Neutral Citation Number: [2022] EWHC 135 (QB)

Case No: QB-2018-001043

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2022

Before:

MR JUSTICE FREEDMAN

- -

Between:

VADIM DON BENYATOV

Claimant

- and –

CREDIT SUISSE SECURITIES (EUROPE) LIMITED

Defendant

- -
- -

Charles Ciumei QC, Andrew Legg and Naomi Hart (instructed by **Scott+Scott (UK) Limited**) for the **Claimant**
Paul Goulding QC, Paul Skinner and Emma Foubister (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendant**

Hearing dates: 8, 9, 10, 11, 14, 15, 16, 17, 21, 22, 23, 24, 25, 28, 29 & 30 June and 8 & 9 July 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 25 January 2022 at 10.30am.

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MR JUSTICE FREEDMAN:

I Introduction

1. Mr Benyatov was a Managing Director of the Defendant bank ("the Bank"). Mr Benyatov is a US citizen, but he was based in London. Prior to the events giving rise to the claim, he was a successful investment banker specialising in the energy sector and especially involved in privatisations in Eastern Europe. This case arises following his arrest in Bucharest on 22 November 2006 whilst working for the Bank, his incarceration for 56 days, his having to remain in Bucharest until August 2007, and his subsequent trial and conviction in absentia in 2013 and sentence to 10 years of imprisonment. His appeal in January 2015 was allowed in part, and his sentence was varied to 4½ years. The result of his conviction was that Mr Benyatov's status as an approved person with the FCA came to an end. Fearing the imposition of a European Arrest Warrant, he went to live in the United States where he still lives. He was made redundant on 13 June 2015. He has been unable to secure employment since then. There is an ongoing appeal to the European Court of Human Rights ("ECHR"), but this has still not been heard.

2. Absent any criticism of Mr Benyatov's conduct, and indeed with the Bank assisting Mr Benyatov in his defence and appeals, Mr Benyatov has brought this action against the Bank. He claims career loss of earnings pursuant to an indemnity to be implied into his contract of employment. The Bank challenges this and says among other things, that this goes beyond the scope of any indemnity that could be implied in a contract of employment. In the alternative, Mr Benyatov claims damages for the Bank's breaches of a duty of care in tort to protect him from criminal conviction in the performance of his duties for the Defendant in failing to assess the risks for Mr Benyatov in Romania which led to his conviction. The amount of the claim is very considerable. In the Amended Particulars of Claim ("AMPOC"), the sum claimed was about $86 million then equating to about £66 million. It is intended to reflect loss of potential earnings for the remainder of Mr Benyatov's working life. The allegations of duty of care, negligence, causation of loss and damage are all challenged by the Bank.

3. There have been long lists of issues prepared by both sides before the trials, but nothing has been agreed in those lists. The Court has been assisted by very detailed closing arguments both in writing and orally, but the arguments have not followed expressly the structure of even their own lists of issues. That has been sensible because otherwise there might have been many tens of issues to be decided without having an easily comprehensible structure. By following principally the structure of the written and oral arguments, the Court has endeavoured to cover the primary and other issues in the case to the extent that adjudication was required.

4. This is a case where there has been a large amount of factual evidence and expert evidence as regards (a) the nature and extent of the risk to which Mr Benyatov was exposed, (b) whether and how this ought to have been assessed by the Bank in advance of Mr Benyatov's arrest, and (c) the steps which the Bank ought to have taken in the light of such risk.

5. The evidence before the Court has comprised the following:

(1) Evidence adduced by Mr Benyatov from three former employees of the Bank where witness summaries had been served, namely Mr Simon Menneer, Mr Gaël de Boissard and Ms Joy Soloman. They refused to provide statements to Mr Benyatov, being concerned about obligations of confidence to the Bank. Accordingly, they were to an extent called 'blind' which might not have happened if they had been released expressly from confidence in connection with assisting Mr Benyatov in these proceedings. Each of them had significant amounts to contribute, and such evidence as they gave for Mr Benyatov in chief was perhaps more valuable than witnesses called with detailed witness statements prepared by one party or the other or in liaison with a party.

(2) The evidence of Mr Benyatov himself.

(3) The evidence of witnesses for the Bank comprising:
   (i) Mr Chris Horne (current deputy CEO of the Bank and formerly Europe, Middle East and Africa ("EMEA") Chief Operating Officer ("COO") for the Investment Banking Division ("IBD") and then the IBD Global COO);
   (ii) Mr Kevin Studd (a consultant for the Bank and former EMEA reputational risk approver at the Bank);
   (iii) Mr Marco Mazzucchelli (a former employee of the Bank who was head of EMEA IBD between 2004 and 2008);
   (iv) Ms Victoria Buck (a managing director of the London Branch of the Bank's parent company and Head of Human Resources for the group's UK entities);
   (v) Mr Jonathan Scheele, (former head of the European Commission's ("EC") delegation to Romania between 2001 and 2006);
   (vi) Mr Quinton Quayle (a former British Ambassador to Romania from November 2002 to May 2006); and
   (vii) Mr Michael Schilling (a former partner of Linklaters who lived in Bucharest at the relevant time).

(4) Expert witnesses summarised as follows in the opening skeleton of Mr Benyatov:
   (i) For Mr Benyatov:
      (a) as country expert, Professor Dennis Deletant, Emeritus Professor of Romanian Studies at University College London, whose report focusses on the risks of doing business in Romania between 1 January 2005 and 22 November 2006 ("the Relevant Period"), and the steps that could have been taken to mitigate those risks.

      (b) as risk expert, Mr Philip Worman, Managing Director and co-owner of GPW & Co Ltd, a market leading risk and investigations firm, whose report focuses on corporate risk assessments and investigations, and addresses the extent to

which the risks of doing business in Romania were reasonably discoverable during the Relevant Period.

(ii) For the Bank:

(a) as country expert, Mr Neil McGregor, an English corporate and commercial solicitor with experience working in Romania as a lawyer, and Chairman of the British Romanian Chamber of Commerce, whose report focusses on the risks of doing business in Romania during the Relevant Period and the extent to which those risks were discoverable by someone 'on the ground' in Bucharest.

(b) as risk expert, Dr Dominick Donald, a political risk consultant and former director at Aegis Defence Services, whose report focuses on the discoverability of the risks of doing business in Romania by businessmen and/ or their employers during the Relevant Period.

6. The evidence was given mainly by witnesses in Court. Some witnesses gave evidence by videolink. Most notably, Mr Benyatov gave evidence from California. The Court offered to sit unusual hours in order to accommodate Mr Benyatov given the time difference of 8 hours. He preferred to give evidence in the night in California, albeit that when he was too tired to go on, the Court curtailed its sitting.

7. This was a case where I find that the witnesses were honest. They were trying to recall what happened. The Court has to consider their evidence from the perspectives from which they were given. This was not a case where it was a "straight swear" between different witnesses, or generally where critical findings of fact had to be made about particular conversations or events. There were no witnesses who came over as if they were fabricating evidence in order to suit their case.

8. Nevertheless, it has been necessary to appraise the extent to which witnesses were reliable in their testimony. It is difficult enough for a witness to recall events of some two or three years earlier. In this case, it was more challenging still since the evidence was about events of almost 15 years ago or more. There were documents to refresh memories, but it is difficult to remember events so long ago beyond that which is in a contemporaneous document. The Court therefore has to take into account the usual warnings about the unreliability of oral evidence, the desire of a witness to give evidence to favour the case of the person who called them, the allegiances built up to a current or former employer and the problems about witness statements prepared by lawyers rather than the witness. The Court has had in mind the importance of looking at contemporaneous documents and objective facts and being cautious about oral evidence: see *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) especially at paras. 19-22.

II The facts

(a) Mr Benyatov's background and experience

9. Mr Benyatov was born in Azerbaijan in the former Soviet Union. In 1980, aged 14, he emigrated with his family in humble circumstances from the USSR to the USA. After studying computer science and working as a semiconductor engineer, he obtained an MBA in finance. He then commenced a career in investment banking in the early 1990s with Morgan Grenfell, based in London.

10. In 1997, with the advantage of his fluency in the Russian language and interest in emerging markets in Russia following the collapse of the Soviet Union, Mr Benyatov moved to Moscow with an affiliate company of the Bank as Head of Russian Oil & Gas. He returned to London in 2000 as a Director and Head of European Emerging Markets Utilities. His remit was based primarily on his industry expertise and extended beyond Eastern Europe to the former Soviet Union, Israel and Turkey, covering some 30 countries. He reported to the Group Head of Global Emerging Markets Utilities (Mr Vengerik), who reported to the Global Head of the Energy Group (and across to Mr Menneer, Head of the European Energy Group, succeeded by Mr Harris in 2002). He worked on privatisations and other projects in a variety of different locations: in Bulgaria, Poland, the Philippines, Russia, Slovakia and Ukraine. He spent the most time in Slovakia, where he worked on a project for the Defendant to privatise the national gas company at a valuation in excess of US$6 billion.

11. Apart from his work on utilities transactions, Mr Benyatov had worked in a number of other sectors, including metals and mining, oil and gas, as well as work involving financing and loan restructuring. Mr Benyatov had a strong understanding of the work of other departments in the Bank. He worked closely with the Fixed Income Division, in particular, developing opportunities and cross selling the Bank's services. He was given credit for his cross divisional activity by way of the Bank's "Single Global Currency Award", given only to a hundred or so employees out of many thousands who worked for the Bank. This was reflected in his total compensation, which increased five times in six years.

(b) Romania in the 2000s

12. There was a context for this work. Between 1995 and 2006, a number of European Emerging Markets, including Romania, were pursuing privatisation programmes in industries such as telecoms, gas and electricity, which led to an increasing amount of work for investment banks in the region. Privatisation became a key economic goal of the Romanian Government (Scheele para. 22) and, as there was insufficient local banking experience, many foreign advisers were involved in providing the required privatisation expertise to facilitate this government-led process. The Romanian Government wanted privatisation to succeed not only in order to join the EU. The evidence was that many large investment banks were involved in working on (or pitching to work on) privatisations in the region: Horne, paras. 10-11; Schilling, para. 17; Mazzucchelli, para. 8.

13. Mr Benyatov agreed that in the late 1990s and early 2000s: (1) the Romanian Government was committed to privatisation as a step towards EU accession; (2) there was a general increase in investment banking work; (3) Romania's privatisation programme attracted a large number of advisers from outside the country; and (4) it made Romania's life much easier to have leading investment bankers on the transactions [T3/104/23-T3/106/3]. Privatisation became a "*key economic goal of the Romanian Government*".

14. Mr Scheele (at para. 32) described how *"the UK Government was also encouraging UK businesses and individuals to travel to and/or work in Romania during this period"*. Mr Quayle (para. 11) said *"British-Romanian relations were warm and friendly"* from 2002 and developed well thereafter. In July 2002, a UK-Romania Action Plan was relaunched on the occasion of the UK Foreign Secretary's visit to Romania. Mr Benyatov said that *"it was one of the prerequisites of the IMF and the EU that they bring in expertise into the country in terms of best practice or running the privatised entities which did not exist in Romania"* [T3/110/13-16].

15. Many foreign firms and advisers working there had a business infrastructure, which included offices in Bucharest of major law firms, such as Linklaters, and accountancy firms, such as Coopers & Lybrand. Mr Mazzucchelli (para. 9) explained that there were "*a large number of business opportunities in Romania for investment banks at this time*". He said: "*Romania was not considered by me – or indeed by any other business people as far as I knew at the time – to be a challenging or high risk place to do business*". He said this was his "*conviction at the time*" [T9/19/24-25] and "*it was part of the overall assessment that we collectively made in the Investment Banking Division and also I did think along these lines*" [T9/20/17-19].

16. Mr Scheele (para. 21) described a *"continuous flow of work for foreign companies"* and *"plenty of European money flowing into the country, both public and private"*.

17. In this role, Mr Benyatov first began travelling to Romania as an industry expert from around 2001-2002 for the first time. He did not have prior experience of working in Romania and had never been there before.

(c) British Embassy in Romania (2002-2006)

18. The Embassy had many visitors during this period. Mr Quayle described how there "*was a lot of interest from London and people wanting to come out to see the country for themselves*" [T7/73/25-74/4]. The FCO travel advice for Romania as of 3 May 2005 was "*tailored advice for Romania, reflecting the risks, as we saw it, for visitors of all sorts, be they tourists or business representatives*" [T8/9/22-25].

19. Mr Quayle was very involved in the detailed work of the Embassy. He explained that visitors would usually go to him or the trade investment section and would not go straight to the political section [T7/91/23-T7/92/8]. He said that if a political briefing was required, they might sit in on the meeting, but he was "*intimately involved in that work…[he] knew what was going on in [his] own Embassy*" [T8/15/5-18]. He described being in "*daily contact*" with the political section and "*they wouldn't have dreamt of dealing with a high level commercial enquiry without mentioning it to [him]. [He] was briefed very regularly*" [T8/20/10-13] and [T8/53/20-T8/54/3].

(d) EU Delegation in Romania (2002-2006)

20. Mr Scheele (para. 12) described Romania as a *"country committed to do whatever was necessary to ensure EU accession"*. He said (para. 13) *"huge efforts were made, often successfully, to make significant improvements in Romania"*.

(e) The Petrom privatisation (2002-2004)

21. Between about 2002 and 2004, the Bank was engaged by the Romanian Government to advise it in relation to the privatisation of SNP Petrom SA ("the Petrom privatisation"). Petrom was Romania's principal oil and gas company, and, at the time, it was the largest privatisation ever undertaken in the country. Mr Benyatov was the overall project leader and advised the Romanian government on the sale. The Petrom privatisation closed on 14 December 2004.

22. Mr Benyatov said he was "*key in securing the Petrom mandate*" [T3/122/19-20]. The Petrom privatisation memo listed him as a member of "*senior staff"*. It was a part of the Petrom privatisation process to keep the World Bank informed of developments and the International Monetary Fund ("IMF") also had a role in the process [T4/15/10-24]. Mr Benyatov was involved in seeking out credible local partners to assist in the process, which included Energan and specifically Stamen Stantchev [T4/5/19-T/6/1].

23. Mr Benyatov confirmed that: (1) as a result of his work on the Petrom privatisation he got to know the relevant people in the privatisation agency, the Office of State Ownership and Privatisation in Industry ("OPSPI"), quite well; (2) he was the primary point of contact for outside counsel, Mr Schilling and for the Romanian Government; and (3) within the Bank, Group Heads would look to him to tell them if there were any problems that emerged on the Petrom transaction: see [T4/43/18-T4/44/14].

(f) The Distrigaz Nord and Distrigaz Sud privatisations (2002-2004)

24. In 2003, the Bank was engaged by the Romanian Government to advise it in relation to the privatisation of SC Distrigaz Nord SA and SC Distrigaz Sud SA. Mr Benyatov was the overall project leader. He was involved in producing a memo on the Distrigaz privatisations to the Investment Banking Committee ("IBC") on 15 July 2004 which provided a valuation of the Distrigaz companies and provided an analysis of due diligence and risk factors relating to the transaction. The Government signed the sale agreements in October 2004.

(g) The Electrica Banat and Electrica Dobrogea privatisations (2003-2004)

25. In 2003-4, Mr Benyatov also worked on the privatisation of two electricity distribution companies, Electrica Banat and Electrica Dobrogea. On this occasion, he was advising the successful bidder, Enel SpA ("Enel"). He was again involved in producing a memo for the IBC on 7 March 2004. His title was *"overall project leader"* on the privatisations: see [T5/22/1-3].

(h) Mr Benyatov's role advising Enel on the EMS privatisation (2005-2006)

26. In 2005, Enel instructed the Bank to advise it in relation to the privatisation of Electrica Muntenia Sud ("EMS"). EMS was another of the eight state-owned electricity distribution companies, a number of which had already been privatised, including Electrica Banat and Electrica Dobrogea in respect of which the Bank had advised Enel as the successful bidder. First round bids had to be submitted by 31 January 2006 and second round bids by 9 May 2006. The Government announced Enel as the successful bidder on 5 June 2006. Mr Benyatov was involved in producing a memo for the I B Con 26 January 2006 on the EMS privatisation. The memo stated that no reputational risk was envisaged. Although Mr Benyatov did not think that a local consultant was required, Enel did wish to have one to protect Enel's interests with the Ministry of Energy. Mr Benyatov proposed Stamen Stantchev as a person with whom the Bank had worked and who *"clearly understands the rules of the game"* (email of 9 February 2006 from Mr Benyatov to Mr Pattofatto). In Mr Benyatov's third witness statement at paras. 60-65, he stated that he thought that Enel rather than the Bank should hire Mr Stantchev, but he was over-ruled in this. He proposed Mr Stantchev as a person who had access to people within the Romanian Government. He was also told that it was not necessary to do a further due diligence report on Mr Stantchev since one had recently been carried out.

(i) Promotion of Mr Benyatov

27. In 2005, Mr Benyatov was promoted to Managing Director: a title that applied to employees of a range of seniorities in the Bank. It reflected the confidence reposed in him by the Bank.

28. In April 2006, Mr Benyatov became Head of European Emerging Markets, succeeding Mr Michal Susak. In that role, he had a responsibility for the Investment Banking Department's emerging market business in Central and Eastern Europe, the Former Soviet Union (excluding Russia) and Israel. Although responsible for a larger team, he reported to Mr Matt Harris until his departure in December 2006. He began to attend Group Head meetings weekly from November 2007, after his release from detention in Romania and return to London.

(j) Contract of employment

29. When he became a Managing Director, he signed a contract of employment ("the Contract") which included the following terms:

> *"1.* ***Job Title***
>
> *Your corporate title is Managing Director (Class of 2005). You will be working within European Energy Group, Corporate & Investment Banking Division and initially, you will report to Matt Harris*
>
> *2.* ***Date from which continuous employment began***

As you are joining from another Group Company the date you began employment with that Group Company is 15th December 1997 and is the date from which continuous employment began.

*3. **Salary***

Your basic salary is £140,000 per annum and is subject to statutory deductions. Salaries are paid in equal monthly instalments on 25th of each month, or the previous working day when the 25th falls on a weekend or bank or public holiday in respect of that calendar month. You will receive an itemised payslip each month. Your salary will be reviewed each year in line with the prevailing Company policy. There is no obligation on the Company to increase your salary at that time.

...

4.1 You will be eligible to participate in the annual discretionary year-end Incentive Performance Bonus scheme for 2005 and in respect of subsequent years, subject to clause 4.3 below. Your eligibility for an annual discretionary Incentive Performance Bonus and, in the event that you are awarded a bonus, the amount of that bonus shall be determined by the Company by its absolute discretion. Such factors may include: the profitability of the Company and its affiliates, your division and your department; your individual performance, conduct and contribution; and the strategic needs of the Company and its affiliates.

...

*8. **Place of Work***

The main place of work is at offices located in Canary Wharf, but as be deemed reasonable by the Company, you may be required by the Company or any Group Company to work in other parts of the UK temporarily or permanently and you may also be required by the Company to work both in the UK and overseas.

...

*17. **Compliance***

Adherence to CSFB compliance procedures will be an integral requirement to your role. You will be required to attend compliance induction in the first week of your employment. It is a condition of your employment that you have and maintain required regulatory approvals and the competencies required by the Company for the functions which you perform from time to time.

> ...
>
> *22. **Entire Agreement***
>
> *The letter of appointment and the attachments to it, together with the "Contractual Terms" and the "Contractual Benefits" sections of the Employee Handbook, the Global Compliance Manual and our local Compliance Manual constitute the entire agreement in relation to your employment and supersede any previous agreement. You will be provided with copies of the Compliance Manuals soon after joining the Company."*

30. The parties agree that the Contract contained an implied term to indemnify the Claimant, although the scope and application of that term is much disputed, as discussed further below.

31. It is also disputed whether the Contract contained a duty of care (co-extensive with a tortious obligation) not to expose Mr Benyatov to criminal conviction in the performance of his duties for the Defendant, in particular in connection with the assessment of risks of sending him to conduct his duties in Romania.

32. The introduction to the Global Compliance Manual states that "*You are required to read this Manual, which provides an overview of the Firm's Compliance Policies and procedures, and comply with its provisions*". In particular, it states that "*This policy requires you to comply with all applicable laws and regulations of the jurisdictions in which you conduct business on the Firm's behalf*"; "*You must know and comply with all legal and regulatory obligations that are relevant to your business activities*". It states that "*You should consider both whether a proposed course of action complies with all applicable laws and regulations and whether it could embarrass you, your colleagues or the firm*". The Manual states, "*Ignorance of the law or regulations is neither a defence to, nor an excuse from, penalties for acting improperly*". It said: "*If you are ever uncertain about the laws or regulations that relate to your business activities, you must contact [the Legal and Compliance Department]*". Materially the same words are used in the later, 2006, version of the Manual.

(k) The circumstances of Mr Benyatov's arrest and conviction

33. In November 2006, Mr Benyatov was arrested in Romania in connection with the EMS transaction ("The EMS Project"). He was imprisoned until 23 January 2007 and was forbidden to leave the country until August 2007, when he returned to the UK. Thereafter, Mr Benyatov periodically returned to Romania to attend court hearings.

34. Immediately after he was arrested, the Bank commenced its own investigations into Mr Benyatov and the others who were implicated with him (including Mr Mircea Flore, Mr Michal Susak and Mr Stantchev) and into their work on the EMS Project in Romania. The Bank instructed political consultancy Aegis Defence Services Limited, which reported on 22 December 2006 that Mr Benyatov was a man of high integrity who had become caught up in a case against political adversaries of the President.

35. On 7 September 2007, Mr Benyatov and two other former Bank employees, Mr Flore and Mr Susak, were charged by the Romanian Prosecutor. The Indictment alleged *inter alia* that on 27 March 2006 Mr Benyatov obtained confidential information (trade secrets) consisting of the figures representing the first-round bids filed by the bidders for the EMS privatisation; that he obtained this information from a Romanian Government official through Mr Stantchev; and that he used this information in favour of Enel. This was said to fall under the criminal offence of economic or commercial espionage. It was further alleged that these acts represented one of the objectives of a group comprising Mr Benyatov, Mr Stantchev and others, namely the acquisition of trade secrets. This was said to fall under the offence of initiation and establishment of an organised criminal group.

36. The Bank conducted an internal investigation into what had occurred. It interviewed a number of employees in late 2006. On 15 October 2007, the Bank (Mr Damian Bisseker and Mr Studd) interviewed Mr Benyatov on his return from Romania. Mr Benyatov stated according to the note of the interview that:

(1) He had always had concerns about Mr Stantchev/Energan in the same way in which he had had concerns about working with anybody else in this region (para. 14).

(2) All businesspeople who had been active in the early 1990s in this region would have been involved in business ventures which could raise concerns. It was simply not possible to do business legally at all times because the legal structures were not there to conduct business in such a way (para. 21).

(3) In respect of concerns that he was being monitored by the Romanian authorities, Mr Benyatov stated that he had not been given any warning; however, he was not surprised to learn that he had been the subject of surveillance (para. 23).

(4) Mr Benyatov had assumed that he may well be monitored in Romania; however, he had never believed that the Romanian authorities would try to make a case based on the "*hearsay information*" which Mr Stantchev had passed to him (para. 26).

(5) Mr Benyatov believed that the information which he received from Mr Stantchev/Energan was in the public domain by the time it was provided to him (para. 31).

(6) Mr Benyatov explained that Enel was made aware of the level of the first-round bids from the information provided by Mr Stantchev and therefore knew they had bid significantly higher than the other bidders (para. 38).

(7) Mr Benyatov stated that he had not been aware of the provisions in the bid rules relating to the confidentiality of bid levels. Mr Benyatov stated that he had only been on the outside of the transaction and had not felt it necessary to review the rules in detail (para. 40).

37. On the basis of the information it received at the time, including Mr Benyatov's comments in his interview, the Bank concluded that the actions of its employees were in accordance with customary business practice. The Bank paid for the criminal defence costs in Romania of Mr Benyatov, Mr Flore and Mr Susak. It now says that in view of the findings of the Romanian court, it has now concluded that his conduct was not in accordance with customary business practice. This is said to be based on findings of the Romanian Courts (in written reasons running to over 1200 pages) that Mr Benyatov obtained and used confidential information regarding the amount of binding offers submitted in the EMS privatisation, being fully aware of the illegal nature of his acts, contrary to Romanian law.

(l) Mr Benyatov's move to the Fixed Income Division in 2012

38. In 2012, Mr Benyatov, together with former members of the Fixed Income Division ("FID") Emerging Market Financing business, who had previously moved into IBD European Emerging Markets, moved back into FID.

(m) Mr Benyatov provisionally selected for redundancy

39. On 15 October 2013, Mr Benyatov was informed that due to difficult market conditions, reductions in headcount had become necessary and he had been provisionally selected for redundancy. A consultation period would follow during which Mr Benyatov was not required to attend the office.

(n) The Romanian Court's decision to convict Mr Benyatov

40. On 3 December 2013, the Romanian Court convicted Mr Benyatov of both offences with which he was charged, along with other defendants, and sentenced him to 10 years' imprisonment. In a 683-page judgment, the Court set out its findings that Mr Benyatov took measures to obtain business secrets and confidential information on the values of bids submitted by competing bidders in the privatisation of EMS, relying in particular on a telephone call of 27 March 2006 between Mr Benyatov and Mr Stantchev.

(o) The revocation of Mr Benyatov's FCA authorisation

41. On 3 December 2013, the Bank notified the FCA that Mr Benyatov had been found guilty by the Romanian court of espionage and membership of an organised criminal group and received unexpectedly harsh sanctions, but that Mr Benyatov would be appealing the decision. The FCA considered the findings to be "*ostensibly very serious and the sentences lengthy*".

42. On 5 December 2013, in response to a query from the FCA on what role (if any) Mr Benyatov was currently performing, the Bank notified the FCA that Mr Benyatov was no longer performing any controlled functions at the Bank and was undergoing a redundancy consultation process. The Bank filed the requisite Form C Notice of ceasing to perform controlled functions. The Financial Services Register currently states, in relation to Mr Benyatov, "*Regulatory approval no longer required*", he "*is no longer in a role that requires regulatory approval*", and "*No FCA or PRA disciplinary or regulatory action*" has been taken against him.

