathanael's approach would be inconsistent with the decision of *Sekavin SA v. The Ship "Platon Ch" and Others* (1987) 1 CLR 297 ("*Sekavin*") and would require the Supreme Court of Cyprus to depart from its previous caselaw. He was of the view that departing from *Sekavin* would not be justified, as the principles set out in the judgment are not "undoubtedly wrong" and remain in line with the express wording of section 70. He also said that such an interpretation would not lead to injustice as the law of Cyprus provides for a number of alternative causes of action that may enable a claimant to recover against a person who had been indirectly enriched as a result of a wrongdoing.

1640. *Sekavin* concerned a claim by a fuel supplier to a ship against both the ship and the mortgagees of the ship who had taken over the ship pursuant to the terms of the mortgage. Prior to enforcing the mortgage, the claimant had delivered the fuel to the ship and the ownership of the fuel had passed from the claimant to the ship. When the mortgagees took over the ship at a subsequent stage, they had effectively benefitted from the fuel. The claimant raised a claim against both the ship and the mortgagees for unjust enrichment. The mortgagees applied to set aside service of the proceedings outside the jurisdiction on the ground that "no cause of action" was disclosed against them. The court held that section 70 "reproduces the common law principles of quasi contractual liability of the recipient of goods or services supplied or rendered non-

gratuitously; whereupon an obligation is cast on the beneficiary of the goods or services to make reasonable compensation for their value (quantum meruit), or restore them", but it concluded that the facts relied on in the claim against the mortgagees were wholly outside the letter and spirit of section 70.

1641. Mr Nathanael pointed out that *Sekavin* was very different from the facts of the present case. The mortgagee was not found as a matter of fact to have received a benefit and the case made no finding on the issue of whether a benefit received indirectly can be the subject of a claim in unjust enrichment. He said that neither the parties in the case, nor the court, are recorded as having made submissions on, or discussed, any issue of direct or indirect transfer or enrichment. He also said that it was not a case involving a complex series of transactions found to be a sham, nor was it a case of a set of coordinated transactions constituting a single scheme.

1642. Mr Erotocritou accepted that, whether an indirect benefit would suffice for the purposes of section 70 is a matter of interpretation of that provision and that nothing in the express wording of section 70 requires the benefit received by a defendant to have been conferred directly upon them by a claimant. He also accepted that his position was based on an inference (by which he meant that his reading of the section as a whole did not contemplate the involvement of a third person), rather than the express language of the section, and that the Cypriot Supreme Court has not had occasion to rule on a case involving a sham series of transactions or a single composite scheme and has therefore not been called upon to interpret or apply English case law in that context. As to the Supreme Court cases on which he did rely, Mr Erotocritou agreed that none of them expressly dealt with the issue of indirect benefit and, apart from *Sekavin*, there "is no other Cyprus case law in relation to indirectness". He also accepted that the remaining authorities to which he referred were not cases concerning indirect benefits and that *Sekavin* was a "very different case" to the English cases. However, he also relied on Pollock & Mulla (the Indian Contract and Specific Relief Act has a provision in identical terms to section 70), and which explains at §70.23 that "the benefit must be direct and not indirect, i.e., directly derived by the person for whom the work is done"

1643. In these circumstances, I see the force of Mr Nathanael's view that, in the right circumstances and having regard to the Cypriot courts' approach to the application of English law principles in interpreting the Contract Law, a benefit or enrichment conferred upon a defendant indirectly is capable of sufficing for the purposes of section 70. I find that this is indeed the law of Cyprus, anyway in very closely confined circumstances. I also agree that such circumstances are capable of including those in which a defendant has received a benefit indirectly from the claimant by way of an intervening transaction which is found to be a sham and where the defendant received a benefit indirectly from the claimant by way of co-ordinated transactions forming a single scheme. This reflects developments in the common law of both England and Cyprus which the court in *Sekavin* explicitly recognised as by and large being reflected in section 70.

1644. The second area of dispute is Mr Erotocritou's statement that "[b]ased on the caselaw interpreting section 70 of the Contract Law, Cap.149, the phrase "for another person" requires the claimant to establish that it intended to enrich the defendant". In support of this proposition he again referred to Pollock & Mulla, in which, commenting on the phrase "for another person" as used in the Indian legislative provision equivalent to

section 70, the authors expressed the view that this means the claimant must have intended to enrich the defendant.

1645. Mr Nathanael's position was that there is no Cypriot case law suggesting that a claimant making an unjust enrichment claim (whether expressed with or without reference to section 70) must establish that he intended to enrich the defendant. He said that there is simply no such statutory requirement and he did not consider that this proposition can be read into section 70 or be the natural consequence of the words "for another person." In his opinion those words simply require that the claimant has done an act as a result of which the other person has received a benefit.

1646. It was not clear to me that the second disputed question remained in issue, because it was not developed in the Corporate Defendants' written or oral submissions. If it is, I agree with the Bank's case. While section 70 requires that the person doing the relevant thing does not intend to do so gratuitously, Mr Erotocritou accepted that there is nothing in section 70 which explicitly requires the claimant to have intended to enrich the defendant. He cited no Cypriot authority in support of his proposition that a claimant must have such an intention. I agree that, if the point were to have been pursued, Mr Nathanael's view, which is that the section simply provides that an unjust enrichment claim will not lie where the claimant intended the defendant to receive the enrichment without adequate reimbursement of value, is to be preferred. There is no requirement that a claimant under section 70 needs to establish that he intended to enrich the defendant.

1647. The third disputed issue identified by the Bank was whether section 70 can apply in cases where the relevant transaction is illegal. It was agreed between the experts that "[w]here the claimant is unaware or is not party to the illegality the Cyprus Courts will not refuse a remedy" under section 70. The Bank submitted that it therefore followed that, if a claimant is party to an agreement or transaction which is prima facie legal, but which is in fact tainted by illegality, the claimant will not be barred from bringing a claim under section 70 if he is unaware of, and not party to, the illegality. I think in the end there was not very much between the experts on this point.

1648. Mr Nathanael accepted that the law of Cyprus has a strict approach to turpitude and that, in circumstances where both parties act unlawfully or in bad faith, any claim would be rejected by the Cypriot Courts on *ex turpi causa* grounds. However he made clear that those principles would not preclude an unjust enrichment claim where the defendant has been enriched at the claimant's expense by means of a fraudulent or sham agreement (or series of agreements) pursuant to which funds moved from the claimant to the defendant, assuming the claimant had no knowledge of the fraud or otherwise acted *bona fide*. In other words the touchstone for the denial of relief in such cases is not the illegality of the transaction per se, but the bad faith of the claimant. This proposition was supported by a number of authorities and, in my view, accurately reflects the law of Cyprus.

1649. However, the Corporate Defendants went on to submit that, for any claim in unjust enrichment to succeed under Cypriot law the court must conclude that the Bank was an innocent party, but that, as at 2014 when the enrichment is said to have occurred, it is plain it was not. It was submitted that the fact that the Bank, under its new post-nationalisation management, has a different perspective on the advisability of Bank's

effecting the Relevant Drawdowns cannot affect this analysis. It was said that it cannot be right that a claim would fail if decided in 2016, but would succeed in 2017.

1650. The Bank disagreed with this analysis. It submitted that, although they were void for the reasons I have already explained, there was nothing illegal about the loans themselves on their face and that, because the Individual Defendants and all of the other individuals who participated in the scheme were acting *mala fide* and the Bank was the victim of the Misappropriation, their guilty knowledge could not be attributed to the Bank.

1651. This aspect of the argument was not really developed in submissions, and there may be an issue arising as to the law which governs the question of whether the state of mind of those involved in the Misappropriation can be attributed to the Bank for this purpose. It may be Ukrainian law as the law governing the Bank's constitution or Cypriot law as the law governing (on this basis) the restitutionary obligation. The parties did not grapple with these issues in this context, but I think it is possible to reach a conclusion because they bear a close similarity to the question of the Bank's awareness of the facts of the claims that were available to it for limitation purposes, which I deal with elsewhere in this judgment.

1652. In that context, it was always accepted by the Defendants that the knowledge of the Misappropriation could not be attributed to the Bank through the Individual Defendants or anybody else who was implicated in the Misappropriation and that no innocent members of senior management had the necessary awareness for limitation purposes before the active stage of the Misappropriation came to an end and the last of the Relevant Drawdowns was made. I do not see how it can be said that, if the Bank had no awareness for limitation purposes, it is nonetheless to be treated as having knowledge sufficient to be aware of the even potentially unlawful nature of what was going on (or otherwise to have been acting in bad faith so as to give the Corporate Defendants a defence to the claim in restitution) during the period in which the Relevant Drawdowns were still being made

1653. I therefore agree that, as a matter of principle, section 70 would be available as a legal basis for a claim in this case. What remains is the highly significant question of whether, on the facts, a restitutionary claim is available to the Bank on the grounds that the enrichment was sufficiently direct. This issue applies to all of the unjust enrichment claims, whether they arise under Ukrainian or Cypriot law, and I shall come to it after I have expressed my conclusions on the other ways in which the Bank puts its case.

Unjust Enrichment: Cypriot law: section 65 of the Contract Law

1654. The Bank's claim in unjust enrichment against the Corporate Defendants is also made under section 65:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

1655. Initially, the experts had disagreed as to (a) whether the "void agreement" must be between the claimant and the defendant, (b) whether section 65 applies to cases of 'indirect' enrichment and (c) the impact of illegality. In their written closing submissions, the Corporate Defendants put the argument slightly differently. They said that, if what occurred was simply what the Bank's counsel had called a Papering Exercise, then section 65 necessarily cannot be engaged, because the Relevant Loans and RSAs were then not 'real' "agreements" at all for the purposes of section 65. They relied on Pollock & Mulla at p.1015 which notes: "… section 65 starts because of there being some agreement or contract between competent parties. It has no application to a case in which there never was, and never could have been, any contract".

1656. It was also submitted in support of the first two disputed points that section 65 cannot be engaged in cases such as the present, because the Unreturned Prepayments were not an advantage received by the Corporate Defendants "under" the Relevant Loans, as section 65 expressly requires. It was said that the Bank's claim seeks to engage section 65 by stitching together two sets of contracts (i.e., the Relevant Loans and the RSAs) in a manner not contemplated by the wording of the section. This was said to mean that, save in exceptional circumstances, its operation is necessarily confined to direct enrichment, a proposition which is reinforced by the liability being to restore or make compensation for the advantage "to the person from whom he received it". It was said that, in all but exceptional circumstances, those requirements can only be satisfied where the (void) agreement was between the claimant and the defendant directly. It also followed that tortious concepts of causation can have no role in the application of section 65 and that the only persons from whom the Corporate Defendants received the Unreturned Prepayments were the Borrowers, who were therefore the only proper claimants.

1657. Mr Nathanael's view was that the agreement or contract in question does not have to be between the claimant and defendant. He relied on the wording of section 65 which provides that "any person", not "any party", must restore a benefit received under a void contract, and pointed out that the use of "person" stands in contrast to other provisions of the Contract Law which specifically refer to a "party" (e.g., the immediately preceding sections 62 and 64). He also relied on the same English law authorities on the effect of sham intermediary transactions and transactions which form part of a single composite scheme as he had referred to in the context of his evidence on section 70.

1658. He also expressed himself forcefully in his report to the following effect:

> "So, for example, if an enrichment has passed from a claimant to a defendant via a series of sham agreements, I am certain that the Cypriot courts would not deny an otherwise just claim brought under section 65 on the basis that there was a series of sham agreements between the claimant and defendant, rather than a single sham agreement to which both were party."

1659. The Bank also relied (although it seemed that Mr Nathanael had not) on the academic commentary in Pollock and Mullah and which was the passage that Mr Erotocritou had failed to refer to and caused the Bank to accuse him of acting in breach of duty (see paragraph 1630 above):

> "The obligation under this section to restore the advantage received under an agreement is not confined to parties to the agreement, but extends to any person that may have received the advantage."

1660. This reflected a case in the Allahabad High Court (Kazi Hamid Ali vs Girraj Bakhsh (1887) ILR 9 All 340), in which Edge CJ had said:

> "It appears to me that in this view of Section 18, the provisions of Section 65 of the Contract Act would apply. That Section provides that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it, to the person from whom he received it." It has been suggested that this Section should be read as if the person making restitution should actually have been a party to the contract; but the Section is expressed in the widest terms, and includes any person whatever who has obtained any advantage under a void agreement."

1661. The Corporate Defendants submitted that this case did not help, because the benefits had clearly been received directly from the claimant and in that sense "under" the agreement and that no Cypriot case had been identified in which section 65 was applied where the agreement was with a different party (i.e., not the defendant). They also relied on a decision of the Supreme Court of Cyprus in *Ioannides as Administrator of Estate Haralampidis v. Archdiocese of Cyprus* (13 January 2020), in which it was held that section 65 could not apply in the circumstances of the case for two simple reasons: that there was no agreement between the parties and that the Appellants had failed to prove any benefit allegedly received by the Respondent. There was some debate about this case during the course of the trial, not least because the Supreme Court was presided over by Mr Nathanael when judgment was delivered. However I think it is reasonably clear that it was an essential part of the reasoning that the absence of any agreement between the parties, or between the respondents and one of the appellants to the appeal, was the essential reason that the counterclaim for restitution could not succeed.

1662. I have not found this an easy point, but I prefer Mr Erotocritou's evidence. Although Pollock & Mullah clearly consider that the law should be developed along these lines, *Ioannides* seems to be clear authority that it has not yet taken that course, while the use of the word "under" indicates that the draftsman only had in mind a single void agreement to which enricher and enriched were both party. Mr Nathanael's evidence as to the distinction between party and person has some force, although its significance is reduced somewhat by the way in which "person" is used in the preceding section (section 64) as an obvious reference to a party exercising his power to rescind a voidable agreement. In summary, I am not persuaded that this is a provision to which such a wide construction will be given under Cypriot law, which is the tenor of the evidence given by Mr Nathanael. I therefore find that, if the matter were to come before a Cypriot court, it would determine that, for the purposes of section 65, both enricher and enriched must be party to one or more agreements which are found to be void.

1663. As to the impact of illegality on the cause of action, Mr Erotocritou had originally said that the courts have traditionally not permitted the recovery of any benefit which was obtained "in the frames of the illegal agreement or contract". It is not very clear what he meant by that, although the phrase seems to have been picked up from an academic commentary. In the event I think it is clear that, as with section 70, the true rule is the

one originally espoused by Mr Nathanael, i.e., that if the claimant was unaware of any illegality in the transaction, and acted *bona fide*, then the Cypriot courts would not refuse that claimant a restitutionary remedy in respect of any benefit passing under that transaction, even if ultimately it is demonstrated that the transaction is tainted by illegality. The same answer therefore applies on this issue, as the answer I have already given in relation to section 70.

Unjust Enrichment: Cypriot law: an independent cause of action

1664. The third alternative basis for the Bank's claim in unjust enrichment under Cypriot law was Mr Nathanael's view that such a cause of action is available outside the scope of the Contract Law and that, upon being presented with an opportunity to do so, the Cypriot courts will explicitly recognise that an independent cause of action in unjust enrichment can exist. In this context, counsel for the Corporate Defendants submitted that the court must be careful to ensure that it carries out the correct exercise when considering possible developments in a foreign law. In *SFO v. Litigation Capital* [2021] EWHC 1272 (Comm), Foxton J gave a concise and helpful summary of the court's task in the following passage from his judgment at [529]:

> "This is clearly an interesting point of Jersey law concerning the interaction of property and trusts law in the context of trustee fraud which is not subject to any direct Jersey authority, and on which there is much to be said on both sides. As Simon J held in *Yukos Capital*, the role of the court in these circumstances is to decide what conclusion the foreign court would reach on a developing area of the law, not to seek to anticipate a rational development in the foreign law or decide what the law should be."

1665. The Corporate Defendants also drew attention to the fact that Mr Nathanael had confirmed in cross-examination that a standalone cause of action would involve a "development of the law" and had said in his second report that:

> "I have no doubt that the Cypriot courts, like their English counterparts, would recognise that the imposition of liability for unjust enrichment in circumstances of indirect enrichment is a sensible and just legal development" (emphasis added)

I do not think that this takes matters very much further. Indeed that statement seems to me seems to me to be entirely consistent with a conclusion that a Cypriot court would decide, in this developing area, that a free-standing cause of action in unjust enrichment does indeed exist under Cypriot law.

1666. The Corporate Defendants also relied on the fact that, in their joint statement, the experts agreed that "[I]n no case so far has the Supreme Court of Cyprus acknowledged unjust enrichment as an autonomous cause of action". However, that of itself does not take matters very much further either, because Mr Nathanael advanced his opinion as consistent with (although not explicitly decided in) two Cypriot Supreme Court authorities in which claims in unjust enrichment were considered without any reference to the Contract Law. While the Supreme Court did not expressly acknowledge an autonomous cause of action, these cases proceeded on the basis of general principles of unjust enrichment as articulated in the English authorities. That factor alone means that

they are some support for a decision on the conclusion which the Cypriot court is likely to reach on a developing area of the law, rather than a decision as to what a rational development in the law should be.

1667. Indeed, I think that Mr Nathanael was correct to draw attention to what he said was the modern approach of the Cypriot courts, in one of those cases. His evidence was that the law has developed in the last 20 years and now aims to give full effect to the principles of unjust enrichment and restitution as developed under English law. He gave a detailed explanation of why that was the case. In particular he said that in *Nakis Theocharidis v. Ioannou* (2012) 1 CLR 1311 ("*Theocharidis*") (in which he had been on the panel as a judge but dissented on the facts), when considering a counterclaim for restitution, the majority had spelt out that three prerequisites must be satisfied for an unjust enrichment claim: (i) the defendant must have been enriched by the receipt of a benefit, (ii) the benefit must have been received at the expense of the claimant, and (iii) it must be unjust for the defendant to retain the benefit. This statement of principle, together with its detailed discussion of the common law, was explicitly drawn from English authority, without reference to any grounding in Cypriot statute (whether section 70, section 65 or otherwise) and in a factual context in which neither of those provisions would have applied.

1668. Although *Theocharidis* failed on the facts, in my view it is strong support for Mr Nathanael's opinion that the Supreme Court would conclude, if asked, that there is a free standing cause of action in unjust enrichment available under the law of Cyprus, which operates independently of both section 70 and section 65, and that the starting point for any consideration of the elements of the cause of action will be the English principles of unjust enrichment, including those relied on by Mr Nathanael in the evidence I have referred to in paragraph 1637 above.

1669. For his part, and despite what he had said in his report, Mr Erotocritou accepted in cross examination that the claims considered in the two authorities (one of which was *Theocharidis*) would not in any event have fallen within the scope of sections 65 or 70. But he did not accept that the reason they failed was because they did not satisfy the requirements set out in the English case law. I think he was wrong about that. In my view they both support Mr Nathanael's evidence that an independent cause of action in unjust enrichment exists under the law of Cyprus and will be recognised by the Cypriot courts when the opportunity arises. It is consistent with the fact, accepted by Mr Erotocritou, that the Contract Law is not exhaustive and some aspects of claims in unjust enrichment, such as defences, have no grounding in the statutory language. They are therefore governed solely by case law and common law principles. It is also supported by Mr Nathanael's unchallenged opinion that it is common practice before the Cypriot Courts to file claims based on unjust enrichment seeking restitution without any reference to the Contract Law.

1670. I also do not think that this evidence is necessarily answered by Mr Erotocritou's citation of a number of authorities such as *Panagiotis Kitsis v. Attorney General of Cyprus* (2001) 1 SCD (AAD)1077, *Ioannou v. Charalambous* (2012) 1 SCD (AAD) 507, *Archippea v. Demetriou* (Civil Appeal 298/10, dated 15/10/15, *Alkiviades v. The Phillips College* (Civil Appeal No 310/11 dated 21.3.2017) which conclude that the Cyprus Supreme Court has not yet recognised an independent/autonomous cause of action in unjust enrichment. While they proceed on the basis that no general and consolidated category based on unjust enrichment has yet been recognised in Cyprus,

they are not inconsistent with a conclusion that more general restitutionary principles would be articulated into conclusions which the Cyprus court would reach if these matters were to be heard before it.

1671. However, I have reached the conclusion that this point in time has not yet been reached, and in any event I think it more likely that it will be developed through the structure of section 70, with the consequences that I have already described. In that regard, it is striking that an authority to which my attention was drawn (again decided by Mr Nathanael: *Zenios Limited v. Touch Properties and Investments* Civil Appeal No 484/2012 dated 10.6.2019) is consistent with that being the position. In that case the judge who again was Mr Nathanael said:

> "It is legally known that the legal ground of the claim for damages on the basis of unjust enrichment is founded on article 70 of the Law on Contracts, Chapter 149. This article provides for unjust enrichment and restitution outside and irrespective of any contractual framework or where the framework fails. Article 70 incorporates the principles of law on leniency known as unjust enrichment and restitution. For restitution, the enrichment must, inter alia, be unjustified"

1672. In all these circumstances, I prefer Mr Erotocritou's evidence on this point although I agree that Mr Nathanael's opinion is a genuine reflection of what he thinks the law of Cyprus ought to be and may well become in due course. It is clear to me that, if the time comes, in the light of *Theocharidis*, the elements of the cause of action are likely to be developed by a Cypriot court in accordance with the principles developed and established under English law but within the confines of section 70.

Unjust Enrichment: Cypriot law: change of position and remedy

1673. It was not in dispute between the experts that the defences of ministerial receipt and change of position apply under Cypriot law. However, it was accepted in the Corporate Defendants' closing submissions that any such defences would not be available if they themselves acted in bad faith. In light of the conclusions I have reached in relation to the role of the Corporate Defendants in the loan recycling scheme and the Misappropriation, and the control of the Individual Defendants to which they were subject, I am satisfied that no such defence is available to them, even though there is evidence which I have considered (in amongst other places paragraphs 1554ff above) in relation to the onward transmission of the Unreturned Prepayments to others.

1674. One further issue which arose in respect of all of the Cypriot law claims related to remedy. It was accepted by both experts that there is a general principle of Cypriot law that the remedy in a claim for unjust enrichment is restitution by reference to the gain made by the defendant, not by reference to the claimant's loss. This is the English law position and, as Mr Erotocritou accepted, the Cypriot courts would look to, and apply, the English law position. But the Corporate Defendants said that there was a more complex point, which related to the extent to which the Corporate Defendants' gain is properly to be regarded as being at the expense of the Bank (and therefore unjust enrichment for which the Bank can claim).

1675. This point is said to arise because the Bank claims against each of the Corporate Defendants in the US$ amounts of the Unreturned Prepayments each of them received, notwithstanding that some of the Relevant Drawdowns provided by the Bank, which are said to have caused those Unreturned Prepayments, were in UAH, while others were in US$. For those in UAH, there was a separate currency conversion effected by the Borrowers after their receipt of the Relevant Drawdowns: i.e., after the Bank had transferred away its property. It was then said that, owing to currency fluctuations, there is now a significant difference in value in US$ terms between the US$ amounts received by the Corporate Defendants and the UAH amounts the Bank transferred away on the making of the Relevant Drawdowns. Mr Plewman called this the "Dollar Differential" and said that it affects the English Defendants and Milbert, with an aggregate effect of a windfall to the Bank of c.US$521 million if the Corporate Defendants are ordered to pay the Dollar Differential to the Bank.

1676. In light of the fact that a very similar issue arises in relation to the currency in which the claim in tort ought to be denominated, I shall explain my findings on this issue at the end of the judgment.

Unjust Enrichment: applying the law to the facts

1677. In the light of my conclusions on Cypriot and Ukrainian law, the principal factual question relates to drawing the appropriate link between the payment made by the Bank (i.e., the Relevant Drawdown) and the receipt by the Corporate Defendants (i.e., the relevant Unreturned Prepayment). As I have endeavoured to show, the test for the appropriate link is different under Ukrainian law from the test under Cypriot law, which is different again from English law. It is therefore important that the court should not become sidetracked on a discussion of how the facts fit into English law principles when they are not the principles I am required to apply.

1678. The Bank's starting point is that, through receipt of the Unreturned Prepayments the Corporate Defendants have been enriched at the expense of the Bank and such enrichment is unjust, because there has been a total failure of the basis upon which the Unreturned Prepayments were indirectly transferred to them from the Bank.

1679. The Corporate Defendants' essential answer is that, even if there could be claims for indirect enrichment in principle (which I have determined there can be under both systems of law), the features of the Corporate Defendants' receipt of the Unreturned Prepayments are so extreme as to be far outside any principled boundaries for claims alleging indirect enrichment. The critical point made by the Corporate Defendants was that what occurred is a world away from a co-ordinated transaction by which property or a benefit is indirectly transferred from A to C via B.

1680. The Bank's response was that, if it were to be correct that the facts of this case were too "extreme", only the most straightforward transfers of benefit could give rise to an unjust enrichment claim, which would be what Mr Anderson called "a charter for money launderers to make their transactions as complex as possible to avoid liability, which is pretty much what the defendants have done in this case". He went on to submit that, if a causal connection can be established, and if as a matter of law the enrichment was at the expense of the claimant, even if indirect, then the enquiry begins and ends there.

1681. The Corporate Defendants submitted that the features of the Bank's case as to enrichment are striking and no doubt were a product of what Mr Plewman called "the contorted analysis of the transactions it has found necessary to put forward so as to maintain its claims for tortious loss against the Individual Defendants". He identified three features. The first was what he called "Ignoring transactional reality in favour of presented narrative", by which I think he meant that the Bank's case ignored the evidence of what in fact happened. The second he called "No coordination and planning beyond high level operation of the general scheme" and the third he identified as being that the Corporate Defendants were not the ultimate transferees.

1682. As to the first, he said that in relation to the vast majority of Looped Connections, the Bank's case is entirely premised on treating the links identified by its own methodology as the transactional reality, ignoring the fact that the monies used by the Borrowers to make the Unreturned Prepayments were not the actual funds drawn down by the Relevant Drawdowns. On the basis of a funds flow analysis, this is correct and gives rise to an immediate issue under Ukrainian law, because, in many cases, the requirements of the very limited degree of indirectness that are permitted under Ukrainian law, together with the need to show simultaneity and coincidence will not be met. It is possible that as a matter of Cypriot law, the requirements of section 70 will be met, because there will be cases in which a Corporate Defendant has received an Unreturned Prepayment indirectly from the Bank by way of an intervening transaction which is found to be a sham, but on the basis of the evidence I discussed in paragraphs 1545ff above, that will not often be the case.

1683. It seems to me that the law of any country needs to be very careful in this area because, where a restitutionary claim lies against a transferee beyond the Borrowers, there is a danger that the same enrichment will head in more than one direction. In this case, that is illustrated by the consequences of the two different methodologies adopted by the Bank and the Defendants: on the one hand there is Mr Kolomoisky's funds-flow or proprietary tracing methodology and on the other there is the Bank's methodology based on a causally linked chain of transactions chain. As will have appeared, I am quite satisfied that the Bank's methodology is the correct one for the claims under Article 1166, but that is not necessarily the case where the court is seeking to identify an enrichment which is not direct but which still can be identified.

1684. The highest it could be put, even if the court was in a position to apply the principles set out by Lord Reed in *ITC v. Revenue and Customs* [2018] AC 275 at [46]-[47] in this case, is that it must be shown that the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real. In my view that sort of consideration is simply not applicable to what occurred in many of the Looped Connections to which my attention was drawn. The transactions were complex and there were often long time gaps between steps which cut across the requirement for simultaneity and coincidence.

1685. In his report Mr Thompson explained that, under each of the 54 RSAs, there were between one and six prepayments between the initial prepayments made from a Relevant Drawdown in respect of a supply agreement with another supplier and the final Unreturned Prepayment to one of the Corporate Defendants. In the case of the Looped Connections, there is no evidence of a pre-plan to eventually cycle the funds drawdown to a specific Corporate Defendant, which in my view would make it very difficult to show that in this category of case "the difference from the direct provision

of a benefit by the Bank to the Corporate Defendants is more apparent than real". Likewise it is obvious that the requirements of simultaneity and coincidence cannot be met.

1686. Two examples suffice to illustrate the point:

i) Tekhspets obtained a Relevant Drawdown on 8 November 2013. It was then cycled twice to Prior Management and Spircom Investments and to Collyer as an Unreturned Prepayment. The Unreturned Prepayment to Collyer took place over 8 months later on 28 July 2014.

ii) AEF made two Relevant Drawdowns on and after 27 December 2013. An Unreturned Prepayment of US$45 million was made by AEF to Trade Point Agro on 26 and 27 July 2014 although in the meantime two prepayments had been made to another Supplier called Kalten Trade SA.

1687. It may be the case that the position is clearer in relation to the No-Looped Connections, although the Corporate Defendants submitted that, even they remain indirect and far outside the compass of the Bank's analysis of *Peasant Farm*. The reason for this is that the actual funds drawn down have not been conventionally traced through to the Corporate Defendants and it is said that the connection is only presentational and not real. What they mean by that is that the Borrower's payment to the Corporate Defendant is narratively identified as relating to an RSA for which there is no record of repayment to that Borrower. But they say that this presentational connection is insufficient when the Bank's own case is that it was all part of a disguise to falsely present the Relevant Drawdown monies as having been lost at the point of the Unreturned Prepayments.

1688. I do not accept that submission. On the evidence before the court, in that category of case, I think it likely that the Ukrainian law requirements of simultaneity and coincidence will be met, because the Relevant Drawdown and the Unreturned Prepayment were made at the same time and were sufficiently linked for the purpose. On the face of it, there is a straightforward claim in unjust enrichment against the recipient Corporate Defendant for the amount of the Unreturned Payment received and I find that such has been established. I have not however heard argument on precisely which of the other Unreturned Prepayments will be captured by this determination, or as to the interrelationship between my conclusions on this issue and the extent of the compensation which the Corporate Defendants are liable to pay under Article 1166.

The Limitation Defence: Overview

1689. It is a central part of the Defendants' defence that the Bank's Ukrainian law claims are barred by the expiry of a limitation period. I identified the parameters of the defence at the beginning of this judgment (paragraphs 43 and 44 above). Under the law of Ukraine, the limitation period for claims under Article 1166 is three years and runs from the date on which a person became, or could have become, aware of a violation of his right or the person who violated such right. Each of the Defendants contends that the Bank became, or could have become aware of the relevant violation from a date more than three years before the issue of these proceedings on 21 December 2017.

1690. The main burden of the argument on this defence was undertaken by counsel for Mr Kolomoisky, and Mr Bogolyubov was content to rely on what they said, although Ms Montgomery made some short supplementary oral submissions in closing. The Corporate Defendants made their own separate written submissions, but they were limited to (a) some differences between their position and that of the Individual Defendants and (b) a fall-back argument made by the Bank in relation to the disapplication of the limitation period for English public policy reasons. Otherwise the Corporate Defendants adopted Mr Kolomoisky's arguments in relation to the underlying principles.

1691. Subject to the fall-back argument, it was not in issue that the Ukrainian law of limitation is applicable to the Bank's Ukrainian law claims. Article 256 of the Civil Code defines the limitation period as the "term within which a person may bring a claim before a court for the protection of its civil right or interest" and was described by the experts in their joint statement as part of the substantive law provisions set forth in the Civil Code. The parties' experts also all agreed that, for the purposes of the Bank's claims under Article 1166, Article 1190 and Article 1212 (i.e., the claims in both tort and unjust enrichment), the three year limitation period is provided for by Article 257: "General limitation period shall be [established for] three years".