(p) The Romanian Court's decision on Mr Benyatov's appeal

43. Mr Benyatov appealed his conviction and was partially successful following a decision given on 27 January 2015. By a 540-page judgment, the Romanian Appeal Court replaced his original convictions with convictions for the instigation of disclosure of professional secrets or non-public information and for establishing an organised crime group under the new Romanian criminal code. A sentence of 4½ years' imprisonment was substituted.

44. The Romanian Appeal Court found that Mr Benyatov obtained professional secrets and confidential information regarding the amount of the binding offers submitted in the EMS privatisation in a conversation with Mr Stantchev on 27 March 2006; that the information was not in the public domain; that confidentiality of such information was a prerequisite to ensure real competitiveness between all potential investors; that Mr Benyatov was aware that the information was confidential and of the illegal nature of his acts; and that Mr Benyatov was motivated by his own gains and did not act on behalf of the Bank in acting illegally.

(q) Mr Benyatov's dismissal for redundancy

45. Notwithstanding that Mr Benyatov was notified of his potential redundancy on 15 October 2013, and placed on garden leave, the Bank continued to pay his £450,000 per annum salary until his employment was terminated for redundancy on 13 June 2015. The Bank suggests that the extension to the usual redundancy timeline of approximately 30 days was connected with a desire to support Mr Benyatov whilst his appeal was ongoing, whilst Mr Benyatov also links it to his appearance as a witness for the Bank in legal proceedings in 2014.

46. The Bank wrote after the conviction by the Romanian court a letter to Mr Lidington (then Minister for Europe Foreign and Commonwealth Office) dated 13 May 2014 in respect of the Romanian proceedings, - saying the following:

> *"Fundamentally the evidence does not support the accusations made by the prosecutors. On the basis of the evidence presented it can only be concluded that the Credit Suisse individuals are collateral damage resulting from confusion between normal business practices and national security crimes in the pursuit of a wider public agenda."*

47. After Mr Benyatov's conviction, the Bank hired Lord Mandelson's consultancy firm, Global Counsel, to advise in connection with the situation in Romania, and thereafter sent a series of letters to individuals who were perceived as likely to be able to influence the situation in Romania and around the world.

48. Since the conviction and appeal, the Bank instructed its own lawyers, Clifford Chance, to file applications and submissions that those findings are unwarranted, unlawful and in breach of Mr Benyatov's human rights as well as invalid as a matter of Romanian law. After his dismissal in June 2015, the Bank paid for an application on Mr Benyatov's behalf to the EC HR that was filed on 23 July 2015, asserting that the convictions in Romania were in violation of Mr Benyatov's fundamental human rights. Despite this, by its Amended Defence, the Bank says that the Court should rely on the findings of the Romanian Court.

(r) Mr Benyatov's move to the United States in January 2015

49. In January 2015, Mr Benyatov moved to the United States of America where he now resides, not having returned to Romania to serve his sentence. The reason for this is that in the United States, unlike in Europe, he could not be the subject of a European Arrest Warrant. Mr Benyatov is unable to work as a regulated finance professional, and he risks arrest, extradition and imprisonment if he travels.

III Assessment of the evidence

50. At the core of the case are the following areas:

(1) The risk of doing business in or connected with Romania at the relevant time;
(2) The risk of the transactions in which Mr Benyatov and/or the Bank were engaged in Romania;
(3) The extent to which assessments of risk were prevalent at the time;
(4) The knowledge which the Bank had or ought to have had of risk to Mr Benyatov and in particular an appraisal of the alleged amber or red flags;
(5) Whether the responsibility was on Mr Benyatov to avoid or mitigate danger.

51. In part, it is necessary to appraise the evidence and make assessments of the witnesses in order to consider these questions. It is therefore appropriate at this stage to make assessments of the witnesses.

(a) Mr Benyatov

52. For a number of reasons, Mr Benyatov has experienced great pressure in this case. He is having to recall what has been a traumatic experience of his arrest, his imprisonment, his restriction of movement in Romania, the years leading up to his trial followed by his conviction, his unsuccessful appeal, his fleeing to the USA to avoid the European Arrest Warrant and the vigorous opposition to his claim. He has

given evidence from his home in California. He has chosen to be cross examined at night-time because he evidently prefers that to going to the East Coast, but the Court has brought proceedings to a conclusion early on at least one occasion, so that he could re-gather his strength.

53. The Bank cross- examined Mr Benyatov over a period of four days. The Bank claims that he has presented a "*slanted version*" of relevant events for the purpose of court proceedings and that he has downplayed his involvement in matters that he thought might adversely affect his case. This is not how Mr Benyatov came across to the Court. There are a series of alleged contradictions relied upon by the Bank (written closing para. 11) leading to the Bank's conclusion (written closing para. 12) that his evidence should be rejected save where it is "*corroborated by documentary evidence or is uncontroversial*". It is not necessary to go through each of them, but they are no more than differences of emphasis, and most of them easily explained by the context. To the extent that there is the odd inexactitude over days of cross-examination, that does not show a lack of reliability, let alone that the Court should view his evidence with "*a healthy degree of scepticism*." An example is that a reference to his being part of senior management of the Bank to the Romanian Court is not inconsistent with the denial in this Court. In the former context, it was to convey that being a Managing Director meant being senior and being in management, that is to say in a responsible position. In the latter context, it was to deny that he was a level above that towards the top of the organisation, that is to say in a board position with even Managing Directors below. Likewise, he said that he had no junior staff reporting to him whilst in this Court he said that he had staff reporting to him for particular projects: the former was true in that there was no permanent staff reporting to him, and the latter was true in respect of an ad hoc basis in respect of particular projects. None of them, in my judgment, show that Mr Benyatov is an unreliable witness.

54. Having considered his evidence as a whole, I find Mr Benyatov to be a witness whose evidence came over as credible. He gave his evidence clearly and calmly. He demonstrated his knowledge, skill and experience. This is subject to an unsatisfactory feature referred to in the next paragraph.

(b) Unsatisfactory features

55. There is a significant caveat in respect of Mr Benyatov's evidence about his losses. He may have convinced himself about his earnings potential, but it stretched credulity to believe that he would have continued on the balance of probabilities to have gone on working to the age of 75 or that he would have gone into a career outside the Bank where he would have earned far more per annum than the most that he ever earned whilst at the Bank. These are matters which I take into account in appraising his evidence, being cautious about the extent to which his experiences and the adversarial nature of this litigation have affected his objectivity.

56. There have been a number of arguably unsatisfactory features of the evidence on behalf of the Bank which require particular consideration as follows:

(i) The need for Mr Benyatov to serve witness summaries;
(ii) Witnesses of fact called by the Bank from outside the Bank;

(iii) The selection of witnesses called for the Bank.

(i) The need for Mr Benyatov to serve witness summaries

57. Mr Benyatov found himself in a very unequal position. He wanted to be able to obtain witness statements from at least former employees of the Bank. The employees had signed non-disclosure agreements ("NDAs") with the Bank or perceived that they had continuing obligations of confidentiality which would or might prevent them from being able to speak with Mr Benyatov. The result was that Mr Benyatov was unable to obtain statements from such witnesses and attempts on the part of Mr Benyatov to call such evidence were thwarted. In the end, he was driven to serve witness summaries in respect of Mr Simon Menneer, Mr Gaël de Boissard, and Ms Joy Soloman. References to these witnesses as Mr Benyatov's witnesses in the written closing submissions have been accurate, but do not reflect the full position.

58. The applications were resisted root and branch. There was a complaint about lateness in the making of the application, and that was dealt with in the application by granting relief from sanctions. In part, the Bank stated that there was no evidence that consent had been refused by the Bank and that it would have considered any request on its merits. The Bank did not need to adopt this approach and could have waived the NDAs, but it did not do so, and by its opposition demonstrated that it would stand in the way of these witnesses being available to Mr Benyatov so that he could obtain witness statements from them.

59. The effect on Mr Benyatov was that he had to make the decision to call these witnesses blind, that is without knowledge of what they would say. He was subject to the additional disadvantages of being able only to ask non-leading questions and not to be able to cross-examine them. This was insisted upon by the Bank, which made an objection at an early stage in respect of Mr Menneer's evidence when he was in effect led as regards his position at the Bank relative to Mr Benyatov [T2/4/7 – T2/5/3 and T2/5/9-13].

60. It might be said that the Bank was simply adopting a course which was available to it. Insofar as it opposed the reliance on witness summaries, there was a costs order against the Bank. However, that is not the end of it. In my judgment, in evaluating the evidence as a whole, the Court is entitled to bear in mind how Mr Benyatov has been unable to call witnesses to support his case other than through witness summaries, calling them in effect blind. The Bank appears to have done nothing to alleviate the reaction of its former employees to NDAs e.g. by waiving them or facilitating a meeting between them and Mr Benyatov's lawyers even in the presence of the Bank's lawyers. The expression that there is no property in a witness evidently has to be qualified in the face of NDAs signed in favour of a powerful employer.

61. As regards the witnesses themselves, in the witness summary application, the Bank contended that the evidence of the witnesses was irrelevant or of marginal relevance. I rejected that submission. When they were called, it was apparent that their evidence was relevant. Among the evidence which they gave was the following.

62. **Mr Simon Menneer** [T2/2/1]-[T2/86/25], who had worked at the Bank as COO, gave evidence who came over as very independent of the Bank with his own views. Although it is now 15 years since he was engaged, his evidence was valuable. He said that:

(1) He would have ranked Romania as the second riskiest location in the whole of the EMEA (Eastern Europe, Middle East and Africa) region after Russia [T2/68/22]-[T2/69/25]. This was qualified by accepting that the position was addressed by a country office in Russia, and in Romania, by engaging local consultants. His evidence in response to the cross-examination of Mr Goulding QC [T2/70/4 – T2/70/21] was as follows:

> *"Q. So one of the ways of addressing that situation, is this right, would be to engage local consultants?*
> *A. Yes, local consultants, people who just knew the area.*
> *Q. Yes. And there was a policy, a procedure, wasn't there, in place at Credit Suisse that had to be satisfied before local consultants were engaged. Were you aware of that?*
> *A. Absolutely, sir, yes.*
> *Q. And provided that procedure was followed then local consultants, their engagement was an acceptable way of getting knowledge on the ground in a country where you didn't have your own office?*
> *A. Yes, consultants come with the risk that you don't know always what they're doing and they can be doing some things that would not pass your compliance manual.*
> *Q. But that was in part why you had the procedure to check out those --*
> *A. Exactly, yes."*

(2) His own view of Mr Benyatov was that he was very bright and hard-working, but was not the most flexible person. He was a little narrow in his strategic view and was keen on getting the transaction done [T2/8/8-15]. This is relied upon by Mr Benyatov in support of the assertion that the Defendant cannot place responsibility for risk solely on Mr Benyatov's shoulders. His evidence is also relied upon by the Bank in connection with his prospect of advancement. Mr Menneer said that Mr Benyatov had done enough to be a Managing Director, but he *"wasn't a slam dunk candidate"* [T/8/3-6]. He said that he "*would have been very surprised if Mr Benyatov had got much higher within the European bank unless he became head of the Moscow office*" [T2/73/25)-74/11].

(3) The proposer of a transaction was the person who is "*taking his reputation to the IBC*", which for the EMS Transaction was Luigi de Vecchi [T2/20/11-19], and that if anything went wrong on a transaction, it was to that person that you would turn [T2/48/10-12]. Mr Menneer explained that the sponsoring banker would be the one to prepare an initial report to the IBC addressing all the risks and the mitigantions [T2/29/21-25]. No such document has been disclosed as referred to below.

63. **Mr Gaël de Boissard** [T3/3/1]-[T3/38/12], a very senior executive, formerly sitting on the Credit Suisse Group Executive Board between 2012-2015, who sent various letters on behalf of Mr Benyatov to the FCO, the American Chamber of Commerce in Romania, the World Bank and the EBRD, gave evidence as follows:

(1) He explained that during 2005-2006 the Bank's risk policies were focussed on risks to the Bank and the Bank's interests, and not those of its employees [T3/21/5-12];

(2) Prior to 2012, risks had been assessed within the separate business divisions of the Bank (fixed income, investment banking, equities), and "*there didn't seem to be much sharing between the divisions*" [T3/14/7-8] (this was confirmed by Mr Studd at [T10/146/14-25]);

(3) This only subsequently became a more centralised process given criticisms of the Bank's processes from regulators [T3/13/20-24].

64. **Ms Joy Soloman** gave evidence about Mr Benyatov. She still remained, all these years later, quite distressed remembering the events in question including her visit to Romania to visit Mr Benyatov. In particular, she also gave evidence of:

(1) her views about Mr Benyatov: *"A very positive one, I think. He was very strategic. He had very strong negotiation skills and he was very firm, very firm with his team, but a really good manager and he led his team."* [T2/91/7-11];

(2) the risks considered by the Bank in relation to sending employees to Romania after Mr Benyatov's arrest [T2/93/18]-[T2/95/17]; and

(3) the steps introduced by the Bank to enhance security following the arrest of Mr Benyatov at [T2/96/6]-[T2/98/7] and [T2/107/17]-[T2/109/2]. After the events in Romania, it was put onto a watch list [T9/132/21-24], which was within the purview of Legal and Compliance Department ("LCD") or Risk Management [T9/136/13-21]. This included as follows:

(i) The introduction by Mr Studd of a reputational risk call, coordinated by Ms Soloman, whereby any new client or governmental transaction would be carefully scrutinised at an early stage, and where there was any concern, the transaction was not pursued. Mr Studd referred to this at [T10/136/25]-[T10/139/25]. There has been no disclosure about this.

(ii) There were sensitive diligence reports introduced where specialist agencies such as Emerisk (employing ex-secret service or military agents) would provide intelligence about the situation in relation to specific locations and transactions, and which had a very limited distribution within the Bank.

(iii) There were emails from Mr Trevor Gannon in the security department with "*an indication of different territories where there may be some trouble, something brewing or a political situation or there were elections, which would make me think about it and potentially question people if I heard they were travelling there*": [T2/96/15-19].

(ii) Witnesses of fact called by the Bank who did not work for the Bank.

65. I start with witnesses who did not work for the Defendant or a Credit Suisse company. They were each paid large sums for giving evidence to compensate them at the rate that they would charge for professional services to clients. There was a large amount of research time of 50 hours for Mr Quayle, and 15-20 hours for Mr Scheele. I accept the submission that this gives rise to what Mr Benyatov's Counsel referred to as the risk of a "*subtle, if unconscious, influence in giving their evidence to please their paymasters*." It presented the risk of unconscious bias referred to by Leggatt J in para 19 of *Gestmin* (cited above). I do not cast any personal aspersions on the witnesses themselves, but their evidence has to be received with caution due to these matters.

66. The Bank makes the good point that Mr Quinton Quayle and Mr Jonathan Scheele have been called responsively to the pleading of Mr Benyatov. Mr Quayle, the former British Ambassador to Romania, was called in response to Mr Benyatov's amendment to the Particulars of Claim, which alleged that the Bank could and should have been informed about risks by engaging with relevant British embassy employees in Bucharest. Likewise Mr Scheele, the former Head of the EC's delegation to Romania, gave evidence which was responsive to the pleading of Mr Benyatov. This had said that the Bank could and should have been informed about risks by engaging with employees of the EU delegation in Bucharest at the relevant time. Since the conclusion of oral argument in this case, the Court's attention has helpfully been directed to a recent decision of Sir Michael Burton GBE in *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm), [2021] WLR 5294. At para. 11 of the judgment, adopting some of the submissions on behalf of the successful respondent resisting a strike out application in respect of what was said to be inadmissible opinion evidence given by witnesses of fact, Sir Michael Burton GBE said the following at para. 11:

> *"ii) There are authorities which exemplify that witnesses of fact may be able to give opinion evidence which relates to the factual evidence which they give, particularly if they have relevant experience or knowledge. Such witnesses are not independent, and to that extent such evidence would need to be tested by reference to cogency and weight: ES (By her mother and litigation friend DS) v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 *esp at [31]–[32], [41] and DN (By his father and litigation friend RN) v London Borough of Greenwich* [2004] EWCA Civ 1659 *esp at [25]-[26].*

> *iii) This is particularly so where the evidence given is as to a hypothetical situation as to what would or could have happened: Kirkman v Euro Exide Corporation (CMP Batteries Ltd) [2007] EWCA Civ 66 esp at [13], [16]–[20] and Rogers v Hoyle [2015] QB 265 esp at [61]–[62] per Leggatt J (upheld in the CA). This is well illustrated in Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712 *CA at [92].*
>
> *iv) Smith LJ in Kirkman at [19] considers that such hypothetical evidence is evidence of fact. Mr Hayman submits that this is limited to evidence as to what the person giving evidence himself, or possibly his company, could or would have done, but in my judgment it is not so limited and extends, provided that the witness can give evidence by reference to personal knowledge and involvement, to what would or could have happened in the counterfactual or hypothetical circumstances."*

67. This has application here in respect of the evidence given of a counterfactual nature. **Mr Quinton Quayle** was then the most senior employee in the period of 2002-2006 as British Ambassador. He gave evidence as to what he would have advised in the event that his advice had been sought. His evidence was in part of a counterfactual nature in response to the allegation made by Mr Benyatov that the British Embassy ought to have been consulted. The evidence was what would have occurred if they had been consulted. The cases referred to by Sir Michael Burton GBE in the above quotation are to the effect that this evidence was admissible.

68. There were limitations about Mr Quayle's evidence: absence of prior experience of Romania or of political risk before being posted there [T7/44/21-23] and [T7/45/1]. He had no direct experience of energy privatisations [T8/7/24]. His role as Ambassador was to support Romania's EU accession efforts and to encourage trade between Britain and Romania [T7/68/14-25]. He had no personal knowledge of questions about the judiciary and judicial reforms, matters of concern relating to national security, or matters dealt with by a political team and of an intelligence nature. All of these matters were dealt with in or by other people connected with the Embassy.

69. These are matters to be taken into account in considering his evidence about the level of risk of doing business in Romania e.g. paras. 25-26 and 32-33 of his witness statement. Having taken into account these limitations, his evidence was still of value since he was reflecting upon his experience and responsibilities as British Ambassador to Romania at the relevant time.

70. As with Mr Quayle, the evidence of **Mr Jonathan Scheele** was of value in giving the counterfactual evidence about the advice he would have given if asked at the relevant time. I bear in mind that he had no experience of the work of investment bankers or of political risk work [T8/91/15]-[T8/92/5]. His personal focus was not on judicial reform or understanding the difficulties in Romania, but his role was working towards

Romania's accession to the EU with a large budget for the Member States who wanted accession to happen on 1 January 2007 [T8/103/13]-[T8/104/16].

71. Mr Scheele gave evidence as to the degree of risk of doing business in Romania, at paras. 24 – 35. I bear in mind that he was not called as an expert witness who was appraised of the expert's duties to the Court, but these were matters which he was entitled to give evidence based on his own experience and perception at the time. Here too, despite these points, his evidence of the degree of risk was still of value, referring as he did to his view of Romania as not being a "high-risk" country, the level of corruption in Romania, the degree of surveillance, the features of the Rompetrol case and the incidence of political risk assessments in Romania.

72. The evidence of **Mr Michael Schilling**, a partner of Linklaters in its Bucharest office at the relevant time, comprised an 8-page witness statement, yet he was paid what appear to be very large amounts for his evidence, comprising 70-75 hours of billable work, starting at £500 per hour. He spent days attending the trial, having flown over from Canada and having a long time in hotel accommodation at £250 per day. This is not to say that he was intentionally biased in any of his answers. It puts the Court on scrutiny against the possibility of a "subtle influence" or unconscious desire to assist the case of the Bank as his paymaster as referred to in *Gestmin* above.

73. Key aspects of Mr Schilling's evidence included the following:

    (1) Linklaters was not providing a political risk assessment service [T8/184/1-5], rather they were providing regulatory risk and immigration assistance (para. 22 of his witness statement).

    (2) Mr Benyatov's arrest made no sense to him [T8/187/6].

    (3) The anonymous letter sent to Mr Schilling involving an allegation of bribery gave rise to a risk of prosecution [T8/191/7-12].

    (4) He brought this to the attention of the Bank's legal department, since they were the appropriate recipient of that information for the purposes of assessing how to address the risk, and not a banker such as Mr Benyatov [T8/166/24]-[T8/167/20]. Indeed, he did not direct his warning email to either Mr Benyatov, Mr Susak or Mr Rao.

    (5) Mr Benyatov and Mr Schilling did not believe they were at risk on the basis that the transactions they had done together "*were in full compliance with the law*" and thus the only thing Mr Benyatov was concerned with when they discussed it was the impact on future business [T8/192/9]-[T8/193/5].

74. Despite the fact that Mr Schilling did not personally feel at risk in Romania (see para. 14 of his witness statement), Mr Benyatov's position was different from Mr Schilling, interacting with members of the government in respect of the transactions.

75. These witnesses gave admissible evidence which was highly relevant to the case. Each of them at the time occupied important positions and of distinction. They come with impressive pedigrees. There is a problem that their evidence was prepared with an agenda of the Bank; they were paid large sums of money for their time; their

witness statements were well crafted. However, they were witnesses who were not seeking to mislead the Court, albeit that the risk of unconscious bias must be taken into account. Overall, the Court found their testimony to be helpful.

(iii) The selection of witnesses called by the Bank from its current and ex-employees

76. Among witnesses within the Bank, **Mr Marco Mazzucchelli** was a senior manager and Head of the IBD for the EMEA region between 2004-2008. Although not accused by Mr Benyatov for what happened to him, Mr Mazzucchelli was a defensive witness who was keen that no blame should be attached to him for what happened to Mr Benyatov and his colleagues. He said the following:

> *"...In fact it came as a big surprise, the fact that Mr Benyatov was arrested. So I think what I'm saying here is that to the extent that there is a possible interpretation that we either knew or should have known that there were these risks, I simply reject this kind of argument.*
>
> *Q. You say it's not your fault -- you actually say that, you say:*
>
> *"... he is wrong if he is suggesting that any of the fault lies with me."*
>
> *That is your position, isn't it, Mr Mazzucchelli?*
>
> *A. Yes, but put it in the context of what it says before, it says that we should have known prior to his arrest that these risks were known, and yes, in that case, at first I'm saying that that was not the case, so there was no risk being identified in this respect, and hence, obviously, that cannot be seen as my fault." [T9/106/2]-[T9/107/10].*

77. In one sense, this defensiveness is understandable because as a senior manager, he was accountable for what happened to Mr Benyatov, as he accepted [T9/114/1-4]. However, it undermines his objectivity.

78. Mr Mazzucchelli explained that the Bank would avoid transactions that were politically hostile, giving the example of Yukos in Russia [T9/88/3-12]. The Bank decided to withdraw from the mandate as regards Russia [T9/66/1-7]. He explained (with emphasis added) that if "*a risk of a possible detention of any of our employees would have been raised, or possible issues of security and safety, we would have taken corresponding measures. So we wouldn't, for instance, have allowed bankers to travel to the region, which is, by the way, what we did in other countries. During this very same year we, for instance, forbid bankers to travel to Lebanon and, actually, we had to help out some of the colleagues in the bank at large to leave Lebanon at the time of another acceleration of a civil war*" [T9/115/14-24]. Where there were issues

raised by business managers or LCD or Risk Management the risk would have been assessed "*and activated mitigating actions*" [T9/116/6-7].

79. **Mr Chris Horne**, a senior executive of the Bank (EMEA COO for the Bank's IBD at the material time) and **Mr Kevin Studd** (EMEA General Counsel from 1997-2010) gave evidence, but they were not the main persons within the Bank responsible for risk. Mr Studd was in the LCD and not responsible for the various risk assessment roles within the Bank. Mr Horne explained that he was not the main person within the Defendant responsible for risk: he had "*never read this annual report before*" [T10/29/25] despite the reliance of the Bank on this as regards risk. Mr Benyatov submitted that the main person was the Chief Risk Officer, Mr Ralf Hafner [T10/22/18], who did not give evidence. However, Mr Horne said that Mr Hafner's knowledge and expertise was about credit risk and market risk, and the persons to speak to about the first line risks were the business heads. That was in distinction to those involved in the second line who created risk management procedures and were responsible for the Risk Management function and the LCD policies.

80. There is no direct evidence of managers of Mr Benyatov discussing with him any risks. Mr Mazzucchelli discussed what Mr Matt Harris (to whom Mr Benyatov reported at the relevant time) and Mr Paul Raphael had told him in the Investment Banking Operating Committee about the Bank's presence in the Romanian market, including a consideration of risk. They perceived from their own impressions that in contrast to the former Soviet Union republics, some of the geographies in the Middle East and Africa, and without discussing Romania specifically, *"in the context of the wide range of countries we were operating in, in emerging markets, that was considered by all of us, almost implicitly, and on the basis of the external markets we had as a country with a limited risk profile"* [T9/22/1 – T9/23/20].

81. **Mr Kevin Studd** gave evidence. He is a consultant for the Bank on an annual retainer [T10/59/1-3] (£96,000 for up to 40 days per year). Mr Benyatov reached out to him through LinkedIn in connection with these proceedings, but he did not respond [T10/66/15-20]. His involvement was very limited. He did not recall that the LCD had developed or communicated anything relevant to the Bank's business in Romania before the end of 2006 as regards relevant banking and securities regulations and corporate policies [T10/72/16-20]. He had not given thought to risks of doing business in Romania prior to the events in 2006 [T10/73/7-11]. This changed after the arrest of Mr Benyatov.

82. Mr Studd suggested there had been an internal review of the Schilling anonymous letter. I do not accept that this is the case. It was not mentioned in his statement and there have been no documents disclosed in connection with it. He stated that Mr Benyatov had taken the line that there was no cause for concern, although he admitted that Mr Benyatov may not have been spoken to directly [T10/99/9]. He accepted that the letter gave rise to a risk of criminal action but did not accept that LCD were better placed than Mr Benyatov to assess that risk [T10/97/2-20].