1692. It was also agreed that the time from which the period runs is prescribed by Article 261. In light of a short but important point of construction made by Mr Howard in his oral closing submissions, it is convenient to cite three paragraphs of the Article. In the translation provided by Mr Beketov, they are in the following form:

> "1. The limitation period shall begin to run from the date on which a person became, or could have become aware of a violation of his right or the person who violated such right. ….
>
> 3. The limitation period for claims seeking to apply the consequences of a void transaction shall begin to run from the date on which the performance of such a transaction commenced.
>
> 4. Where a civil right or interest of a minor is violated, the period of limitation shall start from the date on which such person reaches majority."

1693. The precise meaning and effect of Article 261 was in dispute. Although I do not consider that anything ultimately turns on the different language of the different translations I should also record that two slightly different translations of Article 261 were adopted by Mr Alyoshin and Mr Nahnybida:

i) Mr Alyoshin: "The limitation period shall start running on the date when a person became aware or could have become aware of a violation of their right or identity of the person in violation of the right."

ii) Mr Nahnybida: "The limitation period shall apply from the date, when a person became aware or could have become aware of the violation of its right or about the person who violated the same."

1694. It was also not in issue that the court has power to disapply the limitation period. This power is given by Article 267(5), which is expressed in very general terms as follows:

"If a court finds any reasons for missing the limitation period to be valid, any violated right shall be protected". However, the question of what constitutes a valid reason is a question on which there is some authority and as to the application of which there was significant disagreement.

1695. There was a major dispute on the facts as to when time started to run for limitation purposes. Each of the Defendants submitted that time started to run more than three years before the commencement of these proceedings on 21 December 2017. It was said that the Bank became, or could have become, aware of a violation of its rights before 21 December 2014. They said that the Bank had the necessary actual or constructive knowledge in October or early November 2014 at the latest.

1696. It is important to record that Mr Kolomoisky did not plead a case based on constructive knowledge, a point on which the Bank relied in its written closing submissions. Although Mr Kolomoisky pleaded that the test to be applied under Article 261 was when a claimant became, or could have become, aware of the facts on which its cause of action depends, the pleaded facts and matters on which he relied were facts and matters of which he said that the Bank was in fact aware before December 2014. This therefore was a plea of actual not constructive knowledge. The Bank's criticism of the absence of any plea of constructive knowledge was given force by the linked point that Mr Kolomoisky's case on which individuals were said to have had the relevant attributable actual or constructive knowledge was never properly pleaded either. Indeed, even in his opening submissions, the only individuals said to have the requisite knowledge were members of the Management Board and the ECC, even though the asserted basis for their knowledge was in some respects their participation in the Misappropriation. He then went on to contend that there were many more members of the ECC and the Management Board who knew (or could equally well have found out) about the alleged violation of the Bank's rights, but in the event only advanced a positive case in relation to one of them: Mr Linskiy.

1697. Nonetheless, the force of the Bank's criticism of Mr Kolomoisky for failing to plead constructive knowledge was undercut, anyway to some extent, by the facts (a) that Mr Bogolyubov did plead a case based on the Bank's constructive knowledge, (b) that the Ukrainian law experts addressed constructive knowledge for limitation purposes and (c) that questions around the Bank's constructive knowledge of the violation of its rights were identified in the List of Issues for the trial. However, it may be that the expert evidence and the List of Issues were approached in the way they were because of Mr Bogolyubov's pleading, not because the Bank thought that it would have to respond to a constructive knowledge case from Mr Kolomoisky.

1698. Although constructive knowledge was pleaded by Mr Bogolyubov, he, like Mr Kolomoisky, did not plead which individuals were said to have had the relevant actual or constructive knowledge to be attributed to the Bank. However, in the opening submissions prepared on his behalf, as well as referring to Mr Linskiy, his counsel gave the additional examples of Mr Yatsenko, Ms Gurieva, Mr Pikush and Ms Koryak as individuals through whom the knowledge of the Bank could be attributed.

1699. Although this is very unsatisfactory, the argument now advanced by Mr Kolomoisky was only said by Mr Hunter to have given rise to the limited prejudice of being "an unwelcome and unfair surprise as opposed to an egregious, no warning, all hands in ambush". It is unfortunate and unhelpful that the case was approached in the way that

it was, but in my view, the allegation of constructive knowledge is one which Mr Kolomoisky should be permitted to advance as part of his defence. I agree with the submission made on his behalf that this case is an example of what Rimer LJ had in mind when he made the following comments in *Lombard North Central Plc v. Automobile World (UK) Ltd* [2010] EWCA Civ 20 at [79]:

> "There will be cases in which it will be obvious that it would be unjust for the court not to entertain and decide a non-pleaded issue: for example, when it is apparent that both sides have come to court ready to deal with it as an issue in the case despite its omission from the pleadings."

1700. However, I should stress that my decision to that effect is a finely balanced one, because the lack of particularity as to why and how the individuals through whom the knowledge is said by the Defendants to have been acquired by the Bank, and the changes as to who they might be, made it a difficult case to deal with. It was only at the end of the trial that a significant number of names were advanced by Mr Kolomoisky as individuals through whom the Bank was said to have become aware of the violation of its rights (a point to which I will revert later). This has meant that the criticisms levelled at the Bank from time to time for its failure to call witnesses who might have been available to it to explain what they knew or could have discovered during the period prior to 21 December 2014, have a hollow ring to them.

1701. Turning to the substance, the Bank disagreed that it became, or could have become, aware of a violation of its rights well before 21 December 2014. It submitted that the core question was when it became aware of the facts and matters giving rise to its claims and that it should not be attributed with such knowledge until a reasonable period after nationalisation. It said that on any view, knowledge of a violation of its rights should not be attributed to it while the Individual Defendants were in control of the Bank and it was unable to take action against them. Its pleaded case was that it first acquired actual knowledge of the misappropriation of funds by the Individual Defendants in the manner alleged in these proceedings between August and December 2017.

1702. The Defendants submitted that this was wrong because, while they accepted the common ground between the experts that the knowledge of persons who acted dishonestly to the detriment of the Bank was not attributable to the Bank, the knowledge of other relevant officers was so attributable regardless of who controlled the Bank and regardless of whether the Bank was able, as a practical matter, to bring proceedings. It was submitted that knowledge of facts is quite separate from the ability to bring proceedings. They therefore contended that time runs from the date of knowledge, attributed to the Bank as appropriate through the medium of those individuals. It was submitted that in the normal case, if there are reasons as to why a claimant is unable to bring proceedings within the limitation period, its remedy is to ask the court to disapply the limitation period, but the Defendants said that, on the facts of the present case, disapplication under Article 267(5) was not available to the Bank.

1703. For the majority of the Bank's claims, it was not in issue that time stopped running on 21 December 2017, being the date on which these proceedings were commenced. However, a point which I will have to resolve (and to which I will return) is when it stopped running for some of the Bank's claims. The reason is that the Defendants contended that further claims sought to be made by amendment some two and a half years after these proceedings were issued, which arose out of Relevant Drawdowns

under Relevant Loans made to Prominmet and the Cypriot Borrowers are new causes of action. It was said that for them time only stopped running on 14 July 2020, being the date on which a protective claim form was issued.

1704. The Bank submitted that, if the limitation period otherwise operated to bar its claims, it should be disapplied pursuant to Article 267(5). It also mounted an argument that the Limitation Defence should not be engaged on the basis that the court should exercise its power under Article 16(3) of the Civil Code ("Article 16(3)") to refuse to recognise or uphold a legal right, (that right being the Limitation Defence), on the basis that the right is being exercised in an abusive manner or for an abusive purpose. It also relied on section 2(1) of the Foreign Limitation Periods Act 1984 (the "1984 Act") and/or Article 26 of Rome II in support of an argument that, if the three year limitation period expired before 19 December 2017, the period should be disapplied.

1705. The Defendants argued to the contrary. They submitted that, if they were correct on the issue of awareness, there were no grounds for disapplying the limitation period because there were no valid reasons for the Bank to have waited until December 2017 before issuing these proceedings in circumstances in which the change of control given effect by the Bank's nationalisation occurred a year earlier. They submitted that, the Bank's witnesses accepted that it was in fact in a position to bring the claims at any time from January 2017 onwards, and that the Bank therefore had 9 or 10 months in which it could have commenced proceedings without difficulty, but failed to do so. In making this argument, the Defendants stressed that the Ukrainian law experts identified the key consideration under Article 267(5) as being "whether there were objective reasons beyond a claimant's control which prevented or significantly hindered the claimant from bringing the action in due time"; a test which they said could not possibly be satisfied in the present case, because a full year expired between the change of control on nationalisation and the commencement of these proceedings.

1706. The Defendants' arguments on limitation were expressed relatively shortly in their opening submissions. But they were developed at much greater length in closing, most especially on behalf of Mr Kolomoisky whose case on limitation became more obviously a central part of his defence during the course of the trial. Indeed half of Mr Kolomoisky's written closing was directed to his case on why the claims against him were statute barred, as was much of the cross-examination of the Bank's witnesses and many of Mr Howard's oral submissions. The focus was therefore on whether the Bank's claims under Article 1166 were statute barred.

1707. In relation to the Bank's claim against the Corporate Defendants in unjust enrichment, they only raised a defence of limitation to the extent that the cause of action is found to be governed by Ukrainian, and not Cypriot, law. As with the claim under Article 1166, the Bank submitted that time would not begin to run until a reasonable period after the Bank's nationalisation. The reason for this is that the "facts on which [the Bank's] cause of action depends" include that the Relevant Loans and RSAs were void and/or entered into abusively, such that the Corporate Defendants received the Unreturned Prepayments without sufficient legal basis. It was said that the Bank's actual knowledge of such facts was subject to the same analysis as the claim under Article 1166. I shall deal with this separately a little later, but it is a submission with which I agree.

The Limitation Defence: Construction of the Civil Code

1708. The experts agreed that the limitation provisions of the Civil Code should be construed in accordance with Article 6(1) of the ECHR, which is part of the substantive law of Ukraine and to which the Ukrainian courts make regular reference in that context. They accepted that this meant that the limitation provisions of the Civil Code should be approached flexibly rather than formalistically, and should not be construed in a manner which would create an unnecessary, disproportionate or arbitrary fetter on the ability to bring a claim. However Mr Alyoshin in particular made clear that this approach had to be adopted within the constraints of what he called certain principles, by which he included the need to avoid legal uncertainty.

1709. The evidence on this point was consistent with the resolution of the Supreme Court in *SFG Hermes,* which the experts all agreed reflected Ukrainian law in relation to limitation. It set out the proper approach to the construction of the limitation provisions of the Civil Code and their application in the following passage at [5.85] to [5.91]:

> "5.85. The case law of the European Court of Human Rights in applying the provisions of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees everyone the right to apply to a court, emphasises that the right of access to a court must be effective. There should not be a too formal attitude to the requirements stipulated by law, since access to justice should be not only actual but also real …
>
> 5.86. The limitation period is not an institute of procedural law and cannot be restored (renewed) in case of its expiration, but according to the prescription of part 5 of Article 267 of the Civil Code of Ukraine, the Claimant has the right to obtain judicial protection if the court recognises valid reasons for the limitation period.
>
> 5.87. The question of the validity of these reasons, i.e., the existence of circumstances that, for objective reasons beyond the Claimant's control, made it impossible or significantly complicated the timely filing of a claim, is decided by the court in each case, taking into account the available factual data on such circumstances…
>
> 5.88. The law does not provide a list of reasons that may be recognised as valid for the protection of the violated right in the event of a claim being filed after the limitation period has expired. Therefore this issue falls within the competence of the court hearing the case. At the same time, valid reasons for the expiry of the limitation period are circumstances that make timely filing of a claim impossible or difficult.
>
> …
>
> 5.90. The European Court of Human Rights in its judgment in *Finikaridov v. Cyprus* noted that the mechanism of application of the limitation period should be sufficiently flexible, i.e., as a rule, it should allow for the possibility of suspension, interruption and renewal of the limitation period. and should correlate with a subjective factor, namely, the awareness of the potential claimant of the fact of violation of his/her right.

> 5.91. Thus, the question of validity of the reasons for expiration of the limitation period (existence of circumstances that made it impossible or significantly complicated the timely filing of a claim on objective, independent grounds) is decided by the commercial court in each particular case, taking into account the available factual data on such circumstances."

1710. In his closing submissions, Mr Kolomoisky (and therefore on this point the other Defendants) accepted that, anyway as an abstract proposition, Ukrainian law requires a court to construe the limitation provisions of the Civil Code in a manner which is consistent with the right of access to a court guaranteed by Article 6(1) of the ECHR. This means that the legislation must be construed and applied in a manner which ensures an effective opportunity to bring a claim in order to vindicate a violated right. However, it was said that this is irrelevant in the context of the present case, because the existence of the three year limitation period, combined with the discretion to disapply where there are valid reasons to do so, are a more than sufficient guarantee of fairness for Article 6 purposes. There was therefore no need for what was said to be a "human rights gloss" to be applied to the proper constructions of Article 261 and Article 267(5).

1711. As will appear, I have concluded that the evidence shows that the position is rather more nuanced than that for at least two reasons. First, attribution of knowledge to a corporate entity under Ukrainian law is dependent on the context in which, and the purposes for which, the knowledge is sought to be attributed. In the current context, where the Bank's awareness under Article 261 falls to be determined, one of the central issues is whether an individual's awareness of a relevant fact or matter can be attributed to the Bank if the Bank still had no real opportunity to make use of that awareness in order to vindicate its rights through access to the court. This issue only arises where the claimant is a non-natural person and does so quite independently of the protections provided by Article 267(5).

1712. Secondly, the question of whether Article 267(5) is engaged, is not driven by the question of whether it was not actually possible to sue at a particular moment, but rather the key question is whether it is possible to identify valid reasons beyond the Bank's control which have prevented or significantly hindered it from bringing the action in due time. That is a fact sensitive issue which must be approached having regard to the Article 6 requirement that the right of access to the court must be effective, and too formalistic an attitude to the requirements stipulated by law must be avoided, "since access to justice should be not only actual but also real" (per the Supreme Court in *SFG Hermes*).

1713. I therefore consider that the Ukrainian law principles which require the court to apply the legislation in a manner which ensures an effective opportunity to bring a claim in order to vindicate a violated right affects both the question of how the court assesses whether and when the Bank as a corporate body was aware of or could have become aware of a violation of its rights (Article 261(1)) and the secondary question of whether the Bank is entitled to protection of its rights because the reasons for missing the limitation period are valid (Article 267(5)). The impact of Article 6 is therefore on the true construction of Article 261 and Article 267(5) taken together.

1714. Mr Howard also submitted that there is nothing inherently problematic from an Article 6 perspective, if the limitation law of a country means that a claim becomes time barred

without the claimant having a real opportunity to bring a claim. The reason for this is that the law of limitation is striking a balance between the interests of claimants and defendants, in the sense that, if claims cannot be brought, that may be the price of achieving certainty. I accept that submission as a matter of general principle, and agree that an awareness-based limitation provision, combined with a "valid reasons" discretion to disapply, ought not to run into Article 6 problems. However, that will only be the case if the law's approach to attribution of awareness (which will normally only arise in the context of a corporate claimant) and the validity of the Article 267(5) reasons strikes an appropriate balance between achieving certainty and barring a good claim.

Limitation: the requirement for knowledge

1715. Against that background, the experts all agreed that Ukrainian law distinguishes between two kinds of awareness or knowledge: actual knowledge, being what a person directly knows and constructive knowledge, being what a person objectively should have known. This distinction is reflected in the language of Article 261(1).

1716. Mr Beketov said that there is no hard and fast test under Ukrainian law as to the quality of knowledge that a person must have. He said that, ultimately, the existence of such knowledge will be a question of fact for the court to resolve in view of all the circumstances of the case. He did not, however, consider that a person who merely suspects the presence of facts or matters sufficient to satisfy an element of a cause of action would be treated as having such knowledge for the purposes of Article 261(1). This gave rise to a difference in view between him and Mr Alyoshin, because Mr Alyoshin said that what he called a good faith belief as to the existence of the facts sufficient to show that the claimant's rights have been violated would suffice to start limitation running.

1717. Mr Beketov said that this was not the right test because the Supreme Court's resolution of 29 September 2021 in case No. 753/2965/20, *DGF v. Drobiazko Anatolii* ("*Drobiazko Anatolii*") made clear that the question is whether the claimant has become "reliably" aware of the circumstances of the violation of his rights and interests as a result of the wrongful actions of the defendant, as well as the amount of the harm. This decision also relates to other aspects of awareness, but for present purposes it is supportive of Mr Beketov's view that mere suspicion of the presence of certain facts or matters is not enough. In so far as good faith belief is belief based on something more solid than speculation, there may be little between the experts on the point, but I also agree with Mr Beketov's opinion that *Drobiazko Anatolii* is difficult to square with good faith belief being sufficient in itself. As he explained it is "reasonable to assume that the DGF must have had a good faith belief that the rights of the bank (for which it was acting as liquidator) had been violated when it made a criminal complaint to the authorities, yet this was found to be insufficient to start limitation running."

1718. I also agree that Mr Beketov's opinion is consistent with the resolution of the Supreme Court dated 27 December 2019 in case No. 912/3644/17, *Agrocomplex LLC v. Ustynivka* ("*Agrocomplex*"), which characterised the quality of the necessary knowledge as either being (in the case of actual knowledge) a direct awareness of the facts constituting the violation of the claimant's rights or (in the case of constructive

knowledge) what was called the objective possibility of the person to know about the relevant facts, which should be understood to mean the presumed or contemplated inevitability of the claimant acquiring information about such circumstances.

1719. I accept Mr Beketov's opinion that this goes beyond mere suspicion or unsubstantiated good faith belief. His written and oral evidence (which I accept) supports a finding that the necessary state of mind is established if the claimant's awareness of the facts amounts to a belief derived from sufficient evidence, even though that evidence may not in itself prove the claimant's case at the trial. Whether the nature and quality of the evidence is sufficient will depend on all the circumstances of the case. His opinion on this point was one which he himself regarded as consistent with what he understood to be the English Court's finding in the Tatneft Proceedings as to the equivalent position in Russian law: *PJSC Tatneft v. Kolomoisky and Bogolyubov* [2021] EWHC 411 (Comm) ("*Tatneft*") at [55]-[56]. The way he put the point in his report (as confirmed in his cross-examination) was:

> "377. … In *Tatneft*, the High Court concluded (at paragraphs 55-56 of the judgment):
>
> > "Accordingly, in my view, "knowledge" for this purpose is a belief that a violation of right has occurred which goes beyond mere speculation but knowledge is distinct from evidence and a claimant can have knowledge even though it does not have evidence which would prove the case at trial …
> >
> > … as to what amounts to knowledge of violation of its rights ... under Russian law the claimant has to be able to specify what the act was, what the harm inflicted was and the causal nexus".
>
> 378. Whilst I cannot comment upon the correctness of this conclusion as a matter of English or Russian law, it accords with my opinion as to the position under Ukrainian law."

1720. The experts also agreed that, in determining whether a claimant had constructive knowledge of facts sufficient to start the limitation period running, Ukrainian law presumes that parties to legal relations will exercise prudence and take a reasonable level of interest in the state of their affairs. It was submitted on behalf of Mr Kolomoisky in closing that the consequence of this principle is that if, using reasonable prudence and taking a reasonable level of interest in its affairs, the claimant could have become aware of the violation of its rights, it will be found to have constructive knowledge of that violation. Mr Beketov agreed with this proposition in cross-examination.

1721. However, basing itself on the resolution of the Supreme Court in *Agrocomplex*, the Bank put a slightly different gloss on the principle. It submitted that the question is whether (i) the facts giving rise to the claim are so obvious that any reasonable person in the claimant's position would have realised them; or (ii) the claimant was in default of a duty of care owed by him in not realising them. It relied on the following translation of a passage from *Agrocomplex*:

> "The possibility of becoming aware of the violation of a right or of the person who has violated it should in this case be understood as the presumed inevitability of

> the person being informed of such circumstances, or of the existence of certain obligations of the person, as a measure of due conduct, as a result of the performance of which it would have been possible for it to become aware of the wrongdoing in question and of who committed it."

1722. Another translation of the same passage was included by Mr Beketov in one of his reports in support of his evidence that for constructive knowledge to arise there is a requirement that that the acquisition of knowledge would have been inevitable if the claimant had complied with his obligations or behaved properly:

> "The possibility of learning about the violation of the right or the person who violated it, in this case should be understood as the contemplated inevitability of informing [i.e., acquiring of information by] the person about such circumstances, or the existence of certain obligations on the part of that person, as the measure of this person's proper conduct, as a result of which he would be able to learn about the relevant illegal actions and the perpetrator."

1723. The concept of "presumed inevitability" and the existence of an obligation to behave in a particular manner are concepts that are reiterated in a number of other resolutions of the Supreme Court. Thus in the resolution of the Supreme Court dated 3 March 2020 in case No. 909/52/19, *Person 1 v. Progress-Bud-IF* at [65] the question was what would have been learnt if the claimants "had complied with an obligation assigned to that person as part of a code of conduct", and in its resolution dated 14 August 2018 in case No. 922/1425/17, *Eastern Capital Construction Directorate v. Kharkiv City Council*, the Supreme Court identified the nature of the duty which the claimant must have had in the following language: "the existence of certain obligations of the person as a measure of proper behaviour, as a result of which the person would be able to learn about the relevant illegal actions and the person who committed them".

1724. Finally in the resolution of the Supreme Court dated 10 September 2019 in case No. 923/875/17, *Person 1 v. Agricultural Household 'Skif O'* ("*Skif O*"), the following language was used:

> "The possibility to learn about the violation of the right or the person who violated it in this case should be understood as the foreseeable inevitability of informing the person about such circumstances, or the existence of certain obligations on the part of the person as a measure of good behaviour, as a result of which he or she would be able to learn about the relevant illegal actions and the person who committed them."

1725. In my view, it is clear that speculation, suspicion or good faith belief if unsubstantiated are not of themselves sufficient to give rise to actual knowledge. Nor will a case of constructive knowledge be established, unless it is what Ukrainian law regards as foreseeably or presumptively inevitable that the relevant person, acting reasonably and in accordance with his obligations, would have been informed of the information of which he is said to have been constructively aware. This certainly covers the idea that constructive awareness contemplates a duty or obligation to act in a particular manner which would as a matter of "presumed inevitability" have led to a particular state of awareness.

1726. I do not think that it means that the facts giving rise to the claim must at the outset be so obvious that any reasonable person in the claimant's position would have realised them, because constructive knowledge may arise in the absence of actual knowledge where a duty to act gives rise to a person being put on enquiry. The question is then not so much about what would have been obvious to a reasonable person; it is more about how clear it is that the information would have been discovered if the person had acted with what was described as "proper" or "due" conduct, having regard to all the circumstances of the case. In my view it must be shown that it is inevitable that the required information in a form sufficient to justify the commencement of legal proceedings against the Defendants would have been obtained, if the person concerned had made the inquiries he should have made, once he was put on enquiry by his awareness of facts which "due conduct" required him to investigate.

Article 261(1): Of what must the claimant be actually or constructively aware?

1727. In the part of her judgment in *Tatneft* I have cited in paragraph 1719 above, Moulder J made (and Mr Beketov adopted) a point of significance to another aspect of the Limitation Defence. She said that knowledge was sufficient if a claimant is able to articulate the relevant elements of its case, by which she meant "what the act was, what the harm inflicted was and the causal nexus". In their defences, Mr Kolomoisky and the Corporate Defendants both pleaded that the limitation period commences on "the date when the claimant became aware or could have become aware of the facts on which its cause of action depends". In his closing submissions Mr Kolomoisky explained that the obvious rationale for this is that a person who knows the elements of the cause of action is, by definition, in a position to file a claim with the court, so as to make it appropriate for time to start running.

1728. The Bank took the same view, because in its Reply it adopted essentially the same language as Mr Kolomoisky and the Corporate Defendants, although it put the point the other way round. It pleaded that the limitation period begins on "the date on which the claimant acquires actual or constructive knowledge of the facts on which its cause of action depends", which is justified (as it explained in its closing submissions) on the basis that it is only then that a claimant has the opportunity to bring a claim.

1729. In his Defence, Mr Bogolyubov simply pleaded the wording of Article 261 to the effect that the limitation period commences on a date when a person became aware or could have become aware of the violation of their right or the identity of the person who violated it. In his written opening, he submitted that the Bank's claims were *prima facie* time barred from the time its rights were violated (i.e., the time of the Relevant Drawdowns).

1730. There were therefore some differences in the way in which the parties pleaded the facts and matters of which a claimant must be actually or constructively aware before time starts to run under Ukrainian law, but the essentials of their positions were the same. The same cannot be said about the expert evidence, and a short explanation of what occurred is necessary because it is one illustration of why I have felt it necessary to treat parts of Mr Alyoshin's evidence with some caution.

1731. Mr Beketov's evidence in support of the Bank's case was that a claimant's knowledge must be of facts and matters sufficient to allow it to file a valid claim. In his view, this means that, for the purposes of a claim under Article 1166, a claimant had to be aware of the four elements of the tort: viz. (a) unlawful conduct by some other person, (b) harm suffered by the claimant, (c) a causal connection between unlawful conduct and the harm and (d) fault. By this he made clear that he meant actual or constructive knowledge of facts or matters sufficient to allow them to allege the existence of each of the elements of the cause of action to which the violation in question gave rise. This was therefore consistent with the Bank's pleaded case that the relevant date is the date on which the claimant acquires actual or constructive knowledge of the facts on which its cause of action depends. It was also consistent with the way that Mr Kolomoisky's case was put in closing although, as I shall explain shortly, Mr Alyoshin took a different view.

1732. In his first trial report Mr Beketov linked the knowledge of the facts and matters of which the claimant had to be aware with the question of whether the claimant was in a position to invoke the court's assistance to enforce the relevant right. As he explained in his first trial report:

> "In case No. 321/1702/16-ts, *Ukrainian Railways PJSC v. Person 1* ("*Ukrainian Railways*"), the Supreme Court specified in its Resolution of 10 July 2019 that: "the commencement of the limitation period coincides with the time when the person becomes entitled to sue and able to enforce his right in court".

Another translation of the passage from *Ukrainian Railways* cited by Mr Beketov reads:

> "In other words, the start of the limitation period coincides with the moment when a person has the right to sue and the opportunity to enforce his/her right through the court."

1733. In his first trial report, Mr Alyoshin said that the Supreme Court's position was unequivocal in its interpretation:

> "The Supreme Court has interpreted Article 261(1) of the Civil Code to mean that the start of the limitation period is the time when the opportunity to bring a claim arises. To determine the moment when the limitation period starts running and the right of claim arises, it is important to consider both objective (the fact of violation) and subjective (the person became aware or ought to have become aware of the violation) factors".

1734. In expressing that view, Mr Alyoshin relied on the resolution of the Supreme Court in *Agrocomplex* in which the full passage reads as follows:

> "In accordance with the provisions of Article 261 of the Civil Code of Ukraine, the start of the running of a limitation period coincides with the moment when the right to a claim arises with the interested person, meaning the possibility for this person to enforce its rights through the court.
>
> To determine the moment when the right to a claim arises, objective (the fact of violation of a right) as well as subjective (the person becomes or could have become aware of this violation) factors are important."

1735. Mr Beketov's translation of the same passage reads as follows:

> "In accordance with the provisions of Art. 261 of the Civil Code of Ukraine, the beginning of the limitation period coincides with the emergence of the interested party's right to sue, ie the ability to enforce their right through the court. To determine the moment of the occurrence of the right to sue, it is important to have both objective (the very fact of violation of the right) and subjective (the person learned or should have learned about this violation) moments."

1736. In my view both translations convey the critical point as being whether the claimant has the opportunity to proceed on the basis of the information they have or should have acquired. Until the claimant has that opportunity, the limitation period does not start to run. This is consistent with the agreed position that, in a corporate context such as the present one, the knowledge of a fraudster or a person who has participated in the fraud, will not be attributed to the defrauded company for the purposes of Article 261. Their awareness of the facts required to plead a claim will not cause time to start to run because, despite that awareness, the company will have no real opportunity to vindicate their rights through access to the court.

1737. Despite the fact that he accepted that the start of the limitation period is the time when the opportunity to bring a claim arises, Mr Alyoshin made clear in the experts' joint statement that in his opinion sufficient awareness of all elements of a tort is not required for triggering the limitation period. He said (and Mr Nahnybida agreed with him) that "the limitation period starts running when the person became aware or could have become aware of a violation of its right or identity of violator. Knowledge of all elements of tort is not required for triggering the limitation period". This evidence was surprising because it might be thought that there is no opportunity for a claimant to enforce his rights through the court if he does not have actual or constructive knowledge of all of the elements of the cause of action. If he does not have that knowledge, he cannot know (actually or constructively) that his rights have been violated in such a manner as to enable him to bring a claim.

1738. In his supplemental report Mr Beketov dealt with the need for a claimant to be reliably aware of unlawful conduct causing harm (thereby giving rise to fault) before the limitation period starts to run. In doing so, he referred to the resolution of the Supreme Court in *Drobiazko Anatolii* in which it was stated that:

> "Since the objective possibility of a person to know about the circumstances of violation of his rights is needed to determine when the limitation starts running, the Supreme Court considers the court's conclusions that from the date of entry into force of the criminal verdict of the Kyiv Court of Appeal of 13 March 2017 in case No. 761/30783/13-k the plaintiff became reliably aware of the circumstances of the violation of his rights and interests as a result of the wrongful actions of PERSON_1, as well as the amount of the harm."

1739. It is difficult to read this case as anything other than support for the proposition that the amount of the harm suffered and the fact that the harm resulted from the unlawful conduct of the defendant (in that case PERSON-1) are facts of which the claimant must become reliably aware to allow them to allege each of the elements of the cause of action to which the violation in questions gives rise. I agree with Mr Beketov's opinion that he did not see how a claimant could be said to have knowledge of a tortious

violation of its rights unless it had knowledge of unlawful conduct causing harm, itself giving rise to a presumption of fault.

1740. When he was cross-examined on this point, Mr Alyoshin's evidence was very difficult to follow. In particular he did not accept that a violation of rights without knowledge of sufficient pleadable facts to complete a cause of action was insufficient awareness on the part of a claimant for the limitation period to start to run. The way he chose to summarise his position in his oral evidence was as follows:

> "So I want to confirm my position. So the fact of the causing of harm under normal circumstances is sufficient to -- not to bring a case but to start a limitation period. There's two different things. Please keep -- let's follow that one. To bring a claim and to start a limitation period is two different things."

1741. Although, in Mr Kolomoisky's closing submissions, it was made clear that he now accepted that knowledge of all of the elements was necessary, it is appropriate to record that Mr Alyoshin's evidence on this point was wrong and the approach taken by Mr Beketov is to be preferred. In circumstances in which (a) actual or constructive knowledge of violation or violator is required by Article 261 and (b) the Supreme Court has held that the possibility of suing (per *Agrocomplex*), or opportunity to enforce the right (per *Ukrainian Railways*) is a pre-requisite to the commencement of time for limitation purposes, it makes little sense for a limitation period to start before the claimant knew or could have known of each of the elements of the cause of action he would have to plead in order to substantiate his claim. I find that this is the law of Ukraine, and that the quality of the knowledge must go beyond suspicion or good faith belief.