83. He confirmed that LCD (Mr Goss and Mr Studd) were aware of press allegations in relation to Petrom prior to his arrest [T10/102-3]. He accepted that if there was intelligence that the Romanian Intelligence Service ("SRI") was specifically targeting transactions in which the Bank had been involved, then that might have prompted further inquiry [T10/110/1-T10/110/4]. A further review would depend on the views

of Mr Benyatov and Mr Rao and how concerned they were about the development, and on the basis of their answers the matter may have been taken further [T10/109/2—T10/110/24]. Mr Studd did not give any evidence about whether either of their views were solicited or provided to LCD or senior management.

84. In respect of **Mr Chris Horne**, some relevant points made by him include the following:

(1) Mr Horne confirmed Ms Soloman's and Mr Mazzucchelli's evidence that countries were assessed for risks to the safety of employees only after the events in Romania: see [T10/5/1-16].
(2) Mr Horne gave evidence about the role of risk assessment compared with management responsibility for risk in the annual report (relied on by the Bank). This was in the context of Mr Benyatov being a *"senior business line manager"*. This was undermined by his admission that he had "*never read this annual report before*" [T10/29/25].
(3) He was clear that the European IBC was more than just "*kicking the tyres*" [T10/33/22-25] on IBD transactions but a thorough review [T10/34/3-6].
(4) Mr Horne's evidence was that investment bankers should be expected to identify all risk matters and to escalate them to management if necessary: [T10/30/4-25].

85. **Ms Victoria Buck** was the Chief of Staff (Talent) in the EMEA FID (working in Mr de Boissard's management team[T11/17/16]-[T11/18/5] and the current Head of Human Resources EMEA Investment Banking. She was not involved in any of the underlying events and could not therefore give evidence to them. Further, she accepted the limits of her testimony under cross-examination, for instance her speculation as to what Mr Benyatov would earn outside of banking was not informed by knowledge: "*I don't know enough about the remuneration practices of private equity to be able to confirm one way or the other*" [T11/26/24-25], or why people move into fund management after investment banking [T11/54/18-21]. Ms Buck confirmed orally that based on positive appraisals he received, Mr Benyatov had the potential to progress to more senior roles and that he had transferable skills [T11/32/14-22].

86. These were the witnesses who were called, but it was submitted that more ought to have been called. In his final speech, Mr Ciumei QC referred to Mr de Vecchi, Mr Pattofatto, Mr Harris, Ms Susan Kilsby, Mr Rao, Mr Burkey, Mr Berg and Ms Judith Reed. Nor was Mr Bisseker called, who dealt with the response to the Romanian prosecution. It was submitted that these witnesses were likely to know more about various aspects than those who were called. It was suggested that Mr de Vecchi as proposer and Mr Pattofatto as sponsor were involved in the decision to take on the EMS contract. Mr Harris and Ms Kilsby were involved in the decision to hire Mr Stantchev. As noted above, Mr Harris was also a direct line manager to Mr Benyatov at the time. Ms Kilsby was one of the people who approved the valuation in the EMS transaction. Mr Rao and Mr Burkey's names appear in the fifth to seventh of seven warning flags referred to below. Mr Berg was a person who was said to be a comparator for Mr Benyatov in the loss of earnings. Ms Judith Reed was the author

of an email involved in the Bank's consideration of the anonymous letter sent by Mr Schilling.

87. It is possible that some of these witnesses would have been able to have added informative evidence. That is not to say that their evidence would have been as striking as was submitted. It is possible that Mr de Vecchi and Mr Pattofatto may have had something to say about the decision to take on the EMS contract which may have been relevant to the case, but there is no scope for an adverse inference to be drawn from their absence. Mr Harris as a line manager would have been valuable in connection with the case that Mr Benyatov was a senior business line manager and in respect of the degree of responsibility said to lie with Mr Benyatov. The Court is entitled to and does bear that in mind in considering the weight of the evidence where Mr Harris could have assisted, but that is far from drawing adverse inferences. The absence of Ms Kilsby is marginal. The importance to be attributed to Mr Rao and Mr Burkey became more significant with the documents emphasised for the purpose of the trial in late November 2006, but their significance was not heralded in this way at the time when witness statements were being prepared, as shall be considered below. Mr Berg does not loom large in this case. Ms Reed could have been asked some questions about the anonymous letter, but she communicated with Mr Studd at the time, who gave relevant evidence.

88. The law in respect of adverse inferences has to be considered in this context, and drawing inferences must not be lightly undertaken. Relevant authorities were summarised in Hollander on Documentary Evidence 14th Ed. at para. 11-23:

> "*In Wiszniewski v Central Manchester HA [1998] P.I.Q.R. P324; [1998] Lloyd's Rep. Med 223, Brooke LJ set out the principles as follows:*
>
> > *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> >
> > *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
> >
> > *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
> >
> > *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

> *However, as Ryder LJ made clear in Manzi v King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882; [2018] Med. L.R. 552 at [30].*
>
> > *"Wisniewski is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. 'the court is entitled to draw adverse inferences'".*
>
> *In Magdeev v Tsvetkov [2020] EWHC 887 (Comm) at [154], Cockerill J said:*
>
> > *"(i) This evidential 'rule' is, as I have indicated above, a fairly narrow one …, the drawing of such inferences is not something to be lightly undertaken. (ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the 'missing' witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue. (iii) The court then has a discretion and will exercise it not just in the light of those principles, but also in the light of: (a) the overriding objective; and (b) an understanding that it arises against the background of an evidential world which shifts—both as to burden and as to the development of the case—during trial."*

89. There is the danger of a scattergun approach of considering every document among the thousands of documents where a witness could have been called. The point would have been stronger if there had been identified a more targeted number of people with specific adverse inferences, if any, to put. That did not occur. This was not a case in respect of the witnesses where the analysis of Cockerill J in *Magdeev*, above, was undertaken in respect of each point on which the inference is sought and the other matters to which she referred in the above quotation. It was not because the case had not been thought out: deep attention and preparation went into this case. Having considered the case as a whole, I do not draw adverse inferences from the non-calling of any of the witnesses in this case.

IV Expert Evidence

90. I had reservations relating to aspects of the expert evidence. As often happens in adversarial litigation, each side was critical about the expert witnesses on the other side. There were limitations in the evidence of each of the witnesses, but overall they have been helpful, especially because of the way for the most part, they would accept propositions even contrary to the case for whose side they were appearing. The

evidence for Mr Benyatov was given by Professor Deletant and Mr Worman and for the Bank, Mr McGregor and Dr Donald.

(a) Professor Deletant

91. Professor Deletant is an Emeritus professor of considerable distinction. The focus of his research and writing has been on the Communist era, although he has also pointed to the continuation of the influence in Romanian current affairs after 1989. His evidence which was to focus on 2005-2006 did contain considerable material for "context" of historic periods and the period prior 2005-2006. He accepted that he has no practical experience of working in a business in Romania since 1996, he has not worked on a Romanian privatisation, and he has not written on doing business in Romania. None of this is surprising because his distinction was from an academic perspective, where he has made a great contribution to the understanding of his main fields of interest.

92. It is useful to be reminded about the extent to which old Communist influences were still prevalent. However, when he referred to his published works, he omitted positive passages about Romania's progress and concentrated on the negative aspects. This was demonstrated at para. 39 of the written closing submissions for the Bank which gave the following examples of the omission of positive passages about Romania's progress as follows:

    (1) His quote at paras. 3.11-3.20 from "*Romania under Communism*" is selective to give the impression that nothing has changed since the days of the Securitate and ignoring the positive aspects recognised of the effect of reforms in the process of accession to the EU [T11/140/24-T11/141/4], [T11/144/4-18].

    (2) The passage about the democratic transfer of power from E4/13 in his report [T12/9/7-24].

    (3) The passages from EC monitoring reports: [T12/30/22-T12/31/5], [T12/31/21-T12/32/1]. By way of example, he omitted references to steps to make the judiciary more independent and separate steps to tackle corruption. To his credit, he said it was a "*fair comment*" that he had "*identified the criticisms, but not the positive comments that the EC made about Romania's progress*" [T12/34/6-10].

93. He was a witness who was willing to make admissions in cross-examination, many of which are related in the Bank's closing argument at para. 42, which is to his credit. Some of those admissions are set out elsewhere in this judgment.

(b) Mr McGregor

94. Unlike Professor Deletant, Mr McGregor has significant expertise of doing business in Romania as a lawyer and as a businessman for the last 25 years and covers the

central period of 2005-2006. He has co-authored a book on doing business in Romania, and he has worked on privatisations and as a lawyer advising foreign businesspeople on working in Romania. He has specific experience of working in the energy sector.

95. Despite the above, there were aspects of his evidence which were surprising for a lawyer. He combined little knowledge about certain subjects with a lack of objectivity. He said the following:

(1) He recognised that surveillance existed in Romania but said that the SRI's operations had a legal framework governing its existence [T15/76/16-24]. When asked if the risk of surveillance contributed to a risk of an abusive prosecution, his response was that if a person had done nothing wrong, there was no risk: see para. 74 of his report. He did accept that the SRI tended to operate outside the law, and so this notion is a rather simplistic proposition [T15/94/1]-[T15/95/10].

(2) He said: "*one might say that every prosecution is politically motivated if it is there to support the rule of law*" [T15/56/5-7].

(3) Whilst admitting that there was a high degree of suspect judgments, he believed that appeals would always correct the problem.

(4) He was not familiar with the European Convention of Human Rights or Articles 6 and 8 thereof [T15/138/16-23], despite Romania's ratification for the Convention. He said: "*I'm not aware – I may be wrong, but I'm not aware that privacy is regarded as a human right*" [T15/93/5-7].

96. These matters reduced considerably the credence and weight to be given to the evidence of Mr McGregor.

(c) Mr Worman

97. Mr Worman had relevant expertise including as to risk assessment processes in financial institutions. He was clear that the purpose of a risk assessment process was not to highlight positive and negative issues but to search for and highlight the problems that may impact the business. Dr Donald agreed with this. That said, a difficulty about the area is both to identify risks but at the same time to make a balanced assessment.

98. His evidence was not assisted by his Section 6, which the Bank says is inadmissible. In my judgment, it went beyond the reasonable discoverability of the risks in many respects. This did not advance his evidence but took him into the arena by arguing aspects of the case. For example, he offered views on whether Mr Benyatov was a senior business line manager (para. 6.3), a critical review of the witness evidence on behalf of the Bank (paras. 6.15 – 6.26), what was expected of Mr Benyatov as a banker in connection with risk assessment (paras. 6.34-6.62) and the adequacy of the Bank's travel advice (paras. 6.71-6.73).

99. I do not rule that the entirety of this part of Section 6 went outside the reasonable discoverability of risks, but that many parts of it were at best only of tangential relevance to his remit, and some went outside his remit. I am not critical about the decision of the Bank not to cross examine upon this part of the report.

100. Mr Worman had more direct experience in financial institutions than Dr Donald, as Dr Donald acknowledged [T16/26/11-T16/28/3].

(d) Dr Donald

101. Dr Donald too had considerable experience of political risk analysis, but more in a general business context than specific expertise in respect of financial institutions.

102. He gave evidence regarding the changes in risk management since the Relevant Period, in particular within financial institutions since the 2008-2010 banking crisis [T16/142/19-T16/144/11]. He also gave valuable evidence about the iterative process, so that one learned from a bad event. He put the matter as follows at [T16/50/23 – T16/51/8] in the following evidence:

> *"...it is an iterative process. The -- I think the – the way in which biases and the difficulties presented by biases, the way in which they're understood before a bad event that can be identified as being linked to those biases, the way things will appear before will be very different, probably, from the way they appear afterwards. So in a sense, you need to learn to stub your toe to then learn you shouldn't kick a lamp post. It – before and after need to be taken into consideration, my Lord."*

103. Both Mr Worman and Dr Donald were helpful witnesses in that they repeatedly were prepared to accept propositions even where they would have known that this might not advance their respective clients' cases.

V Mr Benyatov's case as to a duty of care

104. Mr Benyatov's case is that the Bank had a concurrent contractual and/or tortious duty not to expose him to the risk of criminal conviction in the performance of his duties for the Bank. In particular, there was a continuing duty to take reasonable care to protect him from criminal conviction and from the resulting losses by performing various duties including:

(1) undertaking and reviewing (as and when the developments occurred and at least annually) a risk assessment from any requirement to work overseas and/or in an emerging market location and/or in Romania;

(2) not to send Mr Benyatov to Romania without assessing the risk of his being convicted for business activities there that are in accordance with international banking standards but could be construed as unlawful under Romanian law;

(3) not to require Mr Benyatov to carry out business activities which had a material risk of being treated as unlawful in Romania or placing Mr Benyatov at a material risk of conviction without having assessed the risks and advised Mr Benyatov accordingly: see AMPOC para. 24.

105. In pleading such duties, Mr Benyatov relies on a large number of circumstances pleaded at para. 25 of AMPOC. All of the circumstances have been considered, but instead of quoting all 23 sub-paragraphs, it suffices by way of summary only to say that they include:

(1) the relational nature of his contract with the Bank;

(2) the combination of his having a Russian-sounding name and/or being Russian speaking having been born in the former Soviet Union and/or having lived and worked in Russia and/or being an American citizen and/or working for a part of a global investment bank: see AMPOC para. 25.5 - 25.6;

(3) Mr Benyatov was required to work in countries overseas which presented significant risks to its employees, as evidenced by the requirement to observe Local Compliance Manuals dealing with risk management: see AMPOC para. 25.12;

(4) the Bank having a substantial risk management oversight structure under a Risk Committee of the Executive Board *"designed to ensure that there are sufficient controls to measure, monitor and control risks in accordance with Credit Suisse group's framework and in consideration of industry best practices"*: as extracted from the Annual Reports 2005 and 2006: see AMPOC para. 25.9;

(5) the inherent risks of working in emerging market countries in the former Soviet bloc including Romania which was "*a high-risk country"* and/or acting on the privatisation of significant state-owned companies, which was *"a high-risk transaction"*. Those risks included *"the risk of being subjected to politically or commercially motivated judicial or criminal action including but not limited to arbitrary detention, criminal charges, prosecution, conviction and imprisonment or other corrupt action or interference with an individual's fundamental rights and freedoms":* see AMPOC para. 25.14 - 25.16 and 25.22;

(6) in the event of conviction, Mr Benyatov would lose his approved person status and therefore be unable to work in his approved role or at any similar level within a financial regulatory environment;

(7) an assessment of political risk factors was standard procedure for international companies when entering emerging markets from the mid-1990s and in any event prior to 2005, and such assessment should have included judicial independence, political exposure of key investment projects and risk from criminality, corruption and politically targeted investigations: see AMPOC para. 25.23. It should have included an accurate country exposure system, an effective country risk analysis process, a country risk rating system, and adequate and ongoing monitoring of country conditions. It should have reflected the fact that the Bank is a financial institution operating globally including in high-risk countries including Romania.

106. Mr Benyatov in this case does not allege that the Bank owed him a general duty to protect him from economic loss. The duty of care is significantly narrower than that. It is based on, among others, the specific nature of the work that he did; the country in which he was required to work; the foreseeability of the harm that could befall him, including in the form of specific amber and red flags that allegedly came to the Bank's attention; and the gravity of the consequences if the risks materialised.

107. It is worth noting that the same facts and matters said to give rise to a duty of care are also relied upon in the AMPOC to give rise to the implication of the claim for contractual indemnities. In the claim as pleaded, both as regards the duty to exercise reasonable care and to indemnify for losses, there is a common factual substratum to justify both the scope of the duty to take care and the scope of the duty to indemnify.

108. It is therefore a fact intensive duty of care and duty the indemnity. In refusing permission to appeal against an order refusing to strike out the claim in negligence and the claim for the indemnify in the instant case, Stuart-Smith LJ stated that to the extent that this duty does not fall within the already established categories *"it is well within the possible reach of an incremental development to accommodate what may be determined to be a new factual situation*". That is in no way determinative of the case or binding since it is no more than a decision on an application for permission to appeal. However, its significance is that, like the Deputy Judge below, there was not ruled out the possibility of a duty of care simply because this was a case arguably of pure economic loss or a duty to indemnify because it was not by reference to out of pocket expenses or liabilities. It is now for the Court to determine whether on the facts of this case, there is such a duty.

109. The Bank suggests that the duty contended for could expose the Bank and similar institutions to "*huge indeterminate liabilities for loss of earnings to many employees stretching many years into the future*": see opening skeleton of the Bank at para. 91(4). This depends upon how broadly expressed the duty is. It is not a duty to have risk assessments in respect of each country where an employee is sent. As noted, it results from the matters identified in AMPOC para. 25. Given the specificity of the duty to the facts of this case, it is necessary to be cautious about the floodgates argument. There are no other directly parallel cases identified in respect of foreign

based investment bankers. That is likely to be due to how rare the event in question is (which would not herald a loss of earnings *"to many employees"*). There is no indication that there have been such cases, but that only Mr Benyatov has brought a claim.

110. A way in which the duty could be tested would be to take up the evidence of Mr Mazzucchelli regarding times when such high-risk attached to a country or a transaction. He gave evidence relating to Yukos in Russia in 2004-2005 where the Bank dropped its mandate. If it is suggested that there would be no duty in that case because of a possible floodgates argument, the consequence might be the absence of a right to be protected from a clearly perceived risk. In such a case, it may well be just and reasonable for a duty situation to exist for an employer to take reasonable steps to protect its employee even for pure economic loss if that was reasonably foreseeable. The question then might be not whether such a duty could not arise, but whether it arises on the facts of the instant case.

111. To this end, it is necessary to consider the arguments of the parties first as to the relevant law in order to establish whether or not there is a duty and second to make factual findings relevant to what is a fact- specific duty of care.

VI The law as to a duty of care

(a) The law as to the existence or non-existence of a duty of care

112. Where there is a contractual relationship between the parties as in the instant case, if the duty for which the Claimant contends is not a term of the contract, it cannot generally arise in tort. In *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408; [2016] 1 WLR 4487, it was said by Sales LJ (as he then was) at para. 49:

> *"Where the nexus between parties is founded in a contractual relationship, as here, it is the contract which they have made with each other which is the primary source and reference point for the rights they have and the obligations they owe each other. Although a duty of care in tort may run in parallel with the contractual duty and have the same content, it is difficult to see how the law of tort could impose obligations in this area which are more extensive than those given by interpretation of the contract which the parties have made for themselves. The usual rule is that freedom of contract is paramount, and if the parties have agreed terms to govern their relationship which do not involve the assumption of responsibility by the employer for some particular risk, the general law of tort will not operate to impose on the employer an obligation which is more extensive than that which they agreed."*

113. As regards the law, the starting point is that where the existence or non-existence of a duty of care has been established, it should be followed. It is normally unnecessary

and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable: see *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at para. 26 per Lord Reed.

114. It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. In those cases, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority, identifying the legally significant features of the situations. In the exercise of its judgment as to whether a duty of care should be recognised in such a case, the Court considers what is *"fair, just and reasonable"*: see *Robinson* at para. 27 per Lord Reed and see also *James-Bowen v Commissioner of Police for the Metropolis* [2018] UKSC 40, [2018] ICR 1353 per Lord Lloyd-Jones at paras. 22-23.

115. In summary:

> *"Properly understood, Caparo thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable"*: see *Robinson* per Lord Reed at para. 29.

116. The three-stage analysis (whether (a) the harm complained of was reasonably foreseeable, (b) whether the parties' relationship had the necessary quality of proximity, and (c) whether it was in all the circumstances fair, just and reasonable that the duty of care should be imposed) identified in *Caparo Industries Ltd v Dickman* [1990] 2 AC 605 remains material in a case outside any established category: see *Robinson* per Lord Mance at para. 83.

117. The further the facts of the case in issue are from those of a case where a duty of care has been held to exist, the less ready a court will be to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied: see *James-Bowen* at para. 23, citing Lord Bingham in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181at para 7.

118. It is necessary to be precise about the particular loss to avoid because the actual nature of the damage suffered is relevant to the existence and extent of any duty. This was recently affirmed by the Supreme Court in *Khan v Meadows* [2021] UKSC 21, [2021] 3 WLR 147 per Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black and Lord Kitchin agreed), quoting parts of *Caparo*. They said at para. 33:

"…in Roe v Minister of Health [1954] 2 QB 66 Denning LJ said that the questions of duty, causation and remoteness run continually into one another and continued (p 85): "It seems to me that they are simply three different ways of looking at one and the same problem. Starting with the proposition that a negligent person should be liable, within reason, for the consequences of his conduct, the extent of his liability is to be found by asking the one question: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it: but otherwise not." This emphasis on the consequence of the act or omission as an element in analysing the scope of duty owed by a defendant in tort informed the Privy Council's approach in Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) [1961] AC 388, in which Viscount Simonds, delivering the advice of the Board, stated (p 425): "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air … It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other." Similarly, in Sutherland Shire Council v Heyman (1985) 157 CLR 424, 487, Brennan J stated: "It is impermissible to postulate a duty of care to avoid one kind of damage - say, personal injury - and, finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another and independent kind - say, economic loss. … The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it." The law has regard to the actual nature of the damage which the claimant has suffered when it determines the scope of the defendant's duty….

Lord Bridge of Harwich cited Brennan J in Sutherland Shire Council v Heyman (above) and said (p 627): "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless." In the same case Lord Roskill stated (p 629B): "before the existence and scope of any liability can be determined, it is necessary first to determine for what purposes and in what circumstances the information in question is to be given." Lord Oliver of Aylmerton said (p 651): "It has to be

> *borne in mind that the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained."*

(b) Restrictive approach to duty to prevent pure economic loss

119. There is a reluctance in the law to extend duty situations to a case of a duty to prevent a party from suffering from pure economic loss. This was expressed by Lord Bridge in *Caparo* in the following terms at p.618:

> *"One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss."*

120. The common law has shown a resistance to impose a general duty on employers to protect employees' financial interests, and the Bank has referred to examples as follows.

121. In *Reid v Rush & Tompkins Group plc* [1990] 1 WLR 212, Ralph Gibson LJ held that "*the only way in which an employer's general duty of care – and I emphasise that I am referring only to the general duty of care which arises out of the relationship – will be capable of extension to cover financial loss will be by legislation, or by a contractual term, express or implied on the particular facts, or by a term which the court is able to say must be implied by law*" (at 231). He emphasised that the specific factual matrix in that case, concerning insurance (a field regulated heavily by statute) was central to the decision that the relevant duty did not apply (at 223G-H). He also recognised that, on other facts, an employer may be held to owe a duty to protect an employee from financial loss, stating (at 221H):

> *"If a servant is to have a claim in tort against his employer in respect of economic loss it must be based upon some special factor in the circumstances or in the relationship between them which justifies the extension of the scope of the duty to cover such a claim or upon a separate principle of the law of tort which imposes such a duty."*

122. In that case, the employee was injured in a road accident while working in Ethiopia caused by the fault of the other driver. The court held that he was not entitled to recover compensation for his injuries. He alleged that his employer was experienced in employing persons to work overseas in developing countries and knew or ought to have known of the working and living conditions of its employees in those countries: see p.216D-E. The employee relied on an implied term that, prior to the employee's departure for Ethiopia, the employer would give the employee all necessary advice relating to working conditions there, including any special risks (such as the lack of compulsory third party motor insurance), and would advise the employee accordingly that he should obtain the appropriate insurance cover: see p.217G. The claim was also advanced in tort: see p.217H-218B.

123. Ralph Gibson LJ (with whom Neill and May LJJ agreed) considered at 228C-F an implied term that an employer who takes a person into his employment in this country for work to be done in a foreign country shall take reasonable care to provide sufficient information and warning to that servant with reference to any risk of suffering uncompensated injury in the course of his employment in the foreign country, caused through the fault of a third party, which risk would not be suffered in this country and of which a reasonable person would require to be informed before accepting such employment. He concluded that the court could not properly incorporate such a term by law into contracts of employment. He explained:

> *"It seems to me that it would require of employers, many of whom may have no such resources of advice or experience as may be available to this defendant, and who may employ one or two servants, to discover much information about foreign legal and social systems in order to decide whether such a term requires action on their part."*

To incorporate such a duty into contracts of employment would require, if it were to work fairly, exemptions and limitations which can only properly be achieved by legislation.

124. In *University of Nottingham v Eyett* [1999] ICR 721, it was held that the implied duty of trust and confidence did not include a positive obligation on an employer to advise an employee on how best to exercise valuable rights under the employment contract (in that case with regard to pension benefits). Hart J noted at 727H-728B that the decided cases in which breach of the implied duty of trust and confidence has been established had all involved deliberate conduct by the employer. The terms in which the duty has been expressed in those cases have consistently been in the negative form of prohibiting conduct rather than positively enjoining conduct.

125. In *Outram v Academy Plastics Ltd* [2001] ICR 367 (CA), it was held that there was no general duty on an employer to provide information or advice to an employee in order to prevent economic loss. Tuckey LJ noted at [19] that *"Looking more generally at the nature of the duty alleged, it is, of course, a duty to avoid causing economic loss. Secondly, if there is a duty, breach of it will result in liability for an omission (failure to advise) in circumstances where it is not alleged that the company were asked or expressly or impliedly assumed any contractual responsibility to give such advice. As*

a general rule the common law does not impose liability in tort for what are called "pure omissions".”

126. In *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] ICR 1615, the Court of Appeal held that the lower court “*was right to reject … an implied term of any contract of employment that the employer will take reasonable care for the economic well-being of his employee*”, to the extent that such a duty would be “*an incident of all contracts of employment*” (at para. 33). A “*general duty on the part of the employer that he will take reasonable care of the economic well-being of his employees*” would be unduly burdensome on employers, given that it is not “*the function of the employer to act as his employee's financial adviser*” (paras. 42-44).

127. In *Crossley*, Dyson LJ noted at para. 31 that in *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31, Elias J considered that negligent conduct by an employer would have to demonstrate a “*real and unacceptable disregard*” for the interests of the employee before negligent conduct could amount to a breach of the implied duty of trust and confidence. In Dyson LJ's judgment at para. 42, it was not for the Court of Appeal to take a big leap to introduce a major extension of the law in relation to an employer's duty to protect an employee's financial interests when only comparatively recently the House of Lords had declined to do so in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 and *Spring v Guardian Assurance plc* [1995] 2 AC 296. Dyson LJ also noted that it was no answer to say that all the duty required was that reasonable steps be taken: [45]. In most cases, it was obvious what an employer is required to do or refrain from doing to discharge its duty to take reasonable steps to protect the physical well-being of its employees. There was considerable difficulty, however, in seeing what the content of a general duty to take reasonable care for the economic well-being of an employee would be.