1742. There was another associated area in which the experts disagreed. Mr Beketov said that it was necessary for the claimant to have been aware of the identity of the tortfeasor, or in the case of the unjust enrichment claim, the identity of the person whom Mr Beketov called the unjust acquirer. Mr Alyoshin took another view. It boiled down to the question of whether the word "or", where it appears in the phrase "aware of a violation of his right or the person who violated such right" (Article 261(1) is set out in paragraphs 1692 and 1693 above) is to be read disjunctively (as Mr Alyoshin said) or conjunctively (as Mr Beketov said). This would be important if a claimant was aware of a violation of his rights, but did not know who was responsible for the violation, and therefore against whom he had a claim for their vindication.

1743. Mr Kolomoisky said that this dispute did not matter because it has not been suggested that anyone other than the Individual Defendants might have been considered responsible. I do not think that is a complete answer, because it is clear that there was participation in what occurred by many individuals and the mere fact that ultimate responsibility is said to be attributable to the Individual Defendants without whose participation or authority the Misappropriation would not have occurred is no answer to the point. It is also a point which gave rise to another illuminating aspect of the way in which Mr Alyoshin gave his evidence, which it is appropriate for me to record.

1744. In support of his view as to the nature and significance of the word "or", Mr Beketov relied on a resolution of the Supreme Court dated 26 December 2019 in case No. 441/755/15-ts, *Person 7 v. Person 4 and Sukhovilsk village council of Horodok* ("*Horodok*"). This decision left unchanged the decision of the Horodok District Court

of the Lviv Region in which it rejected a limitation defence expressly on the basis that time was to be calculated from the date when the claimant became aware of both a right violation and the violator's identity. The lower court's decision on this point, expressly agreed by resolution of the Supreme Court, concluded with the following sentence:

> "… the court concludes that the limitation period should be calculated from the date on which a person became or could have become aware of both the violation of his right and the person who violated such right".

1745. This analysis was said by Mr Beketov to have been supported by the Supreme Court's resolution dated 18 March 2020 in case No. 310/2647/17-ts, *Person 1 v. Person 2 et al.* and by an article (*Addressing The Challenges Of Determining When The Limitation Of Action Period Starts To Run*), published on 22 March 2018 by a former President of the Supreme Court, Yaroslav Romaniuk, where he made the same point as follows:

> "An analysis of the case law of the European Court of Human Rights on the application of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in terms of the "right to a trial", and a systemic interpretation of Articles 256 and 261 of the Ukrainian Civil Code and Articles 175 and 185 of the Ukrainian Code of Civil Procedure, offer a conclusion that the limitation period should be calculated from the date on which a person became or could have become aware of both the violation of its right and the person who violated such right. A claimant may become aware of those things at the same time. Otherwise, the limitation period should be calculated from the date on which a claimant became or could have become aware of the second of them, which is usually the violator's identity. The first thing is always necessary because no claimant will become entitled to sue to protect its right in court without that right having been violated. A claimant having information regarding either of those things (being usually aware only of a violation of his right) will not cause the limitation period to run"

1746. Mr Beketov also relied on following passage from the resolution of the Supreme Court in *Agrocomplex*:

> "If it is impossible to determine the day, when the person became aware of the violation of her rights or the violator, or there is evidence available that a person was not aware of the violation, although under the circumstances she should have been aware of it, the limitation period starts running from the day when the person ought to have become aware of the violation of her right."

He said that this was an example of the Supreme Court using the word "or" in a manner which demonstrated that it was used in Article 261 in a conjunctive sense because, on the facts it had found that the claimant had knowledge both of the violation and the person who violated the right. I think that he was right about this.

1747. Mr Alyoshin and Mr Nahnybida disagreed with Mr Beketov's opinion on the use and meaning of the word "or". They both expressed the view that his interpretation would be an impermissible contradiction of the statutory language and inconsistent with court practice. They referred to two Supreme Court cases in particular in support of their position: the resolution of the Supreme Court in *Agrocomplex* and the resolution of the Supreme Court dated 20 May 2019 in case No. 183/1474/15, *Party 1 v. Party 3 and*

Novomoskovsk State Notary Office ("*Novomoskovsk*"). However, Mr Beketov pointed out (correctly) that these cases did no more than recite the language of Article 261.

1748. They also contended that the resolution of the Supreme Court in *Horodok* relied on by Mr Beketov was of no value because it did not consider the reasoning of the court below, even though the decision itself was left unchanged. They also pointed out that the underlying claim had no merit and therefore the decisions of the lower court meant that what they had to say about limitation was irrelevant. As to case No. 310/2647/17-ts, they said that the Supreme Court simply reiterated the wording of Article 261 and held that time started running from the time at which the claimant became aware about the person who violated her right, without discussing the question of whether "or" was to be read in a conjunctive or a disjunctive manner.

1749. Mr Alyoshin accepted that the consequence of his construction of Article 261 was that, if there was a gap of three years or more between the time a claimant knew of the violation of its rights and the time it knew of the identity of the violator, it would never be able to bring a claim within the limitation period. He said that, in those circumstances, the court would be able to address the prejudice a claimant might then suffer by disapplying the limitation period, and all of the experts agreed that missing a limitation period for this reason may constitute a valid reason for applying Article 267(5). But Mr Alyoshin did not accept that this was a reason to give a meaning to Article 261(1) which he said contradicted the statutory language.

1750. If matters had rested there, the disagreement between Mr Beketov and Mr Alyoshin could have been characterised as nothing more than a matter on which respectably held views might differ. In particular, and despite the oddity of the result, Mr Alyoshin would have been entitled to say that the use of the word "or" in Article 261(1) reads more naturally in its disjunctive sense. However, there were two matters on which he was cross-examined which cast his evidence in a very different light.

1751. The first was that Mr Alyoshin did not refer in his reports to two other proceedings in which he had given evidence of Ukrainian law to an English court and in which the same point on the meaning and application of Article 261 had arisen. The point had either been determined or agreed contrary to the view he now expressed. In *Avonwick Holdings Limited v. Azitio Holdings Limited* [2020] EWHC 1844 (Comm) at [448], Picken J had found that the relevant limitation period is three years from when a claimant becomes aware, or should have become aware, of the alleged wrong *and* the identity of the defendant. In *PJSC Bank Finance and Credit v. Zhevago* [2021] EWHC 2522 (Ch) at [6], Sir Julian Flaux C had recorded that the need for actual or constructive awareness of both the wrong and the identity of the defendant was common ground.

1752. When this was initially put to him in cross-examination, Mr Alyoshin avoided giving a direct answer to the questions. But the position became more difficult for him the following day when it transpired that, in the *Avonwick* case, Mr Alyoshin had adopted the report of his recently deceased former senior partner, who had expressed a view which justified in terms the finding made by Picken J, albeit as a reflection of the practice of the Ukrainian court's approach to applying the limitation period, rather than the precise language of Article 261. In the end his only answer was that that what occurred in *Avonwick* did not reflect his view of Ukrainian jurisprudence and that was why he had not referred to it. This is a very unsatisfactory stance for an expert to have taken.

1753. The second aspect of the matter on which Mr Alyoshin's evidence was unsatisfactory relates to a reference in his fourth report to an article by a commentator, which dealt amongst other matters with issues relating to the attribution of constructive knowledge to corporate entities (Petro Guivan, "*Legal regulation of the limitation period: features of its calculation and application*", New Ukrainian Law, Issue 2, 2023). A translation of this article was also exhibited to his report. Both Mr Alyoshin's citation from the article for the purposes of considering attribution, and the translation he exhibited omitted the following words from the middle of the passage on which he relied, giving no indication (whether by ellipsis dots or otherwise) that part of the passage was missing:

> "This makes it possible to calculate the statute of limitations from the day when the person learned not only about the fact of the violation of his/her right but also about the identity of the violator, since it is in the presence of these two components that a real opportunity to restore the violated right in court opens up."

1754. This made quite clear that it was Guivan's view that it was necessary for the claimant to be aware of both the fact of the violation and the identity of the violator before the limitation period started to run. When taxed in cross-examination on the reason for what appeared to be a highly misleading citation, Mr Alyoshin's only explanation was that he thought that before he gave evidence he had provided an alternative corrective translation of this article which included the missing passage. There is no corroboration that this is what he did, and it still does not explain why the citation in the body of his report did not include it. He also omitted from his citation of the same article a footnote reference to the Romaniuk article I have referred to in paragraph 1745 above. This had the effect of concealing the fact that both Guivan and Romaniuk took a different view from him on the point in issue.

1755. From the way he gave this evidence, I have been driven to conclude that Mr Alyoshin omitted the passage from his fourth report because he did not want to highlight that an article on which he wanted to rely for one purpose also contained an opinion which was flatly contrary to the view he had expressed on another point. His approach undermined my confidence that I could always proceed on the basis that his evidence was a genuinely independent expression of his own view, having taken proper account of known relevant material to the contrary.

1756. In any event, in my judgment, Mr Beketov is correct on the point. It makes logical sense and is consistent with both decisions of the Ukrainian Supreme court and academic opinion that, in order for a limitation period to begin to run, Ukrainian law requires both the violation of the right and the person who violated the right to be known (either actually or constructively) to the putative claimant.

Limitation: burden of proof

1757. The experts were agreed that there is a general principle of Ukrainian law that each party normally bears the burden of proving the facts and matters upon which they wish to rely. The experts also agreed that the burden of proof is on a claimant who alleges that there are valid reasons why an established limitation period was missed. However,

the experts disagreed on who bears the burden of proof in relation to a number of other aspects of any limitation defence.

1758. Mr Beketov said that the burden of proving that a claimant had sufficient knowledge for the purposes of Article 261 at a particular date is on the defendants, although unsurprisingly he went on to say that, in response to a limitation defence, a claimant will have the opportunity to adduce evidence demonstrating that it did not have, or could not have had, sufficient knowledge within the limitation period. In his view, this is a reflection of the general principle, because the relevant knowledge is a matter of fact upon which the defendants must rely in order to establish that the claim is statute barred.

1759. Mr Alyoshin and Mr Nahnybida disagreed. They contended that, for limitation purposes, the claimant's knowledge of sufficient facts is presumed, because it will be presumed to have been aware of the state of its property rights, with the effect that the Bank has the burden of proving that it did not have the actual or constructive awareness required by Article 261(1). In support of this opinion Mr Alyoshin relied on two cases. The first of these was the resolution of the Supreme Court in *Novomoskovsk* in which the claimant brought a claim to invalidate title documents to an apartment more than 13 years after the title documents were issued to the defendant. Mr Alyoshin said that this established that the burden of proof to show that the claimant had no actual or constructive knowledge for the purpose of limitation is on the claimant, who has to provide what the Supreme Court called "appropriate and acceptable evidence refuting the presumption that the claimant could and should have been aware of the state of his property rights".

1760. The second of these was the resolution of the Supreme Court dated 13 May 2019 in case No. 754/13456/16-ts, *Person 1 v. Desnianskyi District State Administration of Kyiv*, in which the claimant brought a claim to invalidate title documents to a house almost twelve years after the title documents were issued. In this case, very similar language was used drawing attention to what the court called "the presumption of the possibility and obligation of the person to know about the state of its property rights". The Supreme Court seems to have said that it was not enough for the claimant to show why the presumption was rebutted by proving why it did not know about the violation of its rights, it must also prove that it could not have learned about that violation. The court then went on to say that "the respondent, on the contrary, must prove that the information about the violation could have been obtained earlier".

1761. Mr Beketov said that these cases in fact supported his position and pointed to the following language contained in the judgment (in a slightly different translation from that relied on by Mr Alyoshin):

> "The claimant must also prove the fact that he could not find out about the violation of his civil rights, which also follows from the general rule established by … the Code of Civil Procedure of Ukraine with respect to the obligation to prove by the party the facts and matters to which it refers as the basis of its claims or objections. Defendant, on the other hand, must prove that information about the violation could have been obtained earlier".

1762. Mr Beketov said that in the context of constructive knowledge this showed that, while the burden was on a claimant seeking to disapply a limitation period to prove that he

could not have discovered the violation of his rights any earlier, the burden was on a defendant seeking to apply a limitation period to prove that the claimant could have obtained sufficient knowledge at an earlier date. He also relied on two further cases. The first was the decision of the Northern Commercial Court of Appeal delivered on 15 December 2020 in case No. 910/15607/19, *Private Enterprise "TRS LEASING" v. JSC Ukrainian Railway*, in which the claimant discovered that its rail cars were in the defendant's possession and sued to recover them in 2019, more than three years after its lease had expired. In rejecting the defendant's limitation defence, the court said that the defendant had not discharged its burden of proving that the claimant had known prior to 2019 that the rail cars were in the defendant's possession:

> "The appellant [defendant] did not provide … evidence of awareness of the claimant until 2019 that the disputed property was in the possession of the defendant"

1763. This case is of limited assistance because, as Mr Beketov explained when he originally referred to it, the decision itself was overturned by the Supreme Court on other grounds (resolution of the Supreme Court dated 20 April 2021, case No. 910/15607/19). Although it gives some indication of how a Ukrainian court would approach this issue, nobody suggested that decisions of the Northern Commercial Court of Appeal are of precedential value. Even if they were, simply to say that the Supreme Court did not gainsay what was said by the Northern Commercial Court of Appeal on the point does not seem to me to be a strong argument.

1764. The second decision relied on by Mr Beketov was *Skif O*, in which a claim was brought in September 2017 challenging a decision taken at a meeting in January 2013. In that case, the claimant said that he only learned of the relevant decision in July 2016, meaning that his claim was in time. The defendant raised a limitation defence, and in its resolution dated 10 September 2019 the Supreme Court made clear that the defendant had failed to discharge its burden of showing that the claimant could have had sufficient knowledge (i.e. constructive knowledge) more than three years before filing the claim.

1765. There are passages in this judgment which are not entirely easy to follow, but I think that the solution is apparent if it is kept well in mind that Article 261 is concerned both with actual and constructive knowledge. Where the court is concerned with a defendant's limitation defence in which actual knowledge or awareness is alleged, the burden is on the defendants to prove the allegation in accordance with the general rule. This is clear from *Skif O* at [4.10] to which Mr Alyoshin had no convincing answer. However, where the court is concerned with an allegation of constructive knowledge in circumstances in which proof of actual awareness has failed or is not alleged, the presumption based on the obligation of a person to know about the state of his or her property rights operates to impose on the claimant an initial burden of showing that, despite the presumption, he could not have known about the violation on which he relies. The burden may then move back to the defendant to prove that the information about the violation could have been obtained earlier, although that is in reality the same as a shifting of the evidential burden where one party has established their case in the absence of evidence to the contrary from the other.

1766. In the present case the Bank contends that it could not have known of the facts necessary to bring its claim until a reasonable time after nationalisation and it relies on the control

which the Individual Defendants exercised over the Bank until that time. Mr Beketov's evidence and *Skif O* both support the conclusion that if that is sufficient to rebut the presumption based on the obligation of a person to know about the state of its property rights, the burden of proof then shifted back to the Defendants to prove how the Bank could have known of the violation before 21 December 2014.

Limitation: attributing knowledge to the Bank

1767. As the Bank is a non-natural person created by the rules which govern its constitution, the answer to the question of how it became aware of the facts described in Article 261(1) depends on the circumstances in which Ukrainian law attributes to a company the knowledge of a natural person associated with that company. The correct approach has an important impact on the limitation argument in the present case. None of the experts suggested that there is a specific provision in the Civil Code which deals with the attribution of knowledge to a corporate entity, either generally or for the specific purposes of Article 216. It follows that the court must seek to ascertain what the Supreme Court in Ukraine would be likely to decide if an equivalent issue were to come before it for determination.

1768. The Bank's position, substantiated by Mr Beketov's evidence, is that the knowledge of those persons with the power or authority to decide whether the Bank will sue, is the principal relevant factor when applying a common sense approach to the question of whose knowledge should be attributed to the Bank for limitation purposes. Given the limitation context in which the issue arises, the guiding principle is that the relevant knowledge or awareness must be attributable in such a way that the Bank has a real opportunity to bring the claim.

1769. The Bank submitted that the starting point was that the *de jure* powers of the Individual Defendants as the majority on the Supervisory Board and the controlling influence which they wielded over the Bank's affairs at all times prior to its nationalisation, meant that the Bank was unable to sue the Individual Defendants without they themselves giving the necessary authorisations to enable the Bank to do so. It followed that their knowledge of their own violation of the Bank's rights was the only knowledge capable as a matter of concept of being attributed to the Bank for limitation purposes. But, as it was common ground that the knowledge of a fraudster will not be attributed to the victim of the fraud, the Bank was not fixed with what the Individual Defendants knew until after the time of nationalisation, when they were no longer in control and therefore no longer the only persons with the *de jure* or *de facto* ability to procure the Bank to sue themselves.

1770. The Defendants say that is wrong as a matter of principle, because knowledge is what they called a straightforward question of fact and is capable of being attributed to the Bank through individual employees other than those authorised to bring proceedings on its behalf. While the Bank's case is based on the power and authority of an individual whose state of mind is sought to be attributed to a corporate entity for limitation purposes to procure it to sue, the Defendants' case is ultimately based on the duty of an individual whose state of mind is sought to be attributed to a corporate entity to take steps to procure it to do so.

1771. As I have already explained, the experts agreed that there is no Ukrainian legislation which states general rules as to when the knowledge of one person or entity may be attributed to another. The experts also agreed on the following points:

i) a shareholder is not entitled by virtue of that status to manage or act on behalf of the company and is not to be equated with the company for the purpose of assessing the company's knowledge;

ii) once a legal entity has the knowledge to start time running, the limitation period is not interrupted if there is a change of management and the new management become aware of the potential claim only after its appointment; and

iii) the knowledge of a person who is authorised to act on behalf of a company will not be attributed to it if such person aims to defraud it, or (as it was put in Mr Kolomoisky's closing submissions) has acted dishonestly.

1772. Mr Beketov also explained that the principle that a limitation period is not interrupted if there is a change of management only applied where a company knows that it has a potential claim before the change. It does not apply where the former management only knows that the company has a potential claim because the former management was itself engaged in defrauding the company (i.e. as contemplated by paragraph 1771.iii) above). He said that this was the situation considered in case No. 21/89b/2011, *Striletskyi Step Milovskyi zavod rafinovanoyi olii PJSC v. Belovodskyi Elevator LLC*, in which the decision of the Donetsk Commercial Court of Appeal to this effect was confirmed by the resolution of the Supreme Court dated 18 June 2018. I agree with this evidence.

1773. In further development of the experts' agreement that the knowledge of a person who aims to defraud a company will not be attributed to that company, Mr Beketov went on to contend that Ukrainian law's approach was not limited to persons authorised to act on behalf of a company. It applied to any attempt to attribute knowledge to a company through the state of mind of any person who is aiming to defraud it irrespective of whether or not that person was authorised to act on its behalf. It was also the Bank's position that the knowledge of any person who participated in the fraud is not attributable to the defrauded company even though that person may not have had a specific aim to defraud in their own right. For the most part, this aspect of attribution was not disputed by the Defendants. The way that their position was described by Mr Howard in his closing submissions was that he accepted that knowledge could not be attributed to the Bank through an individual, such as Mr Dubilet or Ms Gurieva, whom the Bank says was implicated in the wrongdoing.

1774. I agree that this is the correct approach. I also think that the rationale for this principle casts some light on the correct approach to attribution more generally; a rationale which it is possible to extrapolate from the evidence as a matter of common sense, rather than by reference to a specific opinion expressed by one of the experts. Consistently with the approach adopted by the Supreme Court and by Guivan in the article which was misleadingly presented by Mr Alyoshin when giving a conjunctive meaning to the word "or" in Article 261, it is simply that there would be no real access to justice if the limitation period for a fraudulent breach of duty were to commence through the awareness of the fraudster himself. Both of these aspects of the analysis go to awareness for the purposes of the start of the limitation period, and not just the

circumstances in which the limitation period will be disapplied pursuant to Article 267(5).

1775. Subject to these points and, given that the rules of attribution are undeveloped in Ukrainian law, Mr Beketov's view was that identifying the person whose knowledge is attributable to a company will always be an issue of fact on which a Ukrainian court will adopt a common sense approach. On one level, I see the force of that view, but common sense does not necessarily identify the principles which underlie the approach that a Ukrainian court would take.

1776. One aspect of this approach was Mr Beketov's consistent evidence that, as a matter of general concept, the court will place significant weight on the degree to which the person whose knowledge is sought to be attributed to a company was in a position to exercise influence over the relevant aspect of a company's management or business, whether as a result of formal authority or through informal means. In the case of a bank, those persons may well include managers of the bank, officers of the bank, the owner of a significant participation in the bank, controllers of the bank and UBOs of the bank, but all will depend on the context in which knowledge is sought to be attributed. To that extent, he said that attribution of knowledge is not necessarily limited to persons who formally hold authority to act on a bank's behalf.

1777. So far as legal proceedings are concerned, and leaving aside the question of the degree to which a person whose knowledge is sought to be attributed to a company was in a position to exercise *de facto* influence and control over its management or business, Mr Beketov initially said that the knowledge of members of the Bank's Management Board rather than the knowledge of members of its Supervisory Board would be more likely to be attributed to the Bank for limitation purposes. The reason for this conclusion is important: based on the documents he had then considered, he understood that it was the Bank's Management Board, and not its Supervisory Board, which had the power to authorise both the instruction of legal advisors and the commencement of legal proceedings.

1778. I shall come back to the distinction between the Management Board and Supervisory Board shortly but, on the general point, the Bank's closing submissions drew the threads together in this way. It said that common sense impels a focus on identifying the persons who have the power and authority to bring the relevant claim in the name of the Bank. The reason for this is that the persons so authorised are the persons whose knowledge of the relevant facts invests the company with a real opportunity to bring that claim, or as Guivan put it (see paragraph 1753 above), a real opportunity to restore the violated right. This underlying principle also points to the knowledge of those persons, who have not just *de jure* power to decide to bring proceedings, but those who have *de facto* power (i.e., the power as a matter of practical reality) as well. To all intents and purposes this will mean anyone who has *de facto* control of the entity concerned, which in the case of the Bank was the Individual Defendants. It may also be said that this way of approaching attribution is entirely conventional looked at through the eyes of an English lawyer, where many of the recent cases makes clear that the criteria for attribution must be such as will give effect to the purpose and policy of the underlying substantive rule.

1779. Initially, and subject to the question of *de facto* control, the position of the Defendants was not so very different. Not having identified in their Defences any particular

individuals whose knowledge was to be attributed to the Bank for limitation purposes, their case was run on the basis that the relevant persons, who knew or ought to have known the relevant facts, were the members of the management body with the authority to bring the claim. This was made clear during the course of a debate with Mann J at a hearing in June 2020 when disclosure was being discussed and counsel for all of the Defendants agreed that the knowledge of the management body with authority to bring the claim was the relevant question for limitation purposes.

1780. Mr Kolomoisky's case was then refined by Mr Alyoshin in his first report when his evidence was that, although he disagreed with Mr Beketov's test for attribution of knowledge based on common sense on the grounds that it was both unclear and unpredictable, the concept of knowledge being attributed through a person being authorised in the relevant context was the correct approach. In particular Mr Alyoshin said that attribution falls to be assessed under Article 92:

> "Legal capacity of a legal entity.
>
> 1. A legal entity acquires and exercises civil rights and obligations through its organs which act in accordance with the constitutional documents and the law.
>
> The procedure for the formation of the organs of a legal entity shall be established by its constitutional documents and the law.
>
> 2. In cases provided for by the law, a legal entity may acquire and exercise civil rights and obligations through its participants."

1781. He said that it followed from this that, because a company will be deemed to have the knowledge of the persons authorised to act on its behalf in the relevant context, "knowledge of a person who has no authority to acquire or exercise any rights on behalf of the legal entity is not attributable to it, as there is no reason for such attribution". It followed that the main individual whose knowledge is relevant for the purposes of determining a bank's knowledge is the chairman of its executive or management board. Other members of management may also be equated with a bank when they carry out their functions within or on behalf of the bank, on the basis of its constituent documents or a power of attorney. At this stage Mr Alyoshin's focus was therefore on the power and authority of the relevant individuals or relevant body, not on the question of whether an individual had a duty to convey knowledge he may have received to the person or persons with power or authority to act in the context concerned.

1782. More specifically, Mr Alyoshin was of the opinion that knowledge of members of its supervisory board is not attributable to a bank because they are not responsible for its day-to-day management and do not have powers to act on its behalf. The same principle applied in relation to a shareholder and to persons who indirectly own a beneficial share of a company or who can influence or control the decision-making of a company's managers or officials. In his view the knowledge of such persons cannot be attributed to the company. It was said that such persons are not agents or representatives of the company and for that reason their knowledge is not attributable to it.

1783. This evidence was then reflected in Mr Alyoshin's supplementary report when he made an explicit link between the source of the knowledge required for the limitation period to commence and the internal body authorised to instruct the initiation of legal

proceedings. He agreed that this was the Management Board, and explained that the reason for this was that this was the body authorised to represent the company in the relevant context, viz., the initiation of legal process:

> "the Management Board of the Bank was the sole body authorised to carry out the day-to-day management of the Bank and, accordingly, to instruct third party legal advisors and initiate legal proceedings. Therefore, a Ukrainian court would consider the knowledge of members of the Management Board to be relevant for purpose of limitation in respect of the Bank's claims in these proceedings."

1784. He was therefore in agreement with Mr Beketov that the central question was the knowledge and state of awareness of the Management Board, being the body that he understood to be authorised to initiate legal proceedings. His principal area of disagreement with Mr Beketov was whether the knowledge of the controlling UBOs (i.e., the Individual Defendants) was capable of being attributed to the Bank. He said that it was not, because they were not authorised to act on the Bank's behalf or exercise legal right in relations with third parties.

1785. In his supplemental report, Mr Beketov continued to maintain his original view on this point. He did so having considered the views of Mr Alyoshin to the effect that Ukrainian law adopts a more formalised approach based on attribution of knowledge to a company only through those authorised to act on behalf of the company in the relevant context, based on its articles of incorporation or the law. Mr Beketov said that this approach did not take account of the fact that there are many Ukrainian laws which treat control of a company as a critical consideration in a number of different contexts, and which define control as the person able to exercise decisive influence on the management or business of a legal entity through direct or indirect ownership (whether alone or jointly) of 50% of more of the capital or votes or which exercise such influence regardless of formal ownership. In particular he continued to rely on the fact that Article 2 of the Law on Banks defines "controller" and "significant participation" in a manner which applied to the Individual Defendants and their interests (see paragraph 995 above).

1786. Mr Beketov also referred to a number of other cases which he said supported his view that knowledge of a bank's controller or UBO should be no less attributable to the bank because that person enjoys informal, rather than formal, methods of influence and control. They were a decision of the High Commercial Court of Ukraine dated 2 September 2014 in case No. 925/1986/13, *Kyriachenko v. Interkos Plus* ("*Kyriachenko*"); a decision of the Kyiv Commercial Court of Appeals dated 9 December 2015 in case No. 910/17605/15, *OrionInvest v. UkrGazPromBank* ("*OrionInvest*"), which was upheld by a decision of the High Commercial Court of Ukraine dated 16 March 2016; and a decision of the Commercial Court of Kyiv dated 19 September 2008 in *Nadiia v. Lin-Teks*, No. 3118- 08.

1787. In my view two of those cases substantiate Mr Beketov's evidence as to the fact-specific nature of Ukrainian law's approach to attribution of knowledge in a corporate context. Thus they demonstrate that knowledge is capable of being attributed to a company through individuals with a controlling influence even though they did not hold formal positions of authority within the relevant legal structure:

i) *Kyriachenko* was concerned with a claim by the liquidator of the vendor of a business in circumstances in which the original sale had been invalidated. The ultimate purchaser claimed to be a bona fide purchaser of the business without knowledge of the invalidity of the original sale agreement. The court rejected this argument because the state of mind of the intermediate purchaser could be attributed to the ultimate purchaser as he was a director of the ultimate purchaser, while the state of mind of the vendor could also be attributed to the ultimate purchaser because its sole shareholder was his son.

ii) *OrionInvest* was concerned with a claim that a loan agreement was altered by the creditor and the borrower without the awareness or consent of the surety. The court in fact decided that the scope of the surety's obligations included obligations under additional agreements to the main loan agreement. But it went on to hold that, in circumstances in which the principal debtor and the surety were related parties in the sense that they had the same beneficial owner (or controller) and the same founder, the surety was aware of the conclusion of the additional agreement in any event.

1788. By the time the trial opened, Mr Kolomoisky's case as explained in his written opening, had been modified to include the possibility of attribution not just through the members of the Management Board (a position which was supported by both Mr Beketov and Mr Alyoshin) but also by its other duly authorised representatives including the members of the Credit Committee who approved the Relevant Loans. This was then expanded in oral submissions to include the members of the Bank's legal department who handled the claims brought by the Borrowers against the Corporate Defendants and the Bank.

1789. After the commencement of the trial, the Bank's position developed as well, although in what seems to me to have been a more consistent manner than that of the Defendants. Mr Beketov's original evidence to the effect that the knowledge of the Bank's Management Board was more likely to be considered relevant for limitation purposes than the knowledge of its Supervisory Board was given on the basis of the 2017 version of the Charter with which he was provided at the time he made his initial report in November 2021. After his initial report had been produced, he was provided with copies of five earlier versions of the Charter dating from various dates between 23 April 2013 and 10 July 2015. There were also two further versions of the Charter dating from April 2012 and February 2013 with which he was provided at the time he made his initial report but which he did not then review. These earlier versions of the Charter contained a clause, not contained in the 2017 version, which gave competence to the Supervisory Board and General Meeting to make decisions on holding officials of the Bank's management bodies (by which was meant, amongst others, members of the Management Board, Supervisory Board and General Meeting) personally liable.

1790. This power was an exclusive power until the General Meeting dated 27-30 April 2015, after which it was no longer characterised as such, but it remained an express power of the Supervisory Board in the Charter until it was removed in the 2017 version of the Charter which post-dated the Bank's nationalisation. When it was an exclusive power (and subject only to a very minor change in the language of the translation), it took the following form:

> "9.3.3. The competence of the Supervisory Board includes …

> (34) taking decisions on holding the officials of the Bank's management bodies personally liable.
>
> The powers provided for in paragraphs 1 to 23 and in paragraphs 25 to 46 belong to exclusive competence of the Supervisory Board and cannot be decided by the Bank's authorities other than the Bank's general meeting."

1791. Mr Beketov explained that the Bank's management bodies were defined as the General Meeting, the Supervisory Board and the Management Board, and their officials included members of its Supervisory Board, who at the material time included the Individual Defendants. In light of this information, Mr Beketov produced a further report (after the commencement of the trial, but some 2½ months before he was cross-examined). In that report, Mr Beketov reiterated that it is the knowledge of the persons authorised to decide whether the Bank will bring a claim that is "primarily" relevant to consider when applying a common sense approach to the issue of attributable knowledge for limitation purposes. He then explained that, having considered the relevant versions of the Charter, he no longer considered that the power to authorise the instruction of third party legal advisors and to commence legal proceedings lay within the operational power of the Management Board insofar as it reflected "a decision on holding the officials of the Bank's management bodies personally liable". The consequence of this was that a Ukrainian court would therefore regard the knowledge of members of the Supervisory Board and the General Meeting, but not members of the Management Board, to be the relevant knowledge for the purposes of determining when the limitation period started to run in respect of claims against the Individual Defendants in these current proceedings.