128. In *Greenway v Johnson Matthey,* cited above, the Court of Appeal held that a duty on employers to protect employees from financial losses “*cannot be implied in law either as a usual feature of employment contracts in general or as a feature of these particular employment contracts*” (at para. 39). In the same case, Sales LJ said at para. 37 that the classic formulation of the duty owed by the employer to an employee is focused on protection of the employee from physical injury, not protection from economic harm (albeit if there is physical injury then damages may be recovered for consequential loss of earnings). Sales LJ found that it was not for the Court of Appeal to create a new duty of care in tort or to impose a new implied term in contract to bypass the effect of well-settled legal doctrine that required that actual physical injury be suffered before an employer was liable for an employee's lost earnings. This could have wide-reaching ramifications which it is difficult for a court seeking to apply the law in an individual case to identify and assess. The law does not furnish a remedy for every harm suffered by an individual, and in particular does not do so where the infliction of the harm in question does not constitute a “*wrong*” in the contemplation of the law: [54]-[55].

129. In *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] ICR 1353, Lord Lloyd-Jones affirmed that there was no “*general duty of care owed by an employer to protect the economic interests of employees*” (at para. 19). The Supreme Court refused to extract from the implied duty of trust and confidence a duty of care owed by an employer to its employees to conduct litigation in a manner which protects them from economic or reputational harm. Lord Lloyd-Jones considered it

significant that, despite the researches of counsel, the Court had not been referred to any decided case in any jurisdiction which holds that an employer owes such a duty of care to his employees. To derive such an obligation from the term of trust and confidence would be "*to move substantially beyond the specific derivative duties established to date*": [17].

130. Lord Lloyd-Jones considered the case of *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, where the House of Lords found that the employing bank owed its employees a duty not to conduct a dishonest or corrupt business and that it could be held liable for the employee's losses, including as regards future employment prospects, resulting from a breach of this duty. This type of claim was "*at a considerable remove from a duty to exercise care in the conduct of business so as to avoid economic or reputational damage to employees*". A *Mahmud* claim would not arise even if the business or department was run with gross incompetence: [18].

131. The striking commonality between these cases is that they rejected a general and sweeping duty on employers to compensate employees for their financial losses. However, they did not reject that there were circumstances where a more focused and specific duty to take reasonable care to protect employees from certain economic losses could arise on the circumstances of a given case; indeed, all of them expressly recognised that such circumstances could exist. They alluded to cases such as *Scally* and *Spring v Guardian* as examples where such circumstances had existed.

(c) Cases where duty fashioned to take reasonable care to protect employees from pure economic losses.

132. There are cases where the Courts have fashioned a duty on the facts of a case to take reasonable care to protect employees from pure economic losses, taking an incremental approach to find duty situations and breaches of duty.

133. In the cases of negligent misstatement since *Hedley Byrne v Heller & Partners* [1964] AC 465, the Court found liability for pure economic loss. An example of novel circumstances in a case based on misstatement is *Spring v Guardian*, *cited above*. It is still an incremental extension on a negligent misstatement case. It involved a duty to a former, rather than a current, employee. It involved a duty to a person who was the object of the statement (as in defamation) rather than a person to whom the statement was published who relied on the statement. The loss was pure economic loss, that is the loss of career earnings.

134. *Spring* concerned the liability in the financial industry for a reference to a former employee, where the employee, moving on, is dependent on his former employer for a reference without which no employment can be secured in that regulated industry. The House of Lords held that an employer could be subject to a duty of care to protect an employee's economic interests by taking reasonable care to produce an accurate and properly researched reference. In *Spring,* the Court allowed a claim for purely financial loss. Although there was an analogy to a negligent misstatement, it was still an incremental development of the law. This was in the following respects, namely that (a) the statement was made to a third person about the ex-employee, and not to the person relying on the statement, (b) the statement was not about an employee but a

former employee, and (c) the tort existed despite a possible concurrent claim in defamation.

135. Lord Woolf held at p.342:

> *"The relationship between the plaintiff and the defendants could hardly be closer. Subject to what I have to say hereafter, it also appears to be uncontroversial that if an employer, or former employer, by his failure to make proper inquiries, causes loss to an employee, it is fair just and reasonable that he should be under an obligation to compensate that employee for the consequences. This is the position if an employer injures his employee physically by failing to exercise reasonable care for his safety and I find it impossible to justify taking a different view where an employer, by giving an inaccurate reference about his employee, deprives an employee, possibly for a considerable period, of the means of earning his livelihood. The consequences of the employer's carelessness can be as great in the long term as causing the employee a serious injury."*

136. In the course of his judgment, Lord Woolf said this (at p353G), after having made reference to the case of *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (which I consider below):

> *"As I understand Scally, it recognises that, just as in the earlier authorities the courts were prepared to imply by necessary implication a term imposing a duty on an employer to exercise due care for the physical wellbeing of his employees, so in the appropriate circumstances would the court imply a like duty as to his economic wellbeing, the duty as to his economic wellbeing giving rise to an action for damages if it is breached."*

137. In *Spring*, Lord Slynn commented that there had been changes in the employer-employee relationship *"with far greater duties imposed on the employer than in the past … to care for the physical, financial and even psychological welfare of the employees"*. (p335B)

138. In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, employees claimed damages in respect of the failure of their employer to inform them of the right to buy added pension years. The House of Lords held there was an implied duty on the employer to take reasonable steps to bring this contingent right to an employee's attention where (1) the terms of the contract had been negotiated collectively; (2) a particular term makes available to the employee a valuable right contingent upon action being taken by him to avail himself of the benefit; and (3) the employee cannot

reasonably be expected to be aware of the term unless it is drawn to his attention: per Lord Bridge at 307C-D.

139. In *Hagen,* cited above, the Court (Elias J as he then was) held that the employer owed employees a duty of care (in both contract and tort) to ensure that statements made regarding their pension rights would not be materially affected by their transfer to a new employer, although any loss arising from a breach of this duty would be purely economic in nature.

140. In *Lennon v Commissioner of Police for the Metropolis* [2004] EWCA Civ 130; [2004] 1 WLR 2594, it was considered fair, just and reasonable to impose on a police commissioner a duty of care to give advice regarding a housing allowance to an officer in his force (in a relationship akin to employment) in order to protect him from economic loss.

141. In *Rihan v Ernst & Young (Global) Ltd* [2020] EWHC 901 (QB), Kerr J confirmed that in appropriate circumstances "*a duty of care is imposed by the law upon an employer to protect an employee against economic loss*" (para. 214). He developed the law incrementally, with reference to cases such as *Scally* and *Spring* (at paras. 215-216). He found a novel duty of care to take reasonable steps to prevent an individual (in that case, an employee of a company in the same corporate group) from suffering financial loss, i.e. loss of earnings, by reason of the defendants' failure to conduct an audit in an ethical and professional manner.

142. Kerr J stated (at para. 616):

> *"it is, conceptually, not a huge leap from imposing a duty of care to protect against physical injury and consequent financial loss by providing a physically safe work environment, to imposing a duty of care to protect against economic loss, in the form of loss of future employment opportunity, by providing an ethically safe work environment, free from professional misconduct (or indeed criminal conduct though that is not this case) in a professional setting".*

143. Kerr J continued (at para. 621):

> *"the physical integrity of the employee is protected against injury by the classic duty of care to take reasonable steps to provide a safe place of work and a safe system of work. By parity of reasoning, I see no reason why, in certain circumstances, the moral and professional integrity of the employee (or quasi-employee) should not be protected by a duty to take reasonable steps to provide an ethically acceptable work environment, free of criminal conduct (see Mahmud's case) and free of professionally unethical conduct".*

144. In one sense, the case of *Rihan* was closely analogous to *Mahmud.* In *Mahmud*, the employer was carrying on a dishonest or corrupt business. In *Rihan*, the employer failed to conduct an audit in an ethical and professional manner. The finding was that it was "*no great leap*" from the existing case law to impose a duty on an employer to take reasonable steps to ensure that the business was not being carried out in a dishonest way so as not to cause financial loss thereby to employees of its associated companies.

145. In another respect, Kerr J found that there was no duty. This was the safety duty: see paras. 463-464. The safety duty was said to be a duty of care to protect the claimant from loss of earnings arising from his reasonably apprehended concerns regarding the safety of his work environment overseas, which led him to resign. That duty was to help the employee to relocate to a different job (in that case outside Dubai). The failure to do so had led the claimant to lose his career within the EY organisation and to lose substantial earnings.

146. Kerr J held that the defendants did not owe the claimant the safety duty. He said at para. 476 that *"it would be an illegitimate extension of the law to make the leap from the standard employer's duty to safeguard its employees against personal injury, to a broad duty to safeguard them against pure economic loss incurred as a result of the claimant's need to cease working to avoid a threat to his physical safety."* The standard employer's duties at common law and under statute and in regulations exist to safeguard employees against personal injury but not purely economic interests, albeit that where they are breached, lost earnings consequent on the injury are recoverable: see paras. 477-478.

147. An employee may be permitted to disobey an instruction if it was reasonably considered to be unsafe to do so. There may be a claim for expenses incurred in such circumstances (e.g. the cost of alternative accommodation during a business trip where only insanitary conditions had been offered). It may be possible to claim constructive dismissal relying on the instruction as a repudiatory breach of the employment contract. However, it was "far-fetched" to suggest that the remedy of the employee who is sent to work in a physically unsafe work environment can claim by way of damages in tort the entire cost of a lost career if he or she decides to disobey the instruction and part company with the employer: see para. 482. For these reasons, Kerr J found that the defendants did not owe the "safety duty" for which the claimant contended.

(d) Various general propositions of law

148. There are various points which might go both to the question whether there was a duty of care and, if so, whether there was a breach of the duty. They are as follows:

(1) The Court must consider the information reasonably available to the Bank at the time of the alleged negligence. In this case, that was prior to the arrest of Mr Benyatov, his case about negligence thereafter having been struck out on a strike out application. In *Glasgow Corp v Muir* [1943] AC 448, Lord Thankerton said at 454: *"The Court must be careful to place itself in the position of the person charged with the duty and to consider what he or she*

should have reasonably anticipated as a natural and probable consequence of neglect."

(2) The Court must not consider the matter with the advantage of hindsight. The likelihood of harm is gauged by reference to the state of knowledge at the time of its occurrence: see *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, 1 WLR 1003 at paras. 9-10. As Denning LJ said in *Roe v Minister of Health* [1954] 2 QB 66 at 84: *"We must not look at the 1947 accident with 1954 spectacles."*

(3) Conformity with common practice is prima facie evidence that the proper standard of care is being taken: see *Grey v Stead* (1999) 2 Lloyds Rep 559 and *Heyes v Pilkington Glass Limited* (1998) PIQR 303 and Clerk & Lindsell 23rd Ed. para. 7-194. In the latter case, the employer was entitled to proceed on the basis of a recognised and general practice of operating gantry cranes that had been followed for a substantial period of time in similar circumstances without mishap. However, the Court may find that notwithstanding a general practice in the industry that negligence is established because the practice was itself negligent: see *Lloyds Bank v EB Savory* [1933] AC 201.

(4) In *Baker*, above , Lord Mance at para. 82 said: *"...some degree of risk may be acceptable, and what degree can only depend on current standards. The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may, on any view at common law, guide the court when performing this balancing exercise: see Swanwick and Mustill JJ's statements of principle, set out earlier in this judgment,…".*

(5) The reference to Swanwick J was to *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783, who described the position as follows: *"...where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood· of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve."*

(6) The reference back to Mustill J in *Baker* was to *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405, where he said (at 415F-416C):

"The speeches in that case (Morris v West Hartlepool Steam Navigation Co Ltd [1956] AC 552) show, not that one employer is exonerated simply by proving that other employers are just as negligent, but that the standard of what is negligent is influenced, although not decisively, by the practice in the industry as a whole. In my judgment, this principle applies not only where the breach of duty is said to consist of a failure to take precautions known to be available as a means of combating a known danger, but also where the omission involves an absence of initiative in seeking out knowledge of facts which are not in themselves obvious. The employer must keep up to date, but the court must be slow to blame him for not ploughing a lone furrow."

(7) *"People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities"*: see *Fardon v Harcourt-Rivington* (1932) 146 LT 391 at 392. A further matter which arises in this case is the extent to which the Court will find a duty to protect someone from the unlawful acts of a third party. There are numerous cases where employers have been found to be under a duty to protect employees from foreseeable risks caused by third parties. The Court of Appeal found in *Selwood v Durham CC* [2012] EWCA Civ 979, at para. 52 that an employer was under a duty "*to do what was reasonable in the circumstances to reduce or avoid any foreseeable risk of harm to which* [the employee] *was exposed"*.

(e) Application of the above to the instant case

149. An employer's duty of care to protect employees from a foreseeable risk from third parties has been upheld in relation to, for example, (i) a restaurant owner who was found to owe a duty to protect staff from a known risk of gang attacks: see *Rahman v Arearose Ltd* [2001] QB 351; and (ii) an employer hospital which was found to owe a duty to protect staff from risks posed by psychiatric patients with a known history of violent behaviour: see *Cook v Bradford Community Health NHS Trust* [2002] EWCA Civ 1616.

150. The particular duty which is being considered is in respect of a duty to avoid pure economic loss. The reluctance set out in the above cases has to be taken into account. However, it is not a duty simply to look after the economic welfare of employees but is much more specific. It is novel duty in that there has been nothing found directly on point.

151. The closest which has been cited is the *Rihan* case. The audit duty does not provide assistance because that is closer to the *Mahmud* situation where the defendant is carrying on corrupt business or in the case of *Rihan*, failing to conduct an audit in an ethical and professional manner. In the instant case, there is no challenge about the integrity of the business of the Bank or its practices, but the allegations are about negligent systems and omissions. Mr Ciumei QC submitted that there was an analogy because Mr Benyatov has been tainted with a finding of criminality affecting his career. However, there is an important difference between one who is tainted because of the actions of a third party (in this case the Romanian prosecution and courts) and one who is tainted because of the lack of integrity of the employer (as in the *Mahmud*

and *Rihan* cases). This distinction prevents the analogy between the audit duty in *Rihan* and the facts of the instant case.

152. The safety duty (on which Mr Rihan failed) is in one sense closer. However, the failure related to the losses, that is not from going to Dubai, but from not going to Dubai. The finding was that in those circumstances, the rights in negligence should not be greater than the rights in contract or statutory law relating to constructive dismissal. However, where the employee does go to the country and is then, assume falsely, convicted and becomes unable to practise in the regulated sphere, then there is a different case. If it was reasonably foreseeable that this might occur, and that in consequence, the employee would suffer an inability to continue his career, then in my judgment, there might be a duty of care. Whether there would be a duty of care depends upon the reasonable foreseeability of the events which then occurred.

153. It is suggested by the Bank that is the existence of a duty is prevented by binding authority, namely that of *Reid v Rush & Tompkins Group plc* above. The submission is that there is no duty to provide sufficient information and warning to an employee with reference to any risk of suffering uncompensated injury in the course of employment. This shows the disinclination of the law to extend a duty of care to an omission as well as to pure economic loss. I do not accept that *Reid* is a bar to the formulation of the duty. This is not a case of pure omission. The Bank was taking active steps to take on privatisation work in Romania and was sending its employees to transact business. In those actions, it is possible in principle that it had a duty to take reasonable steps for the safety of its employees and their financial interests. *Reid* in that sense can be distinguished. It was not about whether Mr Reid went to Ethiopia, but a particular narrow issue regarding whether there was a duty to give him advice about uncompensable loss. It is also not accepted that in general terms any duty would not be fair just and reasonable.

154. In a novel case, the question as to whether there is a duty of care is not to be decided subject to these general parameters. It is very fact sensitive in each case. That is recognised by the way in which the matter has been pleaded. Mr Benyatov's legal team is not saying that there is blanket duty in each case for an employer to be procuring risk assessments in respect of its employees. It is brought about by features in this case. They include that it is a large multi-national bank which sends its employees around the world to countries of high-risk and/or in connection with high-risk transactions which take place and/or where there are other high-risk features affecting their employees.

155. There may be cases where there is in principle a duty of care to take reasonable care for the safety of the employee and the financial interests which go with that. In each case, it will depend upon a consideration of the precise facts, the foreseeability of the particular harm and whether in all the circumstances, it is fair, just and reasonable to impose a duty.

156. It is for this reason that at the heart of the case is para. 25 of AMPOC in which Mr Benyatov set out the facts and matters giving rise to the duty of care not to expose Mr Benyatov to criminal conviction in the performance of his duties and the resulting losses. This was said to include the facts and matters identified in the 23 sub-paragraphs of para. 25. This is indeed fact sensitive, and it is to the facts that this judgment must now turn.

VII The facts relating to a duty of care

(a) The case for Mr Benyatov

157. There are various facts and factors which assist Mr Benyatov. It starts from the proximity of the employment relationship. It is no ordinary relationship. It is in the context of a highly successful global business where the employees make enormous contributions to bring about success both for themselves and for the Bank. An employee in the position of Mr Benyatov was required to travel abroad, and particularly in the case of Mr Benyatov to countries in Eastern Europe and the former Soviet Union. It is to countries which are described as "high-risk" countries. It is to countries where the respect for the citizen from state interference may not be high, as may be evident from state surveillance (telephone tapping and other bugging devices) and from the power of the secret police. It is where the judiciary is not independent and where there is a significant level of corruption among judges.

158. The case for Mr Benyatov treats the work which he was undertaking prior to his arrest as being "high-risk" transactions. This was because they related to the privatisation of state businesses in sensitive areas of energy. There was the concern whether acting for the government or for people in the private sector, that state assets were being disposed of or acquired below their true worth. The concomitant was allegations of corruption and politically or commercially motivated judicial or criminal action.

159. Against this background and in any event, it was submitted on behalf of Mr Benyatov that the Bank ought to have carried out regular risk assessments and to have given advice to Mr Benyatov accordingly. The allegations were more specific because Mr Benyatov identified about 7 amber/red warning flags which, it is said, should have put the Bank on alert. If the Bank had reacted properly in the circumstances, it would not have subjected Mr Benyatov to the involvement in the particular transaction which it did. In this way, the Bank and at least Mr Benyatov would have been removed from the instant transactions which led to his arrest and indeed he would not have been in Romania to be arrested, and he would not have been subsequently tried and convicted.

160. A commercial organisation in the position of the Bank was able to have in place sophisticated structures for detailed risk assessment. It is said that the Bank appears to have surrendered this to those involved in the transactions themselves such as Mr Benyatov himself. They have done this by reference to legal submission about the contract. Mr Benyatov takes issue with the legal submission, but even if it were correct, it does not abnegate the liability of the Bank as employer to exercise reasonable care. Mr Benyatov could not reasonably be expected to have knowledge about the legal system of every country to which he was sent or about particular issues affecting such countries. The Bank would have resources available to it through those charged with risk assessment and legal and compliance within the Bank and through the engagement of outside consultants. Further, employees in the position of Mr Benyatov, who are results driven (not surprisingly in view of the impact on their earnings) may not be able to interpret any warning signs. This would not be solely because of lack of knowledge and perspective on their part, but due to a lack of objectivity coming from the desire to advance their careers with the remuneration incentives offered by the Bank.

(b) The case for the Bank

161. The case for the Bank is that it does exercise reasonable care for the employees. It does concern itself with the level of risk of the country and of the transaction. In the instant case, Romania was not perceived to be a high-risk country. This was demonstrated by the amount of trade at the time between Romania and the UK as well as between Romania and western countries. Romania was a member of NATO and was about to accede on 1 January 2007 to the EU which had standards to which Romania was seeking to aspire. As will be set out below, many of the largest and most respected international law firms and accountancy firms had an office or some other presence in Bucharest. Likewise, the large investment banks were advising customers, especially in the lucrative business of the privatisation of state-owned utilities. If Romania had been perceived as a high-risk country, this degree of trade attracting such professionals would not have been so prevalent. If the transactions had been perceived as high-risk, then these firms and banks would not have participated to the same level.

162. The Bank said that it would have not participated because of not wishing to expose employees to such risks. It may have come to the same conclusion through a different route, namely not exposing the Bank to reputational risk consequent upon its employees being accused of involvement in illegal activities. Its case through witnesses whose evidence will be summarised is that Romania was not a high-risk country. Mr Benyatov had been involved in a number of privatisations, both for the government and for the investor, and they were not high-risk. It is true that each of Ms Soloman, Mr Horne and Mr Studd gave evidence that everything changed after the arrest of Mr Benyatov and that the Bank put in place heightened risk assessment procedures, particularly in relation to Romania. Professor Deletant said that "*it was only really after Mr Benyatov was arrested that some of the conclusions or the views that analysts, or certainly analysts I know, had about the political interference in prosecution of…the Petrom affair that this had been driven by political factors*" [T12/37(24)-38(7)]. This tended to suggest, it was submitted for Mr Benyatov, that the Bank would have been able to have measures in place at the material time before Mr Benyatov's arrest. The response of the Bank was that the arrest of Mr Benyatov came as a shock. The fact that the conduct of the Bank may have changed thereafter does not say anything about perceived risk beforehand. It is the prudent reaction to events, but it is important to avoid hindsight vision.

163. The Bank takes issue with the suggestion that external risk assessments were standard practice at the time. If and to the extent that they were, they were about regulatory risk and immigration assistance. It was not until the 2008 banking crisis, when the compliance function took on a more prominent role in financial institutions, that indeed over the years thereafter that political risk assessment came on to the standard radar. To paraphrase the language of Denning LJ in *Roe v Minister of Health* above, it is important not to wear spectacles of 2008 and later to examine conduct of 2006 and earlier.

164. As regards the seven or so amber or red flags, the Bank submits that when the evidence is looked at as a whole, those matters individually or collectively were not such as to require different conduct on the part of the Bank, nor would anything which ought reasonably to have been done (if anything) have made a difference.

165. On this basis, the Bank submits that the foundations of Mr Benyatov's case for the existence of a duty situation and/or for the breach of duty of care do not stand up to careful examination.

(c) Overview

166. The parties have rightly had overviews at parts of their submissions. It is necessary to see the details in a big picture. Each party in stepping back from the trees sees a different wood. Central to the case in the analysis of the facts are the following features of Mr Benyatov's case, namely (1) Romania was a "high-risk" country at the time, and it ought to have been perceived as such; (2) the transactions, namely dealing with privatisations of utilities businesses in Romania, were "high-risk" at the relevant time and ought to have been perceived as such; (3) there were warning flags such as to prompt precautionary measures or at least further inquiry; and (4) the Bank failed to carry out any or any adequate risk assessment, contrary to standard practice at the relevant time.

167. To this end, the Court has received evidence from various sources. In addition to the evidence of Mr Benyatov, there has been evidence from employees current and past of the Bank, from those transacting business in Romania at the relevant time and from experts in risk assessment and country experts.

(d) Romania as a "high-risk" country and the degree of perceived risk

168. The evidence before the Court of the experts was that Romania was not considered to be a "high-risk" country in which to do business during 2005-2006. This was the view of Mr Worman as agreed in his Joint Statement with Dr Donald at para. 7v. In that part of the joint report, *"cases of high risk countries were territories emerging from conflict or prolonged instability or those with serious issues of organised criminality or a predatory state."* Examples at the relevant time included the Democratic Republic of Congo, Iraq and Russia. Lower risk countries where one or more of the above factors might be present, but to a lower degree, included Nigeria, Pakistan, Albania and Romania at the relevant time.

169. In the sixth section of his report, to which the Bank takes objection as going outside the framework of reference for which expert evidence was permitted, Mr Worman, an expert instructed by Mr Benyatov, stated in para. 6.54 of his report that "*I understand that Romania would not typically have been graded as generally 'high risk' in the Relevant Period. One Bank I work with graded Romania in the mid-2000s as "medium risk", although the actual risk in particular may have been higher or lower"*. In a footnote, he added *"with particular concerns being organised crime than the risk of arrest or surveillance."*

170. Reference back is made to paragraphs 12-16 of this judgment in which reference is made to evidence to the effect that:

(1) it was easier for leading investment bankers in Romania in the late 1990s and early 2000s, referring to the evidence of Mr Benyatov (para. 12 above);
(2) privatisation work in that period which led to an increasing amount of work for investment banks in the region (para. 13 above);
(3) encouragement of the UK to business in Romania and the EU and the IMF improving business standards (para. 14 above); and
(4) how major foreign firms and advisers including lawyers, accountants and bankers working in Romania at the time (paras. 15-16 above).

171. In my judgment, this was confirmed by the following:

(1) The UK Government supported and encouraged British business to do business in Romania. The UK was the fifth largest foreign investor with 200 British companies having a presence there including Unilever, GlaxoSmithKline, Allied Domecq, Aviva and WS Atkins. Foreign direct investment increased significantly in 2004-2006. In 2005, Vodafone acquired the Romanian mobile network operator Connex for around €2.5 billion, taking the total of UK investment in Romania to close to €3.5 billion for that year.

(2) Romania was committed to joining NATO, the EU and the Council of Europe. On 25 April 2005, Romania and the EU signed the Treaty of Accession on 1 January 2007.

(3) The privatisation program was a part of the process of joining the EU, taking ownership of the utilities away from central government into private hands.

(4) There were high profile visits from Romania to the UK and from the UK to Romania: the latter included heads of all three branches of the UK Armed Forces, the Lord Mayor of London in 2004, the Director-General of the CBI in 2005, and HRH the Prince of Wales who was a regular visitor: see the witness statement of Mr Quayle at para. 14.

(5) There were problems about corruption in Romania, about the need to improve the judicial system and about telephone tapping and covert surveillance, but it was being addressed: see the witness statement of Mr Quayle at paras. 27-31. Mr Quayle accepted that there was concern about the Romanian system of criminal justice because "*the Romanian judiciary was not considered to be free from corruption, and therefore the possibility that one party or the other might bribe a judge or the police to fabricate evidence or to get a particular result from a trial. Yes, there was that concern.*" [T8/81/7-11]. He then said that he did not believe that this would affect people outside Romania doing business with Romania because of the concern not to do anything which would affect negatively the image of Romania in the West before accession to the EU on 1 January 2007 [T8/81/13-T8/82/3].