1792. After seeing Mr Beketov's analysis of the various versions of the Charter, Mr Alyoshin changed his position completely. He said that he disagreed with Mr Beketov's interpretation of the Charter and specifically with his conclusion that the present proceedings fall within the scope of clause 9.3.3.(34). He also explained that he disagreed with Mr Beketov that it was the knowledge of the members of the body that is authorised to initiate legal proceedings that is "primarily" relevant for the purposes of determining when the limitation period starts to run. He said that "authority to bring a claim has nothing to do with the start of the limitation period" and that "the knowledge of any individual performing his/her duties is pertinent to determining when the limitation period starts to run." This was a critical change from Mr Alyoshin's original position, because it introduced the possibility that a defendant might be able to demonstrate that corporate awareness was capable of being acquired through the state of mind of individuals other than those with the authority to bring the relevant proceedings. I shall deal separately with Mr Alyoshin's evidence as to (a) the effect of clause 9.3.3(34), i.e., the significance of a power to sue and (b) the knowledge of individuals performing a duty.

Limitation: attribution of knowledge: the Charter

1793. As to the effect of clause 9.3.3.(34), Mr Alyoshin contended that the clause did not relate to the bringing of court proceedings against Supervisory Board members at all, but instead was concerned with a specific type of procedure set out in Article 136 of the Labour Code ("Article 136"), which permits a company unilaterally to dock an

employee's wages as a response to (internally-determined) misconduct. It legislates for a deduction regime, which enables an employer to make deductions from an employee's wages, up to a maximum of their average monthly salary, for damages caused by breach of their duties. He also said that the reference to "management bodies" in clause 9.3.3.(34) did not include the Supervisory Board, but only the Management Board and other lower-ranking officials.

1794. I do not accept Mr Alyoshin's opinion on this point. First, and as Mr Beketov explained, the argument that the reference to "management bodies" in clause 9.3.3.(34) does not include the Supervisory Board ignores clause 9.1.1 of the Charter, which expressly defines the Bank's "management bodies" to include the Supervisory Board. It also ignores clause 9.1.3 which states that "[o]fficers of the Bank's management bodies are defined in accordance with" the JSC Law in which "officers" are defined (in Article 2(1)(15)) to include "the chairman and members of the supervisory board" amongst others.

1795. Secondly, there is no reference to the Labour Code in the Charter. This is a surprising omission if clause 9.3.3.(34) were indeed to be referring to the specific type of procedure set out in Article 136. If the drafters of the Charter had intended to refer to the Article 136 deduction procedure when including clause 9.3.3.(34), they would have referred to it more specifically.

1796. Thirdly, as Mr Alyoshin accepted in cross-examination, and as is apparent from the language of Article 136 itself, larger claims against officials of the Bank are not subject to the unilateral deduction procedure. In such cases, "the employer is required to file a claim with the local general court". Based on Mr Beketov's evidence, the Bank is correct to submit that there can be no good reason for reserving the relatively inconsequential statutory power to deduct a month's salary to the exclusive competence of the Supervisory Board, while providing for the main means of holding an official responsible for a more substantial liability, viz. going to court, subject to a lower level of jurisdictional authorisation.

1797. Fourthly, I agree that a more obvious source for clause 9.3.3.(34), is Article 41(g) of the Law on Business Companies ("Article 41(g)"), which provides that the general meeting of shareholders of legal entities, including joint stock companies such as the Bank has the power to "adopt[] decisions on bringing officials of company's management bodies to property liability". I accept the Bank's submission that it was puzzling that, having accepted that clause 9.3.3.(34) was likely to have been taken from Article 41(g), Mr Alyoshin considered Article 41(g) to be irrelevant, but nonetheless contended that the provisions of Article 136 were relevant.

1798. Mr Beketov was criticised by the Defendants for taking the position he did after reviewing the various versions of the Charters, but I think that their criticism was misplaced. In my view, the conclusions which he reached having seen the pre-2017 versions of the Charter are entirely consistent with the general position he had maintained throughout. The form of those versions of the Charter made clear that, subject to the overarching power of the General Meeting (itself controlled by the Individual Defendants), the members of the Supervisory Board, of which the Individual Defendants were a majority until 30 April 2015, had exclusive *de jure* power over the ability of the Bank to hold the officials of the Bank's management bodies personally liable. I accept Mr Beketov's evidence that this gave the Individual Defendants, as

controllers of both the Supervisory Board and the General Meeting, legal authority over proceedings by the Bank against themselves as a matter of the Bank's internal constitutional structures.

1799. I also accept that, as a consequence of this, it was their knowledge which was primarily relevant, or what the Bank called "a highly relevant consideration" to any common sense approach or inquiry as to as to whose knowledge should be attributed to the Bank for limitation purposes. However, I also agree that Mr Beketov's evidence confirmed that, as a matter of principle, the knowledge of persons who were authorised to issue proceedings is not the only knowledge which might (and I think that the word "might" is important) be attributed to the Bank. When asked in cross-examination whether it would be wrong to confine the circle of relevant people whose knowledge might be attributed to the Bank to persons who were simply those who were so authorised, Mr Beketov accepted that "as a matter of principle it would not be advisable".

1800. In their closing submissions, counsel for Mr Kolomoisky submitted that it followed from Mr Beketov's evidence that the disagreement between the experts as to whether the power to bring legal proceedings against the Individual Defendants was in fact reserved to the Supervisory Board under the Charter at the relevant time, or whether it rested with the Management Board was neither determinative of anything nor a "highly relevant consideration". I disagree. In my view, the Bank's constitutional structure for commencing legal process against its officers, including the members of the Supervisory Board, is highly material on the issue of the Bank's awareness of the violation of its rights for limitation purposes. This remained Mr Beketov's evidence throughout and I agree with it.

1801. In my view, the present proceedings fall within the scope of clause 9.3.3.(34). Under the Charter, the only bodies that could authorise the bringing of proceedings against the Individual Defendants were the Supervisory Board or the General Meeting. Given their controlling votes as members of the Supervisory Board and shareholders holding in excess of 90% of the Bank's shares, no resolution authorising the bringing of proceedings could have been passed without their approval.

Limitation: attribution of knowledge through individuals performing a duty

1802. As to the significance of a duty, even though it would have been relevant to the opinions expressed in his earlier reports, Mr Alyoshin's reference to the knowledge of individuals performing their duties was new and was not supported by any authority. He relied on the academic article by Petro Guivan to which I have already referred (paragraph 1753 above) in which the author used the following language: "awareness through the prism of knowledge of [a legal entity's] bodies and other persons whose powers related to the relevant area of activity". As the Bank pointed out, this article does not support Mr Alyoshin's position, because it refers to powers not duties related to the relevant area of activity. Not only does this article not support Mr Alyoshin's new position, it is also consistent with Mr Beketov's evidence on the need to focus on those empowered to act in the relevant context, which in the present instance is litigation against the Individual Defendants.

1803. Mr Alyoshin also relied on the resolution of the Supreme Court in *SFG Hermes*. He pointed out that the court in *SFG Hermes* did not consider it necessary to investigate who on behalf of the company had the necessary knowledge. He drew the conclusion that "because *someone representing the company* knew or should have known about the violation of the company's rights, the company, therefore, had the necessary knowledge for the purposes of limitation." [emphasis added]. I am satisfied that Mr Alyoshin was wrong to say that *SFG Hermes* gave any support to his position. As the Bank submitted, SFG Hermes LLC was a one-man company and so the "someone" referred to was the one man who acted as its director, a very different situation from the position of the Bank with thousands of employees, a management team and a structure of formal decision-making rules.

1804. However, there were some aspects of Mr Alyoshin's new position which were accepted by Mr Beketov in cross-examination. He agreed that, as a matter of common sense, the knowledge of members of a number of the Bank's internal bodies was also capable of being attributed to the Bank. In addition to the Management Board, these included members of the audit commission, the chief accountant, the head of internal audit, members of the credit committee and the ECC, heads of departments with duties to report to the Management Board and members of the legal department. During the course of this cross-examination, Mr Beketov also accepted that knowledge of the facts required to enable a claim to be brought was relevant to the exercise by many of these individuals of their duties to the Bank. He went on to accept that their knowledge may fall to be attributed to the Bank, but he did not say that it would whether by reason of their status or otherwise, nor did he say that the existence of a duty to convey information to a person empowered to act in the relevant context was in any sense the test for determining whether knowledge is to be attributed to the company to which the duty was owed.

1805. This might be thought to have been consistent with what had become Mr Alyoshin's focus on duties rather than powers when he said that:

> "the issue that matters is when an individual within the entity (official or employee) who is allocated or delegated with the relevant duties or powers within the company acquired knowledge about violation of the company's right (actual or constructive), which is relevant to exercising such individual's duties and/or powers."

1806. However, in my judgment the submission made by the Defendants that the knowledge of any employee will always be attributed to the Bank if they acquired that knowledge in the performance of their duties, or if it is relevant to the performance of their duties, is not justified by the expert evidence and is wrong as a matter of Ukrainian law. On analysis, Mr Beketov's evidence, which I accept, was that individuals within identified categories were capable of being the conduit through which knowledge was to be attributed to the Bank, but that the answer would always depend on the context in which knowledge is said to be attributable on the facts. All that Mr Beketov ultimately confirmed was that they fell into a category of persons whose knowledge was capable of being attributable to the Bank, but only if in the relevant context "as a matter of common sense" and having regard to "all the factual circumstances of the case" attribution of knowledge to the company can occur through them; it went no further than that.

1807. I also think there is force in the Bank's submission that the reason Mr Beketov expressed himself in the way that he did (well illustrated by his constant use of the word "potentially" in his answers) was because he considers that Ukrainian law attributes knowledge to a corporate body in a flexible manner. I accept Mr Beketov's evidence that Ukrainian law impels a focus on the relevant context, which in the present case is the commencement of legal process against the entity's own controlling shareholders and those associated with them.

1808. The first conclusion which the Bank submitted the court should draw from Mr Beketov's evidence was that, while the knowledge of the Individual Defendants, as the owners and controllers of the Bank and the holders of executive positions within it, was *prima facie* attributable to it, that could not be the case prior to nationalisation in December 2016, because they themselves were the persons who aimed to (and did) commit the fraud. The Bank also submitted that the same could be said of the members of the Management Board who were involved in the Misappropriation, naming in particular Mr Dubilet, Ms Gurieva and Mr Novikov. The short submission was that it is wholly implausible to suppose that they could have possessed knowledge of the relevant facts in a manner sufficient to start time running, but not also have been party to the fraud.

1809. The next submission is that while it was understandably accepted by Mr Beketov that the knowledge of a person with a duty to draw the attention of those with power and authority to commence the relevant proceedings in vindication of the violated right is capable of being attributed to the Bank, that may not be the case if it is established on the facts that the only persons who had that power or authority (whether *de jure* or *de facto*) will not, on receipt of that information, exercise that power, whether to sue themselves or to sue some other person. This would reflect Mr Beketov's evidence that the guiding principle is for the court to identify the context in which the knowledge is sought to be attributed and then apply common sense and consider all the surrounding circumstances to determine whether, on the facts, the knowledge of a particular individual is or is not attributable to the company concerned. In the present case, the relevant context is whether (and when) the knowledge sought to be attributed to the Bank is attributable for the purpose of bringing proceedings against its controlling shareholders.

1810. Mr Beketov's focus on context was developed by the Bank to include the question of whether, in the light of wrongdoer control, the Bank had a real opportunity to bring the proceedings. This was attacked by Mr Howard on the basis that real opportunity to sue was irrelevant to the inquiry. Its relevance only arose later when the court was considering Article 267(5); knowledge for the purposes of Article 261 is a straightforward question of construction of the Article. He said that real opportunity to bring a claim is not part of the test and finds no direct support in the authorities; apart from anything else he said that there was no such concept included in the statutory language. He said that in the context of a corporate body, once you have identified the relevant people, there is simply a binary factual question – either they have the relevant awareness or they do not.

1811. Mr Howard also submitted that a real opportunity test was inherently uncertain. I am not sure that this is a particularly persuasive point, because it seems to me that, while there will be uncertainty in some cases, it is no more uncertain than the issue of how awareness is to be attributed to a putative corporate claimant in any event. Indeed the

identification both of the relevant people through whom the awareness of the company is to be attributed and their own state of knowledge may itself a be a complex exercise.

1812. Mr Howard illustrated his argument by reference to Articles 261(3) and 261(4), one dealing with the consequences of a void transaction and the other with what happens when the civil right or interests of a minor is violated (for the text see paragraph 1692 above). It was said that neither of these two limitation periods are tied to the question of when the putative claimant had a real opportunity to bring a claim. I agree that is the case in relation to void transactions, but I am not sure that the submission works in relation to the position of minors because it appears likely that the whole point of deferring the commencement of the limitation period until their majority is to give them a practical opportunity to sue in circumstances in which the law does not regard them as having sufficient capacity to do so before that occurs. In any event, my attention was not drawn to anything said by the experts which supported the argument, but I do accept that it is at least one indication that real opportunity to sue is not the driving consideration in all cases.

1813. Mr Howard also pointed to what happened in *SFG Hermes*. He said that what was significant about this decision was that the courts in Ukraine, at all levels, agreed that, for the purposes of the claims by Hermes against its former sole shareholder and director arising out of transactions which took place when he was in control, time started to run at the stage when he was in control even though, as the controller, he was obviously not going to bring proceedings against himself. The case was then decided in the claimant's favour by application of Article 267(5), not on the basis that the director's awareness was not attributable to the company in the first place. This is difficult to reconcile with any principle that knowledge will not be attributed through an individual where any dissemination of the knowledge of which that individual is aware would be a futile exercise for the purpose of commencing legal proceedings, because the corporate entity is controlled by the wrongdoer who is the putative defendant.

1814. *SFG Hermes* was not put to Mr Beketov in cross-examination, and it is difficult to unravel whether there was any significance in the fact that there appeared to be two enterprises involved in what occurred: Hermes Farming LLC and SFG Hermes LLC. It is also not entirely clear to me why the principle agreed in the current case that the knowledge of a fraudster will not be attributed to the victim of the fraud did not determine the issue.

1815. Nonetheless, I agree that it is a decision of the Supreme Court which recited that the lower courts had determined that Hermes became aware of the transfer of the funds sought to be recovered at the time of the relevant transaction, and went on to say that it was therefore correctly concluded that this was the moment when the company could assess the amount of damage corresponding to the amount of the transferred funds with the consequence that the limitation period started to run. This is clear authority for the proposition that the company acquired knowledge for limitation purposes, even though its sole director and shareholder at the time was the defendant who was hardly likely to authorise the bringing of proceedings against himself. It is inconsistent with corporate awareness being affected by the question of whether the company had any opportunity to sue once the relevant knowledge came into the hands of an individual whose state of mind might normally be attributed to the company.

1816. Mr Hunter's answer to this point was that *SFG Hermes* (together with at least one other decision of the Supreme Court: its resolution dated 11 November 2021 in case No. 910/8482/18, *PJSC Sirius-Bud v. Department of Enforcement of Decisions of the Department of the State Executive Service of the Ministry of Justice et al*, ("*Sirius-Bud*")) proceeded throughout on the basis that corporate awareness was unaffected by the question of whether knowledge of the individual concerned would still not give the company a real opportunity to sue; nobody argued to the contrary and the case was decided in favour of the claimant on the grounds that the lower courts could and should have applied Article 267(5).

1817. Some of the argument in closing on this issue went beyond the expert evidence, but the real challenge to Mr Howard's approach is that it did not pay sufficient regard to the fact that Article 261 is dealing with awareness for limitation purposes not just where the claimant is a non-natural person, but also where he is a natural person. How awareness is to be attributed to a non-natural person raises very different questions, which are ultimately corporate law issues. That is where, on the expert evidence, the question of context comes in, i.e., what is the purpose for which attribution is said to be necessary and why? This is not so very different from recognised principles of English law: see e.g. the decision of the UK Supreme Court in *Singularis Holdings Ltd v. Daiwa Capital Markets Europe Limited* [2019] UKSC 50, [2020] AC 1189 at [34], where the context and purpose for which the attribution is relevant was said by Baroness Hale PSC to be at the core of the analysis.

1818. I agree that the relevant context is the commencement of legal process against the Bank's controlling shareholders and their associates, and the power, *de jure* or *de facto*, to bring the relevant claim on behalf of the Bank. I was not shown any authority which establishes that knowledge in this context always includes the knowledge of someone who is under a duty to convey information to another person who has that power to act, let alone to any other employees. However, consistently with the agreed requirements of Ukrainian law to have regard to Article 6(1) of the ECHR where the attribution of awareness is an issue that arises in a limitation context, it was Mr Beketov's evidence that it may do, but a duty to act is just one of the factors which goes into the mix when determining whether as a matter of common sense the company is to be attributed with the knowledge of a particular person.

1819. The critical question from the Bank's perspective is whether it had a real opportunity to bring the claim said by the Defendants to be barred by the statute. Mr Howard submitted that to ask such a question, based as it is on the suggestion that where a company is controlled by the person who is the defendant in the claim, the real opportunity test is not satisfied because attributing the knowledge won't lead to the company having a real opportunity, is to apply a rule of disattribution, rather than a rule of attribution and is in fact what he called "totally bogus". In other words, he submitted that knowledge of facts is quite separate from the ability to bring proceedings.

1820. I do not agree with that submission in the form in which it was put, not least because it seems to me to be founded on too hard-edged a rule of when knowledge is to be attributed to a corporate entity. It is not disattribution; it is simply a recognition that because the Bank is a non-natural person, with many stakeholders (such as depositors and other creditors interested in its assets) and always subject to the possibility that its controllers may change, its state of mind is capable of being determined differentially depending on the context. Indeed the importance of the claimant's opportunity to bring

the claim was accepted in this very context by Mr Alyoshin in his first report (see the passage cited for other reasons in paragraph 1733 above).

1821. It was also established as a statement of principle articulated by the Supreme Court in *Agrocomplex*, in which Mr Alyoshin's translation made clear that the start of the running of a limitation period coincides with the moment when the right to a claim arises "meaning the possibility for this person to enforce its rights through the court". If there is no possibility to enforce rights through the courts, because the only individuals with power (*de facto* or *de jure*) to sue are themselves implicated in the fraudulent activity in respect of which a claim might be made, knowledge will not normally be attributed to the Bank for the purpose of determining whether or not the Bank's claim in respect of that activity is barred by the limitation period. The reason for this is that in that context it cannot be said that the Bank is in a position in which it can properly be said that there is any possibility for the Bank to enforce its rights through the court. This is a perfectly logical approach for any legal system to take, given that the whole purpose of a requirement that the claimant is aware of a violation of its rights before time starts to run is because it is only then that the claimant is, as a matter of practice, in a position to sue.

1822. I also accept the Bank's submission that there will be cases in which the Defendants' submission is difficult to reconcile with the approach taken more generally by Ukrainian law on the proper application of the ECHR to the construction of Article 261 (*SFG Hermes* as cited in paragraph 1709 above). In that context, Mr Hunter submitted that the evidence showed that Ukrainian law answers the question of whether knowledge is attributable to a company through an individual by reference to the guiding principle that the law of limitation must not undermine real access to justice. It was said that in the same way that this leads to the exclusion of a fraudster's knowledge, so too it must guide the question of whether the knowledge of others counts, where, notwithstanding their knowledge, the company has no real access to justice because it has no real opportunity to bring the claim.

1823. In my view, the ultimate answer to the question of when awareness of a claim is capable of being attributed to a company notwithstanding wrongdoer control is nuanced. I agree that, even where the evidence supports a finding that the defendant wrongdoer was in control and will not permit the action to proceed, there are circumstances in which knowledge will still be attributed to the company for limitation purposes. Thus it may be the case that, even if a senior employee has no power to procure suit, there may be other ways in which he can influence the taking of steps to enable the company to vindicate the violation of its rights, which it might be appropriate to take into account as part of the relevant context. However, as Mr Beketov said in his evidence, that will not necessarily be the case and it is much less likely to be the case if the nature of the proceedings is such that there is no prospect of those with both the *de jure* and *de facto* power to bring them will not do so because they are the putative defendants.

The relevance of Article 267(5) to awareness under Article 261

1824. For the reasons I have endeavoured to explain, I agree that in general terms the Bank's argument has real substance, and is consistent with the apparent policy behind a

knowledge-based limitation system in the first place. But the Defendants submitted that the way that Ukrainian law recognises the guiding principle is through the general disapplication of the limitation rule in accordance with Article 267(5), rather than at the anterior stage of determining whether awareness or knowledge should be attributed to the claimant company in the first place. I agree that this is a perfectly coherent concept, and so long as the disapplication provisions are construed in an appropriate manner, is capable of providing a just answer where litigation is not in fact available to a putative corporate claimant because of wrongdoer control. It also avoids that difficulty that the consequence of the Bank's submission is that where wrongdoer control prevents a corporation from suing for a lengthy period, it will always be the case that the limitation period will not start to run in any such cases until a change of control occurs. Mr Hunter did not shrink from accepting that as the consequence, but I think it would be a surprising result and is difficult to reconcile with the principle that an important factor in any limitation context is legal certainty.

1825. The Defendants also drew attention to the fact that their submission was consistent with the approach adopted in *Sirius-Bud* and *SFG Hermes*, a point to which I have already alluded above. Mr Hunter accepted that this was the case and also accepted that there was no decision of the Supreme Court which applied the real opportunity or the real access test at the attribution stage, but he submitted (correctly) that the point was not argued in that way in *Sirius-Bud* or in *SFG Hermes*. He said that, if the matter were to come before the Grand Chamber, it would confirm that the limitation period cannot commence until an individual with the legal and practical ability to commence the claim knew of the relevant facts, not someone who was a party to the fraud or who would be prevented from proceeding with the claim by the fraudsters.

1826. While Mr Hunter may be correct to say that the point was not argued in that way, it is striking that, if it were to be correct that there was in fact an anterior reason for rejecting the defendant's limitation defence, i.e., that his state of mind was not attributable to the claimant in the first place, nobody sought to do so. Both cases are also a clear reflection of the way in which Ukrainian courts approach these types of problem. The question of awareness is dealt with by asking whether the relevant individual is sufficiently senior and either has the authority to act or an obligation to convey the relevant knowledge to those with the authority to act, irrespective of whether or not the power will then be exercised.

1827. In reaching my conclusion on this point, I agree with the Bank that the Supreme Court in *SFG Hermes* does not accept the way in which the interrelationship between Article 261(1) and Article 267(5) was put in Mr Kolomoisky's closing submissions. It was said that there is no need to distort the plain meaning of Article 261(1), because the Civil Code provides a "safety valve" in Article 267(5) for claimants who miss the limitation period for valid reasons, and then went on to submit:

> "Where a claimant claims to have been unable practically to bring its claim in time, whether because it was under the control of a wrongdoer or for other reasons, such arguments can be taken into account in the exercise of the court's discretion under Article 267(5)".

1828. The evidence of Ukrainian law does not support a conclusion that the plain meaning of Article 261(1) would be distorted as suggested. Because the awareness is that of a corporate entity, that is to beg the very question as to whose awareness is to be attributed

to the Bank in the first place. But much depends on whether Article 267(5) will always give the necessary protection to fulfil the policy reflected in a number of Supreme Court decisions, all of which concentrate on the *start* of the limitation period coinciding with the moment which is variously described as the moment when a person has the possibility to enforce his right through the court (*Agrocomplex*), the right to sue and the opportunity to enforce that right through the court (*Ukrainian Railways*) and when he is reliably aware of the violation (*Drobiazko Anatolii*).

1829. In particular I do not accept that the evidence shows that this policy is necessarily satisfied when, as a matter of principle rather than practicality, a claimant has an opportunity to file a claim or that any other approach would lead to great uncertainty. That is not the way that the Ukrainian decisions describe the underlying policy. A system based on actual or constructive awareness inevitably carries with it a level of uncertainty both as to the start of the limitation period itself and as to the question of whether or not it should be disapplied.

1830. Quite apart from the way in which the principle is expressed in the authorities and explained by Mr Beketov, it is self-evident that Article 267(5) does not deal only with the situation in which a corporate entity seeks to sue its former controllers. As I shall explain shortly, it is a general provision which is engaged in many different contexts. It is therefore doing a different job from the legal principles applicable to the rules attributing knowledge to a corporate entity. It applies in any situation in which the claimants would otherwise miss the limitation period for valid reasons, and in that sense is capable of being quite broad in its impact. But, if the Defendants are correct in their approach to attribution of knowledge or awareness, Article 267(5) also gives a narrower protection to a corporate entity in the position of the Bank, and potentially only a very short time to sue its fraudulent former controllers from the time at which it acquired the real opportunity to do so.

1831. This is most clearly illustrated by those parts of the expert evidence which support Mr Kolomoisky's closing submission that the fact that a claimant does not have the full limitation period to investigate its claim or bring proceedings does not in itself imply that it had valid reasons for failing to file a claim in time. In other words, Article 267(5) only protects a claimant defrauded by its former controllers if it moves quickly to file its claim when that control comes to an end. There is a much greater level of protection for the defrauded claimant if the limitation period has not started to run in the first place, because no knowledge or awareness can be attributed to it until the transfer of control can take effect.

1832. It follows that if the Defendants are right, Article 267(5) can properly be described as a less satisfactory substitute for the protection granted to a defrauded entity by Mr Beketov's approach to attribution of knowledge for limitation purposes. That is obviously capable of being a policy choice made by Ukrainian law, but in light of the common ground that the knowledge of the fraudsters cannot be attributed to a defrauded company, it is difficult to think of any sensible reason why the new controllers should be placed under a significantly more restrictive limitation regime. This is particularly the case as the evidence indicates that the underlying policy focuses on the importance of awareness as the trigger for time starting to run, a trigger which itself is driven by the claimant being in a position to take steps to vindicate its rights. Given the context, and given the fact sensitive approach to attribution of knowledge which I am satisfied represents the law of Ukraine, I have concluded that the right approach to attribution of

knowledge for limitation purposes, substantiated as it is by a proper understanding of the evidence given Mr Beketov, is that the law of Ukraine will not normally attribute to a corporate entity, the actual or constructive awareness of a violation of its rights for limitation purposes, if that corporate entity does not have the ability to commence or influence the commencement of proceedings against the wrongdoers responsible for the violation. This is more especially the case where the reason for the inability is both that the wrongdoers have the only *de jure* power to commence legal process and are in *de facto* control of the Bank such that there is no prospect of the Bank being able to vindicate its rights through suing them.

Article 267(5): disapplying the limitation period

1833. The parties' experts agreed that the burden is on the claimant to establish valid reasons to disapply a limitation period in accordance with the provisions of Article 267(5). They also agreed that the grounds on which the limitation period might be disapplied are heavily fact dependent and that, in assessing those grounds, the key consideration is whether there are "objective reasons beyond the claimant's control that prevented or significantly hindered the claimant from bringing the action in due time". They also agreed that, in appropriate circumstances, a claimant's lack of knowledge (either actual or constructive) as to the identity of the person who violated its rights may constitute a valid reason for disapplying the limitation period in accordance with Article 267(5).

1834. However it is important to stress that the experts were careful not to say in their joint statement that the key consideration I have just described was a proxy for the statutory test. It remains the key consideration but it is by no means determinative. There were occasions on which the Defendants' submissions appeared to be based on the proposition that it was. I do not agree that any such construction of what the experts said would reflect Ukrainian law and other parts of their joint statement (particularly relating to the discretionary nature of the court's power to disapply and the fact sensitivity of what occurred) make plain that it is not. The same can be said about decisions of the Supreme Court such as *Sirius-Bud* and *SFG Hermes* both of which are inconsistent with an inflexible application of the language of Article 267(5) itself with its reference to "valid reasons".

1835. So far as this agreement between the experts was concerned, it amounted to a moderation of Mr Alyoshin's initial view that "compelling" rather than "valid" reason was required before the court could exercise its discretion under Article 267(5) or that the objective reasons required made the filing of a claim either "impossible or substantially burdensome". The difference in language reflected discrepancies in the translation of both Article 267(5) and a decision of the High Commercial Court of Ukraine dated 29 May 2013 which the experts seemed to have resolved in the course of preparing their joint statement. Mr Beketov explained that the High Commercial Court has now been abolished but its guidance is still relied on today unless in conflict with the practice of the Supreme Court. In that decision, the High Commercial Court also made clear that the objective reasons referred to by the parties' experts must be decided by the court in each specific case taking into account the available factual data on such circumstances.

1836. There was disagreement between the experts as to whether, as Mr Beketov considered to be the case, the need for objective reasons beyond the claimant's control means that the court will assess the sufficiency of the claimant's asserted reasons for failing to bring a claim within the limitation period on an objective basis, applying a standard of reasonableness. Mr Alyoshin said he knew of no cases in which the court had applied a standard of reasonableness when assessing the validity of an objective reason advanced by the claimant for not applying the limitation period. He said that objectivity was not about reasonableness but was about being independent from the claimant's own actions and being beyond its control.

1837. Mr Beketov also said in his initial report that these objective reasons were capable of including the Individual Defendants' control of the Bank prior to nationalisation and the systematic concealment of the Misappropriation during that period. He said that, if it were established that those matters prevented or significantly hindered the Bank from bringing its claim within three years of the Misappropriation, Article 267(5) could appropriately be applied. Mr Alyoshin did not wholly disagree with this evidence, but he said that "control" and "systematic concealment" were both concepts that were too vague to allow him to agree or disagree with Mr Beketov's view.

1838. This evidence was adopted by the Bank in its opening submissions, in which it relied on three objective reasons beyond its control which prevented or significantly hindered it from pursuing its claim. The first was that, prior to its nationalisation, it was under the ownership and control of the Individual Defendants. The second was that, throughout this period, other senior managers within the Bank were loyal to the Individual Defendants and involved in implementing the misappropriation. The third was that the notion that the Bank would ever have been permitted to investigate or pursue claims against any of the Defendants may be swiftly dismissed.

1839. Mr Alyoshin disagreed, asserting that he did not consider that the Individual Defendants' control of the Bank in the period prior to its nationalisation would be recognised as a sufficiently "compelling" reason (the language he then considered applied) to engage Article 267(5). In his opinion other officials and organs of the Bank still had the ability to bring claims in time, and, because they had fiduciary duties to act in the Bank's best interests independently of the Individual Defendants' control, they were obliged to submit the claim once the grounds were established and they were practically able to do so. However, he did accept that, if the influence exerted by the Individual Defendants in practice prevented the Bank's officials responsible for preparing or filing lawsuits from doing so, then, in theory, that could provide a ground for disapplying the limitation.

1840. It was clear from the evidence of both Mr Alyoshin and Mr Beketov, and from an analysis of the decisions of the Supreme Court which were addressed in their evidence, that the question of whether the reasons for missing the limitation period were valid is in the ultimate analysis highly fact specific. I also consider it clear that Ukrainian law requires the court to avoid extreme formalism (per *SFG Hermes*) and to that extent hard-edged rules will be disapplied where the circumstances of an individual case justify that approach. But I also accept Mr Howard's submission in closing that, in the passage from the judgment in *Esim v. Tukey* (App No 59601/09 at [21]) relied on by the Supreme Court in *SFG Hermes*, the ECtHR went on to state that the court must also avoid excessive flexibility such as would render nugatory the procedural requirements

laid down in statutes. The court is also required to apply the general principles of justness, good faith and reasonableness discussed at some length in *Sirius-Bud*.

1841. Those cases included:

i) the Supreme Court's resolution dated 18 January 2021 in case No. 29/5005/6325/2011, *Tamira LLC*, where the following was said:

> "The panel of judges also agrees with the statement of the commercial court of appeal that the law does not specify the list of reasons that may be found to be valid for the protection of a violated right if a claim is filed after the limitation period has expired. Therefore, the powers to resolve this issue are vested directly in a jurisdictional authority - the court that hears the case on the merits with due regard to all the circumstances of the case and based on the assessment of evidence presented."

ii) the Supreme Court's resolution dated 15 May 2020 in case No. 922/1467/19, *Company Talant PE v. Person 1*, where the following passages give a good flavour of the right approach:

> "The conclusion on the validity of reasons for filing a lawsuit after expiry of the limitation period can be reached only after examining all facts and examining evidence in each specific case. At the same time, valid reasons for filing a lawsuit after expiry of the limitation period are deemed such circumstances that make timely filing of a claim impossible or difficult."
>
> "In its decision dated 03 April 2008 in case of "Ponomarev v. Ukraine", the European Court of Human Rights concluded that legal system of many member states provides for the possibility of extending periods of limitation if there are reasonable grounds for doing so."
>
> and
>
> "In the decision of the European Court of Human Rights in case 'Ilian v. Turkey' it is stated that the rule on restricting access to court due to expiration of a time limit for appeal must be applied with some flexibility and without extreme formalism, it must not be applied automatically and shall not be absolute; when monitoring its application one should pay attention to circumstances of each individual case."

1842. However, although the test of "valid reasons" is highly fact specific, I accept the Defendants' submission that the fact that a claimant did not have the full limitation period to investigate its claim or bring proceedings will not in itself imply that it had valid reasons for failing to file its claim in time. This was illustrated by Mr Beketov's answer in cross-examination, when he was asked about the situation in which a claimant was disabled from bringing proceedings for two years of the limitation period and at the beginning of the third year he knew the full facts and could have brought the proceedings if he had wanted to, but had "just either carelessly or deliberately chosen to delay". It was put to him that this would be a matter of the claimant's decision not to bring the proceedings in time, and would mean that there would not be an objective reason justifying a disapplication of the limitation period, because the claimant could

have brought the proceedings in time if it had chosen to do so. His answer was "Potentially, yes."

1843. In my view, the evidence supports a conclusion that, if there was a material period of time during which it could no longer be said that the "timely filing of a claim [was] impossible or difficult" (per the Supreme Court in *Talant*) and that the claimant then made a careless or deliberate choice not to proceed, and it can properly be said that it was not hindered by any difficulties in making a timely filing caused by objective reasons beyond its control, it is potentially the case that the key consideration for application of Article 267(5) will not have been satisfied.

1844. However, the critical point is that this does not address the fact-specific question of what is capable of amounting to prevention or hindrance. In a case such as the present, the cases do not focus simply on the question of whether it has become possible by reason of the change of control for the proceedings to be brought because the new management have succeeded in acquiring enough information about the potential claim to enable proceedings to be issued. That would be much too rigid an application of the "key consideration" and would not have proper regard to the distinction between a situation in which objective reasons beyond the claimant's control actually prevented the claimant from bringing the action in due time (i.e., made it impossible) and those which significantly hindered the claimant from doing so.

1845. Thus, while the Bank may have been *prevented* from suing the Individual Defendants until the change of control, that does not mean to say that removal of the preventative bar when the Bank was nationalised means that the Bank might not be *significantly hindered* for a period of time thereafter in light of all the circumstances of the case, including circumstances relating to or arising out of what occurred throughout the pre-nationalisation period in which the Bank is found to have had the relevant awareness. What is required is a careful scrutiny of all the circumstances of the case, both before and after the change of control, to work out whether the reasons for the claim not being brought within the limitation period are, having regard to the key consideration, valid ones.

1846. This focus on the particular circumstances draws into the analysis the general principles of justness, good faith and reasonableness; and the prohibition against abuse of rights. This can most clearly be seen from *Sirius-Bud*. In this case, the claimant's sole property was sold at an undervalue, its sale price having been determined by a forged valuation report. It was then declared bankrupt, and its liquidator sought to have the auction and subsequent sale declared invalid. There seem to have been procedural issues in relation to the conduct of the bankruptcy, but the liquidator eventually commenced the proceedings almost four years after the relevant transaction and more than 18 months after what was called external independent management was introduced. The Supreme Court found that the impugned auction was invalid and rejected a limitation defence. It said the following in the context of its discussion of Article 267(5):

> "95.2. Evaluating the seriousness of the reasons for missing the limitation periods when Sirius-Bud PJSC filed this lawsuit, the panel of judges takes into account the obvious fraudulent nature of the contested tenders (including the behaviour of the debtor's management bodies prior to the initiation of bankruptcy proceedings), the identification of signs of such fraud for a long time, including the period of the pre-trial investigation in criminal proceedings No. 42020100000000263 dated

> 07/03/2020, within which a significant part of the evidence of fraudulent transactions in dispute was discovered during 2020 and 2021 (experts' conclusions of 12/21/2020 and 01/27/2021), lack of external independent management of PJSC "Sirius-Bud" until August 14, 2019, which was actually established only from the date of declaring the debtor bankrupt and opening the liquidation procedure."
>
> 95.3. All these circumstances, fully and correctly established by the courts of previous instances, give grounds to believe that the reasons for PJSC "Sirius-Bud" skipping the limitation periods both with regard to the claim to invalidate the results of the disputed auctions and with regard to the vindication claim can be considered valid."

1847. I agree with the Bank's submission, supported as it is by Mr Beketov's evidence, that one of the important principles illustrated by *Sirius-Bud* is that it is not appropriate simply to ignore the period of time in which the relevant corporate entity was subject to the control of management which was not independent of the wrongdoers and focus only on the period where the new management comes in. To do so would be over-formulaic and would not give sufficient weight to the guiding principles laid down by the ECHR. It would also be wholly inconsistent with the pre-bankruptcy conduct of the debtor's management referred to in this context by the Supreme Court in *Sirius-Bud* at [95.2]. It also means that one of the questions the court can and must answer is whether, looking at the period as a whole, and not just the period after the change of control, it can be said that the Bank has been significantly hindered in bringing the action in due time.

1848. It was also clear from Mr Beketov's evidence that one of the questions that the court will look at where a claimant has been actually prevented from bringing the action in due time by objective reasons beyond its control, is whether they acted with reasonable diligence to do so once the preventative bar has been removed. They may still be significantly hindered during the period post-change of control by reason of events which occurred previously. In my view the evidence supports a conclusion that, acting with reasonable diligence to commence proceedings after the change of control does not mean that the claimant has to commence process as soon as it has the information to do so.

1849. All the circumstances of the case are capable of being a significant hindrance to bringing the action in due time, so long as they operate as objective reasons beyond the Bank's control. Contrary to the Defendants' case, which seeks to draw a bright line at the stage at which the change of control occurred, the test may be satisfied even if the post-change of control conduct, which is said by the Defendants to amount to unreasonable delay, arises as a result of a reasonably diligent response to earlier events which were themselves beyond the Bank's control. It follows from this that there is no room for the suggestion that it is necessarily inappropriate for new management to delay proceedings for a period after they become fully aware of facts sufficient to commence legal proceedings, if what they find when they take over justifies them in taking that course. It would be wrong to conclude that there is a requirement to proceed with expedition after they reach that state of awareness – even applying the key consideration and ignoring all other reasons the need to bring the action in due time does not trump all other considerations so long as they flow from objective reasons beyond the Bank's control.

Article 16(3) of the Civil Code

1850. This conclusion also chimes with the principles which flow from Article 16(3), advanced by the Bank as an alternative legal basis on which the court can and should refuse to give effect to the Limitation Defence. Article 16(3) permits the court to "refuse to protect a person's civil right or interest if that person is in breach of the provisions of paragraphs 2 to 5 of Article 13 of the Civil Code [i.e. basic Ukrainian law civil rights]". The Bank initially submitted that the Defendants' reliance on the Limitation Defence to avoid the consequences of their tortious conduct and the obligation that would otherwise arise to pay compensation to the Bank is an abusive purpose within Article 13(3), although in the event Mr Beketov's evidence did not support an argument that this provided a free-standing basis for disapplying the limitation period.

1851. I have already set out Article 13 earlier in this judgment for a different reason (see paragraph 865 above), but it is convenient to recite it again. It is entitled "Limits to the exercise of civil rights" and paragraphs 2 to 5 are as follows:

> "(2) When exercising their rights, a person is obliged to refrain from actions that could violate the rights of others, cause harm to the environment or cultural heritage.
>
> (3) Actions of a person committed with the intent to harm another person, as well as the abuse of rights in other forms are not allowed.
>
> (4) When exercising civil rights, a person must observe the moral foundations of society.
>
> (5) The use of civil rights for the purpose of unlawful restriction of competition, abuse of a monopoly position in the market, and unfair competition is not allowed."

1852. It was Mr Beketov's initial evidence that the court has a discretion under Article 16(3) to refuse to recognise or uphold a legal right, including a limitation defence, where it concludes that the right is being exercised in an abusive manner or for an abusive purpose. This principle is capable of being applied in relation to the claims in tort and the claim in unjust enrichment. He referred to it as abuse of rights.

1853. Mr Alyoshin and Mr Nahnybida disagreed with Mr Beketov on the basis that Article 16(3) was not applicable in the context of limitation periods. They said that any such application would be unnecessary in view of a claimant's ability to invoke Article 267(5) in an appropriate case. In his initial report, Mr Alyoshin said that, if the reasons for missing the limitation period are not compelling (for which now read "valid"), he did not see how it could be an abuse of the defendants' rights to rely on the expiry of the period. If such a construction is to be given to the abuse of rights doctrine, it would be logical to conclude that the concepts of prevention and hindrance used in the agreed translation of Article 267(5) should be given a construction which reflects the policy underpinning that doctrine.

1854. Initially Mr Beketov cited no Ukrainian authority which gave direct support to his argument, but he identified a decision of the Supreme Commercial Court of the Russian Federation, (case No. 17912/09, *Priokskoye LLC v. Aquamarine LLC*) which held that a limitation defence may be dismissed as an abuse of rights in appropriate circumstances. However, in his supplemental report, Mr Beketov found more substantial support for his opinion in *Sirius-Bud*, which he explained as follows:

> "That the abuse of rights rule can be applied to defeat a limitation defence has now been confirmed by the Supreme Court's resolution *Sirius-Bud*. In that case, the claimant's property (real estate) was mortgaged, foreclosed against and then alienated by one defendant through a fraudulent process involving a purported sale of the property at auction at a very significant undervalue followed by a rapid succession of transfers by which the property came to be owned by another defendant. The defendants raised a limitation defence against the claimant's claim to recover the property, but the defence was rejected on the basis that, in view of the defendants' actions in fraudulently causing the claimant's property to be transferred away, it was an abuse of right for the defendants to apply to strike out the claim on grounds of limitation."

1855. The passage from *Sirius-Bud* on which Mr Beketov relied in support of this opinion is in the same part of the Supreme Court's resolution as the passages which relate to the application of Article 267(5). They were as follows:

> "94.4. The statute of limitations is an institution of substantive and not procedural law and cannot be restored (renewed) in case of its expiration, but the plaintiff is entitled to receive judicial protection if the reasons for missing the statute of limitations are recognized as valid (part 5 of Article 267 of the Civil Code of Ukraine).
>
> 94.5. For these reasons, the application of the statute of limitations is subject to the general principles of substantive civil law, which constitutes fundamental rules as well as the rules of direct action (Supreme Court decision of 25 January 2021 case No. 758/10761/13-ts), including general provisions on fairness, good faith and reasonableness as a general standard of conduct for participants in civil relations.
>
> 94.6. In this regard, this significantly weakens the position of the defendants who are involved in fraud transactions and are protected from the claim for invalidation of such transaction and derivative claims by reference to the omission of the statute of limitations by the plaintiff, because according to the content of Part 3 of Article 16 of the Civil Code of Ukraine, in case of abuse of rights, the court may deny the person protection. The provision applies not only to the plaintiff, who requests the use of certain means of protection, but also to the defendant, who defends himself against the claim by filing certain objections (including claiming the plaintiff's omission of the statute of limitations)".

1856. The result of Mr Howard's cross-examination of Mr Beketov on this part of *Sirius-Bud* was that he accepted that the decision to disapply the limitation period in that case was made under Article 267(5), and abuse of rights was referred to only in that context. The effect of his evidence was that he agreed that there is no suggestion that abuse of rights might be an independent basis for rejecting a limitation defence in a case in which if Article 267(5) not engaged.

1857. However, Mr Hunter submitted in his oral closing submissions that these passages demonstrated that the court in Ukraine will take into account the fact that the relevant proceedings are a fraud claim and that the defendants who were defending themselves against the proceedings were also responsible for the claim not being brought for the first two years of the limitation period. He submitted that it is apparent from [74.6] of the resolution that the Supreme Court was fortified in its conclusions on this point by the application of Article 16(3).

1858. I think that there is substance in that submission. It is unnecessary to determine whether or not an abuse of rights gives rise to a free standing ground for disapplication of the limitation period. However, in my view, it is clear from *Sirius-Bud* that a court in Ukraine would have regard to the abuse of rights doctrine spelt out in Article 16(3) when determining whether in all the circumstances of the case, the court ought to exercise its discretion to disapply the limitation period. That will include giving weight to the period of time during which a corporate entity was in fact disabled from proceeding against its former owners, prior to a change of control.

Limitation: findings on knowledge and awareness

1859. The next question, which was also explored in the cross-examination of four of the Bank's witnesses, was the state of the Bank's awareness of the violation of its rights as at 21 December 2014 (i.e. 3 years before the commencement of these proceedings) as properly to be attributed to it through the medium of a number of individuals. The Defendants contended that there were a significant number of such individuals through whom knowledge could and should be attributed to the Bank for that purpose, and that time therefore started to run for limitation purposes before that date.

1860. The Bank's position was very different. In its opening submissions, it argued that it was only when the Management Board and the Supervisory Board were both replaced on nationalisation that the new management took control from the Individual Defendants and was able to come to the Bank with what Mr Oleksiyenko called "fresh eyes". Ms Pakhachuk and Mr Oleksiyenko both gave evidence that, even then, their initial focus was on investigating and seeking to ensure the Bank's liquidity. It was only in the summer of 2017 that their knowledge of what Ms Pakhachuk called "the Bank's historic non-standard practices" developed to a point where they could understand that the Bank's operations did not comply with best practice and they could "see the idea of potential claims against" the Individual Defendants. It was then said that they only acquired actual knowledge of the violation of the Bank's rights sometime between August and December 2017.

1861. I address this aspect of the dispute in circumstances in which I am satisfied that the nature of the control over the Bank and its affairs that was exercised by the Individual Defendants up to the time of nationalisation, both *de facto* and pursuant to their roles as controlling members of the Supervisory Board and the General Meeting, mean that theirs were the primary states of mind capable of being attributed to the Bank so as to establish awareness of a violation of its rights for limitation purposes. They were the only persons who, acting together, had the necessary power and authority to procure the Bank to bring proceedings against themselves and/or their associated corporate vehicles including the Corporate Defendants. This meant that no proceedings would or

could have been commenced against them by the Bank without their approval and consent and it is clear that they would not have allowed that to happen.

1862. It is also clear that the role of the Individual Defendants in what occurred makes it inevitable that they were aware of a violation of the Bank's rights more than three years before these proceedings were commenced. The same can be said about the state of mind of anyone who participated in the Misappropriation in a dishonest manner, by acting in the relevant context contrary to its interests. However, because it is not in dispute that the Bank could not have become aware of a violation of its rights through any of these individuals even if their status was such that awareness might otherwise be attributable to the Bank through them, the source of what they might have known is irrelevant to the enquiry.

1863. That is not the end of the matter, however, because Mr Beketov accepted that there might be circumstances in which knowledge could be attributable to the Bank through others not authorised to issue the current proceedings (or other proceedings seeking the same relief against the same defendants). It is therefore necessary to consider whether, in the context of these proceedings, the Individual Defendants' *de facto* and *de jure* control provide the Bank with a complete answer to the Defendants' limitation defence, even though Mr Beketov accepted that knowledge might be attributable through others. It was argued that if relevant knowledge was acquired by an officer or employee of the Bank in the course of performing their duties or where the violation of the Bank's rights was relevant to the performance of their duties, that amounted to knowledge by the Bank for the purposes of Article 261, and the Bank's remedy was to seek a disapplication of the limitation period pursuant to Article 267(5).

1864. The Bank had two substantive answers to this point. The first was that, as a matter of fact, the Individual Defendants could have prevented any claim being brought against them whilst they owned the Bank. It was said that, if a member of the Management Board or other senior employee had started to investigate any claims based on the information they had, they would have been at least sacked, rebuffed or fobbed off. The consequence would have been that they would not have acquired knowledge of the facts sufficient to plead the claim before 21 December 2014. The second was that, even if an employee had been given free rein to investigate following publication of the Glavcom Article in November 2014, it would have taken him until well after 21 December 2014 to obtain sufficient knowledge to start time running.

1865. I shall come back to those two answers, but I think it is first necessary to make findings on what was known by other senior employees of the Bank, who may not have participated in the Misappropriation and in respect of whom there is no evidence of dishonest conduct. In light of those findings, I will then consider whether any awareness they had of a violation of the Bank's rights prior to 21 December 2014 was capable of causing the limitation period to start running. This will involve an examination of the Bank's case that, even having the awareness they had, they did not know enough to justify the commencement of legal proceedings and even if it had been, there was nothing they could have done to protect the Bank's rights to commence legal proceedings had they sought to do so.

1866. There was no dispute that the Relevant Loans, the Relevant Drawdowns, the RSAs and the Unreturned Prepayments were all executed or made before September 2014, which was more than three years before the date on which the Bank issued these proceedings.

Although this date was seized on in Mr Bogolyubov's Defence as the relevant date (because he pleaded that the limitation period therefore expired on 31 August 2017 at the latest), the point was not pursued in closing submissions, in which Mr Bogolyubov adopted Mr Kolomoisky's case on limitation. It was not therefore said that there was anyone sufficiently senior and not implicated in the Misappropriation, who knew all of the facts necessary to establish all the elements of the causes of action at this stage. In short the case argued by Mr Kolomoisky proceeded on the basis that it was necessary for at least one of the sources of knowledge he identified to have come to the attention of a senior person not implicated in the Misappropriation.

1867. Mr Kolomoisky's pleading of the sources of the Bank's knowledge of the facts and matters on which its claim was based made the following allegations:

i) The Bank knew of the making of the Relevant Loans as they were authorised by the ECC.

ii) All advances under the Relevant Loans on which the Bank relied were made before September 2014 and were known to the Bank because they were recorded in the Bank's accounts with the Borrowers.

iii) Between September and November 2014, most of the Borrowers had sued the Corporate Defendants in the 2014 Ukrainian Proceedings.

iv) On 7 November 2014 the Glavcom Article was published in which Mr Kolomoisky was accused of misappropriating over US$1 billion of the Bank's funds and some of the Borrowers and Corporate Defendants were named.

v) On 13 November 2014, the GPO instigated a criminal investigation into allegations of misappropriation of the Bank's funds through some of the Borrowers and the Corporate Defendants which were similar to those made by the Bank in these proceedings.

1868. In their closing submissions, and to this extent consistently with Mr Kolomoisky's pleaded case, his counsel identified a number of different sources from which individuals of sufficient seniority within the Bank, but who were not implicated in the Misappropriation, did or should have become aware (before 21 December 2014) of the violation of the Bank's rights. The sources relied on by the Defendants were the 2014 Ukrainian Proceedings, the Glavcom Article, the article published by LigaBusinessInform as a result of their interview with Ms Gontareva, the Bank's own records and public records. It is clear that relevant information relating to the violation of the Bank's rights was derived by individuals not implicated in the Misappropriation from each of these sources, but, in the light of Mr Beketov's evidence, I think it is necessary to identify the extent to which any of these individuals have been shown by the Defendants to have had a sufficiently complete and reliable picture of what occurred.

1869. This task was made no easier because of the manner in which Mr Kolomoisky's case was advanced and the fact that it was not tied down on the pleadings. In particular it was not always easy to identify whether it was being said that the court should infer that a particular individual had actual knowledge of relevant facts or whether it was being said that they would have acquired knowledge of those facts if they had made the

enquiries they should have made, having regard to what it can be seen that they knew. These difficulties were exacerbated by the late emergence of the Defendants' case as to the individuals through whom the Bank's awareness was said to have arisen.

1870. At one stage there was also some uncertainty as to which of the individuals relied on were implicated in the Misappropriation. Ms Korotina was the principal example, because she was said by the Defendants to have been a candidate for having been the informant whistleblower I refer to below, while at the same time having been one of the members of the ECC who approved a large number of the Relevant Loans. But, for the most part, it is not suggested by the Bank that any of the individuals now relied upon by the Defendant as the conduit for knowledge to be attributed to the Bank were also implicated in the Misappropriation.

1871. The other Defendants put their case on the Bank's awareness for limitation purposes more shortly, relying on the first two allegations made by Mr Kolomoisky. Mr Bogolyubov simply said that the Bank authorised the Relevant Loans and accordingly knew and/or could have known about the alleged violation of any rights at the time the Relevant Loans were made. The Corporate Defendants took a similar approach, relying on the ECC's grant of authority for the Relevant Loans and the making of the Relevant Drawdowns (and the making of the relevant prepayments and their onwards transfers) into accounts at the Bank as particulars of the Bank's knowledge. All of this happened before October 2014.

1872. This way of putting the case was also addressed in Mr Alyoshin's initial report. He said that, if harm was inflicted on the Bank by drawdowns under the Relevant Loans, the limitation periods must all have expired by the end of August 2017, being three years after the last of the Relevant Drawdowns. The reason for this was that the Bank was a party to the Relevant Loans and was in possession of the respective records of the fund transfers. If, however, the harm consisted of non-repayment of the Relevant Loans, he said that the limitation period started to run on the date when the Bank was first aware (actually or constructively) that the Relevant Loans had not been repaid.

Limitation: the 2014 Ukrainian Proceedings as a source of the Bank's knowledge

1873. As to the 2014 Ukrainian Proceedings, it was said by the Defendants in Mr Kolomoisky's closing submissions that the Bank must have become aware of them, and therefore the allegations which were made in them, as soon as they were served on the Bank during the course of September and October 2014. In particular, the Defendants submitted that, in the ordinary course, a number of members of the Bank's legal department will have become aware of them. They included the head of the legal department, Andriy Stupak and his deputy Sergiy Nakorchevskiy. They also included Anastasia Sizova, a chief legal specialist in the Bank's legal support department and Yaroslava Strelchenko the lead legal specialist of the Bank's department of demand and claims, both of whom had been issued with powers of attorney specifically to represent the Bank in defending it against the claim for cancellation of the relevant RSA Pledges.

1874. The Defendants also submitted that three other members of the Bank's legal department had roles which made it likely that they would have been aware of the 2014 Ukrainian Proceedings: Anna Mazur, the deputy head of the Bank's Head Office department of

legal support for work with lawsuits against the Bank; Evegenia Bagrova a lawyer in Ms Mazur's department; and Taras Levadskiy, the deputy head of the Bank's advocacy and court support department. It was only in Mr Kolomoisky's closing submissions that it was said for the first time that the identified members of the Bank's legal department knew of the 2014 Ukrainian Proceedings, and even then it was not very clearly spelt out that this of itself meant that the individuals concerned were said to have been the conduit through which awareness by the Bank of the violations of its rights was obtained.

1875. It was also said by the Defendants that it would have been obvious from the Borrowers' Statements of Claim taken together, that something was wrong. Each of the Corporate Defendants had written to each of the Borrowers they were to supply explaining that it was not able to supply the goods they had ordered. This was too much of a coincidence not least because the RSAs were for a variety of different goods and it was implausible to think that supply chains for such goods would prove to be problematic at exactly the same time. The Statements of Claim identified the Relevant Loans and the Pledges securing them, and the RSAs by reference number. The amounts and dates of the Unreturned Prepayments were also identified. This information was said to have been sufficient to allow people within the Bank to retrieve the relevant documentation.

1876. I agree that those involved in the 2014 Ukrainian Proceedings would have known that the Bank knew of and authorised the Relevant Loans, would have known that the Relevant Drawdowns were made before September 2014 and would obviously have known that the Bank was a party to the 2014 Ukrainian Proceedings. However, although they might well have suspected that something was very wrong, it has not been established that any particular individual not involved in the Misappropriation actually knew (a) that the Individual Defendants were the true owners and controllers of the Borrowers, (b) that either of the Individual Defendants were party to any unlawful act or omission or (c) that the Bank had sustained loss caused by the Relevant Drawdowns. In my view there is also no basis for inferring that at this stage any of them might have had anything other than a suspicion that this was indeed the case.

Limitation: the Glavcom Article as a source of the Bank's knowledge

1877. As to the Glavcom Article, I have summarised its contents and the extent of its dissemination within the Bank in paragraphs 432 to 441 above. Glavcom identified 30 of the Borrowers by name and all six of the Corporate Defendants. It contended that many of the Bank's "would-be-borrowers" had many things in common with Mr Kolomoisky's Privat group and gave a number of examples of the interconnectivity between the Borrowers and the Bank. It explained how many of them had the same founders, the same place of registration and even lawyers in common. It was said in Mr Kolomoisky's closing submissions that this was not just a sensational and unfounded story, it joined all the dots together and the allegations made in the Glavcom Article were too topical, too serious and the details too specific to have been ignored. He went on to summarise the journalist's view as being that "in other words, the money had gone, the Bank would bear the cost and the beneficiaries were probably the owners of the Bank".

1878. In his cross-examination of the Bank's witnesses on this issue, Mr Howard characterised the Glavcom Article as one which made serious allegations that UAH 11 billion had been siphoned off to foreign companies by issuing loans which did not look as if they were likely to be repaid. He also said that the gravamen of the article was that Mr Kolomoisky need have no concern for what had occurred, because the money that was alleged to have been siphoned off from the Bank had gone to Mr Kolomoisky himself or to his companies.

1879. I agree with what much of what Mr Howard submitted as to the actual knowledge of alleged facts which would have been acquired by any reader of the Glavcom Article. However, the Bank relied in its closing submissions on two aspects of the story which were not then apparent from the Glavcom Article, and I think that they were correct to do so. The first was that the information obtained by Glavcom was limited to 29 or 30 of the 50 Borrowers, there is no mention of the Share Pledges and there is no mention of the role of Mr Bogolyubov. The second was that the way in which it described the interconnectivity between the Borrowers, the Corporate Defendants and the Individual Defendants was still relatively incomplete. This was an important point because the NBU was unable to make that link in May 2015 despite the further investigations which were carried out in the light of the NashiGroshi Articles (see paragraph 468 above).

1880. Notwithstanding this, Mr Howard submitted that, leaving aside the fact that Glavcom was only reporting on part of the sum, namely the US$1.1 billion-odd paid to the Corporate Defendants, and did not identify all of the Borrowers, the basic allegation in the Glavcom Article is effectively identical to the allegation made by the Bank when it issued the present proceedings. I do not agree that this is sufficient to make the Bank aware of the facts necessary to pursue its claim. It is important to bear in mind that, whether or not it is right to characterise Glavcom as the Ukrainian equivalent of the Sun (as Ms Rozhkova did in her evidence and as Mr Akkouh did in his submissions in reply), it was still no more than a journalist's description of what he had discovered from a number of different sources. Accepting that it is not necessary for the hypothetical innocent member of the Bank's management to have the evidence which would prove the Bank's case at trial (see the discussion of the *Tatneft* test in paragraph 1719 above), I agree that the contents of the Glavcom Article were not a proper basis on which to advance a claim without further verification. It seems to me fanciful to suggest that any such verification could take place in the 44-day period between the publication of the Glavcom Article and 21 December 2014.

1881. One of the ways in which the Defendants sought to address the timing point was to suggest that at least one individual at the Bank was aware of the allegations made in the Glavcom Article prior to the date of its publication. There is some evidence that this was the case.

1882. The first and more straightforward reason is that the Bank was pre-warned of publication because three days earlier, the editor contacted the Bank asking for comment, as it had identified from the court's register that the Bank had made loans to 30 Borrowers on the security of property right to goods to be delivered to Ukraine. A number of questions were asked as to why the Borrowers were seeking to terminate the Bank's rights under the RSA Pledges with particular reference to the relationship between loans by the Bank to the Borrowers and a number of refinancing loans which had been advanced to the Bank by the NBU during the course of the year. The e-mail correspondence between Glavcom and the Bank was copied to Mr Dubilet and to a

number of other senior members of the Bank's management, some of whom continued in a senior position after the Bank's nationalisation. They included Mr Linskiy, who, as head of the Bank's financial and risk department, was responsible for monitoring the Bank's financial ratios and capital.

1883. The second reason is that it was said that an unidentified informant within the Bank of sufficient seniority to persuade the GPO to open an investigation, learned of the facts and matters supporting the Misappropriation and reported them to both the GPO and Glavcom. It was submitted by the Defendants that this was what led to the publication of the Glavcom Article and that this would place the Bank's awareness of the violation at a time prior to the publication of the Glavcom Article. It was also then submitted that the court should infer that the Bank has made enquiries, knows who the whistleblower was and has chosen not to reveal that information. Furthermore, it was said that the court should draw adverse inferences as to the Bank's state of awareness from the fact that the Bank has not revealed the identity of the whistleblower and that the reason it has not done so was that it knows that the informant was someone sufficiently senior within the Bank for his or her knowledge to be attributed to the Bank for the purpose of commencing the limitation period.

1884. Although the existence of an unnamed whistleblower was suggested to some of the Bank's witnesses during the course of Mr Howard's cross-examinations, the point was not pleaded or mentioned in opening and, as Mr Akkouh said in his oral closing submissions on this area, the unnamed whistleblower did not appear as a source of attributed knowledge until service of Mr Kolomoisky's written closing arguments. If this new allegation were to have had any significant impact on my ultimate conclusions, I might have taken a different course, not least because there has been no disclosure by either party on the existence, identity or seniority of any such person. However, in the event, and without condoning the way in which the point is now sought to be run, I think the better course is to deal with it on its merits as they appear from the argument that Mr Kolomoisky has advanced, much of which was ultimately pure speculation.

1885. It was said that the evidence pointed to the involvement of a whistleblower because (a) Glavcom and the GPO were alerted simultaneously, (b) Mr Pikush responded to Glavcom's approach to publication of the Glavcom Article by starting an enquiry to identify the person responsible for the leak of information and (c) Mr Oleksiyenko gave evidence that, without a tip-off, it would be impossible for a third party to have spotted the pattern of judgments emerging on the public registry of judgments. It was also said, based on Mr Oleksiyenko's evidence, that a formal letter and request from one party to start the GPO's investigation would have been necessary and that the informant would clearly have had to be someone of sufficient seniority within the Bank for the GPO to have taken action.