172. I referred above to having to consider with caution the evidence of the three witnesses outside the Bank who were called to give evidence of their work in Romania at the time. They are respected sources, but the manner of the collation of the evidence

gave the Court concern about the risk of unconscious bias. Nevertheless, collectively their evidence is of considerable weight to the effect that they did not consider that Romania to be a high-risk country in any relevant sense. In particular:

(1) Mr Scheele referred to the absence of instances of arrest or conviction in Romania of a foreign adviser comparable to Mr Benyatov and his colleagues despite the huge number of foreign advisers and investors. He said (at para. 24): "*At no point during my time in Romania did I regard it as a dangerous place to be or a "high risk" country, including in 2005-2006. Nor was that the view (so far as I am aware) of other diplomats or foreigners doing business in Romania*". He distinguished Rompetrol, to which I shall refer in the context of the various flags, as being a prosecution against executives of an oil company based in Romania, and as the offences were very different, being of tax evasion and money laundering (at paras. 28-31). Mr Scheele referred to the UK government encouraging UK businesses and individuals to travel to and/or work in Romania at the material time: see his witness statement para. 32. Mr Scheele (para. 33) does not "*recall any company ever approaching the Delegation to ask about the risks of doing business in Romania*". He said (para. 35) that if the Bank had asked him about the risks of doing business in Romania, he would not have flagged any risk of arbitrary arrest or detention or conviction.

(2) Mr Schilling, a partner of Linklaters in 2000-2008 and managing partner of the Bucharest office with 50 people working there, lived in Bucharest from 2003-2007. He stated that there were risk assessments, but they covered matters like work permits and regulatory risks, but the risk of arbitrary arrest, detention and conviction was never raised as an issue either by a client or by him: see his witness statement at para. 22. He was not aware of any other occasion of foreign advisers being targeted, arrested or convicted despite the huge flow of such advisers including the largest law and accountancy firms and the world's leading investment banks: see para. 20. He did not consider prior to the arrest of Mr Benyatov and his colleagues that there was any such risk in Romania: see para. 14.

(3) Mr Quayle, British ambassador to Romania from November 2002 to May 2006, regarded Romania as being a bit below "*easy*" (the top category): it was by no means difficult or high-risk, and it was suitable for new and inexperienced exporters. He said that if it had been considered a high-risk country with foreigners being subject to arbitrary criminal investigation, detention and imprisonment arising out of normal business activities, the UK Government would not have been actively encouraging UK businesses to do business there at that time: see his witness statement at paras. 25-26. Mr Quayle in his witness statement at paras. 32-33 explained that, had he been approached as ambassador, he would not have advised of any "*risk of arbitrary arrest and detention and conviction for carrying out work there in a legal and proper manner*" [paras. 32-33]. He said: "*We didn't pick up things like arbitrary arrest and detention because they were not happening to visitors from Britain*" [T8/10/10-12].

173. As regards the evidence of those who worked for the Bank at the relevant time, the appraisal of Romania as not being a high-risk country is confirmed and corroborated by the following evidence, namely:

(1) Mr Studd who at the relevant time was General Counsel for EMEA, recalled how shocked he was at the time of Mr Benyatov's arrest. He took issue with the suggestion that the risks of arbitrary arrest, detention etc were known, or should have been known, to the Bank prior to the arrest. Were that the case, it would have been experienced by other foreign banks and businesses operating in Romania at the time, but he was not aware that this was the case: see his witness statement at paras. 13 and 37. Mr Studd (para. 13) said that he did not consider Romania to be a high-risk country.

(2) Mr Horne, who was EMEA COO for the Bank's IBD at the relevant time, and who in 2015 became the Deputy CEO of the Bank, stated at para. 37 of his witness statement that he was not aware of any bank carrying out a risk assessment of the kind contended for by Mr Benyatov during the relevant period, nor was Romania considered a high-risk country.

(3) Mr Mazzucchelli, a Managing Director and on the Board of Directors of the Bank at the time, did not regard Romania as challenging or high-risk: it was one of the least concerning of the Emerging Markets. It was not therefore a country where a risk assessment was standard: see his witness statement at paras. 9 and 25. Whilst account must be taken of the defensive approach of his evidence, his evidence as a whole was of assistance to the Court.

174. As regards the expert evidence, there is evidence of Mr McGregor, consistent with Mr Schilling's evidence, but I have not given it much weight despite its corroboration because of my concern expressed above about Mr McGregor's evidence.

175. What is the evidence to contrary effect? The evidence of Mr Menneer requires careful consideration. As noted above, this evidence is to be given more weight than a witness talking to a carefully prepared witness statement. As stated above, he rated Romania as the second riskiest state in the EMEA region. He did temper this comment by reference to the system whereby the Bank appointed local agents. That took a lot of the sting out of what he said. He did not give any detailed evidence from which this statement could be appraised. The Court does not have any detailed evidence from him as to his response to the large amount of evidence that Romania was not one of those countries that gave rise to high risk. His involvement in the area was in respect of the relevant period, but it is a long time since he was involved. I take his evidence into account, but it is not consistent with the majority of the evidence which I have heard, and it is neutralised significantly by his concession about the impact of local agents. In the end, the Court prefers the evidence of the majority to the effect that Romania was not a high-risk country or perceived as such at the relevant time.

(e) High-risk transactions and the degree of perceived risk

176. In my judgment, it has not been shown that the relevant transactions were high- risk. This is evident from the following matters, namely:

(1) There is an overlap in part between whether the country was high-risk and whether the involvement in the particular transactions were high- risk. The large involvement of professionals including lawyers, accountants and investment bankers in transactions at the time evidencing that Romania was not perceived to be a high-risk country applies also to the transactions not being perceived to be high-risk. A major part of the commercial activity was in the run up to Romania's accession to the EU, and a significant part of the work at the time was that of privatisations. The level of that activity and the absence of people withdrawing from transactions due to perceived risk strongly suggest that the transactions were not perceived as high-risk.

(2) It was perceived that Romania was intent on joining the EU due to the economic and political advantages to Romania. That made people confident that these transactions would take place in an orderly manner and not involve high risk to the professional advisers. In this regard, Professor Deletant said that Romania had agreed programmes with the international financial institutions, including the IMF, the World Bank, the European Investment Bank and the European Bank for Reconstruction and Development ("EBRD"), and that the E C wanted Romania to press ahead with privatisations [T12/13/22-14/14]. He agreed that the EC was closely monitoring the progress of the privatisations and was likely to continue to do so until they were completed [T12/20/17-22]. In particular, the EC welcomed the privatisation of Petrom, saw it as a milestone [T12/25/16-22] and noted with approval the progress in the privatisations of the electricity distributors [T12/27/8-21].

(3) Mr Benyatov worked for many years in European emerging market privatisations including energy privatisations. For four years, he had worked on energy privatisations in Romania including as an adviser to the Romanian Government on three privatisations, all without incident. He had previously advised Enel on the privatisation of two electricity distribution companies prior to the EMS privatisation without incident. Professor Deletant accepted that the involvement of Mr Benyatov and the Bank in respect of the earlier privatisations reflected that there was no suggestion of any particular sensitivity regarding energy privatisations or any risks to bankers advising on those privatisations [T11/135/5-18]. This is a further reason why the transactions were not perceived to be high-risk.

(4) In the instant transaction on which he had been working prior to his arrest, the Bank was acting for Enel, a multinational utilities supplier of Italian origin. There was nothing dubious or high-risk about acting for such a company. The contract involved the supply of electricity which was less controversial than being involved in the privatisation of oil.

(5) It was Mr Benyatov's case that the transactions were high-risk. The allegation has not been established, and it is clear that they were not perceived as high-risk at the relevant time**.** Professor Deletant accepted in the course of cross-examination that in 2005 when assessing risks of working on the EMS transaction from the point of view of the Bank, the following factors were relevant: (a) Romania was committed to a successful privatisation programme, (b) energy privatisations were scrutinised by global financial and other institutions, (c) they were worked on by the world's leading investment bankers and law firms, and (d) Mr Benyatov had already worked on four utility privatisations [T12/139/2-T12/140/5]. Mr Goulding QC then asked, *"Would you agree then the net effect, when you take all these factors into account, is that the risk of worked (sic) on the EMS utility privatisation was a low risk"*. To which Professor Deletant replied *"On working on EMS, yes. It was a low risk"* [T12/140/11-14].

177. Professor Deletant referred to unpublished material which he said would be known to certain political analysts that in late 2004, the new government launched an investigation into the privatisation programme. However, he did not identify how they would have this knowledge, and he referred to material within the last two or three years which alleged that the then President was a collaborator with the Securitate. Shortly after this, Professor Deletant made the important observations set out in the previous paragraph above.

178. The above evidence shows that the EMS privatisation was not perceived as a high-risk transaction at the relevant time. Indeed, Professor Deletant believed that it was low risk.

(f) Alleged warning flags in relation to Mr Benyatov's work in Romania

179. In the months before Mr Benyatov's arrest in November 2006, there were, according to his case, a number of amber/red flags that could and should have alerted the Bank to heightened risk facing Mr Benyatov and his colleagues in Romania. It was at the heart of his negligence case that these flags or any of them should have been apparent to the Bank and led it to review any assessment of risk to Mr Benyatov or should have triggered a careful assessment of the risks. These amber/red flags were as follows:

(i) December 2004 reports of corruption investigations into Petrom;
(ii) the Rompetrol matter from June 2005;
(iii) Linklaters' email about an anonymous letter in September 2005;
(iv) Petrom press allegations in June 2006;
(v) SRI investigations into Petrom in June 2006;
(vi) Burkey intelligence from the Bulgarian secret services in Sept/ Oct 2006;
(vii) Matt Harris approval of travel to Romania in November 2006.

180. Each of these flags will now be considered.

(i) December 2004 reports of corruption investigations into Petrom

181. On 7 December 2004, there was political pressure reported publicly in the press to start an anti-corruption investigation into some of the former President Nastase's comments in connection with Petrom. It was not established in the course of evidence how this report in Romania in December 2004 did or ought to have come to the knowledge of the Bank. There is no reason why it should have done so.

(ii) The Rompetrol matter from June 2005.

182. Mr Benyatov has put his case in this way in written closing (at para. 102.2), namely *"This was widely reported in the mainstream press, including in the Wall Street Journal. The Rompetrol matter was (a) a political prosecution involving (b) covert surveillance in connection with (c) an energy privatisation, (d) resulting in the investigation of a foreigner and American (which was "anomalous") and (e) leading to widespread international attention and condemnation that did not result in its immediate cessation, meaning (f) it was a significant event for international businesses operating in that sector in Romania (such as the Defendant) and a serious amber flag requiring attention and investigation."*

183. According to an article in the Wall Street Journal in the context of the Rompetrol prosecution, local media and human rights groups expressed concern that this push had spurred overzealous prosecutors who sometimes showed little respect for the rights of those being investigated. As one local investment banker put it in mid-2005: "*You don't really know anymore who's guilty and who's not…The justice isn't functioning*".

184. In the case of Rompetrol, Mr Scheele "*agreed that there had been abusive behaviour by the prosecutor*" [T8/142/12-13], and that there had been a political motivation for the prosecution [T8/125/6-8].

185. The pleaded case about the knowledge of the Bank was that:

> *"52.2.1. The well-publicised Rompetrol saga involving the investigation, arrest and indictment by the Romanian authorities of inter alia Philip Stephenson in 2006, which the Defendant either knew about (which information is outside of the Claimant's knowledge, the Defendant's disclosure on this point being inadequate to date) and/ or should have known about if it had conducted adequate regular assessments of risk".*

186. The points made on behalf of the Bank in closing were as follows:

(1) The newspaper articles prior to the arrest of Benyatov in respect of Rompetrol (Wall Street Journal and Washington Post June 2005, Mediafax News and Platts Oilgram News March 2006 and Platts Oilgram News of 21.7.06 [B/19/628]; Platts Commodity News July 2006) did not refer to the Bank. No

allegation of knowledge about them was pleaded. There was no reason for the Bank to know about these articles.

(2) Mr Benyatov did know about these articles, but he did not do anything about this. He did know about the Rompetrol story some weeks before he travelled to Romania in November 2006 but decided that it did not merit taking any further action. He explained in his oral evidence that he chose not to overreact to it but rather to wait and see and expect things to blow over. He said he was used to seeing fairly aggressive articles in the press, as there had been with attacks on the Bank following privatisations in the Ukraine and Slovakia. He said "*So when the Rompetrol saga sort of appeared in the press and I became aware I took exactly the same approach, you know, wait and see if it blows over or not. So in other words, point number one, don't overreact as the sort of articles sort of appear in the press, and expect for things to go away or to sort of dissipate, you know with the clarity of time.*" [T4/112/18-115/4].

(3) The investigation of Rompetrol was very different from the work of Mr Benyatov on the EMS transaction in a number of features. This was accepted by both Professor Deletant [T12/131/8–T12/134/6] and Mr Worman who accepted ten points of distinction made by Mr Goulding QC in cross-examination on Rompetrol (all listed in the Bank's written closing submissions at para. 239). They included that:

(i) Rompetrol was an oil refinery company and not an electricity distribution company (the privatisation of an oil company being more sensitive than of an electricity company, albeit that energy privatisations were regarded as sensitive);
(ii) the privatisation of Rompetrol had closed many years before 2005, whilst the EMS privatisation was ongoing in 2005-2006;
(iii) Mr Stephenson was a long-time investor in and an employee of Rompetrol whilst Mr Benyatov was an adviser on behalf of an international bank;
(iv) Mr Stephenson had lived in Romania for many years unlike Mr Benyatov who was a business visitor to Romania; and
(v) Mr Worman said that he would have pointed out these differences if he had undertaken a risk assessment.

187. Professor Deletant agreed that "*the circumstances of the Rompetrol investigation were very different from the investigation into Mr Benyatov*", and in particular he agreed with the ten significant distinctions between them put to him which included the matters set out immediately above [T12/131/3-134/6]. Likewise, Mr Worman accepted these differences. He said that if he flagged Rompetrol in an analysis, he would have gone into the fact that *"the circumstances seemed a very long way from what is proposed on the EMS transaction"* [T13/154/10-12].

188. There was an allegation in AMPOC para. 52.2.4 that Mr Stantchev may be wanted by Bulgarian intelligence. However, this was not pursued at trial and so did not feature in the list of flags.

(iii) Linklaters' email about the anonymous letter in September 2005

189. The anonymous letter was distributed within Romania and beyond, containing serious allegations of criminal conduct relating to the Romgas transaction and alleging bribery. Mr Schilling confirmed that the letter got to OPSPI in Romania [T8/190/17]. It is said that this was a very serious threat to the Bank's business and yet there is no evidence that the Bank assessed risks beyond a conversation between Mr Schilling and Mr Benyatov, which was a failure on the part of the Bank. Mr Benyatov said that he felt very comfortable and that *"we had no case to answer"*, but he did not know if the Bank assessed risks beyond that [T5/44/13-20].

190. The Bank answered these allegations as follows:

(1) The letter was anonymous (J. Proper seemed to be a fictitious name). It was expressly said to be based on rumours for which there was no solid evidence.

(2) Mr Schilling of Linklaters produced a note of advice stating that the allegation of bribery was ludicrous. He said in evidence he had no concerns about any prosecution being brought, and he also said he considered such letters fairly common in Eastern Europe in those days [T8/187/20-22] and [T8/193/8-10].

(3) Through Judith Reed of LCD, the matter was brought to the attention of Mr Benyatov. She said that the letter could easily be motivated by sour grapes, which is consistent with the terms of the letter and Mr Schilling's note.

(4) Mr Benyatov discussed the letter with Mr Schilling and expressed no particular concern about it. He did not ask the Bank to take any action.

(5) Mr Studd corroborated the above. Mr Studd recalled Judith Reed reporting to him that the view of the business was that this should not be taken seriously, merely being sour grapes and/or an attempt by a competitor to poison the well in relation to other business in Romania [T10/90/16-21; T10/95/19-23; T10/100/1-8].

(iv) Petrom press allegations June 2006.

191. In June 2006 the Romanian press began to run stories that Petrom had been given away, and that the Romanian economy's crown jewels had been sold off. This gave rise to intense scrutiny within Romania, and the Bank was made aware of it (see the Raj Rao interview at – especially at para. 28). This said that *"DM [that is Mucea] then started calling VB a lot. There were a lot of articles in the Romanian press regarding the Petrom privatisation. [Rao] informed Marco Mazzucchelli and Susan Kilsby about the attacks on the privatisation in the press. Corporate communications advised the deal team that [the Bank] should not respond to the press coverage.")*

192. This was pleaded in AMPOC at para. 52.2.4 as follows:

> *"Adverse press coverage of the Petrom privatisation from May 2006 and the interest of the Romanian secret police in that transaction, which it is reasonably to be inferred (the Defendant's disclosure on this point being inadequate to date) the Defendant knew about given that it was the subject of the adverse coverage and it was involved in the Petrom transaction and/ or which should have been known to the Defendant if it had conducted adequate regular assessments of risk."*

193. In fact, the evidence was not of adverse press coverage, but a press inquiry made on 21 June 2006 about a forecast of the value of oil barrels and the terms of the contract as regards re-assessment of the value of the prices in the light of market conditions. The request for comment was passed on to Mr Benyatov who was unperturbed, saying *"Unfortunately not unusual post privatisation behaviour. We should not be commenting on this."* He also thought that there must be sources for the forecasts which should be found. A responsive email from Mr Raj Rao indicated that they were found, and the oil price forecast had been discussed with the Petrom strategy team and with the technical and commercial adviser on the deal.

194. When asked whether this was a specific concern which should have triggered some form of risk assessment, Mr Studd said "*I think that's straying into hindsight territory. I don't think that a media inquiry, which talked about the price of oil and the privatisation, by itself would have prompted anyone to think that we needed to engage third parties to look at this*" [T10/103/8-12].

195. There are various features to which the Bank drew attention in final submissions of Mr Goulding QC, namely:

(1) The matter was taken up with Mr Benyatov, and it is to be inferred from his approach to the journalist's inquiry that he saw no need to escalate this within the Bank. In evidence, he said that this was "*par for the course when it comes to privatisations. Criticism comes with the territory, especially when you are – when you have a government change*" [T5/73/18-21].

(2) The interview of Mr Rao including para. 28 was put to Mr Mazzucchelli who said that he had no recollection of these events, see [T9/121-123]. It did not seem like an out of the ordinary matter, and as he commented, the Bank would be dealing with the press on a constant basis if it were to respond to every such story in the press.

(3) By May/June 2006, most of the work on EMS had been completed.

(v) SRI investigations into Petrom, June 2006.

196. Mr Benyatov's case is that matters escalated whereby the Bank was then notified that the SRI was investigating the Petrom matter. This was evidently a significant event

giving rise to a requirement to investigate and take action to mitigate the risk and avoid catastrophe. Instead, nothing was done. The Bank responded saying that as regards the allegation comprising "*the interest of the Romanian secret police in that transaction"* (as quoted above), this was introduced by way of amendment in November 2020. The Bank objected to this in that it did not state whether it was alleged that the Bank knew (in this case about the alleged interest of the secret police) and, if so, who, when and how they knew. The Deputy Judge held on 25 November 2020 that these were legitimate questions, and it was a condition of permission that these particulars were given: see his judgment at para. 192.

197. When the matter next came before the Deputy Judge, particulars had not been provided, but it was stated on behalf of Mr Benyatov that the amendments provide the best particulars of knowledge available based on the inadequate disclosure provided by the Bank. The Deputy Judge gave permission at para. 28 of his judgment dated 8 December 2020 in the following terms, namely:

> *"I have no way of assessing whether the disclosure given thus far has been inadequate, but I accept Mr Ciumei's assurance that these are the best particulars which the Claimant can presently give. I give permission to amend the pleading as requested, subject, however, to an important caveat: I do so on the express understanding (which seems to me clear from the pleading) that at present there is no case of actual knowledge made against the Defendant. If proper grounds for such a serious allegation were to emerge, I would expect a further application to be made to amend to make such allegation expressly. Any such application would of course fall to be considered by the Court on its merits when made."*

198. The suggestion at trial was that the Bank had actual knowledge of the alleged interest of the secret police in the Petrom transaction on the part of the Bank. This occurred through cross-examination of the Bank's witnesses on the basis of particular documents which had been disclosed in November 2019. The documents comprised notes of interviews (with Mr Rao and Mr Burkey). There was reliance too on a report of Realitatea TV dated 22 November 2006 after the detention of Mr Benyatov referring back to events in June 2006, but there was nothing to tell that this information was available before the arrest. It follows from the above that in order to make an allegation of actual knowledge, the documents evidencing the same ought to have been pleaded by no later than the time of the amendment before the Deputy Judge. Failing this, in the light of the above ruling, they should have been pleaded in advance of the time for witness statements and in any event, well in advance of the trial. The consequence is that the Bank did not have the opportunity to meet a case about actual knowledge and in particular to consider whether to call witnesses to deal with the documents referred to below.

199. In the notes of his 24 November 2006 interview with Alastair Foy (a secondee from Allen & Overy), Mr Rao is recorded as saying at para. 29 that in May/June 2006, Mr Dorin Mucea of OPSPI called Mr Rao/Mr Benyatov and told them that he had to hand over to the Romanian secret police all documents (including meeting notes) in relation

to the Petrom privatisation. Mr Mucea had said that the Bank would have to make a statement. Mr Rao thought that Lee Goss and Gavin Sullivan were involved at this point. Mr Benyatov now says that the Bank was put on notice in these circumstances of the interest of the Romanian secret police and did nothing to deal with this or to protect Mr Benyatov. As to this, the Bank states:

(1) Mr Benyatov said nothing about this matter in his witness statements and did not refer to any such call from Mr Mucea, what he is alleged to have said or about any involvement of Lee Goss or Gavin Sullivan. This is surprising given the reliance apparently now placed in Mr Benyatov's case on this paragraph. His failure to deal with this suggests that he does not support the account of Mr Rao.

(2) The note says that Mr Rao "*thought*" that Lee Goss and Gavin Sullivan were involved at this point. It is noted that Mr Rao did not know whether they were involved, rather he merely "*thought*" this was the case. It is not stated what Mr Goss or Ms Sullivan knew about the secret police's alleged interest.

(3) In any event, Mr Benyatov cannot allege that the Bank knew about this alleged interest in the light of the Deputy Judge's ruling in December 2020 and so the issue must be considered (if at all) on the basis that the Bank did not know.

(4) Due to the lack of particularity in the pleading despite the Deputy Judge's ruling, and the fact that Mr Benyatov's reliance on this document was not revealed until cross-examination at trial, there is no scope for any inferences from the fact that the Bank has not called witnesses to deal with this document, whether Mr Rao, Mr Goss, Ms Sullivan or anyone else.

(5) The alleged call from Mr Mucea was said to be in May/June 2006. By this stage, Mr Benyatov's work on the EMS privatisation was wholly or substantially complete, and it would have been too late to change the course of events that led to the conviction.

200. There was also a note of an interview of 29 November 2006 prepared by Mr Bisseker of LCD and approved by Mr Raj Rao in which it was recorded (at para. 18): *"On 17 November 2006, DM (Mr Mucea) contacted RR (Mr Rao) regarding the questioning on the Petrom privatisation which DM was due to undergo with the commission headed by the Secret Police under the supervision of the President of the country. VB (Mr Benyatov) and RR travelled to Romania on 21 November 2006 (RR checked with his Managing Director, MH (Mr Harris), before going to Romania). The purpose of the trip was to help prepare DM to respond to the various questions he would be asked."* Upon seeing this document, Mr Menneer said that if he had received this enquiry he would have been "*extremely concerned. I think the introduction of any secret police force into your transaction is never going to be positive, but a secret service in Romania, obviously with the history of the Securitate, would have concerned me greatly*" [T2/37/5-9]. He would immediately have taken steps to assess the risks before letting them travel. In cross-examination, he acknowledged that this would depend on what Mr Harris had been told [T2/81/2-19].

201. As to these comments:

(1) The Bank makes the same submissions regarding the Deputy Judge's ruling. There is no allegation that the Bank knew about the interest of the Romanian secret police, and the evidence must be dealt with on the basis that the Bank did not know. Here too the witness statements did not deal with this matter. In particular, in the first witness statement of Mr Benyatov in opposition to the strike out application at para. 38, Mr Benyatov said that in November 2006, he travelled to Bucharest for two reasons, namely to discuss the Romgas and Romtelecom privatisation mandates and to help Ministry of Energy officials with their presentation to the new government on the privatisation of Petrom. There was no reference there to the involvement of the secret police, or his knowledge of the same, despite the fact that it would be obvious for him to deal with it in that statement if that had been a purpose of this visit.

(2) The absence of scope for adverse inferences referred to in respect of the note of 24 November 2006 applies to this note too in the absence of a pleaded case referring to this note or to actual knowledge about the interest of the Romanian secret police.

(3) The note does not record what Mr Rao told Mr Harris. It does not state that he told him about any involvement of the secret police.

(4) This visit was a matter of days before Mr Benyatov's detention. His work on the EMS privatisation had long been completed and the die was cast.

(5) Mr Benyatov's evidence on this point is that he does not recall a conversation with Mr Harris but believes that either he also checked with Mr Harris before travelling to Romania or Mr Rao would have checked with Mr Harris on behalf of both of them: see his third witness statement at para. 83. Mr Benyatov does not say that he told Mr Harris anything about the involvement of the secret police, or that he asked or understood Mr Rao to have done so.

(vi) Burkey intelligence from the Bulgarian secret services in Sept/ Oct 2006

202. There was a note of 24 November 2006, following the arrest of Mr Benyatov, of a telephone call between Mr Burkey, Managing Director of the FID of the Bank, Mr Studd and Mr Foy, a litigation secondee solicitor. It stated a month earlier, Bulgarian advisers had informed the Bank that a file was being compiled in Romania on Mr Stantchev and the Bank in the context of the privatisation of Petrom. The suggestion was that there had been bribery or corruption surrounding the privatisation of Petrom. This led the Bulgarian government to be concerned about instructing the Bank on a deal. Mr Burkey said that he had spoken to Mr Benyatov regarding the information received. Mr Benyatov said that there was nothing more than gossip which was fuelled by a frustration at the sale of Petrom for a price lower than might have been achieved at a later date because of the post-privatisation increases in oil prices.