1886. In Mr Kolomoisky's closing submissions, it was speculated that the whistleblower might have been Ms Korotina (the Bank's chief accountant) or Mr Vetluzhskikh (the head of the Bank's internal audit department). It was submitted by the Defendants that they would have been aware of the concerns the NBU had expressed about collateral in the form of Share Pledges, because they would have seen the NBU's inspection report dated 15 August 2014 (see paragraph 402 above). It would have been natural for members of the Bank's legal department receiving the claims in the 2014 Ukrainian Proceedings to have come directly to Ms Korotina or Mr Vetluzhskikh for guidance in relation to the loans that had been made to the Borrowers and the significance of the

pledges which the 2014 Ukrainian Proceedings sought to annul. It was also said that, as senior members of the Bank's management, they would have had access to the Bank's transaction data.

1887. Neither Ms Korotina nor Mr Vetluzhskikh are said by the Bank to have been directly implicated in the Misappropriation in the sense that there is no evidence that they participated in the approval of the Relevant Loans. However, it is material to note that the Bank says that Ms Korotina was one of the members of the Management Board with a small equity stake in the Bank's shares, who reported to and acted on the instructions of the Individual Defendants, even when contrary to the Bank's interests. This submission is supported by e-mail and WhatsApp correspondence with (amongst others) Mr Dubilet and Ms Koryak in relation to a number of different issues. In my view, the nature of that evidence (which dates from 2015 and 2016), and Ms Korotina's apparently unconditional willingness to act in accordance with the Individual Defendants' interests, is inconsistent with the Defendants' case that she may have been an informant to Glavcom.

1888. It was also said that the possibility that the whistleblowing informant was not an employee or officer of the Bank can be discounted, apparently on the basis that, if it had been an auditor or an employee of the NBU, the Bank would certainly have said so in the course of the trial if not before. This was a very surprising submission in light of the fact that the allegations made by the Defendants on this point only fully emerged on service of the Defendants' written closings. It is also not made out on the evidence, because during the course of that part of Mr Oleksiyenko's cross-examination on which the Defendants relied for this purpose, he made clear that the informant was likely to be "Some insider definitely", but what he meant by that was then explained: "It can be person inside the Bank or outside of the Bank. It can be a person who in the know of the UBO private affairs", i.e. it might not even have been a Bank official, let alone one of sufficient seniority to be capable of having awareness for limitation purposes in the present context.

1889. In these circumstances, I do not consider that the evidence justifies a finding that there was an unnamed senior ranking informant from within the Bank who had any more information than that which was reported in the Glavcom Article or that they were collecting together that information during a period of time prior to its publication. Furthermore, I think that the probabilities are that anyone who suggested to Glavcom that an investigation by them might provide a worthwhile story, is more likely to have known less about what was reported by Glavcom than Glavcom itself acquired and reported having regard to the number of sources to which the journalist appears to have had access. A reading of both the Glavcom Article and the chief editor's letter to the Bank's press officer supports an inference that the information on which it was primarily based was derived from the public record in relation to the 2014 Ukrainian Proceedings, together with a number of additional facts, which, as is plain from the wording of the article itself, were derived from the journalist's own investigations that may not have been any form of tip-off.

1890. While I accept that someone from inside the Bank may have suggested to Glavcom that the existence and essential elements of the 2014 Ukrainian Proceedings were worthy of investigation, the tip-off was no more than that and could have come from any level of seniority within the Bank. In short, it would be wrong to infer that there was an individual within the Bank not implicated in the Misappropriation, who had any more

information about what had occurred than that which was recorded in the Glavcom Article, nor that there is any evidence to suggest that any such person was of a sufficient level of seniority within the Bank to be capable of contributing to the Bank's own awareness of the violation of its rights.

1891. Furthermore, I do not accept the contention that the GPO would only have acted on the back of information derived from an individual at a particular level of seniority within the Bank or that the GPO would only investigate on the basis of a formal letter from the Bank itself. This submission was based on what was said to have been Mr Oleksiyenko's acceptance that, without a tip-off, it would be impossible for a third party to have spotted the pattern of judgments emerging on the public registry of judgments in the 2014 Ukrainian Proceedings. I think that the position is more nuanced that that. Mr Oleksiyenko's evidence was as follows:

> "I don't know the basis based on which the GPO opens this particular investigation but I don't think that GPO would open the investigation unless there is a formal letter and request from one party to start the investigation. GPO doesn't open investigations on a tip."

1892. He also agreed with Mr Howard's suggestion that someone who was in a position to express an authoritative position must have gone to the GPO to tell them, "You need to investigate this". In my view, the most that can be derived from this evidence was the view he expressed that someone must have tipped-off the journalist that what appeared from the public record of the 2014 Ukrainian Proceedings was something to look at. But his evidence as to the likely seniority of the individual concerned and that they would have been in a position to express an authoritative position struck me as being no more than speculation. It is also inconsistent with what in fact happened because there is no evidence that a formal letter was written by anyone, and it is most unlikely that an informant would have done so. This rather cuts across Mr Oleksiyenko's evidence that one would have been required before a GPO investigation could be initiated.

1893. In my judgment, this all makes for a very thin basis for concluding that the GPO only started its investigation because of information which was brought to its attention by a senior officer of the Bank, or which amounted to anything more extensive than that which was disclosed by the Glavcom Article. The GPO investigation commenced very shortly after the Glavcom Article was published, and much the more probable order of events is that the GPO commenced its investigation in the light of the Glavcom Article and the information which it contained. I think it is quite possible that the matter was drawn to the GPO's attention by someone from within the Bank, but the timing is consistent with a conclusion that the GPO considered that it needed to conduct a formal investigation given the public nature of the documentation referred to in the Glavcom article and the seriousness of the allegations that had been made affecting as it did a large proportion of the population of Ukraine, even though it may at that stage have appeared possible that the explanation for what seemed to have occurred was less nefarious than that which is now alleged in these proceedings.

1894. What happened with the GPO's investigation is also illustrative of another problem with the Defendants' contention that the Bank (through a senior official not implicated in the Misappropriation) was aware of the necessary facts before 21 December 2014. The evidence is that the investigation was treated by the GPO as relating to the

"misappropriation by [Bank] officials of another's property, namely state funds of the [NBU] allocated for refinancing". The focus was therefore on misappropriation of the NBU's property as a criminal act, rather than the actionable harm sustained by the Bank itself under Article 1166, a rather different form of legal complaint. Furthermore, the GPO's own investigation had made little progress by the end of the year in identifying what had occurred, in part due to obstruction from inside the Bank. This response included refusal from within the Bank to provide documentation sought. There is no reason to think that any other form of investigation into the facts of what had or might have occurred would have any more success in identifying the salient facts, itself wholly inconsistent with the suggested that there was a presumed or contemplated inevitability that someone would become reliably aware of sufficient facts to commence a claim before 21 December 2014.

1895. As to the LigaBusinessInform article, I have described what happened in paragraphs 437 and 438 above. The interview added little in itself to the Glavcom Article, but the Defendants relied on the fact that LigaBusinessInform was a more respectable financial publication than Glavcom. In effect, it was said that the fact that allegations were repeated by LigaBusinessInform gave them a greater level of respectability than might otherwise have been the case. It is also of some relevance that, for the reasons she explained (and cited in paragraph 438 above) Ms Gontareva said during the course of the interview that "To date, I have no complaints about Privat."

1896. The Defendants then submitted that there were a significant number of individuals who had read or knew about the contents of the Glavcom Article on or as a result of its publication. The evidence that some of them knew is derived from their communications with KPMG (see paragraphs 434 to 436 above). This group included Ms Korotina, Mr Vetluzhskikh and Ms Kucher. I agree that it is likely that each of them read the Glavcom Article at the time and I also agree that it is likely that they all appreciated that it raised serious questions as to the Bank's conduct, although the extent to which they knew all of the facts necessary to establish a cause of action is wholly unclear.

1897. The Defendants submitted that, in light of the widespread correspondence on the subject within the Bank, it is improbable that there was any member of the Management Board who did not read the Glavcom Article. They also submitted that, having omitted them from the most recent list of members of the Management Board alleged to have been complicit in the Misappropriation, the Bank implicitly identified the following members of the Management Board as people whose knowledge could be attributed to the Bank: Roman Nehynskiyi and Alexander Vityaz (both deputy chairs) and Igor Teryokhin (head of financial monitoring). Similar submissions were made in relation to the following members of the Credit Committee who were not also members of the ECC, none of whose integrity has been impugned and all of whom continued in the employment of the Bank after nationalisation: Oleksii Shaban, Andriy Tanankov, Alexander Nikolenko, Aleksandr Sokolovsky and Mr Shevchenko.

1898. I agree that it is unlikely that these individuals did not read or become aware of the contents of the Glavcom Article at or shortly after the time of its publication, although there is little positive evidence that they did. For reasons that I shall summarise shortly I do not accept that this means that any of them would have therefore acquired sufficient knowledge to enable the commencement of proceedings by the Bank against the

Individual Defendants (even if that had been something that any one or more of them would otherwise have been able to achieve).

Limitation: other records as a source of the Bank's knowledge

1899. As to the Bank's own records, the Defendants submitted that the RSAs, the Pledge agreements and the loan agreements for the Relevant Loans (more especially those referred to in the 2014 Ukrainian Proceedings) were all available to members of the Management Board from the Bank's own records. Ms Rozhkova agreed that anyone looking at the RSAs would see that they were incredible on their face. Indeed it was not really contested that the absurd quantities of goods that the Corporate Defendants had agreed to deliver, together with the other terms I have already described, made it obvious that something improper was going on.

1900. The Defendants also submitted that, although Glavcom had only identified 30 of the original 46 Ukrainian Borrowers, all 43 claimants in the 2014 Ukrainian Proceedings would have been known to the Bank's legal department through the claims they had filed by mid-November 2014. It was accepted that lawyers in that department would not have known of the arbitration claims because the Bank had not been joined as a party. However, it was said that both the 2014 Ukrainian Proceedings and the Glavcom Article revealed the Corporate Defendants as defaulting Suppliers and a search of the Bank's transaction data would have revealed all the other Borrowers who had made prepayments to one or more of the Corporate Defendants more than three months earlier.

1901. The Bank said that the Intermediary Loan repayments would have had to be investigated to understand the detail of what had occurred, but the Defendants submitted that, so far as repayment of the Relevant Loans was concerned, the Bank's records would have revealed that other BOK clients had taken out loans and used the proceeds to repay some but not all of the Relevant Loans and that some Relevant Loans were being used to repay others. It was also said by the Defendants that, in any event, the implication of the complaints being made by the Borrowers in the 2014 Ukrainian Proceedings was that they would be short of funds to repay the Bank and would therefore be unable to comply with the legislative requirements to return the prepayments on non-delivery.

1902. It was also said that, if the Share Pledges had been produced, there would have been no reason to believe they would be available for enforcement. This was because, as Mr Kolomoisky submitted, it was no secret that the companies whose shares had been pledged were companies owned and/or controlled by the Individual Defendants. It was submitted that, whatever the value of the companies may have been at any particular point in time, there was no guarantee that the Share Pledges would remain valuable if anyone tried to enforce them. This was because assets could be removed from them before any enforcement action was taken.

1903. As to the public records, it was apparent from the NashiGroshi Articles that some of the connections between the Corporate Defendants and the Bank and other Privat group companies could have been identified or confirmed from publicly available information. NashiGroshi's work (albeit carried out at the beginning of 2015 and so

less than three years before the commencement of the proceedings) also established that it was possible to identify links between the Borrowers and the Bank through a combination of searching Google and "exploring the Unified State Register and register of court decisions and correlating money withdrawals with loss of Ukraine's foreign currency reserves". Therefore it was said that these were all publicly available sources of information, which were as much available to the Bank in any investigation, carried out in response to the Glavcom Article and at the instigation of senior individuals not alleged to have been complicit in the Misappropriation, as they were available to NashiGroshi early the following year. It is said that it would have been evident to all of these individuals that all of the Relevant Loans were for the benefit of companies owned and/or controlled by Mr Kolomoisky and Mr Bogolyubov and were inadequately secured, which on the Bank's case would have completed its cause of action.

The Bank's answer to the extent of its awareness pre-21 December 2014

1904. As I have already explained (see paragraph 1864 above) and quite apart from its arguments in relation to the knowledge of the Individual Defendants and others who participated in the Misappropriation, the Bank had two answers to this way of approaching the allegations of awareness of the violation of its rights in the period prior to 21 December 2014. The first was that there was no real prospect of any employee of the Bank, at whatever level, being permitted by the Individual Defendants to investigate the circumstances surrounding the Misappropriation, so as to give them as individuals sufficient awareness of the facts to enable a claim under Article 1166 to be pleaded against any of the Defendants. It was said that, had they sought to do so, they would have been sacked, rebuffed or fobbed off. The second is that, even if there was a Bank employee who had been given free rein to investigate the position subsequent to the publication of the Glavcom Article, they would not have identified all the facts necessary to complete the Bank's cause of action before 21 December 2014.

1905. As to the first of these points, the Bank submitted that it is incredible to suggest that any Management Board member or other senior members of the Bank's management not implicated in the Misappropriation would have been able to investigate allegations of a huge fraud perpetrated by the Individual Defendants against the Bank in late 2014. An investigation into the source of the information leak to Glavcom or the GPO by someone who was trusted by the Defendants was one thing. That was probably why Mr Linskiy was appointed to conduct the investigation into how Glavcom had acquired the information it had. But an investigation by an independent senior member of the Management Board would have been quite another. The Bank submitted, and I agree, that the reaction which any such investigation would have provoked in Mr Kolomoisky reflects the internal culture within the Bank (see the section of this judgment dealing with the exercise by Mr Kolomoisky of influence and control over the Bank and its affairs) and is illustrated by the sort of threat against Ms Rozhkova I described at the beginning of this judgment (see paragraph 60 above).

1906. I was also shown evidence of other behaviour by Mr Kolomoisky, which illustrated the forcefulness with which he would act in order to get his own way. Two examples of this evidence dating from 2014 make the point. The first was video footage played in court of Mr Kolomoisky, who had a substantial private army, using armed men in combat fatigues and ski masks to seize the offices of the majority state-owned

Ukrtransnafta. The exercise was witnessed by journalists and recorded the use by Mr Kolomoisky of abusive, aggressive and threatening language, liberally laced with expletives. The second was a report in the Washington Post which contended that Mr Kolomoisky, who had what was described as his own army, was "flouting central authority by interdicting aid convoys headed to the Donbas and permitting brigades he finances to engage in activities that contravene the law". Their significance lies in the fact that they reflect behaviour by Mr Kolomoisky at the same time as it is now suggested that individuals might have been prepared to conduct an investigation into whether and if so how the Bank may have claims against Mr Kolomoisky (as suggested by the Glavcom Article).

1907. There were other examples in the evidence, as well, all of which reported events the truth and accuracy of which were not challenged by Mr Kolomoisky. It is not necessary for me to describe them in any detail but they included serious threats to the personal safety of Ms Gontareva. She was prepared to tell the press in a November 2019 interview she gave to the Guardian newspaper, that he was behind the use of hitmen who drove into her on a pedestrian crossing in Knightsbridge, set her son's car on fire in Kyiv and burnt down her family home. This added to the evidence as to the type of behaviour of which Mr Kolomoisky was capable and generally known to be capable both at this stage, and later on once the Bank had been nationalised. It has contributed to my conclusion that it is inconceivable that any employee who wished to keep his job would have undertaken an investigation to obtain the necessary information to establish the facts sufficient to plead a claim against the Defendants.

1908. There was no real attempt made by the Defendants to identify who might have been prepared to carry out an investigation (the whistleblower speculation fell far short of that) or to provide any analysis as to why they might have done so, even if they might have been under a duty to do so. At one stage Mr Kolomoisky seemed to have been suggesting that Mr Linskiy was a candidate for a person through whom attributable awareness pre-21 December 2014 might have been established against the Bank, but the written closing argument did not in the event make that allegation and in any event I think that any attribution through him would have been most improbable. Although he was described in the evidence as an important employee, he was not a senior executive let alone a member of the Management Board. However, he was involved in approving almost all of the Relevant Loans, and, in his role as head of the finance and risk department, was entrusted with investigating the leak to Glavcom – not to get to the bottom of what occurred but to identify whether anyone might have given Glavcom a tip-off and if so who that might have been.

1909. The reason that a spotlight was shone on Mr Linskiy was that he remained an employee of the Bank post-nationalisation involved in investigating what was by then referred to as the Bank's "toxic portfolio" of loans to companies related to Mr Kolomoisky. It was submitted on behalf of Mr Kolomoisky that he was therefore available to be called by the Bank which should have taken that course. It is said that this should have been done because he had significant knowledge of what had been going on and was trusted as someone who had at the time toed the party line. I do not accept that submission.

1910. Leaving aside the fact that Mr Kolomoisky did not plead a case of constructive knowledge against the Bank, and despite what I have earlier described as the shifting evidential burden of proof, none of the Defendants sought to call Mr Linskiy either. I can draw no inferences one way or the other from his absence from the witness box,

because I have no information on whether he would or might have been a willing witness for either side. Even if the Bank had been able to anticipate the case which appeared to be being developed during the course of cross-examination, the possibility that Mr Linskiy may not have been available to the Bank was illustrated by Ms Pakhachuk's oral evidence. She explained the difficulties the Bank's new management had in operating under the shadow of the Individual Defendants' surviving influence post-nationalisation in the following terms (and I accept as accurate the evidence which she gave):

> "We could not replace about 20,000 of staff. We remained working with the existing staff but we tried to engage new people just to be able to manage this huge institution. We couldn't spend all our time just for replacement of the staff, so we took it in stages and we tried to hire staff as fast as we could and, yes, we used our old resources and, yes, we used our old resources, and that's why we need a lot of time in order to come back to the same matters and to do verifications because we couldn't always trust the information they were providing to us, but along with that, we were very confident going along the strategy as to restorations on Bank's work."

1911. The Bank submitted that the individuals through whom the Defendants sought to attribute knowledge seem to have included Ms Rozhkova, the First Deputy Governor of the NBU, which was of course the Bank's regulator. If that had been had Mr Kolomoisky's case it would have been misconceived but I do not think that it was. Mr Howard's cross-examination was directed to what the NBU knew by the time of nationalisation on which it was then able to brief the Bank's new management in January 2017. It therefore did not go to the question of whether the NBU's knowledge could have been attributed to the Bank before December 2014 for the purposes of Article 261; rather it went to the question of whether the court ought to exercise its power under Article 267(5) to disapply the limitation period if the Bank had otherwise been actually or constructively aware of the violation of its rights more than three years before the commencement of these proceedings. I accept the Bank's submission that there is no basis for attributing any awareness of the Glavcom Article to the Bank through Ms Rozhkova.

1912. The Bank's second main reason for saying that it had insufficient awareness for the limitation period to start running pre-21 December 2014 was that, even if there was a Bank employee who had been given free rein to investigate the position subsequent to the publication of the Glavcom Article, they would not and could not have identified all the facts necessary to complete the Bank's cause of action before 21 December 2014.

1913. The Bank's starting point was that Mr Kolomoisky realistically acknowledged that, in and of itself, the Glavcom Article did not provide sufficient information to enable the Bank to plead a case against the Individual Defendants. As Mr Howard explained in opening his client's case, what the Glavcom Article served to do was to put the Bank on enquiry that it might have been defrauded and that the Individual Defendants were the beneficiaries of the fraud. This is consistent with the fact that, when the GPO instituted its pre-trial investigation six days later on 13 November 2014, the initial response of the Bank's legal department was to refuse to provide the GPO with documents unless they obtained a court order. This is an unpromising start for an allegation that further inquiries could have put a senior member of the Bank's management who had not participated in the Misappropriation into possession of sufficient material to plead a claim.

1914. The Bank submitted that, as the Glavcom Article was published at 6.30pm on 7 November 2014 and the Claim Form was issued on 21 December 2017, the Defendants must establish that, within 44 days of reading the article, an investigator would have acquired knowledge of facts sufficient to allow the Bank to allege each element of its claim. It said that this was unrealistic. It was said that the hypothetical investigator would have needed to gather and review the loan documentation for the loans to the 30 Borrowers identified in the Glavcom Article, including client questionnaires, financial statements, loan applications, minutes of meetings approving the borrowing and loan agreements, which can now be seen to run to several thousand pages. This task would have been likely to take several weeks. They would also have needed to review the 20 published judgments in the 2014 Ukrainian Proceedings and the further 31 judgments which were published during the course of the 44 day period and then review the additional loan documentation for the further c.20 Borrowers identified as a result of reviewing those further judgments.

1915. I think it likely that this kind of investigation would exceed what was necessary to ensure that the investigator was reliable informed of the necessary facts, but there is no doubt that a lot of work would have had to be done and the hypothetical investigator would also have needed to establish that the Individual Defendants were indeed the true owners and controllers of all 50 of the Borrowers with a sufficient degree of reliability to justify a plea in fraud. I was cautioned against applying the English rules of pleading, but a properly sustainable case based on reliable information would still have been required. As I have already explained suspicion and good faith belief are not of themselves enough for this purpose. That would have been a difficult task on the evidence then available, not least because the most recent NBU related party list dated 1 October 2014 failed to identify that any of the Borrowers were the Bank's related parties, and indeed specifically asserted that a number of them (Celastrina, Fiastra, Imris, Inkom, Tseris and AEF were identified by Mr Akkouh in his oral closing submissions) were not. The most recent IFRS shareholder representation letter dated as at 31 December 2013 (the copy in the papers was signed by Mr Kolomoisky but contained an uncompleted signature block for Mr Bogolyubov) was to the same effect.

1916. I also agree that, the fiendish complexity of many of the structures through which the Borrowers were owned and controlled would have made it impossible for anyone to have gained enough information on the issues to enable them to plead a case against the Individual Defendants in the time available. It is obvious that nobody implicated in the Misappropriation would have provided any information to help, and indeed subsequent events (including the changes introduced to conceal the true beneficial ownerships as reflected in the Luchaninov e-mail) indicate that it was likely that they would have been hampered in their task by the ownership structures being changed.

1917. I also accept that a similar conclusion can be reached having regard to what subsequently occurred on the publication of the NashiGroshi Articles. The NBU responded with Request 27 (see paragraph 444 above). This led to a stalling response from Mr Dubilet in a letter dated 19 February 2015 asserting that "the said loan operations were performed in full compliance with the requirements of the law" and providing lists of the loans to the 42 Borrowers, the RSAs and a 26 page description of the collateral. When it was suggested that the NBU knew by reason of Request 27 that "the supply contracts were shams", Ms Rozhkova responded:

> "I cannot agree with it, my Lord, because to clarify the situation, NBU requires some additional documents and my further experience, when I work with the bank management, give me -- I can suggest that the Bank provide a lot of explanations that all these contracts and borrowers is real and good."

1918. In light of what Mr Dubilet told the NBU about the security, it could not be said that the hypothetical investigator would have had sufficient information to justify a claim against the Defendants until they had had sufficient time to gather each security agreement and assess whether the security was valid and valuable or a sham in the light of the vastly inflated prices attributable to the assets. In this regard, any investigator would have been faced with assertions that (a) the Relevant Loans were secured by shares in valuable companies with significant production and trading activities which were generating cashflows and holding real assets; and (b) that this security was examined and accepted by PwC over successive audits. This has been the position of Mr Kolomoisky throughout these proceedings, but some understanding of whether the Bank had valuable security to the extent of the Relevant Loans was an essential part of assessing whether the claims now made were then pleadable.

1919. To like effect was the response of the NBU's NashiGroshi audit team when they reported back on 15 May 2015. As I explained in paragraph 468 above, they concluded that, although the majority of customers were "interrelated to each other according to the ownership structure", the 42 Borrowers were not linked to the Individual Defendants or other Bank insiders. This can now be seen not to have been the case, but it is an important feature of the way the Bank has formulated these proceedings and it is impossible to say that at that stage, anyone could have reached any more than a speculative, but as yet unpleadable, conclusion to that effect. The way it was put was that "[n]o facts have been found of relationships of the non-resident legal entities, the owners of the Branch's customers, with the insiders and the Bank's related parties."

1920. In my judgment the Bank was justified in relying on this evidence as demonstrating that there was no prospect that anyone not involved in the Misappropriation could have obtained sufficient information to plead a case within 44 days of the Glavcom Article being published. I accept the Bank's submission that these examples of what happened when attempts were made by the NBU to investigate what had been alleged in the NashiGroshi Article in 2015, corroborates the Bank's case. For so long as the Bank was controlled by the Individual Defendants, any innocent employee or Management Board member would not have been able to obtain sufficient knowledge to plead and issue a claim by the Bank against the Individual Defendants, even if they had had the power and authority under the Bank's Charter to do so, which they would not have had in any event.

1921. Even if 44 days had been sufficient to enable the innocent hypothetical investigator to corroborate Glavcom's reporting of the broad structure of what had occurred, I think it is probable that, as with the NBU, any such person would have been given false information as to the Borrowers' beneficial ownership. In my judgment, this was a further reason why there was never any prospect of anyone being in a position to procure the issuing of proceedings by the Bank against any of the Defendants. Even if that might have been permitted by those in position to procure the Bank to sue, they would not have been able to take that steps on the basis of the information available to them.

1922. In these circumstances, I accept the Bank's submission and find that, even if it were correct that a hypothetically diligent and non-implicated person would have concerns about the terms of the Relevant Loans or the status of the Borrowers, they would not have identified enough of what is now known about the role of the Defendants to enable proceedings to be brought and it is likely that reasonable diligence would never have led anywhere other than to their dismissal. The consequence of this is that I find that the Bank was not aware of the violation of its rights (including the persons in the form of the Defendants responsible for violating its rights) so as to give rise to the starting of the limitation period at any time prior to 21 December 2014. The Limitation Defence for the purposes of its claims under Article 1166 therefore fails.

Application of Article 267(5): the position of the Bank

1923. In the light of the conclusions I have reached on the Bank's state of awareness on 21 December 2014, three years before the issue of these proceedings, it is not necessary for me to consider what occurred thereafter. However, I think it is appropriate for me to explain why I would in any event have exercised the court's discretion to disapply the limitation period under Art. 267(5) as against all of the Defendants.

1924. In a case such the present, where a material part of the delay occurred during a period in which the Individual Defendants remained in control of the Bank, it is clear from cases such as *Sirius-Bud* that the starting point is that the Bank will have been prevented from bringing its claims during the period prior to the change in management. However it is also clear from *Sirius-Bud* that, merely because change of control removed what amounted to an absolute impediment to the commencement of legal process up to that time, the court does not then ignore what happened before the change of control. Nor does it mean that the court must look at the period after the change of control through the blinkered spectacles of ignoring what occurred before. In my judgment, the task of the court is to look at the whole of the period and all the circumstances, including whether the conduct complained of was fraudulent, whether the old management was implicated, whether there were steps taken to conceal it, and whether the investigation of the true facts was complicated.

1925. It was submitted by the Bank that, on the extreme facts of this case, all of those factors were present and all justify disapplication. It was also submitted that the Bank's new management, installed in late December 2016, plainly acted reasonably in their approach to investigating and commencing the claim, which they managed to do within a year. They were presented with the nearly impossible task of stabilising a systemic bank that had been catastrophically mismanaged, they worked 14-hour days, seven days a week, for the first three months to stave off a run on the Bank (which, given the Bank's size, may have led to civil unrest and/or the collapse of the Ukrainian financial system) and they established a unit to investigate related party lending which looked into the 200+ related-party loans and the purported security for them. It was submitted that, against that background, it was wholly reasonable to give the Individual Defendants a short period (until July 2017) to make good on the promise that they had made in an open letter to the Prime Minister that they would, by 1 July 2017, "ensure the restructuring of loans extended by the Bank to legal persons" (see paragraph 582 above) and to instruct solicitors when that promise was broken.

1926. I have touched on a number of these points during the course of describing what in fact happened in the period between nationalisation and the commencement of these proceedings, but in its closing submissions the Bank summarised the key tasks undertaken by its new management during the course of 2017 under nine separate headings as illustrative of why it submitted that this is a paradigm case for the court to disapply the limitation period. It submitted that *Sirius-Bud* sets out a multifactorial general discretion type test for the purposes of Article 267(5), which meant that one of the things the court has to consider is whether there was undue delay on the part of the Bank, and the nine separate headings itemise different but interlinked reasons why that was not the case.

1927. It was also submitted that, in making an assessment of whether alapse of time between nationalisation and the commencement of these proceedings amounted to undue delay, the court would be assisted by considering three distinct periods. The first was a period of firefighting, which was followed by getting information in relation to related party loans into one place. The second was a period during the Rothschild negotiations. The third was a period in which the claim was worked up following the instruction of Hogan Lovells.

1928. The Bank's first to fourth reasons fall into the first period, during which its new management was seeking to stabilise the Bank. It said, and I accept, that immediately post-nationalisation, the Bank's new management were in firefighting mode. They had taken over the running of a bank which was systemic to the Ukrainian banking system with more than 20,000 employees and more than 20 million customers in what can properly be described as a state of disarray. The Bank had what Ms Pakhachuk said was an "enormous cash flow problem", with liabilities of more than US$6 billion, available cash of US$70 million and customers regularly withdrawing deposits. The Bank was obviously more secure whilst in the ownership of the state, but she believed that there was the real possibility of civil unrest if ordinary Ukrainians became unable to access their deposits.

1929. The new Supervisory Board was given a list of priority tasks by the NBU on 6 January 2017, with a 293-page audit report detailing the extent of the Bank's dysfunctionality following on 30 January 2017. I accept Ms Pakhachuk's evidence that for the first few months everyone on the Management Board was at their absolute limits in seeking to fulfil those tasks.

1930. The second heading was what the Bank called "dealing with poison pills". Ms Pakhachuk said, and I accept, that the Bank's new management had to create an organisational structure "almost from scratch", a task made more difficult because the most senior pre-nationalisation executives (including Mr Dubilet, Ms Gurieva and Mr Novikov) had left the Bank without any transfer of their work. Other problems included the fact that some of the Bank's staff had what appeared to the Bank's new management to be an enduring loyalty to the Individual Defendants. This meant that their subordinates were not necessarily going to be helpful all of the time, a problem which they had to work around as best they could.

1931. None of this was helped by the fact that the state of the Bank's records was plainly deficient. Perhaps the most striking example of this was something I have described much earlier in this judgment relating to the documentary record. It was Ms Pakhachuk's unchallenged evidence that, by the time she started work at the Bank

immediately after nationalisation, the Investment Business had been "stripped of everything: the filing cabinets were completely empty and even the plug sockets had been removed from the wall". Another linked problem was said to be the need to deal with claims which had been filed in Ukraine and Cyprus by former clients of the Bank, against the so-called "bail-in" process which was associated with the Bank's nationalisation.

1932. The third heading related to the establishment of Mr Stratonov's related-party loans unit, the details of which I have given in paragraphs 591 to 596 above. It is possible to gain some sense of the amount of work which had to be done by Mr Stratonov's unit from his 6 March 2017 report. The tasks included a detailed analysis of what he called the transformed loans (to be completed by 30 March 2017), a full and detailed check of collateral for loan and lease agreements (to be completed by 30 April 2017), the production of a full set of credit documents and a separate archive segment for keeping them (to be completed by 30 April 2017) and the formation of an information base for claim-related work.