203. There are various features to which the Bank drew attention in its final oral submissions, namely:

(1) There is no evidence from this note that anyone other than Mr Burkey within the Bank knew about this matter.

(2) The terms of the note indicate that Mr Benyatov was unconcerned about this issue because he did not escalate it internally. Consistent with this, he does not recall this conversation with Mr Burkey according to para. 80 of his third statement. Mr Benyatov does not suggest that he told anyone else.

(3) This appears to have been communicated in late October 2006. The EMS deal was done or largely done by then, and the work of the Bank was done. Mr Flore was indicted even though he was not in Romania as of 21 November 2006 when Mr Benyatov was arrested.

(vii) Matt Harris approval of travel to Romania in November 2006

204. Mr Benyatov's case refers to an interview with Mr Rao of 29 November 2006 in which Mr Rao says he checked with Matt Harris, his and Mr Benyatov's line manager, before travelling to Romania in November 2006 to help Mr Mucea prepare for a secret police commission into the Petrom matter.

205. It is said that Mr Harris knew what was happening and failed on behalf of the Bank to recognise it as a red flag and stop the travel and launch immediate mitigating action. Mr Menneer says that were he told this information, he would have been "*extremely concerned*" [T2/37/5].

206. The Bank points out that there was no pleaded allegation about this matter despite the ruling of the Deputy Judge to particularise knowledge of the Bank of the interest of the Romanian secret police. The notes of 24 November and 29 November do not record what Mr Rao told Mr Harris or what he told him about any involvement of the secret police. This visit was days before Mr Benyatov's detention and long after the completion of his work on the EMS privatisation. Mr Benyatov's evidence at para. 83 of his third statement is that he does not recall a conversation with Mr Harris but believes that either he also checked with Mr Harris before travelling to Romania or Mr Rao would have checked with Mr Harris on behalf of both of them. Significantly, Mr Benyatov does not say that he told Mr Harris anything about the involvement of the secret police, or that he asked or understood Mr Rao to have done so.

(g) Discussion regarding the amber or red flags

207. The above matters need to be considered both individually and cumulatively as well as in context. I accept the Bank's response on each of the points which it has made as regards the amber or red flags. I shall not repeat all of the observations but add the following.

208. As regards the reports of corruption investigations into Petrom, there is no evidence that the Bank had knowledge of the same. It was not referred to in evidence, and there is therefore no flag identified.

209. As regards an individual consideration of the allegations, the many factors put by the Bank to the witnesses included that it was targeted against Mr Stephenson, an investor and employee rather than an adviser on behalf of an international bank and that Mr Stephenson had lived in Romania for many years. These factors together with the other factors referred to on behalf of the Bank make the Rompetrol case very different from the case of Mr Benyatov.

210. It was submitted on behalf of Mr Benyatov that it was unsatisfactory that the Bank had not called the most senior people within the Bank dealing with risk assessment. There was also an absence of contemporaneous documents containing an analysis of the impact of Rompetrol on the Bank's business in Romania. In my judgment, there is no reason to believe that there has been a cover up by not calling the most senior people within the Bank dealing with risk or by not disclosing documents. It is more likely to indicate that there was no specific risk assessment consequent upon Rompetrol. It was a considerable time prior to the arrest of Mr Benyatov. If there had been some risk assessment following Rompetrol, I am satisfied on the basis of the evidence as a whole that the distinguishing features between Rompetrol and the involvement in electricity and gas transactions of the Bank was such that it would not have affected the willingness of the Bank to continue to transact the instant business nor would it have affected its willingness to send Mr Benyatov to Romania. I also note the view of Mr Worman referred to above who accepted the points of distinction between Rompetrol and Mr Benyatov (as did Professor Deletant), as put by Mr Goulding QC in cross-examination.

211. As regards the Linklaters' email about an anonymous letter, I accept the case of the Bank that it was considered and dismissed by Mr Benyatov. It was considered elsewhere within the Bank. Such allegations were so commonly made without consequence that they did not merit a full review. The allegations were considered and dismissed not only by Mr Benyatov, but also by external Counsel, namely Mr Schilling and Judith Reed and Mr Studd in Legal and Compliance, but there was nothing more formal than this amounting to an internal review contrary to Mr Studd's suggestion. There were no reasons to escalate the matter still higher. There is no reason to infer anything from the fact that Mr Studd was called, but not Ms Reed.

212. As regards the Petrom press allegations, I accept that such press coverage went with the territory, and that there would be no time for anything else if every such story was the subject of a full review. There was no reason at the time not to dismiss the report. There was no failure to exercise reasonable care in the circumstances by not escalating the matter.

213. As regards the SRI investigations into Petrom in June 2006, the point about no particularisation of the knowledge of the Bank that the Romanian secret police had an interest in the transaction is a good one. The note of 24 November 2006 refers to Mr Rao thinking that Mr Goss and Mr Sullivan were involved, but even the note does not state that the matter had been escalated. There is no suggestion of what the Bank knew or that they knew that the Romanian secret police was involved. If the note is accurate, then Mr Benyatov knew about it and did nothing to escalate it. There is no

scope for inferences from the fact that the Bank has not marshalled evidence in advance to deal with this because of the failure to make a particularised allegation in advance of trial. The same applies to the note of 29 November 2006. For all these reasons, the existence of this flag has not been proven.

214. As regards Mr Burkey, there was a failure to provide particulars of reliance on the note referring to Mr Burkey in advance of the trial. The note only reveals knowledge on the part of Mr Burkey and Mr Benyatov. Mr Burkey was not senior to Mr Benyatov: they were both at Managing Director level. Mr Benyatov was clearly unconcerned about the issue and hence did not escalate it internally. He was so unconcerned that he did not recall the conversation: see para. 80 of his third witness statement. Even if this had been proven, there is no pleaded allegation as to what the Bank could or should have done and bearing in mind that at this time the investigation had been started. In the case of Mr Flore, he was indicted even though he was not in the country. Here too, for these reasons and for any additional reasons relied upon by the Bank as set out above, the existence of this flag has not been proven.

215. As regards approval of travel to Romania by Mr Harris, there is no allegation of actual knowledge on the part of the Bank. There is no evidence that Mr Rao told Mr Harris anything about the secret police. In his evidence, Mr Benyatov does not say that he or Mr Rao told Mr Harris about the secret police. Even the allegation that it is clear that Mr Harris did know what was happening (which is the way in which it was put on behalf of Mr Benyatov) is too vague: it is not said what he knew. It was also very late in the day: the experience of Mr Flore being indicted whilst out of the country is such that Mr Benyatov being out of the country would not have shielded him from prosecution. For these reasons, and for any additional reasons relied upon by the Bank as set out above, the existence of the flag has not been proven.

216. There is a further matter to add. In a case such as this with numerous interactions, it is possible with the advantage of hindsight to pull out a document and seek to say that if only the Bank had reacted, then the arrest and the conviction could have been prevented. That is not sufficient. They have to be real flags, that is to say matters that ought to have been noticed and acted upon at the time. They have to be matters which were, or ought reasonably to have been, in the knowledge of the Bank. They have to be matters which if they had registered at the time ought to have been acted upon in a manner which would have avoided a conviction or reduced the chance of a conviction. In this case, (a) without a specific pleading in advance of the parts of the documents dated 24 and 29 November 2006 now relied upon (which themselves were compiled only after the arrest of Mr Benyatov), (b) without proving relevant knowledge on the part of the Bank of any of these matters, and (c) without Mr Benyatov having escalated within the Bank such knowledge as he may have had, none of the fifth to the seventh flags have been established. Indeed, for all the reasons referred to by the Bank and for the reasons set out in this conclusory section, none of the flags have been proven let alone that they were warning signals on which the Bank ought to have acted.

(h) Risk assessment not standard

217. The experts were broadly agreed that the political risk assessment industry was in a state of development especially in the first decade of this century. It developed to some extent after 9/11 due to the increased concern about international terrorism. It experienced significant impetus after the 2008-2010 financial crisis when the compliance function took on a more prominent role in financial institutions: see the Joint Statement of Worman/Donald at paras. 7d, 7f-7k, 7m-7r; and Dr Donald's at paras. 6, 33-35, 40. It was common ground between the experts that there was no 'standard procedure' for risk management by companies during 2005-2006 and no standard practice regarding what would be included in any political risk assessment that would be carried out. There were also no statutory obligations to conduct country risk analysis in 2005-2006 (save for AML and anti-bribery regulations).

218. Dr Donald further explained in his oral evidence that there was a change in terms of awareness of political risk and performing political risk assessments at the time of and as a result of the financial crisis of 2008-2010. Political risk assessment came to be seen as falling under the remit of the compliance function: [T16/142/14-144/11]. Mr Worman said in his report at para. 3.21: "*The degree to which thorough risk management processes in banks was followed varied enormously and in my experience during the Relevant Period compliance departments were, unfortunately, far less influential (or indeed 'listened to') than post 2008 (ie post the financial crisis)*". His oral evidence was that compliance took a far more important function within institutions and companies after 2008: see also his oral evidence at [T13/18/8-22/6].

219. Contrary to Mr Benyatov's pleaded case (AMPOC para. 25.23), the parties' risk consultant experts agreed that there was no "standard procedure" for risk management by companies doing business in Romania during the relevant period. Romania was not a high-risk country and would be less likely to be the subject of comprehensive political risk analyses than high-risk countries: Joint Statement at paras. 7g, 7h and 7v. Banking risk management in the relevant period would generally involve a system of sign-offs and checks and balances via risk committees and franchise risk teams in which senior employees could bear a significant degree of personal responsibility.

220. There is no evidence before the Court that any business carried out any political or detailed risk assessment, or even considered doing so, in relation to business in Romania prior to Mr Benyatov's arrest. Neither political risk consultant expert gave evidence of any political risk assessment of doing business in Romania being performed by or on behalf of any international company during the Relevant Period. Nor did Professor Deletant know of any such political risk assessment. Nor did Dr Donald. In considering the expert evidence, it is important not to look at the events in 2005-2006 with the political risk industry's spectacles of 2021.

221. In his five years in Romania (2001-2006), Mr Scheele was not aware of any international companies carrying out political risk assessments on Romania prior to carrying out business there and he does not recall any company ever approaching the EU delegation to ask about the risks of doing business in Romania: see Mr Scheele's witness statement at para. 33. Mr Quayle says that if companies were conducting risk assessments as a matter of routine before doing business overseas, he would have

been aware of the practice, and he was not: see Mr Quayle's witness statement at paras. 9 and 33. Linklaters had no particular concerns about its staff from overseas going to work in Romania and there was no particular advice, training or guidance given to staff going to work at Linklaters' Bucharest office: see Schilling at paras. 22-23. The absence of any political risk assessment of Romania before Mr Benyatov's arrest is striking, given the large number of foreign, including British, businesses, businesspeople and advisers who were working in Romania at that time.

222. In my judgment, the effect of this evidence is that absent some special circumstances of which the Bank had knowledge, there was no standard procedure to have a political or other detailed risk assessment for international companies doing business in Romania or advising in respect of the same. The position on the evidence goes further in that there was no evidence to the effect that a political business or other detailed risk assessment was carried out at all by international companies carrying out business in Romania at the relevant time, let alone by professional advisers such as an investment bank and international law or accountancy firms. There was an inability of Mr Benyatov to establish a pleaded standard procedure (AMPOC para. 25.23): it appears on the contrary to have been standard not to have had such an assessment prior to conducting or advising in connection with business in Romania. This is another factor going against a duty of care. It is not the sole factor because it is combined with the other factors set out above including that it was not a high-risk country or perceived as such and not a high-risk transaction or perceived as such. Major building blocks of the case about the duty of care and/or the breach thereof have fallen away.

(i) Features specific to Mr Benyatov

223. There is not sufficient evidence on which to suppose that Mr Benyatov's risk profile was increased by reason of a Russian sounding name or a Russian birth or having worked in Russia. On the contrary, Professor Deletant gave evidence in this regard that the Romanian Government welcomed Russian involvement in the Romanian energy sector [T12/46/10-12]. He agreed that: (a) Lukoil was a Russian oil company and PetroTel was a large oil refinery in Romania in Ploiesti; (b) in 1998 Lukoil bought a majority stake in PetroTel as part of its privatisation; (c) that was not in any way prevented by the Government even though that gave the Russian oil company control of one of Romania's largest oil refineries; (d) it is an example of an outward act of apparent welcome to Russian involvement in the Romanian energy sector; (e) PetroTel Lukoil has a chain of petrol stations throughout Romania; and (f) Lukoil has invested heavily in PetroTel in the subsequent period [T12/47/13-48/16]. Further points are made below in connection with breach about the absence of significance of Mr Benyatov's name and his background and experience in Russia under the heading "the suitability of Mr Benyatov". This goes against the thesis that if there were perceived connections of Mr Benyatov with Russia then that this would materially affect his risk.

(j) Conclusion as regards duty of care

228. The effect is that key features relied on by Mr Benyatov to establish the duty of care have not been established. The Court is then left with the employment relationship or the relational contract, but this does not prove anything different unless every contract of employment would have this duty, which it does not.

229. I am not satisfied that any of the evidence gives rise to the alleged duty of care. Having reviewed the entirety of para. 25A of the AMPOC, Mr Benyatov has been unable to prove the basis of the pleaded duty of care. He has failed to prove that in the circumstances of this case it was reasonably foreseeable that Mr Benyatov would be exposed to a conviction in the performance of his duties for the Bank.

230. Among the matters which have been taken into account in reaching the conclusion that the particular duty of care has not been established are the following factors, namely:

(1) The facts showing that Romania was not regarded as a high-risk country during the Relevant Period;

(2) The facts showing that the EMS transaction was not regarded as a high- risk transaction;

(3) The fact that none of the alleged amber or red flags have been established as putting the Bank on notice of some special need for vigilance in the instant case, nor in respect of various of the alleged flags were they escalated by Mr Benyatov to the Bank on the basis that they were treated as worthy of consideration at a higher level;

(4) The fact that, contrary to the Mr Benyatov's pleaded case, there was no standard practice in respect of commissioning a political or other detailed risk assessment whether as alleged by Mr Benyatov or at all. Indeed, the evidence is that international companies did not commission such an assessment;

(5) There were no circumstances applying specifically to Mr Benyatov including his name, his origin and his experience which made it inappropriate for him to be appointed on the EMS transaction.

231. The case as to the duty of care therefore fails by reference to the facts of the case. If it had been a case with radically different facts, there would arise for consideration whether such a novel duty of care could be found. These questions do not arise in a factual vacuum. In the instant case, the claim as to the particular duty of care must fail. For the purpose of completeness, I shall consider additional arguments of the Bank to seek to negate the duty of care. They do not arise for necessary consideration in view of the conclusion above.

VIII The argument that Mr Benyatov had the ultimate responsibility in respect of risk assessment

(a) Risk assessment processes within Credit Suisse

232. The Bank referred to the description of its risk management system in its 2005 Annual Report. The Annual Report claimed that the Defendant's risks "*are managed as part of the global Credit Suisse Group entity*". It stated that "[r]*isk management oversight is performed at several levels of the organization*" and that the Group's "*risk management framework*" is based on five principles including 'management accountability' and 'independent oversight'. The latter principle provides that:

> *"Risk management is a structured process to identify, measure, monitor and report risk. The risk management, controlling and legal and compliance functions operate independently of the front office to ensure the integrity of the risk and control processes. The risk management functions are responsible for implementing the relevant risk policies, developing tools to assist senior management to determine risk appetite and assessing the overall risk profile of the Group."*

233. Mr Benyatov's evidence was that he was never informed that he was or had become a senior business line manager or that he had assumed additional responsibility for assessing risk. "*The fact that it is not mentioned in any of the compliance manuals, and they were numerous, as you can see, that I had to read, and no one has gone out of their way to explicitly inform me of this event. I mean, this is a big event. I'm assuming a tremendous amount of responsibility beyond what I had before, and somehow nobody within the bank thinks it is important to highlight this point to me*" [T4/106/1-8].

234. Mr Menneer's evidence was that Mr Benyatov was *"absolutely not"* a senior business line manager. *"In European terms or in UK terms that would be a SIAP. So in this case the Head of European Investment Banking, Mr James Leigh Pemberton, which then became Mr Marco Mazzucchelli"* [T2/39/1-6]. Mr Menneer said: *"I would not be comfortable that many of the bankers in management of those areas [European Emerging Market Utilities] could think strategically enough to assess that risk. Bankers tend to be very good at assessing transactional risk, i.e. how can they get their transaction done through, but generally speaking, there weren't that many bankers that I trusted to think through all the risk issues about a transaction"* [T2/71/14-21]. His view was that Mr Benyatov would not have been capable of doing so: [T2/72/10-11]. (This is relied upon by Mr Benyatov to show that it was the responsibility of more senior management in the Bank to assess risk to a Managing Director, rather than to depend on the employees' own assessment).

235. Others stated to the contrary. Mr Mazzucchelli said *"that Mr Benyatov was in charge of a business line is very clear and that he was a senior manager, given that he was a managing director, I think that's also clear"*: [T9/98/20-23] and his witness statement para. 18. He sought to suggest that the term was *"a very conventional expression" and "financial industry jargon"* [T9/98/10-15]. However, he was unable to point to

any documents that contained the expression. He was also unable to explain precisely who might qualify as such [T9/98/10-25].

236. Mr Horne said "*I do regard Mr Benyatov as being a senior business manager in 2005 when the EMS deal was secured*" [Horne para. 31]. However, he accepted that the (single) sentence in the Annual Report that referred to the role of a senior business line manager was open to interpretation [T10/29/2-10] and that, in fact, he had never even read the Annual Report [T10/29/24-25].

237. Mr Studd said that "*Mr Benyatov was a senior business line manager for emerging markets, by virtue of his functional title and his role as the head of a discrete business group*" (Studd para. 36). Mr Studd accepted that senior business line manager was neither a key concept, nor a term of art [T10/87/4-11].

238. Mr de Boissard said that the term referred to "…*a broad category of people, managing directors, certainly the more senior type of managing directors would fall under that line… with hindsight I would say at the time [Mr Benyatov] was a senior business line manager*" [T3/17(2-11)].

239. In addition to the issue as to whether Mr Benyatov was a senior business line manager, there was a broader issue. Mr Benyatov put the matter by reference to his background, training and experience at para. 68 of his third witness statement as follows:

> *"I have an MBA in finance and experience in investment banking. I have no background, education, training or experience in intelligence matters, personal security or aspects of Romanian politics which might lead to ordinary business activities being treated as unlawful by the Romanian authorities. Credit Suisse was a very large international organisation with vast resources, and I assumed and expected that they had my back".*

240. He developed this in his oral evidence at [T4/99/8]-[T4/100/21] and at [T4/113/16]-[T4/115/10] where, as a transactional banker, he took a 'wait and see' approach to aggressive press reporting and would "expect things to blow over". It was for others at the Bank (or for the Bank to obtain requisite external assistance) to ensure that that was the correct approach, such as those in LCD, or the risk and security department [T5/6/7-16]. That was true, but he was nonetheless a front line of intelligence for the Bank. As a senior employee of the Bank, it was up to him to refer any potentially problematic matters to LCD and/or the risk and security department. If he did not do that, he could not expect others at the Bank to deal with it.

241. My conclusions are as follows:

(1) I accept the evidence of Mr Benyatov that he was not told that he was a senior business line manager. There was an easy way of bringing it to his attention, namely by stating it in his contract of employment. Neither was he told nor was it in his contract.

(2) The evidence that he was a senior business line manager was far too imprecise. It is telling that Mr de Boissard used the expression that he had this position in hindsight. The term was not properly defined such that it was difficult to say who at the Bank had the role and who did not.

(3) The Bank has not shown that Mr Benyatov was a "*senior business line manager*" and, as such, bore primary (indeed, on the Defendant's case, essentially all) responsibility for the risks of transactions with which he was involved.

(4) In any event, it does not follow from the seniority of Mr Benyatov's position that he was saddled with sole responsibility for his judgments. It was still the case that the Bank with its knowledge of the bigger picture of risk, to the extent that it had a duty to protect Mr Benyatov, was not relinquished of that duty because of the seniority of the position of Mr Benyatov.

(b) The effect of Mr Benyatov's contractual duties on any duty of care of the Bank

242. The Bank has raised an argument that under his contract of employment, the Global Compliance Manual was incorporated. The effect was that Mr Benyatov would be held personally responsible for any improper or illegal acts committed by him during the currency of his employment. Ignorance of the law would not be a defence. The argument that is then raised is that if Mr Benyatov did not realise that what he was doing was illegal in Romania, the allocation of risk was therefore on him. On this basis, the conviction was his responsibility, and he is unable to sustain an argument to the effect that the Bank failed to protect him from a conviction.

243. In my judgment, this is not an answer to the claim of Mr Benyatov. The Bank has failed to prove that Mr Benyatov was guilty of the conduct which was the subject of the convictions, and the convictions by themselves do not prove anything. In those circumstances, the unlawful conduct is not proven. It would therefore follow that if there were a contractual duty on the part of Mr Benyatov to conduct himself in accordance with Romanian law of which he was ignorant, then he would not have been in breach of contract. If there were a duty of care to take reasonable care not to expose Mr Benyatov to a conviction, the duty of care would still stand.

244. In case that conclusion was wrong, if, which is not clear, there was a contractual duty to observe the foreign law even where the law could not be known to Mr Benyatov even with the exercise of reasonable diligence, this did not exclude the duty of care, if it existed. In this case, the Bank did not consider that Mr Benyatov had done anything unlawful prior to the conviction after taking legal advice, and so Mr Benyatov could not reasonably be expected to have done better. Accordingly, this too would not prevent the alleged duty of care from arising. The contract does not exclude the alleged duty of care, of not exposing him to the risk of committing an offence of which he would have not reasonably been expected to have had knowledge, from arising.

(c) Responsibility for risk

245. This is not to say that Mr Benyatov did not have some responsibility for risk in liaison with the Bank. He was not a senior business line manager, but he was in a senior position, by April 2006 being Head of European Emerging Markets. His curriculum vitae for Swedish Central Government Offices in 2004 described him as the "overall project leader" for a number of transactions including Romanian transactions. He was in the front line. It was reasonable to expect of him in the first instance, where appropriate, to escalate matters to the LCD and others involved in the assessment of risk.

246. Thus, in connection with the alleged flags, his view was very important in respect of the Petrom press articles that this could be discounted as being "*par for the course when it comes to privatisations. Criticism comes with the territory, especially when you are – when you have a government change*". The same applied to his approach to the anonymous letter with an allegation of bribery, that he was very comfortable that there was no case to answer. This was especially so in the context of Eastern Europe where it was frequent to have such letters, according to the evidence of Mr Schilling.

247. This responsibility of Mr Benyatov did not absolve the Bank from having a duty of care to Mr Benyatov relating to his safety where there were reasonably foreseeable risks. However, in respect of one-off matters, he was very much the front line when it came to risk. If there was a situation which required escalation, it was for him to refer it. He was also able to make a judgment that this was not required. Thus, in respect of the so-called warning flags, to the extent that he chose not to refer matters such as the last three flags, the matter would generally stay there. It was suggested that the bonus structure so incentivised Mr Benyatov or persons in equivalent positions that there was a danger that their commitment to their projects would reduce their objectivity about risk. Further and in any event, the combined experience and resources of the Bank gave it greater ability to discern risk than the person on the "front line". These points only go so far. When it came to points which arose in the course of the projects, such as have been called warning flags, there was reasonably a responsibility on the part of the Managing Directors, where appropriate, to bring these matters to the attention of the LCD and those others charged with risk assessment.

248. The fact that Mr Benyatov did not escalate them is evidence at the time that on the information available, they were reasonably not perceived as warning flags. Whilst the Bank could not disown a duty, nor could it be expected to come into action where the judgment of Mr Benyatov or people at his level or below was not to refer it to LCD or others entrusted with risk management within the Bank. Likewise, Mr Benyatov's view as to whether to take action in respect of the anonymous email was very significant as a senior employee on the ground, able to make an appraisal. The same applies to his views of the allegations in connection with the Petrom privatisation, and indeed the other alleged warning flags.

(d) Conclusion on duty of care

249. It follows that major building blocks on which the duty of care is said to exist are not established. The case that Romania was or was perceived to be a 'high-risk' country fails. There also fails the case that the EMS transaction or the other privatisations in which Mr Benyatov was involved were 'high-risk' transactions or were perceived as such. Nor have any of the warning flags been established. Nor has it been shown that there were any factors specific to Mr Benyatov which needed to be brought into the equation. Absent all of this and having considered the evidence as a whole, in my judgment the conviction and the subsequent losses were not reasonably foreseeable. Further, in circumstances where there was so much business activity in Romania (in the run up to the imminent entry of Romania into the EU) and against the background of successful privatisation work undertaken by the Bank involving Mr Benyatov in the early years of the decade, it was not fair, just and reasonable to create the alleged or a related duty of care in the circumstances of this case. It follows that Mr Benyatov's case on the duty of care must fail.

XI Breach of duty of care

250. As indicated above, on the facts of this case, the concepts of whether there is (a) a duty of care, and (b) a breach of duty in the circumstances of this case, are intimately connected. The effect may often be that the very points which would negative a duty of care may be the answers to the allegations that there was negligence and/or a breach of duty.

251. That then engages the law set out above. In particular, the Court must consider the information reasonably available up to the time of the arrest of Mr Benyatov. If a conviction was not reasonably foreseeable, then the flip side may be that there was not a failure to exercise reasonable care not to expose Mr Benyatov to a conviction.

252. More specifically, I am satisfied, on the basis of the information reasonably available to the Bank at the time of the alleged negligence, that there was no reasonable probability or possibility that Mr Benyatov would be arrested and the subject of a criminal conviction in Romania as a result of working in Romania and/or by reason of the work undertaken in Romania up to 2005-2006.

(a) Risk assessment

253. There has not been evidence of any political risk assessment undertaken by the Bank in respect of Romania at the relevant time prior to Mr Benyatov's arrest. There was no full-blown risk assessment of the sort suggested in AMPOC at para. 25.23. There was no assessment of risk in relation to him in respect of Romania before his arrest in Romania in November 2006. Mr Mazzucchelli said that prior to the arrest "*I don't think we ever even remotely discussed and raised the topic of private safety or security, that was something that was not even on the radar screen*" [T9/68/20-23].