1933. The fourth reason flowed from the appointment of EY as the Bank's new auditors on 17 January 2017. This led to a very difficult process for the audit of the Bank's first set of post-nationalisation accounts and extensive investigations by EY into the Bank's capital needs, culminating in the lengthy EY Capital Report on 19 March 2017. I have already explained the new management's reaction to this report and its dramatic impact on the Bank's financial statements in paragraphs 597 to 599 above.

1934. Moving on to the second main period, the Bank submitted that the fifth reason for why the lapse of time after nationalisation did not amount to undue delay, was the Rothschild negotiations, the progress of which I have described in paragraphs 600 to 604 above. These were focussed on seeking to achieve the result to which the Individual Defendants had committed themselves in their 16 December 2016 letter to the Prime Minister (the Nationalisation Letter). The Bank submitted that it was entirely appropriate for its new management to seek to hold the Individual Defendants to the promises they had made. One of the reasons for this was that a negotiated resolution with the assistance of an "internationally recognised company" was one of the IMF's requirements. The negotiations proceeded because, in the words of the press release issued at the time of Rothschild's appointment, if a restructuring could be negotiated "adding more collateral and restoring the value of problem loans given to the former final beneficiaries of [the Bank] and related persons" it would minimise the expenses of the state. Having said what they said on 16 December 2017, the Individual Defendants participated in that process.

1935. The Bank placed particular emphasis on this fifth reason. It submitted that it had relied directly on the Individual Defendants' conduct and promises, and indeed was formally required by the IMF to engage in negotiations in order to minimise expenses to the state. Once those talks had collapsed, the Bank acted expeditiously in putting together its claim and issuing proceedings. In my judgment, although taken alone not of itself a reason why the lapse of time did not amount to undue delay, on the particular facts of this case the Bank's approach was both justified and reasonable. It weighs firmly in the balance to disapply the limitation period in accordance with Article 267(5).

1936. The sixth reason was the work on assessing related party lending and the New Loans. As I explained in paragraph 599 above, the Bank's accounts signed off on 25 May 2017

wrote down the New Loans by 98% and – as Ms Pakhachuk explained – "The position of these borrowers were deteriorating with every passing month, so by May we realised that those were mocked borrowers". This was illustrated by Mr Shlapak's 20 July 2017 report to the Supervisory Board on the problems faced by the Bank. Amongst other things, it examined the interest paid on loans to 229 related parties, approximately two-thirds of which by value were the New Loans. In January 2017, UAH 556 million in interest was paid on loans to related parties but, by June 2017, interest payments showed a sharp decline to UAH 207 million. As to the New Loans themselves the position was even more stark. Mr Stratonov's March 2017 report had explained that UAH 698.98 million of interest was paid in January to February 2017, but this had declined to UAH 17.133 million in June 2017.

1937. This report also illustrated another aspect of what the Bank said amounted to the firefighting required of the Bank's new management during this period. It explained the extent of the investigations which were being conducted by outside agencies, including the investigation which was still being pursued by the GPO in the light of the Glavcom Article. There were also two other police investigations in relation to abuse of office and embezzlement by Bank officials arising out of transactions with PJSC IC Ingosstrakh and Novofarm LLC, both of which had involved the interrogation of a significant number of Bank employees.

1938. The next period commenced on 27 July 2017 and related to the instruction of Hogan Lovells and the working up of this claim. I have described the bare outline of what occurred in paragraphs 604 to 608 above.

1939. The Bank started this part of its submissions by drawing attention to the fact that, at the time it commenced these proceedings, it was already involved in hundreds of civil claims in Ukraine concerning matters related to those addressed in these proceedings. That gave rise to the potential for *lis alibi pendens* and estoppel arguments being run as a reason why the Bank was precluded from suing in England. It was the Bank's case that the majority of these proceedings were brought by New Borrowers controlled by the Individual Defendants for the sole tactical purpose of eliciting a reaction which might give more substance to any such arguments. In its evidence in support of the WFO application, it was said that this suspicion was strengthened by the discovery that 27 fraudulent claims had been brought, purportedly on behalf of the Bank, since its nationalisation. They had not been authorised by the Bank and bore the forged signatures of Bank employees. The Bank relied on this evidence to illustrate the difficult types of jurisdictional issue with which it had to grapple before it was able to get these proceedings off the ground.

1940. The manner in which these proceedings were then worked up was described in the evidence in support of the WFO Application by Mr Richard Lewis, a partner in Hogan Lovells. It makes the position quite clear, and I can do no better than set out the relevant part of his affidavit in full:

> "In due course and following the breakdown of the Rothschild discussions (but without waiving privilege), my firm was engaged by the Bank on 7 August 2017, to consider whether claims might be brought against the First and Second Defendants in England. There followed several months' intense activity involving the collection, review and analysis of available information and documents and the preparation of this affidavit and its exhibit. If anything, 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 ongoing leaking of information evidenced by the Fieldfisher and Skaddens letters), have meant that the Bank needs to act now."

1941. The Bank also summarised a number of miscellaneous points which made it more than usually difficult to actually issue proceedings once the decision to instruct Hogan Lovells to make preparations to enable the Bank to do so was made, as it was on 27 July 2017.

Application of Article 267(5): the position of the Defendants

1942. In closing submissions, Mr Kolomoisky made the inevitable concession that, while he was in control of the Bank, it could not bring proceedings against him. However, he also pointed out that, although the NBU could have intervened at any time after learning of what was alleged in the Glavcom Article in November 2014, it did not do so until December 2016, at which point, the Bank's management were immediately replaced and the Individual Defendants were no longer in control.

1943. Against that background, it was at the heart of the Defendants' submissions that, despite the suggestions to the contrary made in the witness statements filed on behalf of the Bank, it could have commenced proceedings against the Defendants very shortly after nationalisation. It was said that the fact that it did not do so was not because it was "prevented or significantly hindered" by any external circumstances, but was simply due to its own choices as to how and where to proceed. They submitted that the true reason why the Bank did not bring its claim at some point between January and November 2017 was that it chose first to negotiate with Mr Kolomoisky and then to prepare a WFO application before issuing its claim. Both of those were choices freely made by the Bank for commercial or tactical reasons and cannot possibly qualify as "objective reasons beyond its control". This was said to disable the court from applying the jurisdiction to disapply the limitation period pursuant to Article 267(5).

1944. The Defendants also submitted that it was irrelevant that the Bank could not bring proceedings before the change of management at the end of 2016. Mr Beketov confirmed that the mere fact that the claimant is deprived of part (or even most) of the limitation period in which to bring its claim was not in itself a ground for applying Article 267(5). It submitted that, while in some cases the loss of part of the limitation period might prevent a claimant from filing its claim in time, that is not what happened in this case, because the Bank was in a position to file its claim for many months but chose not to do so. The Defendants suggested that the reason for this was that the Bank wanted to bring the claim outside Ukraine and make an application for the WFO before doing so. They said that this is not at all the type of situation that Article 267(5) contemplates.

1945. The facts on which the Defendants relied in support of this submission included some of the matters which I have already described in the context of the Defendants' new defence that the Bank made a deliberate post-nationalisation choice to continue to treat

the New Loans as outstanding and thereby accept that the Relevant Loans had been repaid (see paragraphs 1096ff above). I will, however, revisit the same material in the limitation context.

1946. The focus of the Defendants' submission was that Mr Oleksiyenko and Ms Pakhachuk, who were two of the more important members of the Bank's new management, conceded that they had known about the essential elements of the Bank's claims in these proceedings since December 2016 or January 2017 and that proceedings could have been commenced against the Individual Defendants at any time thereafter. In support of this contention, Mr Oleksiyenko and Ms Pakhachuk were asked about the attitude of the Bank's new management to the commencement of legal proceedings for the recovery of the Bank's losses, in circumstances in which the Bank's preferred option was to negotiate with the Individual Defendants for them to comply with the undertakings they had given in the Nationalisation Letter.

1947. In that context, Mr Oleksiyenko was asked on two occasions about the Bank's attitude to proceedings against the Individual Defendants at the beginning of 2017. The first exchange took the following form:

> "Q. … If one had wanted to commence proceedings, leaving aside the nationalisation, you were -- the Bank was, as you saw it, in a position to do so but it didn't in the early part of 2017 because you thought you would wait to give the former owners a chance to make good on the nationalisation letter promises; correct?
>
> A. That's correct. To clarify it, I was referring to commercial litigation of a similar nature which is reviewed by the court."

1948. The next exchange took place on the second day of the cross-examination and took the following form:

> "Q. Is this a fair summary: you had knowledge of those facts, you -- your position and that of your fellow board members was you were aware of the terms of the nationalisation letter and you thought, at the beginning of 2017, that the former owners should be given the opportunity to make good on those commitments?
>
> A. Absolutely, my Lord
>
> Q. Yes. And the expression you use is that time should be allowed for them to provide their proposals, that you should give them an opportunity to do that before you resorted to other methods to get compensation?
>
> A. That is correct."

1949. The evidence from Ms Pakhachuk as to the potential need for legal proceedings and the interrelationship with the Nationalisation Letter was in similar terms:

> "Q. My question is just a simple one. In the event, if it turned out that they did not honour the commitment, it would then be necessary to institute legal proceedings in order to get compensation from them. That's also correct, isn't it?
>
> A. Yes, I agree.

> "Q. Good. Now -- and so anyone on the management board -- and I understand this wasn't part of your area of responsibility -- but those who were responsible for looking into these things, particularly Mr Shlapak, were fully aware of the fact that it might well be necessary to institute legal action if the former owners did not honour their commitment; correct?
>
> A. Yes, correct."

1950. This link between the undertakings given by the Individual Defendants in the Nationalisation Letter and the possible need for legal proceedings against the Individual Defendants if they did not comply was no secret. On 20 January 2017, the VoxUkraine Article was published (see paragraph 589 above) and the views of Ms Rozhkova and Ms Gontareva can be garnered from the following passages:

> "If they do not restructure the amount of loans (to related parties - UE) within six months on market conditions, they will face criminal liability for bringing the bank to bankruptcy," NBU head Valerya Gontareva says about Kolomoisky and his partner Gennady Bogolyubov.
>
> "By July, the former shareholders must restructure their loan portfolio. That is, to do exactly the same thing that the National Bank had previously demanded of them, explains Rozhkova: transfer loans to solvent borrowers and provide collateral. If these conditions are met, it is not necessary to repay loans at once: payments will stretch over several years. And if borrowers regularly repay loans, the bank will continue to cooperate with them."
>
> "The National Bank is confident in their decisions, especially since dozens of former owners of banks, withdrawn by it from the market over the past two years, are already suing the regulator. And with regard to Privatbank, the head of the NBU, Valeria Gontareva, is determined: a refusal to restructure loans, in accordance with the relevant law, could lead the former shareholders of Privatbank to the court."

1951. The Defendants made detailed submissions as to the context in which it was necessary to assess the significance of the answers given by Mr Oleksiyenko and Ms Pakhachuk. Their starting point was what they contended to be the wide-ranging information that was available to the NBU before nationalisation. This was the background against which the court should reach conclusions as to the extent and significance of the new management's awareness of the elements of the available claims against the Individual Defendants on and shortly after their appointment. This included what was said in the NBU's 15 August 2014 audit report (see paragraph 402 above), the Glavcom Article, the NashiGroshi Articles which led to Request 27 and the several reports and investigations by the NBU between February 2015 and December 2016 that I have summarised earlier in this judgment. These included the NBU's stress testing Diagnostic Study sent to the Bank on 15 December 2015 (see paragraph 485 above) and the EY Related Parties Report (see paragraph 470 above). It also included the continuing disagreement between the Bank and the NBU on the identity of related parties and how many there were, and the fact that the NBU and the Ukrainian Government took steps to instruct professional advisors, including Hogan Lovells, as early as the middle of July 2015.

1952. As to the latter point it was said that it appeared that, as early as the middle of July 2015 a strategy was being developed to recover losses from the Individual Defendants in case the Restructuring Plan failed and the Bank had to be nationalised. For the reasons I have already explained in paragraphs 495 to 499 above I do not accept that submission in the terms in which it was made. I agree that the possibility that the Bank might have claims against the Individual Defendants was in the mind of the Ukrainian authorities when these meetings were being held, although there are plenty of indications that losses to the public purse through the NBU was the focus, not claims by the Bank itself. However, the likelihood is that no legal analysis was done at that stage as to how any claims against the Individual Defendants might be formulated or pursued if the Bank were to be nationalised. Furthermore, there is no indication that any evidence was being considered at that stage or that there was any detailed discussion about the facts or the extent to which particular facts needed to be proved in order to establish liability; it is clear to me that the discussions were much more general than that.

1953. The next category of pre-nationalisation information was the contents of the December 2016 NashiGroshi Article and at least one of the other articles that I have referred to in paragraph 589 above. It was accepted by both Mr Oleksiyenko and Ms Pakhachuk that they knew of the contents of these articles either at or about the time they were published, or by January 2017 at the latest.

1954. The Defendants then relied on the fact that Ms Rozhkova confirmed that "it was very important" for the new management of the Bank to be informed of the NBU's conclusion that the Glavcom allegations were true and that she believed the new management did understand the real situation because of all the materials that the NBU had submitted to the Bank and were available for their review. The way in which Mr Oleksiyenko described this as happening was as follows:

> "There was a process of on-boarding involving the Ministry of Finance and [the NBU], but that was fairly limited: it consisted of a small number of presentations, from which we were not permitted to take copies of the underlying materials. We were never provided with a formal briefing pack of documents, for example."

1955. In closing submissions on behalf of Mr Kolomoisky, Mr Oleksiyenko was severely criticised for providing hardly any detail of these "on-boarding" briefings. He did not accept that it was his deliberate decision not to go into detail and explain the position to the court, although he accepted that he had understood that it was particularly important for the court to know what the new management was told at the time of their appointment and confirmed that it was part of the Management Board's responsibility to take such steps as were necessary on the Bank's behalf to recover money that had been misappropriated. He also confirmed that it was equally material for the management to know if the NBU had formed the conclusion that the former owners of the Bank had violated the Bank's rights, whether by procuring a misappropriation of the Bank's assets or otherwise, and that the new management had a duty to ensure that steps were taken to seek compensation from them within the time limits prescribed by law.

1956. Mr Oleksiyenko accepted that, in the course of the on-boarding briefings, the new management's attention was drawn to the NBU's findings that the Bank's former management had been making decisions designed to benefit its shareholders. These findings included the conclusion in the NBU's report dated 1 July 2016 (see paragraph

512 above) that "the Bank [had been] an instrument for raising funds for lending to a wide range of parties related to the Bank. Most of the corporate loan portfolio is scheme-based and sham".

1957. The Defendants also contended that Mr Howard had extracted admissions from both Mr Oleksiyenko and Ms Pakhachuk that the Bank knew of the violations of rights which were the subject of these proceedings during the course of January 2017. This evidence was relied on in the same way as the evidence I referred to earlier as to what were said to be concessions by Mr Oleksiyenko and Ms Pakhachuk that (a) they had known about the essential elements of the Bank's claims in these proceedings since December 2016 or January 2017 and (b) that proceedings could have been commenced against the Individual Defendants at any time thereafter.

1958. So far as Mr Oleksiyenko is concerned, his evidence on this issue appears from the following exchange, which occurred after Mr Howard had taken him through a whole series of points on what he had and had not seen, and when he had and had not seen it:

> "Q. Right. What I'm interested in and I think where we get to is, firstly, at the date when you and your colleagues come into the Bank, you are fully aware of the fact that the NBU has in fact itself -- we've seen what the journalists say, so we'll leave that on one side. We've now got what the NBU is saying about the borrowers and the suppliers. You're fully aware of the fact that the NBU is satisfied and has determined that the borrowers and suppliers, insofar as they have been listed in the documents, were related parties of the shareholders being used to transit funds on behalf of the shareholders or siphon funds to them; correct?
>
> A. This is correct, but, my Lord, I would want to stress that the revelation that NashiGroshi article list of companies and related parties list of companies in full was produced only in December 2016, not earlier.
>
> Q. Right.
>
> A. Before that, NBU didn't have a full picture who are related parties to the Bank and if they are abusing or not abusing.
>
> Q. Right. Okay. That will do for me. So in December 2016 there is a full picture, as far as you were concerned, that the borrowers and the suppliers -- in relation to the matters which are the subject matter of the particulars of claim, the borrowers and the suppliers are simply related parties who are being used to transit funds on behalf of or to siphon funds to the shareholders; correct?
>
> A. Yes.
>
> Q. In other words, in the terminology that the Bank likes to use in these proceedings, in December 2016 you are fully aware of the fact that at least $1.82 billion has been misappropriated, as you see it, or that misappropriation has been procured by Mr Kolomoisky and Mr Bogolyubov by use of the borrower and supplier companies; correct?
>
> A. I agree with this."

1959. Ms Pakhachuk was cross-examined on a similar basis. She accepted that she had read the NashiGroshi articles and one of the articles referred to in paragraph 589 above (Antiraid) in or before January 2017. She also agreed that, from an early stage in 2017, she knew that the NBU had found that the Bank had been used as what the NBU called "an instrument to raise capital for providing a wide circle of Bank-related or Kolomoisky and Bogolyubov-related parties with credit". In fact, the passage from the NBU's July 2016 audit report to which Mr Howard was referring in this line of questioning (see paragraph 512 above) did not specifically use the phrase "Kolomoisky and Bogolyubov-related parties", and it is plain that Ms Pakhachuk's focus at this stage was on liquidity, and not on the investigation into the Bank's borrowing being carried out by Mr Stratonov (paragraphs 591 to 596 above).

1960. Nonetheless I agree that some of what Ms Pakhachuk had seen by then (in particular the second of the February 2015 NashiGroshi articles) included reference to Mr Kolomoisky having siphoned off US$ 1.8 billion overseas, although it is right to note that in the same article, it was being reported that Ms Gontareva had told LigaBusinessInform that, as at November 2014, all she had seen were deposit outflows and that she had "no claims against PrivatBank". It is also clear that much of the focus of these articles was on deficiencies in the NBU's regulation and whether it was the victim of poor and dishonest lending practices involving the Individual Defendants, because of the public money which had been advanced to keep the Bank afloat. They were not focussed (other than inferentially) on the possible claims that the Bank itself may have had against the Individual Defendants.

1961. Having gone through these events in some detail, I can express my conclusions quite shortly. I accept that this all shows that, from shortly after nationalisation, the new management of the Bank was aware that there were likely to be available claims against the Individual Defendants, and that in broad terms any such claims would be likely to contain many of the allegations which are made in these proceedings. However, it is also clear that the precise extent of what occurred had not yet been identified or unravelled, and it is equally clear that there was a vast mass of material to be gone through in order to ensure that any claim was properly formulated.

1962. I also consider that it was both reasonable and consistent with the statutory test for the Bank to concentrate on two specific issues quite apart from the process of commencing preparation of the proceedings. The first was the taking of steps to stabilise the Bank and the second was the efforts to do what it could to negotiate for the Individual Defendants to comply with the undertakings they gave in the Nationalisation Letter.

1963. As to the issue of negotiation it was said by the Defendants that this was a deliberate choice made by the Bank which meant that the statutory jurisdiction under Article 267(5) was not engaged. I disagree. The decision was driven by the requirements of the IMF and the government to try to negotiate first so that expenses to the state could be minimised. I agree that this was a factor beyond the Bank's control and significantly hindered the bringing of the claim during the period up to July 2017. I also agree that it is a factor which was contributed to by the Individual Defendants themselves by giving the undertakings they gave and engaging in the process of negotiation. Even if this second aspect were not to be part of the key considerations as defined, I consider that, as with the recognition in *Sirius-Bud* that fraud by the defendant was a relevant factor for the court when considering a case such as the present, any Ukrainian court

would regard it as a factor which strengthened the validity of the reasons for the claim not being commenced in due time.

1964. Mr Hunter finished his submissions on this point in reply with what can properly be called a peroration. He said that in a case in which the Individual Defendants have acted in egregious bad faith, both by committing the fraud, by lying about it, by concealing it and then by seeking to obstruct its proper investigation and whose fraudulent conduct caused the collapse of a bank of systemic importance to the Ukrainian economy, it is inconceivable that the Ukrainian court would not do all it could to ensure full access to justice. I agree that the likelihood of this response by a Ukrainian court is supported by the authorities which impel a multi-factorial fact-based approach with access to justice as the founding principle. The fact that the incoming management had to deal with the consequences of the Individual Defendants' conduct as well as investigating the claim makes it a clear case to disapply the limitation period.

Limitation: the claims against the Corporate Defendants

1965. As to the claim against the Corporate Defendants under Article 1166, it was submitted on their behalf in closing that the applicable limitation period (together with any issue as to its disapplication) is unaffected by whether limitation was or was not running or should be disapplied in respect of the claims against the Individual Defendants. It was submitted that, even if the Bank had had good reason to pursue claims against all Defendants together, the Bank could have issued a protective claim form against the Corporate Defendants while it continued to investigate and prepare its claims against the Individual Defendants. The fact that it failed to do so is no reason to conclude that the limitation period as against it should be held not to have expired. On the issue of when the limitation period started to run, I agree with that submission. However, I think that the interconnectivity of the various causes of action is capable of amounting to one of the circumstances to be taken into account when the court is assessing whether the Bank is entitled to relief under Article 267(5).

1966. The Corporate Defendants then submitted that there were three reasons why the contention that the claims against them under Article 1166 are time-barred is stronger than the Limitation Defence available to the Individual Defendants.

i) The first was said to be the identity of the wrongdoer. It was submitted that ascertaining who was behind the misappropriation is irrelevant to when time began to run as against the Corporate Defendants, since their role was at all times visible. The reason for this is that the Unreturned Prepayments appeared on the face of the Bank's transaction records and the RSAs were on the Bank's files. It followed that the time necessarily began to run for these claims against the Corporate Defendants as soon as harm was discovered.

ii) The second was said to be that the running of time on the claims against the Corporate Defendants does not depend upon the Bank having knowledge or constructive knowledge as to who is said to have procured their actions, but only as to that conduct itself. It was also submitted that, even on the basis that time did not begin to run until the Bank had a real opportunity to bring a claim, the

Bank had the opportunity to bring proceedings against the Corporate Defendants as soon as its new management took over after nationalisation.

iii) The third was said to be that the revisions to its Charter which effectively disabled the Management Board from bringing a claim against the Individual Defendants while they were on the Supervisory Board was irrelevant to limitation for the claims against the Corporate Defendants, because the revisions only concerned claims against the Bank's officers.

1967. I do not accept that any of these distinguishing features have the effect for which the Corporate Defendants contend, and I agree with the Bank's submission that time did not begin to run until a reasonable period after the Bank's nationalisation. The only difference in the analysis of the Bank's awareness of its claims against the Corporate Defendants and the Bank's awareness of its claims against the Individual Defendants relates to those aspects of the cause of action which required identification of the violator of the Bank's rights and the impact of the Charter.

1968. So far as the Charter is concerned, I accept the Corporate Defendants' submission that it is irrelevant to the Limitation Defence available to the Corporate Defendants, because the cause of action against them is not one for "holding the officials of the Bank's management bodies personally liable" and therefore remained in the hands of the Management Board. Nonetheless, the conclusion as to the impact of the Charter on the inability of the Management Board to procure the Bank to commence proceedings against the Individual Defendants deals only with the arguments as to the *de jure* entitlement of the Management Board to procure the Bank to sue. It has no effect on the *de facto* ability of the Bank, controlled as it was by the Individual Defendants, to sue either them or the Corporate Defendants (as entities they also controlled). In my view, for the reasons I have already explained, I have little doubt that the real opportunity test for claims against both the Individual Defendants and the Corporate Defendants, would not have been satisfied.

1969. The same point applies to the identity of the violator, added to which, this would still have required some investigation. The Corporate Defendants have not pleaded or demonstrated any link between particular individuals whose knowledge is said to be attributable to the Bank and any actual or constructive knowledge of what appeared on the face of the Bank's transaction records and files. Even if this exercise had been done by the Corporate Defendants (which it has not), that is not the only element of the violation of the Bank's rights of which it was required to be sufficiently aware for time to start running. All the other reasons I have already given for explaining why time did not start to run against the Individual Defendants, apart from the impact of the Charter, are equally applicable to the claims against the Corporate Defendants.

1970. As to the claim against the Corporate Defendants in unjust enrichment, which as I have explained is only raised as a defence to the extent that the cause of action is governed by Ukrainian law, it was simply said in the Corporate Defendants' written closing submissions that the claim was time-barred on the same grounds as the claim against them in tort. This was developed (albeit shortly) in oral submissions, when Mr Plewman said that all that was required was sufficient knowledge of facts to plead a case which satisfied each of the elements of Article 1212, i.e., (i) the acquisition (or preservation) of property, (ii) at the expense of the claimant and (iii) in the absence of legal grounds for the acquisition. That is correct as far as it goes. For obvious reasons,

he concentrated on the knowledge of facts required to show with sufficient clarity that there were no legal grounds for the acquisition, and submitted that the Glavcom Article had identified everything in that regard, most particularly because the Unreturned Prepayments appeared on the face of the Bank's transaction records and the RSAs were in the Bank's files.

1971. I do not agree. For the unjust enrichment claim to be time barred, it was necessary for the Corporate Defendants to prove that the Bank had sufficient awareness of the facts on which its cause of action depended, including most specifically those which supported the Bank's case that Relevant Loans and RSAs were void, such that the Corporate Defendants received the Unreturned Prepayments without a sufficient legal basis to do so. In my view, the Bank's actual (and constructive) awareness of such facts was subject to the same analysis as the claim under Article 1166, and was insufficient to enable proceedings to be commenced on or before 21 December 2014 for broadly the same reasons. I also consider that any awareness by individuals did not give the Bank a real opportunity to sue for the same reasons I have identified in relation to its claims under Article 1166.

Limitation: the Cypriot Borrowers and Prominmet

1972. As I have already explained, the allegations made by the Bank in respect of the Relevant Loans to the Cypriot Borrowers and Prominmet were only added to these proceedings by amendment with effect from the issue of a protective claim form on 14 July 2020, by which time it is said by the Defendants that the limitation period had expired. At the time permission to amend was granted, the court did not determine the issues with which CPR 17.4 is concerned, but granted relief which had the effect of adjourning to the trial the questions of whether or not the amendments introduced a new cause of action or arose out of the same or substantially the same facts as were already in issue at the date of the amendments. That relief, recorded in paragraph 2 of an order made by Nugee J on 8 September 2020 (the "Nugee Order"), took the following form:

> "2. Save as provided for by paragraph 3 below, for limitation purposes the amendments contained in the RRAPOC (the "New Matters") shall have effect as follows:
>
> > a. Unless otherwise agreed the Court will determine at trial (i) whether the New Matters introduce a new cause or causes of action; and (ii) whether if so the New Matters arise out of the same or substantially the same facts as were already in issue at the date of amendment.
> >
> > b. If the answer is (i) that the New Matters do not introduce any new cause of action; or (ii) that they arise out of the same or substantially the same facts as are already in issue, the amendments shall be deemed to date from the issue of the Claim Form, namely 21 December 2017.
> >
> > c. If the answer is (i) that the New Matters do introduce a new cause or causes of action; and (ii) they do not arise out of the same or substantially the same facts as are already in issue, the amendments shall be deemed to date from the issue of the Protective Claim Form, namely 14 July 2020.

d. Notwithstanding paragraph 2(b) above, the Trial Judge may conclude (as a matter of discretion) that the amendments shall be deemed to have been made on 14 July 2020."

1973. The New Matters, as defined in the Nugee Order, all related to an expansion of the definition of Borrowers to include the Cypriot Borrowers and Prominmet. They were therefore such of the amendments contained in what was then the Bank's Re-Re-Amended Particulars of Claim as introduced:

i) the Cypriot Borrowers and Prominmet as Borrowers in respect of Relevant Loans with a value of between US$14.5 million and US$59.5 million in relation to the Cypriot Borrowers and a value within the range already pleaded in relation to Prominmet;

ii) averments as to the purposes for which the Relevant Loans to the Cypriot Borrowers and Prominmet were made, viz., "working capital replenishment" in relation to Prominmet and "replenishment of floating assets for payments according to contracts, including for shares" in relation to the Cypriot Borrowers; and

iii) averments as to the interest rates at which and periods of time for which the Relevant Loans to the Cypriot Borrowers and Prominmet were to be advanced and the security granted in consideration for their advance.

1974. Unlike the Relevant Loans made to the original 46 Ukrainian Borrowers, it was not alleged that Prominmet or the Cypriot Borrowers executed RSAs. However, it was alleged that the Relevant Loans of which each of them was a Borrower (totalling US$46,023,133) caused, in part, the making of two of the Unreturned Prepayments. The details are set out in paragraph 301 above.

1975. The Corporate Defendants submitted that the consequence to the Bank's claim of the Relevant Loans to Prominmet and the Cypriot Borrowers being time barred, would be a reduction of US$46,023,133 in the Defendants' liability under Article 1166 and also a reduction of the same amount in Collyer's liability in restitution. I should note that the figures referred to in this paragraph are taken from the Particulars to the Bank's Re-Re-Re-Re-Amended Particulars of Claim, itself confirmed by Mr Thompson. I was not addressed on the significance if any of the fact that the relevant Schedule to the Bank's protective claim form was in some respects different.

1976. The amendments also pleaded that, as with the other Borrowers, Prominmet and the Cypriot Borrowers had no proper credit or trading history and no real prospect of repaying the Relevant Loans or the interest payments that would fall due under then. This was particularised by allegations that the account opening documentation indicated the only credit history was a single loan from the Bank to Fiastra Trading Ltd, that Prominmet carried on the types of non-specific trading activity described in paragraph 327 above and that they each had only one or two employees. It was also pleaded by amendment that the Individual Defendants were the ultimate beneficial owners and controllers of Prominmet and the Cypriot Borrowers.

1977. In relation to the allegation that the Individual Defendants were the ultimate beneficial owners and controllers of Prominent, the Bank relied on the same particulars it had

already pleaded in relation to the other Ukrainian Borrowers. It also added an averment that the (worthless) security purportedly granted in support of the Relevant Loan to Prominmet consisted of security granted by companies ultimately owned and controlled by the Individual Defendants. This was said to have taken the form of a pledge of contractual rights under RSAs entered into by Agroprom, Inkeriya and Viglon (all of which were Ukrainian Borrowers mentioned earlier in this judgment) and Stalkar LLC and a guarantee granted by Ingosstrakh, which purported to limit Ingosstrakh's liability to the Bank to UAH 10,000 (see also paragraph 105 above).

1978. In relation to the allegation that the Individual Defendants were the ultimate beneficial owners and controllers of the Cypriot Borrowers, it was also alleged that the security granted in support of the Relevant Loans consisted of security granted by companies ultimately owned and controlled by the Individual Defendants and particulars of that security was pleaded. These allegations were said to be supported by the following particulars:

i) that the business plan provided to the Bank by each of the three Cypriot Borrowers stated that the loan would be used for a project involving the purchase and resale of shares in a company ultimately owned and controlled by the Individual Defendants;

ii) that the speed with which the loans to the three Cypriot Borrowers were granted meant that the period of time for consideration was insufficient to enable any or any proper due diligence to be undertaken;

iii) that the Bank's records do not disclose any lending admissibility opinion or credit committee presentations in relation to the Relevant Loans to the three Cypriot Borrowers;

iv) that the interest rate specified in each of the Relevant Loans was substantially below prevailing market rates;

v) that the Relevant Loans to the Cypriot Borrowers were purported to be repaid by way of loans to the Borrowers and further companies ultimately owned and controlled by the Individual Defendants, which like the repayment of other Relevant Loans were made for the purpose of disguising the Misappropriation and did not amount to legitimate lending and therefore stand to be ignored; and

vi) that the Relevant Loan agreement between the Bank and each of the Cypriot Borrowers was backdated on the instructions of the Individual Defendants, an allegation which is to be inferred from the fact that in each case employees of the Bank requested a copy of the loan agreement, minutes of the meeting at which the Borrower's directors approved the loan, a share pledge agreement, a feasibility study and other documents from employees of Primecap two days after the loan had purportedly been entered into and the funds had been drawn down.