254. In a different sense from a political risk country assessment, there were structures in place to identify risks. The Bank had a Global Policy on Reputational Risk valid from 1 May 2006, and Mr Benyatov agreed that there would have been an earlier version in place [T4/96(7-12)]. It stated that "*Each employee is responsible for assessing the potential reputational impact of all business in which they engage, and for determining whether any actions or transactions should be submitted through RRRP for review*". It also stated that "*An employee who determines that he or she is engaged in, or considering, an action or transaction that may put the Bank's reputation at risk must submit that action or transaction through RRRP for review, before the Bank is committed to pursuing or executing it from a legal or relationship standpoint*". Mr Benyatov was familiar with the reputational risk review process including the parts quoted in this paragraph: [T4/95(14-17)], [T4/97(14-15)] and [T4/98(9-15)].

255. The Reputational Risk Policy also stated, "*Business line personnel have primary responsibility to consider the potential reputational impact of all business they conduct and raise appropriate transactions for review*". Mr de Boissard said that "*the assessment of the risks involved lay primarily with the businesses, and in the cases where it wanted or thought it needed or indeed where it was mandatory, it would then seek the approval of the reputational risk process*" [T3/12(16-20)]. Mr Menneer accepted "absolutely" that bankers were expected to take the initiative on risk, including:

    (1) by making enquiries and seeking out information;

    (2) considering the wider context in which the transaction was to take place; and

    (3) considering the political climate [T2/60/22 – T2/61/11].

256. There was also an Operating Committee within IBD, which involved all the different heads of either regional businesses or global product verticals for product groups, and it was an operational body where business developments and business priorities and devolution of the business activity was discussed on a regular basis [T9/13(7-13)]. Mr Mazzucchelli described how, within the committee, there was an overall exchange of views including with Mr Raphael and Mr Harris [T9/21/7-16].

257. In the Investment Banking Division, in respect of EMEA work, the IBC was a separate committee, at which bankers would have to explain why the bank should risk its capital or reputation on the projects they were proposing: see Mr Studd's statement at para. 47. It was mandatory for reputational, unusual or controversial issues to be brought to the attention of the IBC [T2/55(4-6)]. The memo had to be transparent, and the onus was on those who presented it to raise all issues [T2/57(2-6)]. Mr Studd explained that it was "*the deal team's responsibility to ensure that all salient risks and potential downsides are captured in it*". The deal team would be "*grilled [by the IBC] on the contents of the memo, and the expectation was that there should be a full disclosure of potential risks in the memo. It was then for that Committee to decide whether the deal could proceed*": see paras. 50-51 of Mr Studd's witness statement.

258. Mr Menneer said *"obviously risks can occur that were not foreseen in the IBC memo, and you are then reliant upon a banker from within the project team to say, there is now this risk"* [T2/30(6-9)]. He made clear that the people with expertise in a transaction were those bringing it to the IBC, and not the members of the IBC: no member of the IBC could scrutinise their own business line [T2/47(1-7)].

259. Mr Benyatov attended a number of training courses while employed by the Defendant. In particular, on 7 November 2005, he attended a course on "*Reputational Risk Review Process: Our Reputation is Everything*".

260. I am satisfied that there was no standard practice for an assessment of political risk for international companies acting in Romania at the relevant time. There is no evidence of any other business performing such a risk assessment in relation to Romania during the Relevant Period, or even enquiring about doing so.

261. Further, the failure to have a political or any other full blown risk assessment prior to Mr Benyatov's arrest was not a failure to exercise reasonable care. That was not simply in the absence of a standard practice. It also takes into account that Romania was not a high-risk country or perceived as such. Further the EMS transaction and/or the energy privatisations in Romania in which the Bank and Mr Benyatov were engaged were reasonably not perceived as "high-risk" transactions.

262. In Section G of the written closing submissions of Mr Benyatov in respect of disclosure issues (paras. 135-175) it is suggested that there have been shortcomings in disclosure by the Bank in respect of the following:

(1) the Bank's risk assessment policy and process:

(2) the Bank's approval process for doing business in Romania;

(3) the EMS approval documents.

263. As regards (1), there has been disclosed the Credit Suisse Global Policy on Reputation Risk effective from 1 May 2006. It was stated that this was to be read with other risk management and control policies It was not apparent that any other risk management and control policies were relevant to this case. In any event, this case is being decided on the ground that in the circumstances of this case, no political or other detailed risk assessment was carried out.

264. As regards (2), there has not been provided an approval process of the Bank for doing business in Romania. Mr Benyatov seeks to infer that there was no assessment of risks of doing business in Romania, and that Mr Benyatov was not involved in any such risk assessment. The same point applies: there was no political risk assessment, and no other detailed risk assessment was carried out. There is no evidence that Mr Benyatov was involved in such a risk assessment.

265. As regards (3), it is stated that whereas there was disclosed a memorandum to the Investment Banking Committee dated 26 January 2006 from a number of individuals including Mr de Vecchi, Mr Pattofatto, Mr Berg and Mr Benyatov, there has not been disclosed what has been described as the EMS Mandate Approval Memo. This aspect

is not clear from the correspondence and submissions, and there are inferences which Mr Benyatov seeks to draw which in their totality are not easy to follow, namely that there was no such document prepared or that it was prepared and not provided. I am not satisfied that there was a document which was prepared and which has not been provided. In any event, whether there was or was not such a document, there is no scope on the material as a whole to draw an inference that there were significant reputational risks in connection with the EMS transaction such as ought to have caused the Bank to have acted significantly differently from the way it did in connection with the EMS transaction.

266. It was submitted that Mr Mazzucchelli made an important admission about the Bank's failure to assess and identify the risks to Mr Benyatov when he said [T9/69/10-16]:

> *"Had we known that there was this type of risk, it would have been a bit illogical not only to expose individuals, if I may say, but also expose the bank. Let's not forget that Credit Suisse also had reputation damage out of this whole sequence of events."*

267. This does not bear out the point then made on behalf of Mr Benyatov that if an assessment had been made, it would not have exposed Mr Benyatov to such risks. Mr Mazzucchelli's point was that there was no perceived risk. The question is then whether the failure to make the assessment was at that point in time a failure to exercise reasonable care.

268. There was detailed consideration of risk in Romania after the arrest. This was evident from the evidence of Joy Soloman referred to above. It is said that this shows that this could have been obtained before the arrest. It does not show that the Bank failed to exercise reasonable care because it did not carry out an assessment. It shows that very significant adjustments had to be taken as a result of Mr Benyatov's arrest which came as a shock within the Bank.

269. The absence of evidence of detailed risk assessments must be evaluated in the context of the following, namely:

(1) The absence of evidence that other investment banks, accountants and lawyers at the time had such risk assessments. It appears from the evidence as a whole that at the relevant time, this was not standard practice, and generally that the same was not obtained in respect of Romania.

(2) The vast amount of work undertaken by Banks and providers of financial services as well as billions of dollars of trade between Romania and the UK and between Romania and EU and other western countries generally without risk assessment. This is evidence that Romania was considered as a place where people from the West could provide professional services in relative safety as opposed to places of high risk.

(3) There had been no significant difficulties in connection with the large amount of privatisation work in which Mr Benyatov had been concerned in Romania,

and there was no reason to believe that the EMS Project would be any different. The analysis of the warning flags referred to above is that none of them have been established as putting the Bank on notice of some special need for vigilance.

270. In my judgment, the failure to engage such an assessment in the circumstances of this case was not a breach of duty. It is not simply the absence of a standard practice in connection with such political risk or other detailed risk assessments by itself. It is also in the context of Romania not being a high-risk country or perceived as such and the relevant transactions not being high-risk or perceived as such. All the analysis set out above in connection with the reason that there was no duty situation applies to answer the allegation that there was a breach of duty.

271. Just as there was no negligence established by reference to the allegations relating to failure to have adequate risk assessment in para. 52.1 of AMPOC, so too the allegations in paras. 52.3, 52.4, 52.6 and 52.8 of AMPOC fall away for the same reasons. They are allegations of negligence either by failing to advise C of the contents of a risk assessment, or advice following from it, or of sending him to Romania without performing an adequate risk assessment or of failing to protect him from criminal conviction.

272. In my judgment, to find a failure to exercise reasonable care in the circumstances would be to consider the matter with the advantage of hindsight. It would be to look at matters through spectacles acquired after and with the knowledge of Mr Benyatov's arrest and/or after the more stringent regulatory regime which came into being after the 2008 banking collapse including political risk assessments being more common: see *Roe v Minister of Health* above. The analysis of the alleged amber or red flags has been that there has not been a breach of duty in responding to the same because they were not flags as such and/or they did not require any different conduct on the part of the Bank. This is relevant to answer both the case that there was a duty situation and that there was a breach of duty. For all these reasons, the allegations of breach of duty are rejected.

(b) Other allegations of breach considered

(i) Contacting third parties (para. 52.1.2. of AMPOC)

273. For the reasons stated above, there was no need or trigger for the Bank to inform itself about any risks in Romania over and above its reasonable reliance on its own in-house expertise and its employees on the ground.

274. The evidence of Mr Quayle (para. 24 of his witness statement) is that businesses did not raise with the British Embassy issues concerning risks of doing business in Romania. Neither he nor any members of his staff were ever asked by any company to carry out, or contribute to, an assessment of risks of doing business in Romania, independent of the UK Government's Security Information Service for Business Overseas ("SISBO"), and he knew of no such risk assessments through SISBO (which

would likely have been referred to him if they arose). The evidence of Mr Scheele (para. 33 of his witness statement) is to like effect. This evidence is particularly noteworthy as it responds to and contradicts decisively and authoritatively Mr Benyatov's case that the British Embassy and the EU Delegation in Romania were bodies which would have informed the Bank of the risk of arbitrary arrest/conviction.

275. There is no evidence of engagement with academics in relation to Romania during the Relevant Period. Dr Donald was clear that engagement with academics with relevant expertise would not have been standard for any jurisdiction: see para. 57 of his report. Mr Quayle also said that he would not have consulted Professor Deletant if approached by a business asking about risk assessment [T8/67/17-T8/68/6].

276. As for commercial intelligence organisations, they were much thinner on the ground in 2005-2006. There was no reason for the Bank to approach them in relation to Romania or the EMS transaction and Professor Deletant specifically said, by reference to such organisations, that he did not know of anyone seeking advice from them in relation to business in Romania in 2005-6 [T12/181/11-18].

(ii) The suitability of Mr Benyatov (para. 52.1.3 AMPOC)

277. This allegation was despite the prior involvement of Mr Benyatov in Romania, who had for more than three years prior to engagement in the EMS transaction, proposed and worked on Romanian deals (including with the Romanian Government as his client). The allegation was made despite his being at the time Head of European Emerging Markets Utilities.

278. It was reasonable for the Bank not to question the suitability and experience of Mr Benyatov conducting business in Romania, having a specialism acquired over a period of more than a decade in European Emerging Markets Utilities. In 2001, he developed a business plan to work on utilities privatisations in Romania and undertook that work between 2001 and 2005 without untoward incident. He proposed that he should work on the EMS transaction. There was no reason for the Bank to have considered Mr Benyatov unsuitable to work on the EMS or any other Romanian transaction, nor was there any trigger to do so.

279. It was suggested for Mr Benyatov that his Russian-sounding name, the fact he was born in the former Soviet Union, speaks Russian and had lived and worked in Russia materially added to his risk profile in Romania [AMPOC para. 25.6]. As to these:

(1) The name Vadim meant nothing: it also being the name of a well-known leading Romanian politician.

(2) He was born in the former Soviet Union but emigrated with his family to the USA at a young age, where he was educated and obtained US citizenship.

(3) He spoke Russian, as did many people who lived in Central and Eastern Europe and especially those who had lived and worked in Russia.

(4) It was not at all surprising that someone who specialised in European emerging markets privatisations in the 1990s had worked or lived in Russia which was a considerable market for such work.

280. Professor Deletant's point appears to be that these features would have drawn the SRI's attention to Mr Benyatov. However, as Prof Deletant agreed, if that were the case (which is speculation), Mr Benyatov is likely to have drawn their attention on the earlier Petrom, Distrigaz and Electrica privatisations.

281. There were referred to reported views of a former CIA station manager with leaked Embassy cables, which appeared approximately 8 years after Mr Benyatov's arrest. The view of someone in 2014 as an explanation for what occurred in 2005-2006 adds nothing. These matters were not known to the Bank at the time. There was no reason to enquire into them and they were not reasonably discoverable. The link between Mr Benyatov's origins and the prosecution is speculative.

(iii) Stamen Stantchev (AMPOC para. 52.1.4)

282. The allegation that the Bank did not give any or any adequate consideration to the suitability of working with Stamen Stantchev in Romania has been refuted.

283. In an interview on 15 October 2007, Mr Benyatov said that he and Mr Susak had been looking for a local partner to assist with the Petrom bid. He was introduced to Mr Stantchev, held a meeting with him and was impressed by his credentials: see paras. 1-3 of the note of that meeting.

284. The Bank had in place a written policy for the engagement of consultants, which was followed before Mr Stantchev was first engaged. Mr Benyatov was involved at that time and later in the engagement of Mr Stantchev. A part of the Bank's policy on the retention of third parties then in place is referred to and partially set out in an email of 12 September 2002 from Mr Andrew Brooke to Mr Susak. A later policy from September 2004 (revised in November 2004) is in the papers and is headed Global Policies and Procedures for the Use of Finders and other Consultants.

285. The due diligence conducted on Mr Stantchev prior to his engagement on Petrom included checks on the Austrian company register; an evaluation report from an external agency (Sinthesis); obtaining Mr Stantchev's passport entries; a background check and references from Volksbank, OMV and an internationally recognised law firm; obtaining Mr Stantchev's CV; seeking and obtaining internal approval; and entering into an engagement letter containing appropriate Foreign Corrupt Practices Act (FCPA) wording. Mr Benyatov was copied into all relevant email correspondence seeking approval to engage Mr Stantchev on Petrom.

286. Subsequently, a due diligence questionnaire was completed, for which Mr Benyatov was named as one of the sources of information about Mr Stantchev and Energan and asked to check its accuracy. He made no changes. This questionnaire stated that

Energan's senior members boasted sound work ethics and there was no known history of unethical practices or corrupt practices.

287. On EMS, Mr Benyatov recommended Mr Stantchev as a consultant. This was in response to an email on 8 February 2006 from Mr Pattofatto saying that he had met with Mr de Vecchi who asked if Mr Benyatov was comfortable in hiring Mr Stantchev and whether there was any reputational risk if his involvement became public. Mr Benyatov replied on 9 February 2006 saying that Mr Stantchev "*understands the rules of the game*". A draft letter of engagement for Mr Stantchev was then provided. A memorandum of understanding was signed dated 18 February 2006 by Mr Stantchev and for the Bank by Mr Benyatov and Mr Matthew Harris.

288. It was submitted on behalf of Mr Benyatov that if a proper assessment had been carried out in respect of Mr Stantchev, a decision could have been reached that he was the wrong person or that Mr Benyatov and Mr Susak should be taken off the transaction [T17/99/1-T17/100/2]. That was to assume that a more detailed assessment should have taken place than the one which did take place, and there is no reason to believe that this should have been the case, bearing in mind that Romania was not regarded as a high-risk country at the time, and the EMS transaction was not regarded as high-risk. In my judgment, this aspect of the case is based on possibilities open to the Bank if it knew what was about to come next rather than by reference to what could reasonably have been foreseen at the time.

289. This sets out the position by reference to the documents at the time. It could have been supplemented by evidence of Mr Harris, Mr Pattofatto and Mr de Vecchi, but there is no reason to infer anything adverse by reason of their not having been called. I have also taken into account that Mr Benyatov would have been driven to get on with the transaction (bearing in mind the financial incentives) and therefore he could not take the sole responsibility. It was logical for him to be the first line in this regard, but it is apparent from the above-mentioned documents that others were the second line, and the responsibility was not his alone.

(iv) Failure to have a risk assessment review AMPOC para. 52.2

290. This allegation must fail on the basis that there was no negligence in failing to have a political risk assessment or some other full-blown assessment. Having considered the various warning flags, there was no reason or trigger to have a risk assessment review.

(v) Surveillance para. 52.5

291. It is alleged that the Bank was negligent in failing to provide Mr Benyatov with advice or training or guidance or awareness of how to deal with the risks of covert surveillance and on steps he should take to reduce such risks. Mr Benyatov admits that he knew at the time that he was or was likely to be under covert surveillance in Romania: see his first witness statement at paras. 34 and 36, and his third witness statement at para. 76 and in cross-examination at [T5/109/10-13]. He explained in his October 2007 interview that he assumed he may well be monitored in Romania, as he had been in Slovakia and Ukraine previously: see paras. 23-26. Mr Schilling gave evidence that Mr Benyatov was aware of the possibility of covert surveillance having

discussed it with Mr Benyatov and Mr Mucea: see his witness statement at para. 21. Mr Benyatov did not believe that it was a particular cause for concern because he was acting entirely in line with ordinary investment banking business practices and had nothing to hide: see his third statement at para. 76. He did not raise it with the Bank or seek advice. In my judgment, there is nothing here which indicates that the Bank was negligent in failing to advise him or otherwise in this regard in Romania at the relevant time.

(vi) Conclusion on breach of duty

292. In the circumstances, and based on the evidence as a whole, and having taken into account the many arguments raised, I am satisfied that (a) the alleged duty situation did not exist, and further (b) there was no breach of duty. It therefore follows that this part of the claim must fail.

X The defence of limitation

293. The next section of this judgment is about whether a part of the claim is barred for limitation. The claim in tort for failure to exercise reasonable care not to expose Mr Benyatov to a conviction and the losses which would then ensue is said by Mr Benyatov not to arise until the conviction at the earliest. The claim was brought within 6 years of the conviction. The Bank now says by recent amendment that the claim in tort is barred because losses, albeit not the losses claimed, arose outside the limitation period, and a claimant cannot avoid the limitation period by restricting his claim to certain losses, but not others.

294. Mr Benyatov understandably points to the fact that limitation was only raised by a very late amendment, such that it did not form a part of the strike out application in which there was an apparent root and branch attack on the claim. When asked to provide a reason why the amendment had been so late, the Bank was unable to provide any sensible answer. This therefore makes the Court especially concerned as to whether there is some flaw in the argument. It is also of concern that Mr Benyatov may have wished not to sue his employer prior to the loss of his employment, bearing in mind that some of his best trading years were after his return from Romania and before his conviction. Despite this, the law of limitation has to be considered and applied.

295. The principle which is here engaged is that a claimant cannot defeat a limitation period by claiming only in respect of damage which occurs within the limitation period if he has suffered damage from the same wrongful act outside that period: *Hatton v Chafes* [2003] EWCA Civ 341, [2003] PNLR 24, per Clarke LJ at [12] who said the following:

> *"12. The following principles are not in dispute and may be summarised in these propositions:*

> *i) A cause of action in negligence does not arise until the claimant suffers damage as a result of the defendant's negligent act or omission.*
>
> *ii) The damage must be 'real' as distinct from minimal: Cartledge v Jopling [1963] AC 758 per Lord Reid at 771 and Lord Evershed MR at 773–4.*
>
> *iii) Actual damage is any detriment, liability or loss capable of assessment in money terms and includes liability which may arise on a contingency: Forsted v Outred [1982] 1WLR 86 per Stephenson LJ at 94, approved by the House of Lords in Nykredit per Lord Nicholls (with whom the other members of the appellate committee agreed) at 630F.*
>
> *iv) The loss must be relevant in the sense that it falls within the measure of damages applicable to the wrong in question: Nykredit at 1630F. (Propositions i) to iv) were confirmed by Sir Murray Stuart-Smith in Khan v Falvey at paragraphs 11 and 12.)*
>
> *v) A claimant cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period if he has suffered damage from the same wrongful act outside that period: Khan v Falvey at paragraph 23, following Knapp v Ecclesiastical Insurance Group Plc [1998] PNLR 172 per Hobhouse LJ at 184 and 187."*

296. The relevant negligence, that is breach of duty, if it occurred, was until November 2006, the point of arrest. There was a case about continuing negligence thereafter, but that has been struck out. The question then is what damage was suffered thereafter. Leaving aside for this purpose how the duty is framed, the question is whether any possible damage may have been sustained prior to the 6-year limitation period, that is before 22 January 2012.

297. As a result of the arrest, Mr Benyatov suffered incarceration in Romania, at first in prison until 23 January 2007 and then being forbidden to leave Romania until August 2007. He periodically returned to Romania to attend court hearings. As a result of the incarceration, the earnings of Mr Benyatov were lower in 2007-2008 than they had been in 2006.

298. As is recognised on behalf of Mr Benyatov in the written closing submissions (at para. 224.1) *"that drop in earnings was related to the fact that [Mr Benyatov] was required to spend time dealing with the Romanian criminal proceedings."* He was still able to work, and so it was not a loss of earning capacity. It was different in kind from *"the permanent and wholescale loss of earnings that were caused by his criminal conviction, which disqualified him from working as a senior finance professional at all."*

299. The evidence in respect of this loss of earnings in 2007-2008 is as follows. In 2007, Mr Benyatov's bonus was $1,659,173 which was a fall of $484,407 on the previous year, as confirmed by Victoria Buck. Mr Benyatov admitted that his revenue and compensation decreased due to his incarceration for much of the year: "*I was incarcerated in Romania for most of 2007 and so my revenue and compensation decreased, though the pipeline had been built in 2006*" (first witness statement at para. 24). Although he says that as the pipeline had been built in 2006 and his team did well, his earnings "*held up*", I accept the submission that in context this means that they did not drop any more dramatically. Ms Buck's table shows that his bonus and total compensation fell in actual terms, which is unsurprising given that he spent from January to August 2007 under 'house arrest' in Romania (i.e. he was unable to leave Romania). Mr Benyatov confirmed this decrease was due to his incarceration in his oral evidence. Mr Benyatov said, "*I confirm that my bonus did decrease during the year when I was held in Romania…it was because I was unable to generate the pipeline that would have allowed me to earn money the following year, yes*" [T6/35/14-T6/36/3].

300. In 2008, Mr Benyatov's bonus was $1,134,656, which was a fall of $524,517 on the previous year. Mr Benyatov said (para. 24 of his first witness statement) that the biggest reason for this was his incarceration in 2007, "*2008 was a difficult year: obviously the financial crisis played a part, but the biggest difficulty was that I needed to rebuild after missing most of 2007 detained in Romania*".

301. If there was a duty of care and a breach of the duty of care, then Mr Benyatov suffered damage as a result of that breach in 2007 and/or 2008. Although his earnings were considerable in an objective sense during that period, the damage was real as distinct from minimal, and it was capable of assessment in monetary terms. The fact that it was not as considerable as the loss of earnings thereafter or that Mr Benyatov's inability to work for his employer was limited and temporary as opposed to total and permanent does not mean that there was no loss.

302. The duty is framed in a way that captures only loss of earnings consequent upon a conviction. The question is then whether that really is the duty, assuming that there was a duty. It was submitted on behalf of Mr Benyatov that the duty situation is limited to not exposing Mr Benyatov to the risk of conviction and loss of career earnings thereafter. It had not been formulated as a duty not to expose Mr Benyatov to the risk of arbitrary arrest, detention and restriction of movement, which would have been more akin to a physical safety duty. It was submitted that *"there was no real loss in relation to those."* [T17/80/6-T17/84/9]. In my judgment, there is an artificiality about capturing the duty in the way in which it is pleaded. It was not just a conviction and the subsequent loss of earnings which ensued from the failure to exercise reasonable care. It was an arbitrary process of arrest, imprisonment, house arrest, facing a criminal trial and conviction. The case is in reality predicated upon an abusive process from start to finish. In his opening skeleton (at para. 124), Mr Benyatov referred to the duty of care being one whereby the Bank was obliged to take reasonable steps to identify and avoid certain risk which Mr Benyatov faced in carrying out the EMS project in Romania "including in particular the risk of wrongful prosecution and conviction". The prosecution took place over a period of years. Either a part of that prosecution was the arrest, imprisonment and incarceration in

Romania, or it is so closely related to it that it must be a part of the risk for which the Bank must be responsible to exercise reasonable care to identify and avoid.

303. Another way of looking at the matter is that if the duty is to take reasonable care not to expose Mr Benyatov to conviction, that itself is wide enough to embrace the steps which led to conviction including investigation, arrest, imprisonment and incarceration. In my judgment, it is artificial to frame the duty simply by reference to the loss of earnings subsequent to conviction. There is no reason to restrict it to these losses consequent upon conviction and not to include losses suffered in 2007-2008 referred to above. It is right to say that the losses were not total losses of earnings because Mr Benyatov was still remunerated throughout this period, and it is therefore a different extent of loss that ensued after conviction. However, it was nonetheless 'real' as distinct from 'minimal'. His own evidence bears out both that the incarceration was the cause of his losses and that the losses amounted to hundreds of thousands of dollars.

304. It therefore follows that if, contrary to the above, the Court had found that there was a duty of care or a breach of a duty of care, this is a case where Mr Benyatov cannot defeat the statute of limitations by claiming only in respect of damage occurring within the limitation period given that he has suffered damage from the same wrongful act outside that period. By parity of reasoning, a person cannot tailor the duty situation so as to capture losses claimed in time when in fact the duty, if it had existed, would capture losses outside the limitation period. For this reason also, the claim in tort fails.

305. In view of this conclusion, it is unnecessary to consider arguments about loss of earnings opportunities accruing prior to the limitation period. It suffices to say that Mr Benyatov gave evidence in connection with quantum that particular fund management opportunities might have been available to him during 2006 to 2010, but he was unable to pursue them because of the Romanian prosecution. These might have led to an increase in his remuneration. Since this evidence was not developed in the same way as the evidence about the losses in 2007 and 2008, it is not necessary to reach a conclusion on whether this would be a further reason to reject the case on limitation grounds.

XI The contractual indemnity claim

(a) Indemnity: introduction

306. It is common ground that there is a right to an indemnity implied into Mr Benyatov's contract of employment. The issue between the parties is as to the scope of that indemnity.