1979. At the trial, the Bank approached this issue from two separate perspectives. First, it said that what were called the New Matters did not introduce a new cause or causes of action, and in any event arose out of the same or substantially the same facts as were already in issue at the date of amendment. If this is correct, it would follow as a result

of paragraph 2b of the Nugee Order that the allegations relating to the Relevant Loans to the Cypriot Borrowers and Prominmet fall into exactly the same category for limitation purposes as the claims relating to the other Relevant Loans.

1980. Secondly, it pleaded that, in any event and having regard to the Ukrainian law principle that the limitation period begins on the date on which a claimant acquires actual or constructive knowledge of the facts on which its cause of action depends, it first acquired knowledge of the misappropriation of funds by the Individual Defendants in the manner alleged in these proceedings between August and December 2017. If this is correct, it would follow as a result of paragraph 2c of the Nugee Order that whether or not the New Matters introduced a new cause of action or arose out of the same or substantially the same facts, the Limitation Defence as it applies to the New Matters would fail, because 14 July 2020 is less than three years from the earliest date in that period.

1981. In its opening submissions, the Bank relied on the arguments which it had made on the original application for permission to amend and they were not further supplemented in the Bank's written or oral closing argument. For present purposes the starting point is whether the proposed amendments seek to add or substitute a new claim, a phrase which involves for present purposes the introduction of a new cause of action (section 35(2)(a) of Limitation Act 1980). The Bank submitted, in my view correctly, that the question of whether amendments raise a "new claim" for the purposes of section 35 of the Limitation Act 1980 and CPR 17.4 is a procedural matter determined by English law (*Tatneft v. Bogolyubov* [2018] 4 WLR 14, per Longmore LJ at [32], [60]). The court therefore applies the English law test as to what constitutes a new claim where that claim is governed by foreign law, albeit against the backdrop and elements of the foreign cause of action. In *Berezovsky v. Abramovich* [2011] 1 WLR 2290 Longmore LJ at [59-61] made clear that a cause of action for these purposes comprises the essential facts giving rise to a legal right and those facts must be selected at the highest level of abstraction. It should not be over-elaborate.

1982. The next question for the court is to ask whether, if the amendments involve the addition or substitution of a new cause of action, they arise out of the same or substantially the same facts as are already in issue in the existing claim. The answer to this question is an important and substantive question of law. The assessment proceeds having regard to the fact that the underlying purpose and policy of section 35 is to prevent a defendant from having to investigate after the expiry of the limitation period facts and obtain evidence of matters which are "completely outside the ambit of " those which would be investigated in relation to the unamended claim and are unrelated to those which he could reasonable be assumed to have investigated for the purpose of defending the unamended claim (*Ballinger v. Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597 at [34], approving a statement to that effect by Colman J in *BP plc v. Aon Ltd* [2006] 1 Lloyd's Rep 549, 558).

1983. The Bank also submitted that, simply because the new claim pleads new facts is not determinative of whether the new claim arises out of substantially the same facts as already pleaded. In a sense that is obvious from the language of CPR 17.4 and is reflective of the underlying policy referred to in *Ballinger*. The underlying policy described above has continued to inform the court's approach: see e.g., the decision of the Court of Appeal in *Alame v. Shell Plc* [2024] EWCA Civ 1500 and *Geo-Minerals*

GT Ltd v. Downing [2023] EWCA Civ 648 and *Diamandis v. Wills* [2015] EWHC 312 (Ch), in which Stephen Morris QC said at [79] of his judgment as follows:

> "Furthermore, even if it can be said that those matters are outside or unrelated to existing matters, I have to consider the extent to which the Defendants would be required to embark upon an extra investigation of new facts. This is a matter of degree; and when set against the scope of the matters which are already in issue in the proceedings, in my judgment the extent of this further inquiry is relatively limited."

1984. The Bank submitted that, properly analysed, its primary claim relies upon a single cause of action in tort against the Defendants and not on different causes of action in relation to each of the Relevant Loans. It relied on what Mr Beketov had said in his evidence in support of the Bank's without notice application for injunctive relief at the outset of the proceedings to the effect that the claim in tort arose out of the Defendants' unlawful scheme which consisted of what he called their "interconnected cumulative unlawful actions, all taken with a common intent to defraud the Bank, and which caused a single, indivisible harm to the Bank for which the Defendants are jointly and severally liable". One aspect of this description which no longer reflects the Bank's case is that the harm for the purposes of Article 1166 is no longer said by the Bank to be indivisible, a point to which I have alluded in a number of different contexts and which is well-illustrated by Mr Hunter's clear statement in opening that "The essence of our case is that there were 270 separate misappropriations of the Bank's money in the form of the relevant drawdown."

1985. The Bank also relied on the fact that what it characterised as its single cause of action sought compensation to the extent of the value of the Unreturned Prepayments (US$1,911,877,385), which the Bank did not seek to increase by way of the amendments. This is said to be apparent from the fact that the reference to the further Relevant Loans to the Cypriot Borrowers and Prominmet are no more than further particulars of the Bank's existing causes of action in tort and unjust enrichment. Put another way, no new provisions of Ukrainian law are relied upon and the proposed amendments simply provide further particularisation in relation to c.US$46 million of the US$1.911 billion claimed, explaining how the fraudulent scheme had caused the Bank to suffer loss.

1986. The Bank then submitted that if it is wrong that the New Matters do not introduce a new cause or causes of action, they arise out of the same or substantially the same facts. In support of this submission the Bank relied on:

i) the common ground that there was a complicated and artificial money circulation scheme operating within the Bank before its nationalisation;

ii) its case that where, as part of this scheme, the Relevant Loans were said to have been repaid with illegitimate further lending from the Bank in the form of the Intermediary Loans, those purported repayments stood to be ignored when determining both the amount remaining unpaid under the Relevant Loans and the amount of the Bank's loss for the purpose of its claim in tort; and

iii) the Defendants' allegation that if (contrary to their primary defences) there was no legitimate repayment of the Relevant Loans, the Bank had still suffered no

loss because the monies paid under the Relevant Loans were transferred back to the Bank as part of the money circulation scheme as evidenced by the Lafferty Spreadsheets.

1987. The Bank also contended that Prominmet and the Cypriot Borrowers were controlled by the Individual Defendants, that they had no prospect of repaying the Relevant Loans which were made to them and that those Relevant Loans were not the "the subject of legitimate repayment".

1988. Mr Kolomoisky disagreed on both scores, and Mr Bogolyubov adopted Mr Kolomoisky's arguments. It was submitted on their behalf that, in his expert's report for the trial, Mr Beketov had accepted that the Bank was the victim of a series of torts and that procuring each loan is a separate tort, a point that was reflected in the Bank's opening submissions (as described above) in which it was also said by Mr Hunter that its case was that the Misappropriation caused a series of direct, immediate losses to the Bank in the form of the Relevant Drawdowns. This was reiterated in closing when it was said that the Relevant Drawdowns were misappropriations of the Bank's money, which caused loss in the amounts which were extracted. That loss was materially reduced only by true repayments and the true value of the Transferred Assets. Mr Kolomoisky submitted that the amendments introduced new causes of action because this way of putting the case made clear that each Relevant Drawdown was a separate cause of action.

1989. It was also submitted that the amendments could not properly be characterised as the Bank merely producing further particularisation of a claim to US$1,911,887,385. This figure represented the total amount of the Unreturned Prepayments, and the Bank had only claimed misappropriations of money under Relevant Loans made to the original 46 Ukrainian Borrowers who had paid those Unreturned Prepayments. By contrast, it was said that the claims in respect of Prominmet and the Cypriot Borrowers were made in respect of advances of money to parties who did not make Unreturned Prepayments.

1990. Counsel for Mr Kolomoisky also said that there were other significant differences from the remaining 46 Ukrainian Borrowers. It was said that the claims in respect of Prominmet and the Cypriot Borrowers involved different agreements, different unlawful acts and (so it was said) different losses. They also relied on the fact that Prominmet's security package was different in the respects I have outlined above, that the Cypriot Borrowers did not enter into RSAs with the Corporate Defendants and did not make any Unreturned Prepayments directly to them, because it was the Bank's case that their Relevant Loans only funded Unreturned Prepayments indirectly as described in paragraph 1974 above. Prominmet and the Cypriot Borrowers did not appear as what were called Residents on the Kazantsev Spreadsheet or Customers on the Gurieva Spreadsheet.

1991. There is no doubt that this list of differences between the position of the Cypriot Borrowers and Prominmet on the one hand and the position of the original 46 Borrowers on the other is material in some important respects. However, the compensation to the extent of the value of the Unreturned Prepayments (US$1,911,877,385) remains the same and the Relevant Loans to Prominmet and the Cypriot Borrowers arise in relation to the same loan recycling scheme. They are all intimately interconnected in their impact on the Bank with the Relevant Loans to the original 46 Borrowers.

1992. In these circumstances, while I think that in the light of the way the Bank puts its case, the better view is that the amendments plead additional causes of action, the right way of characterising the further Relevant Loans to the Cypriot Borrowers and Prominmet is that they amount to additional tortious acts causing harm to the Bank, but for which the same compensation is payable. So far as the claims in unjust enrichment are concerned, the amounts by which the Corporate Defendants were enriched remains unchanged; the effect of the amendments is further to particularise the insufficiency of the legal grounds on which the enrichment was acquired.

1993. Having regard to the guidance in the authorities I have cited, the amendments have not required the Defendants to investigate facts and obtain evidence of matters which are completely outside the ambit of those required to be investigated in relation to the unamended claim. In my view, when set against the scope of the matters which are already in issue in the proceedings, the extent of the further inquiries required were relatively limited.

1994. In my judgment, the amendments arise out of substantially the same facts as were already in issue before the New Matters were sought to be included in the proceedings by amendment. I did not understand any party to contend that, notwithstanding this conclusion, the discretion granted by clause 2d of the Nugee Order should be exercised and, in any event, I can see no basis on which it would be appropriate for me to do so. It therefore follows that the amendments shall be deemed to date from the issue of the claim form, namely 21 December 2017.

Foreign Limitation Periods Act 1984 and Article 26 of Rome II

1995. By way of postscript, I should briefly explain my conclusions on one of the arguments, which in the light of my earlier findings on the Limitation Defence does not arise. The Bank pleaded, and addressed in both its opening and its closing written submissions (albeit shortly), a further juridical basis for disapplying the limitation period under Article 257 and Article 261. It relied on section 2(1) of the 1984 Act and/or Article 26 of Rome II in support of an argument that, if the three year limitation period expired before 19 December 2017, the period should be disapplied and/or extended. This submission was not developed in oral argument, but it was addressed in the closing submissions of Mr Kolomoisky and the Corporate Defendants, and also orally by Mr Howard, who described it as "beyond surprising" and "utterly hopeless".

1996. The starting point for this argument is section 1 of the 1984 Act, which provides that, where the law of a foreign country falls to be taken into account in the determination of any matter, the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings. The relevant exception is contained in section 2(1), which provides that section 1 shall not apply, if the application of the foreign limitation period conflicts with and/or is manifestly incompatible with public policy. Section 2(2) then provides that there will be a conflict with public policy where the application of a foreign limitation period would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

1997. The Bank then submitted that, while it accepts that a three-year limitation period is not itself incompatible with English public policy, and that, without more, a limitation period of this length would not cause undue hardship, that is not the case if Ukrainian law were to permit time to run during the period when the Bank was under the control of the Individual Defendants. This would be the case if it were to have failed both on its case as to awareness for the purposes of Article 261, and most particularly its argument as to attribution of knowledge, and on its argument for disapplication under Article 267(5). It said that, in that eventuality, the fact that it stood no realistic prospect of bringing claims against the Individual Defendants during the course of the period for which time was running would be manifestly incompatible with English public policy.

1998. The Defendants' answer to this submission was that English law recognises that different states may reasonably make different rules in relation to limitation and that the mere fact that a foreign limitation rule is stricter than the corresponding English rule comes nowhere near establishing a violation of public policy. They relied on the judgment of Leggatt J in *Alseran v. Ministry of Defence* [2017] EWHC 3289 (QB), [2019] QB 1251 at [827]:

> "Private international law is founded on principles of comity and mutual respect and on the recognition that in many areas of law different approaches may be reasonably taken. That is obviously true in the field of limitation law, which involves striking a balance between allowing claimants to assert their legal rights and protecting defendants against stale claims. Different legal systems may legitimately strike this balance in different ways. An English court should for this reason be very slow to substitute its own view for the solution adopted by the foreign legislature.

1999. In *Begum (on behalf of Mollah) v. Maran (UK) Ltd* [2021] EWCA Civ 326 at [96], Coulson LJ recorded with approval that the parties had agreed that Section 2 of the 1984 Act echoes Article 26 of Rome II. Article 26 provides that: "[t]he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum". In *Begum*, Coulson LJ then went on to explain (at [113]):

> "As Wilkie J noted in [*KXL v. Murphy* [2016] EWHC 3102 (QB)] public policy should be invoked for the purposes of disapplying a foreign limitation period only in exceptional circumstances. That could only be where the foreign limitation period was contrary to a fundamental principle of justice. That is, deliberately, set as a very high bar. Mr Bright rightly drew attention to the words of art 26, which said it 'only' applied if the foreign limitation period was 'manifestly incompatible' with public policy."

2000. It was then submitted on behalf of Mr Kolomoisky that there is nothing harsh about the Ukrainian rules of limitation which apply in this case. A three-year limitation period is unremarkable and any potential harshness is mitigated by the existence of a discretion to disapply the limitation period under Article 267(5) if the claimant is prevented or significantly hindered from filing its claim in time by factors beyond its control. It was said that this would be a perfectly fair and balanced scheme, and cannot seriously be contended to raise any public policy concerns, and that it was impossible to see how the court could conclude that English public policy is offended if it has also concluded that there is no basis on which to disapply the limitation period under Article 267(5).

The reason for this is that the facts on which Mr Kolomoisky relies in relation to Article 267(5) also answer any case based on public policy.

2001. This would have been a short point, the answer to which depends on two interlinked questions both of which arise out of the law of Ukraine relating to limitation within the meaning of section 1(1)(a) of the 1984 Act. The first is whether the Ukrainian law rules of attribution permit time to run during the period when the Bank was under the control of the Individual Defendants, and had no real opportunity to sue either them or the corporate vehicles which they controlled. The second is whether it is manifestly incompatible with English public policy for the Bank to be obliged to satisfy the requirements of Article 267(5) as a condition for the disapplication of the three year period.

2002. In light of the conclusions I have reached in relation to attribution of knowledge as a matter of Ukrainian law and the impact of those principles on the facts of this case, there is no need for me to reach a conclusion on whether, if I had reached another view, English principles of public policy would have been engaged. However, if I had not reached that view, and if the Bank was unable to satisfy the requirements of Article 267(5), I accept that there are difficulties in concluding that the test explained by Coulson LJ in *Begum* had been satisfied. It is likely that, given the Ukrainian law evidence, and the way in which the Ukrainian courts approach the grant of relief under Article 267(5), the failure of the Bank to satisfy the disapplication test would simply reflect a legitimate striking of the balance in a different way from that struck in English law.

Currency of the Bank's claim

2003. In the opening submissions of both the Bank and Mr Kolomoisky, there was a disagreement as to whether the law applicable to the determination of the appropriate currency is a matter for the *lex causae* or the *lex fori*. In light of the nature of such differences as there are in the approach adopted in English law and Ukrainian law, Mr Kolomoisky's closing submissions described this as a sterile debate. I agree that there are in fact no differences in substance but, whether or not the distinction matters, it is appropriate to record that I shall follow the view expressed in Dicey (at para 34-059) that whether Article 15(c) or 15(d) of Rome II is engaged, the *lex causae* applies to "cover questions concerning the currency of any damages award and the court's powers to award interest". I shall therefore apply Ukrainian law to questions relating to the appropriate currency in which the Bank's claim for compensation is to be denominated.

2004. It was not disputed that, as a matter of Ukrainian law, a claim in tort can be expressed in a foreign currency, and that the Ukrainian courts will have regard to what Mr Beketov said was the principle of "full compensation" in order to "assess whether damages awarded in currency A or currency B would be most effective in compensating the claimant in full for the harm caused". In my view the evidence shows that this is very similar to the English law concept that the appropriate currency is the one in which a claimant has felt its loss.

2005. Initially the Defendants contended that the Bank felt any loss in the currency in which its financial statements were presented, (i.e. UAH) or indeed the currency which Mr

Kolomoisky's opening submissions called the IFRS functional currency being "the currency of the primary economic environment in which the entity operates" (also UAH). This was said to be substantiated by Mr Davidson's suggestion that the Bank had only "relatively minor" exposure to US$ liabilities or currency risk.

2006. As Mr Thompson explained, the difficulty with this argument was that the Bank's assets and liabilities were denominated in US$, UAH and other currencies, but were simply converted to UAH at the prevailing exchange rate at the end of the accounting period for the purpose of presenting its accounts. It was therefore his evidence that the Bank's financial statements do not imply that the risk associated with US$ lending was carried in UAH.

2007. There was a great deal of evidence on this point, but in the end Mr Davidson changed his position and accepted in cross-examination that "the only sensible way of calculating loss on the dollar loans is in dollars". Although this was not clear until service of Mr Kolomoisky's closing submissions, this is now accepted by the Defendants, because Mr Kolomoisky accepted that the court should find that any loss was suffered by the Bank in the currency of each Relevant Drawdown, a position said to reflect the Bank's case that it suffered 270 separate losses, at the precise moment each Relevant Drawdown was credited to the Borrower's accounts. For the purposes of the Bank's claims in tort under Article 1166, the other Defendants either said that they relied on Mr Kolomoisky's submissions on the applicable currency of the Bank's loss, or that they had no independent position to maintain.

2008. In my view this change of position was inevitable, because the fact that the New Loans were denominated in UAH and impaired in UAH in the Bank's 2016 financial statements does not mean the Bank suffered a loss in UAH at the time of the Relevant Drawdowns (a point which was part of Mr Kolomoisky's original pleaded case). The Bank does not claim for losses arising from the New Loans – its claim is for full compensation for the harm it was caused by the Relevant Drawdowns. I agree that the currency of the New Loans and the subsequent impairments recorded in the Bank's financial statements is irrelevant to the determination of the currency in which the Bank suffered the harm in respect of which it sues.

2009. Turning then to the currency of the Relevant Drawdowns, the Bank's position was that, although that was the correct starting point, its entitlement to full compensation meant that its claim was one for a US$ loss, whether the currency of the Relevant Drawdown was US$ or UAH. It relied on the fact that, where a Relevant Drawdown was made in US$ (as to which the figure was US$1.5 billion) and was not validly repaid, it is clear that the Bank suffered a direct loss in US$. It then said that the position was the same where a Relevant Drawdown was made in UAH (as to which the figure was UAH 8.8 billion). The reason for this was that, in those cases, the UAH Relevant Drawdown was immediately converted into US$, using the exchange rate applicable on the date of drawdown, so that the Borrowers could then make US$ payments out to the Corporate Defendants under the RSAs as part of the cycle of prepayments and returns of prepayments, all of which took place in US$. The Bank then submitted that the effect of the conversion was that the Bank suffered a US$ loss, quantified as the US$ value of the UAH Relevant Drawdowns.

2010. The effect of Mr Kolomoisky's change of approach was therefore that the only point of substance which remained outstanding on the currency issue was the right currency for

assessing the compensation to which the Bank was entitled in respect of the UAH Relevant Drawdowns. The Bank submitted that the working through of the conversion process meant that a combination of the UAH Relevant Drawdowns and their immediate conversion into US$ was used as a temporary substitute or proxy for US$ Relevant Drawdowns. What occurred was said to underline the fact that this was a currency fraud directed at the extraction of US$ from Ukraine, a process which continued uninterrupted when it was no longer possible to extract US$ from the Bank using US$-denominated Relevant Loans.

2011. The way in which the conversion process worked was as follows. The Bank advanced a UAH Relevant Drawdown to a Borrower, the Borrower sold its UAH to the Bank, the Bank used the UAH to purchase US$ on the Interbank Foreign Exchange Market of Ukraine and the Bank then transferred the US$ to the Borrower which used the US$ to make a prepayment. This was evidenced by, amongst other things, the Bank's transactional data, which showed the Borrowers using the UAH Relevant Drawdowns for the "purchase of foreign currency". The evidence was that the UAH Relevant Drawdowns were converted to US$ through 193 sales of UAH of which 142 (being 74% by number and 93% by value) occurred within an hour of the Relevant Drawdown, a further 43 (being 22% by number and 4% by value) occurred on the same day, while the remaining eight (being 4% by number and 3% by value) occurred within five days.

2012. It was submitted on behalf of Mr Kolomoisky that this argument suffered from two fatal flaws. The first was that steps taken by the Borrowers *after* the making of the Relevant Drawdown could not affect the nature and quantification of the Bank's loss at the moment of advancing the funds drawn down. The second was that currency exchange transactions entered into by the Bank on behalf of Borrowers were transactions for value, under which the Bank debited UAH from the Borrower's account, and credited it with a corresponding amount of US$, which it had bought for the Borrower on the Interbank Exchange Market. It was therefore incorrect for the Bank to contend, as it did through Mr Thompson's initial evidence, that, where it exchanged UAH Relevant Drawdowns for US$ at the request of the Borrower, the result was that the Bank's "net position" at the end of the day was that it had paid out sums of US$. This was said to be supported by Mr Thompson's evidence in cross-examination that the net position analysis did not stand up to scrutiny and that the correct position was that the Bank had 'lost' UAH, rather than US$. In short, it was said that, in the absence of the net position analysis, the currency conversions were separate transactions to the Relevant Drawdowns, and did not affect the currency (or indeed the amount) of the Bank's loss.

2013. The Bank also relied on the fact that the sham documentation created for the purpose of the Misappropriation gave the impression that the Bank would be able to recover the UAH Relevant Drawdowns from the Borrowers at their US$ value on the date of drawdown, because the UAH Relevant Loans contained a provision to pay what was variously called a loan commitment or index commission fee which was calculated so as to cover any decline in the value of UAH against US$, a factor which was reflected in the computations in the Gurieva Spreadsheet. This was but one illustration of the fact that it was a fundamental feature of the Misappropriation that it was designed to misappropriate US$, whether the original drawdown was in US$ or UAH.

2014. It followed that, although the Borrowers' primary obligation under a UAH Relevant Loan was to return the UAH sum in that currency, the inclusion of the index commission fee was, as Mr Davidson accepted, an embedded "protection for the Bank

that ensures that it gets back […] what would be an equivalent amount in dollars", which itself had the effect of adjusting what the Borrower had to repay from UAH to US$. In his closing submissions Mr Hunter said that this meant that they were, anyway ostensibly "synthetic dollar loans". Mr Davidson also agreed that the fee "represents the difference between the value of capital and interest payments in [UAH] and what would have been paid if the loan had been denominated in [US$]" and that it could be that the need to proceed in this way was because the Bank wanted to hedge its foreign currency risk associated with the UAH Relevant Drawdowns, being a risk which would arise if they were being funded by the Bank's US$ reserves.

2015. What this meant from the Bank's perspective was that, for capital and interest purposes, the UAH Relevant Loans, although expressed in UAH follow the US$. As Mr Hunter submitted, the Bank was a retail bank which needed to keep a broad equilibrium between what it borrowed either in the form of deposits or on the money markets, and what it paid out in the form of lending. It also needed to keep an equilibrium in respect of its reserves and its hedging for foreign exchange risks. It followed that (for so long as it appeared to be a genuine loan) a purported loan with an embedded derivative which made it behave exactly like a US$ loan, will or certainly should have been managed as part of the Bank's US$ loan book, not its UAH loan book, because any such loan will have behaved in all respects like a US$ loan. In particular, the value will go up when the US$ goes up and go down when the US$ goes down.

2016. One issued raised on behalf of Mr Kolomoisky in response to the Bank's case was that the Bank has not sought to recover its loss as a matter of contract because it asserts that the Relevant Loans are all void which means that it cannot rely on the terms of the void Relevant Loans for this purpose. The Bank's answer to what appeared at first blush to be an attractive point is that the indexation fees are relevant, not because the Bank has claimed to recover them, but because they show that it was an integral part of the purposes for which the UAH Relevant Drawdowns were made that they would be converted into US$ immediately as part of the currency fraud and that, if the Borrower made any repayment to the Bank, it would be for the US$ equivalent value of the UAH drawn down.

2017. Another point which was made in Mr Howard's oral closing submissions was that the relevant footnote in the Bank's 2014 financial statements provided that "Fair value of option derivative embedded in loans and advances to customers (refer to Note 30) was included in the table above together with host instruments into UAH denominated financial assets." This was said to be a reference to the line in the table which gave the UAH figure for foreign currency exchange risk at the end of the reporting period, which meant that the embedded derivative option was still being accounted for in UAH assets.

2018. At first blush this appeared to be a new point unsupported by any evidence to confirm that Mr Howard's suppositions were well founded. However, in his submissions in reply, Mr Hunter addressed the point head on and said that in fact it supported the Bank's case rather than undermined it. He said that what the note reflected was that the embedded derivatives are included at mark-to-market fair value, recorded in the table with a value in UAH. It is then necessary to look at two other notes to the financial statements (notes 4 and 30), which further explain and confirm that the Bank was treating the embedded derivatives as a hedge against adverse movements of the UAH against the US$.

2019. He then said that when the Bank was induced to pay out as part of the Misappropriation, it was simultaneously induced into thinking that those purported UAH loans were currency-hedged to the US$ and that was false because there was in fact no hedging. So in the circumstances of the Misappropriation, what was taken from the Bank was not just UAH 8.8 billion; given the manner in which it was done the Bank was simultaneously induced to think that it had UAH 8.8 billion of UAH assets hedged to the US$ when that was not in fact the case. If that had not happened, the Bank would have found an equivalent way to hedge that UAH 8.8 billion risk, either by buying US$ or by utilising some other mechanism to create the same effect. For these reasons, it is right to regard the Bank's loss as felt in dollars even in respect of UAH drawdowns.

2020. I prefer the Bank's submissions on these points. The Defendants' case depends on drawing an artificial distinction between the actual making of the Relevant Drawdown and a central element of the purpose for which it was made, i.e., a scheme which required an immediate transfer of US$ out of Ukraine. This purpose was confirmed by the terms of the Relevant Drawdowns and most particularly the provisions for the indexation fee. Until the Russian invasion of Crimea this central purpose was achieved through the Relevant Drawdown itself being effected in US$. Thereafter, it was sometimes necessary for the Relevant Drawdown to be in UAH followed by an immediate conversion into US$, which was effected by the Bank, albeit through market transactions rather than through the use of its own foreign currency reserves, a process which was confirmed by the notes to the Bank's financial statements. When that was required, it did not affect the fact that the process was all part of a single transaction for the transfer abroad of US$. I am satisfied that for the Bank to obtain full compensation for the harm it sustained, its claim is properly one made in US$ for the full amount of its loss.

2021. It was also submitted on behalf of Mr Kolomoisky, based on the evidence of Mr Davidson, that any credit for (valid) repayment should be calculated by reference to the exchange rate at the date of the Relevant Drawdowns rather than the date of repayment. As to that, the Bank's pleaded position is that, where Transferred Assets were valued in UAH (which was the position with all of the Transferred Assets other than the Aircraft), the true value of those assets should be converted from UAH to US$ using the exchange rate applicable at the time of transfer to the Bank in 2016. It was submitted that this approach is consistent with what actually happened in relation to repayment of the US$ Relevant Drawdowns because the Bank's transaction data shows that where a US$ Relevant Drawdown was repaid with a UAH-denominated asset, the value of the asset was converted from UAH to US$ at the exchange rate on the date of repayment before being applied to reduce the outstanding balance on the Relevant Loan. It was said that converting the value of UAH-denominated assets at the 2013-14 exchange rate, rather than at the depreciated 2016 exchange rate, would prevent the Bank from being fully compensated for its loss, because the assets were, by 2016, worth approximately three times less in USD terms). In my judgment, the Bank is correct on this point for the reasons it has given.

2022. A similar point was argued by the Corporate Defendants. It was argued that the Bank asserted claims against them in the US$ amounts of the Unreturned Prepayments each of them received, notwithstanding that some of the Relevant Drawdowns provided by the Bank, which are said to have caused those Unreturned Prepayments, were in UAH. It was then said that, owing to currency fluctuations, there is now a significant

difference in value in US$ terms between the US$ amounts received by the Corporate Defendants and the UAH amounts the Bank transferred away on the making of the Relevant Drawdowns. Mr Plewman called this the "Dollar Differential" and said that it affects the English Defendants and Milbert, with an aggregate effect of a windfall to the Bank of c.US$521 million if the Corporate Defendants are ordered to pay the Dollar Differential to the Bank. The Corporate Defendants said that this gave rise to a complex point, which related to the extent to which the Corporate Defendants' gain is properly to be regarded at being at the expense of the Bank (and therefore unjust enrichment for which the Bank can claim).

2023. In light of the nature of the conversion process, the fact that conversion into US$ was all part of the recycling scheme in the first place and the fact that the conversion occurred so immediately after the Relevant Drawdown in all but a handful of cases, I do not agree that the Dollar Differential discloses the mismatch described by the Corporate Defendants. Although some of the Relevant Drawdowns were made in UAH, they were immediately converted to US$ as a central element of the purpose for which they were made in the first place. For that reason it cannot be said that the Bank will have obtained a windfall from what occurred if the Corporate Defendants are ordered to pay any part of what they called the Dollar Differential to the Bank.

Disposition

2024. The consequences of my conclusions are as follows:

i) The Repayment Defence and the Limitation Defence both fail.

ii) The Individual Defendants are both jointly and severally liable to the Bank for compensation for the harm it sustained on the making of the Relevant Drawdowns; the figure is to be quantified as US$1,911,877,385 less the real value of the Transferred Assets as reflected in the body of the judgment.

iii) The Corporate Defendants are jointly and severally liable to the Bank for compensation for the harm it sustained on the making of specific identified Relevant Drawdowns, but only to the extent I have identified in paragraph 1571 of this judgment; if the parties are unable to agree on the extent of the consequential liability, the matter can be restored for determination at a further hearing.

iv) The Corporate Defendants are liable to the Bank in unjust enrichment but only to the extent I have identified in paragraph 1688 of this judgment; if the parties are unable to agree on the extent of the consequential liability, this matter too can be restored for determination at a further hearing.

2025. I did not hear submissions on interest during the course of oral closings, although the Bank had produced written arguments on their claim for both compound and simple interest in the event that they were to succeed. In the light of my conclusion, any dispute on interest will have to be determined at a further hearing consequential on this judgment.