307. The AMPOC rely on two overlapping but alternative expressions of an implied indemnity. They are as follows:

> *"19.1. To indemnify Mr Benyatov in respect of all losses, costs, expenses and claims he has suffered arising from or in consequence of faithfully, diligently or properly performing his duties on its behalf. This obligation continues after the*

> *termination of the Contract in respect of the duties performed by Mr Benyatov as an employee and/ or agent of the Defendant.*
>
> *19.2. To indemnify Mr Benyatov in respect of all losses, costs, expenses and claims he has suffered arising out of any unlawful enterprise upon which he was required to embark without knowledge that it was unlawful. This obligation continues after the termination of the Contract in respect of the duties performed by Mr Benyatov as an employee and/ or agent of the Defendant."*

(b) The general indemnity implied into an employment/agency relationship.

308. The implied indemnity in para. 19.1 is based upon a general indemnity implied into employment and agency relationships. The implied indemnity in para. 19.2 was inserted in the course of a strike out application (to which greater reference is made below). This formulation was by reference to the decision of the House of Lords in *Lister v Romford Ice and Cold Storage Co Ltd* (1957) AC55, where Lord Tucker said:

> *"It has always been an implied term that the Master will indemnify the servant from liability arising out of an unlawful enterprise upon which he has been required to embark without knowing that it was unlawful."*

309. The two indemnities are sought to be implied *"as a matter of law, fact or business efficacy."* The indemnities are expressed either as an indemnity as employee and agent under the established law, or an indemnity based on an implied term in fact. For a term to be implied in law, it must be demonstrated that *"it is a necessary incident of a definable category of contractual relationship"*: see *Scally*, cited above. For a term to be implied in fact, among other things, it must be necessary to give business efficacy to the contract or so obvious that it goes without saying: see *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [18, 21]. The way in which this is expressed in Chitty on Contracts 33rd Ed. para. 16-15 is as follows:

> *" The hallmark of a term implied in fact is that it is implied into a "particular" contract in order to give effect to the presumed intention of the parties to that contract, whereas a term implied in law is implied as "a general rule ... in all contracts of a certain type" or as "a standardised term" into a "definable category of contractual relationship". Thus, when a court is considering whether or not to imply a term as a matter of law its focus is less on the particular relationship between the parties to the litigation (as would be the case with a term implied in fact) but on the appropriateness of the term for*

> *implication into all contracts of the type that is before the court."*

310. As regards the indemnity referred to in para. 19.1 of AMPOC, Mr Benyatov submits that its existence is covered by existing law, referring to all expenses, costs and liabilities, and does not need an extension of existing law. However, if this case is considered to fall at the margins of the existing authorities, it is justifiable, according to the submission on his behalf, to develop the case law to recognise the application of the indemnity to the circumstances of this case. This is said to be in the light of the compelling policy considerations and developments in the common law incrementally expanding the class of recognised protections to employees: see Mr Benyatov's closing submissions para. 177.3.

311. The battleground between the parties is about the scope of the indemnity. The Bank accepts that it owed an implied duty to indemnify the Claimant in respect of expenses and liabilities reasonably incurred by him in carrying out his duties as the Bank's employee and in the scope of his authority. In other words, it seeks to limit the scope of the indemnity to sums *"paid or payable to third parties"*: see Amended Defence para 13.3.2. However, Mr Benyatov's case is that the duty applies not only to expenses and liabilities incurred but also to losses suffered. The reference to "losses" is, as will be demonstrated, a common feature of textbooks summarising the nature of the indemnity from which the first of the two formulations is derived. The matter will be analysed first by reference to an implied indemnity as a matter of law and second, by reference to an implied indemnity as a matter of fact.

(i) Analysis of implied indemnity as a matter of law

312. Several textbooks refer to losses as well as liabilities and payments. There was an attempt to strike out the indemnity in a strike out application which was heard by Mr Roger ter Haar QC, sitting as a Deputy Judge of the High Court. He gave judgment on 22 January 2020. It is useful to set out in full paras. 101 – 104 of the judgment of Mr Roger ter Haar QC:

> *"101. In the 33rd edition of Chitty on Contracts at paragraph 40-114 the learned editors say this:*
>
> *"Duty to indemnify the employee*
> *"The relationship of employment imposes a duty on the employer to indemnify or reimburse the employee against all expenses, losses and liabilities incurred by the employee in the execution of his employer's instructions or within the authority granted to him by the employer, or during the reasonable performance of his employment. Thus an employer who failed to insure his vehicle in respect of third party risks was obliged to indemnify his employee who drove the vehicle in the course of his employment and who was held liable to a third party injured by his negligent driving. Nor, it was held in Reid v Rush & Tompkins Group plc, is the employer under any implied*

obligation to advise an employee working overseas to arrange his own insurance cover against accidents. But there is no general duty to keep the employee insured against all third party risks or to indemnify the employee against liability for his or her own negligence. Ancient authority suggests that if the act or omission of the employee was manifestly unlawful, he or she is not entitled to such an indemnity; but he may still be entitled to an indemnity from his employer if the act was apparently lawful or he was ignorant of the facts which made it unlawful and could not be presumed to know that the particular transaction was unlawful."

102. In that passage, the word "nor" at the beginning of the sentence dealing with the Reid case, to which I refer below, reads somewhat oddly, as also does the word "but" at the beginning of the next sentence. A matter for consideration raised by that passage is the overlap between an employer's obligation to indemnify and an employer's obligations in tort.

103. In the Employment section of Halsbury's Laws of England at paragraph 39 is the following statement of principle:

"An employer is under an implied duty to indemnify or to reimburse the employee, as the case may be, against all liabilities and losses and in respect of all expenses incurred by the employee either in consequence of obedience to his orders, or incurred by him in the execution of his authority, or in the reasonable performance of his duties of his employment. Notwithstanding the fact that an employee was acting in the course of his employment, he may lose his right of indemnity or reimbursement where the liabilities or expenses did not arise out of the nature of the transaction which he was employed to carry out, but were solely attributable to his own default or breach of duty, or where, by reason of his conduct, he has forfeited his right to receive any remuneration for his services.

"If the employer requires the employee to perform an act which, unknown to the employee, is unlawful, the employee is entitled to be indemnified by the employer against any damage suffered in consequence of its unlawful nature. Even where the transaction is prima facie unlawful, he is entitled to his indemnity if he was led to believe by the employer, and was justified in believing, that in the circumstances of the case the transaction was one in which he might lawfully engage ...."

104. As I have said, I was also referred to passages from textbooks relating to the position of agents. Of those references, I need only set out the following from Article 62 in the 21st Edition of Bowstead on Agency:

"Reimbursement of Expenses and Indemnity from Liabilities Incurred in Course of Agency

"7-057 Subject to the provisions of Article 63, every agent has a right against his principal to be reimbursed all expenses and to be indemnified against all losses and liabilities incurred by

> *him in the execution of his authority: and where the agent is sued for money due to his principal, he has a right to set off the amount of any such expenses, losses or liabilities, unless the money due to the principal is held on trust. There is, it seems, no implied indemnity in respect of loss suffered by an agent from torts committed against him by third parties in the course of the agency.*
> *"Comment*
> *"7-058 The rule here given is normally stated in such general terms, but its juristic basis may require attention. In the nineteenth century, actions at law were based on the common count for money paid, and it was not often necessary to distinguish between contractual and what would now be called restitutionary claims. At the present day it could matter how the claim was classified in a particular case.*
> *"Contract*
> *"7-059 Where the agency agreement is contractual, the agreement to reimburse and indemnify in return for what had been requested, if not express, can be regarded as an implied term of the contract that operates unless clearly excluded. There is thus no difficulty in such cases in holding that the principal is liable to reimburse and indemnify the agent for all payments made and liabilities incurred within the agent's express or implied authority. This would include not only payments that the principal is legally bound to make, but also payments which the agent is legally bound to make though the principal would not be liable for them, cases where the agent is bound by the usage of a market, cases where the agent makes an authorised but gratuitous payment on the principal's behalf, cases where the agent makes a payment which could not have been enforced but which there is a strong and legitimate pressure to make, cases where the agent, though under a liability, has as yet not had to meet it, and cases where a payment is reasonably but mistakenly made by the agent. Cases where the agent acts beyond his instructions, or interferes without request, would not however be included."*
>
> (The underlining in the above quotation has been added by way of emphasis of reference to the word "losses" in addition to "liabilities")

313. Following the judgment of the Deputy Judge, the editors of Bowstead thought it appropriate to remove from para. 7-057 the last sentence cited at [104] of that judgment (previously suggesting there may be no implied indemnity in respect of loss suffered from the actions of third parties) and adding the following to para. 7-058:

> *"In respect of the latter category (losses suffered through the wrongs of third parties), where the losses were suffered while carrying out an action specifically directed by the principal*

> *there is likely to be a right of indemnity if the agent cannot recover from the wrongdoer."*

314. Bowstead cited the authority of *The James Seddon* (1866) LR 1 A&E 62. Although this is treated as significant, it does not ultimately help to define the kind of losses which are the subject of the indemnity. It may be relevant to the fact that the indemnity in respect of legal costs arose out of the defence of a murder charge based on perjured evidence, and therefore arising out of the wrong of third parties.

315. The references in the textbooks to "all expenses, losses and liabilities" come from the case law. Thus, in *Birmingham and District Land Co v London and Northwestern Railway Co* (1886) 34 Ch D 261 at 273, Cotton LJ said the following:

> *"Of course, if A requests B to do a thing for him, and B in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A to indemnify B from the consequence of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing that which he does at the request of the other".*

316. In the *Birmingham* case, the statement of Cotton LJ was in the context of a decision that no indemnity could be implied because the context was a contract of sale. It follows that Cotton LJ was not defining the scope of an indemnity and finding on the facts of a case that an indemnity could apply to every loss incurred in consequence of a request to do an act. Nonetheless, Mr Benyatov is entitled to draw attention to the formulation of the words used by Cotton LJ, referring in broad terms to *"some liability or loss"* in consequence of the agent doing an act at the request of the principal. In the same case at p.274, Bowen LJ said that in cases chiefly arising under the law of principal and agent where a person is employed to do a thing, there was an undertaking on a part of the principal to indemnify the agent.

317. In *Re Famatina Development Corpn Ltd* [1914] 2 Ch 271, 282, Lord Cozens-Hardy MR stated that "an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expense incurred by him in the execution of his authority".

318. In the relatively recent case of *First Names (Jersey) Ltd v IFG Group plc* [2017] EWHC 3014 (Comm), Robin Knowles J implied an indemnity of a director acting in good faith that he *"would be indemnified against costs, losses and liabilities in the course of that directorship."*

(ii) Mr Benyatov's submissions

319. Mr Benyatov's submission is that the indemnity is not limited to sums paid or payable to third parties, and in contending otherwise, the Bank is failing to give effect to the

plain and wide meaning of the expression "all losses and liabilities". In the above cited case of *Famatina*, an agent incurred costs in defending himself against an action which originated out of reports made by him in the execution of a duty owed to his employer. The Court of Appeal held that he was entitled to be indemnified in respect of the costs of defending himself, which costs he was unable to recover against the third party. Mr Benyatov makes the submission that it conforms to the underlying rationale of the indemnity to give unlimited protection in respect of all consequences to an employee or agent of having followed the instructions of the employer or principal. There ought to be no distinction between losses which are out of pocket, and losses such as loss of earnings. As it was put at para. 66 of the opening submissions for Mr Benyatov: "*The rationale for the implied indemnity is that the employee or agent shouldn't be worse off as a result of employers' or principal's instructions*".

320. Thus, if an agent is required to pay a fine in connection with the performance of his duties, on the Bank's approach, that agent would be entitled to be indemnified. However, if in respect to the same conduct the agent was imprisoned rather than fined, the agent would not be entitled to any indemnity including loss of income consequent upon conviction. That undermines, in the submission of Mr Benyatov, the rationale of the indemnity that the employee/agent should not be worse off as a result of performing duties on behalf of the employer/principal.

321. Mr Benyatov's submission is that it is not necessary to extend the breadth of the indemnity by judicial development because the indemnity is sufficiently broad to cover this case. However, if there is a need for judicial development, that is justified by the continuing development of employment law to provide increasing protection to the employee. Examples of where this has occurred are in relation to the scope of the duty of trust and confidence (e.g. see *Mahmud v BCCI*, above and the development of the law regarding the vicarious liability for the act of their employees. Mr Benyatov also draws attention to the words of Stuart-Smith LJ in refusing permission to appeal against the refusal of the Deputy Judge to strike out the claim on the implied indemnity. He said the following:

> *"**Ground 2: Implied Indemnity***
>
> *2. The Judge was right not to strike out this head of the claim. The extent of any obligation to indemnify an agent or employee is (a) uncertain and (b) liable to development. The facts of this case are unusual and it is not fanciful to suggest that they gave rise to an obligation to indemnify as alleged by the Claimant even if that requires the common law to develop or adjust in order to provide a remedy that is not apparent on past authorities. The features identified by the Judge at [61]-[67] of the Fifth Judgment were properly brought into the balance, though I would not regard them as determinative if this Ground of Appeal were otherwise solid, which it is not. I endorse the Judge's view that this is an area of the claim that falls squarely within the Altimo principle and where the legal questions should be decided after the facts are found."* (emphasis added)

(iii) The Bank's submissions

322. The Bank submits that the scope of the implied indemnity is limited to expenses and liabilities incurred by the agent or employee. They do not extend to losses in the nature of lost earnings which are neither expenses or liabilities.

323. The Bank refers to the authorities in this area going back hundreds of years and submits that "there is not a single case in which an indemnity implied into an agency or employment contract has permitted the agent or employee to recover lost income. Rather, in every reported case where an indemnity was ordered it was for payments that the agent or employee had made, or was liable to make, to a third party." (See the Bank's opening skeleton at para. 56). In its written closings, the Bank at para. 143 referred to the authorities which Mr Benyatov relies on to support his claim for an indemnity in respect of loss of earnings. Despite loss of earnings being common between employee and employer, none of the authorities are ones where lost earnings had been claimed or recovered pursuant to an implied indemnity. Para 14.3 referred to eleven authorities as follows:

> *"The authorities on which it is understood that C relies to support his claim are considered below. On analysis, they support D's position on scope of the indemnity.*
>
> *(1) Fletcher v Harcot (1622) Hutton 56: The defendant (a sheriff) asked the plaintiff (an innkeeper) to keep a third party (Batersby) prisoner. Batersby sued the plaintiff for false imprisonment and the plaintiff sought an indemnity for the sum which he had paid to his lawyers in defence of the action. This is a case in which the indemnity covered sums paid to third parties.*
>
> *(2) Adamson v Jarvis (1827) 4 Bing 66: The defendant falsely represented to the plaintiff that he had a right to sell property and directed the plaintiff to do so on his behalf. The true owner of the goods then recovered the value of the goods from the plaintiff and the plaintiff sought to recover this from the defendant. This was therefore a case in which the 'loss' sought was a sum paid to a third party.*
> *(3) Frixione v Tagliaferro (1856) 14 ER 459: The plaintiff paid damages to a purchaser of cargo after defending a claim for breach of contract on behalf of the defendant, his principal. He then sued under an implied indemnity for the legal costs of doing so, which were sums paid to a third party, his lawyer. He was also awarded interest on that sum (as to which see further below).*
> *(4) The James Seddon (1866) LR 1 A&E 62: Two crew members brought a murder charge against the Master of a vessel. The Master was bound over to prosecute them for perjury in the sum of £10. He also incurred expenses defending the murder charge against him and returning the vessel to its owner. He was able to claim under an implied indemnity for these expenses from the ship owner.*

(5) Lacey v Hill (1874) LR 18 Eq 182: Stockbrokers were directed to purchase stock for their principal and entered into contracts to do so. The principal then became bankrupt and the brokers were entitled to be indemnified (and to prove that entitlement in the bankruptcy) for the liability which they had incurred to the vendor. While this case establishes that the implied indemnity extends to liabilities not already paid by an agent to a third party, the sums here were (as in all the other cases) monies paid or payable to such a third party.

(6) Birmingham and District Land Co v London and North Western Railway Co (1886) Ch D 261: BDL entered into a contract with a land company to demise land, which agreement was voidable if buildings were not complete within a certain time. BDL sold the land to LNWR, subject to the contract with the land company. The buildings were not completed on time and LNWR took possession and treated the agreement as at an end. The land company sued LNWR alleging that BDL had agreed an extension of time for completion of the work. LNWR sought to bring a claim against BDL for a contribution or indemnity in respect of any liability it was found to owe the land company. Again, the indemnity here was in respect of a liability to a third party.

(7) Sheffield Corporation v Barclay [1905] AC 392: A joint owner of Corporation stock (Mr Timbrell) forged the transfer of stock and borrowed money on the security of the stock. The bank sent the transfer to the Corporation and sought to be registered as holders of the stock. The stock was then sold to a third party. After Mr Timbrell's death, the fraud came to light and the other joint owner (Mr Honeywill) recovered against the Corporation. The Corporation brought a claim for an indemnity against the bank in respect of its liability to Mr Honeywill. This is therefore again a claim in respect of liabilities to third parties. As well as the facts, it is clear from the speeches of Earl of Halsbury and Lord Davey (with both of whom Lord Robertson agreed) that they considered the indemnity to apply where doing an act at the request of another turns out to be injurious to the rights of a third party (see D's opening skeleton at §55(6)) and therefore sums become payable by the agent to that third party.

(8) In re Famatina Development Corporation Ltd [1914] 2 Ch 371: The applicant was employed by a company as a consulting engineer to report on the company's properties in the Argentine. He did so and criticised the company's managing director, who brought an action for defamation, which was ultimately dismissed. He sought to recover the costs (payable to his third party lawyer) incurred in defending that claim. At first instance his claim was dismissed because it was held that he was not defending the action on behalf of his principals (281). On appeal, the Court of Appeal held that defending the claim was pursuant to his duties as agent and therefore that he could

> *recover the sums paid to his lawyers. C relies on the short judgment of Lord Cozens-Hardy MR. However, the judge was plainly not seeking to expand the scope of the losses recoverable beyond sums paid to third parties, in a case where the issue did not arise and had not been argued, and where the basis of the decision was that the acts were done in the course of his agency.*
> *(9) Gregory v Ford [1951] 1 All ER 121: An employee negligently drove a lorry during the course of his employment, causing a collision with a motorcycle. He was sued by the motorcycle driver and claimed an indemnity from his employers in respect of the damages he was required to pay. This is again a case of indemnification in respect of a liability to a third party.*
> *(10) Coulson v News Group Newspapers Ltd [2012] EWCA Civ 1547: C relies on this in his opening skeleton (at §67) because it "refer[s] with approval to these indemnities". In fact, Coulson was about the construction of an express indemnity in an employment contract and no authority on implied indemnities is referred to in the case. In any event, this was a claim to be indemnified for legal costs, axiomatically sums paid or payable to a third party.*
> *(11) First Names (Jersey) Ltd v IFG Group plc [2017] EWHC 3014 (Comm): This was a case decided in England under Jersey law and none of the English cases on implied indemnity are mentioned in the judgment. In any event, the indemnity was in respect of the legal costs of defending a claim by the company's directors. Again, this comprises sums paid or payable to third parties."*

324. Central to the opposition of the Bank to the indemnity as formulated by Mr Benyatov is a decision of the Court of Appeal of New South Wales in *National Roads and Motorists' Association v Whitlam* [2007] NSWCA 81 in which Campbell JA (with whom the other members of the Court agreed) stated at [94]:

> *"If the general principle stated by Bowstead & Reynolds were applied so that "losses" included losses of types that can be compensable by action in tort at the suit of the person who suffered the loss, the civil law would be very different to what it in fact is. If, for instance, "losses" included the type of damage that is remediable by an action seeking damages for personal injury, the mere fact that A had requested B to do a task, and B was injured in the course of performing it, would mean that B was entitled to be indemnified by A for the injury he had suffered. Any such entitlement would sweep aside those aspects of the law of tort that require there to have been a recognised tort committed by A before B is entitled to be compensated by A for his injury. It would mean that, in the paradigm case in*

> *which worker's compensation payments are made, where a worker in the course of carrying on his duties is injured, the worker would have had a right of indemnity under the general law from his employer just because the employer had requested him to do the task in the course of which he was injured, quite independently of any obligation created by the worker's compensation legislation, and the indemnity would be to provide a full indemnity, not merely the limited scale of benefits conferred by workers' compensation legislation. I do not believe that a general principle of law that alters the civil law in such radical ways, exists but has hitherto gone unrecognised."*
>
> (emphasis added)

325. In view of the above, the Bank submits that the scope of the indemnity contended for by Mr Benyatov would represent a very significant extension of the law.

(iv) Discussion

326. The decision in *Whitlam* is more controversial than is recognised by the Bank's submissions. That is because the claim of Mr Whitlam did seek an indemnity in respect of the legal costs incurred to clear his name in connection with defamation proceedings which arose out of a publication made in the course of his employment. His words were edited in such a way that they were regarded as defamatory of him. The claim for an indemnity was made on the basis of a contract which had a wide meaning for "liabilities". The Court of Appeal as a matter of construction, found that the costs incurred were not losses covered by the express indemnity and nor were they capable of being recovered under the general law. The controversial aspect was that the case appears to be on all fours with *Famatina* where costs incurred in defending legal proceedings were awarded pursuant to the indemnity. In *Whitlam*, the costs were incurred in prosecuting legal proceedings made to clear Mr Whitlam's name consequent on a publication made in the course of his employment.

327. The judgment of the Deputy Judge in this case questioned the decision in *Whitlam* in the following terms:

> *"141. In Whitlam, the New South Wales Court of Appeal held that this case was merely an example of the principle stated in Sheffield Corporation v Barclay [1905] AC 392, namely that it was an example of an indemnity granted in respect of an act carried out by one party at the request of another "which turns out to be injurious to a third party". As the article referred to above suggests[1], and as the Claimant submits in this case:*

[1] The article is *Dissolving Fictions: What to Do with the Implied Indemnity?* (2009) 25 Journal of Contract Law by Justin Gleeson S.C. and Nicholas Owens. The authors had appeared for Mr Whitlam in the case before the New South Wales Court of Appeal.

> *" Famatina is actually an extension to the formulation of the indemnity set out earlier by Campbell JA in his judgment in Whitlam (derived from Sheffield Corporation v Barclay), in that the actions of the claimant (as agent of Famatina) were not in fact injurious to the third party (the managing director). So the indemnity covers situations where the third-party interaction does not result in injury to the third party, but only loss to the person entitled to be indemnified."*
> *142. It is also significant that the Court of Appeal in Famatina did not accept the first instance judge's restriction of the scope of the implied indemnity.*
> *…*
> *144. It is noticeable in this review of authority how little discussion there is of the extent of the scope of the right to indemnity implied between employer and employee or between principal and agent.*
> *145. It is clear that the underlying principle is that set out in the pithy judgment of the Court of Appeal in Famatina (see paragraph 140 above), namely that there is a "well settled rule that an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority."*
> *146. That formulation distinguishes between, on the one hand, indemnity against losses and liabilities, and, on the other, reimbursement of expenses.*
> *147. Much reliance has been placed by the Defendant upon the Whitlam case. Insofar as that case holds that under the general law of indemnity Mr. Whitlam was not entitled to be indemnified against his legal expenses, I have some difficulty in reconciling it with the English cases of Fletcher v Harcot, Adamson v Jarvis, Frixione v Tagliaferro and The James Seddon, none of which were cited to the NSW court. It also seems to me difficult to reconcile its interpretation of Famatina with that case itself. Accordingly, I question whether an English court would come to the same conclusion on the facts.*
> *148. On the other hand, paragraph [94] of the judgment of the NSW Court of Appeal seems to me to raise a real problem as to the interrelation of the right to indemnity as formulated in the cases and in the textbooks with the law of tort as to circumstances in which an employee can recover damages against an employer."*

328. I respectfully adopt this analysis and raise the same question. I do not need to answer the question in the last sentence of the quotation in para. 147 of the judgment of the Deputy Judge. In both *Famatina* and *Whitlam*, the costs were costs incurred by the claimant. In *Famatina*, this may have shown that the indemnity can be in respect of a

payment due to a person with whom the employee did not have interaction during the currency of the employment. They were costs paid to the lawyer of the employee. They were still sums paid or payable to third parties, albeit not to the same party with whom the claimant had an interaction as employee. It is still money paid out of the pocket of the claimant or a liability incurred. It is not obvious how the Court in *Whitlam* reached a different decision as regards those moneys from the decision in *Famatina*.

329. Whether or not *Famatina* and *Whitlam* should have reached the same conclusion in this regard, Mr Goulding QC points out that in *Whitlam*, there was a claim for the implied indemnity to extend to loss of earnings which was rejected. This submission ought to be qualified in two senses. First, it was not a claim for an indemnity in respect of loss of earnings per se: it was a claim for loss of reputation and consequential loss of earnings: see the judgment in *Whitlam* at paras. 50-52 and 69. The claim for loss of reputation failed on principled reasons, and so with it, the claim for loss of earnings went. Second, once the claim for out-of-pocket expenses to the lawyers for costs was rejected as an unwarranted extension of the law, the claim for loss of reputation or loss of earning was axiomatically going to fail. This only emphasises the questions of the Deputy Judge regarding the decision in *Whitlam* as regards the absence of indemnity in respect of the costs. However, it does not affect the importance of the reasoning in para. 94 as regards the impact of a wide scope for the indemnity, and especially so if it were to embrace loss of reputation and consequential loss of earnings.

330. Irrespective of whether *Whitlam* reached a result to which an English court would have come on the same facts, para. 94 of the judgment still raises, in the words of the Deputy Judge in this case at para. 148 of his judgment *"a real problem as to the interrelation of the right to indemnity as formulated in the cases and in the textbooks with the law of tort as to circumstances in which an employee can recover damages against an employer."* In my judgment, the features relied upon by the Bank are powerful in indicating that loss of earnings are irrecoverable as a matter of law in the implied indemnity. The features are at least twofold. First, there is the absence of any authority in which losses other than sums paid or payable to third parties were recoverable. Second, the reasoning in *Whitlam* at para. 94 (irrespective of the reasoning in other parts of the judgment) is in my judgment convincing reasoning for refusing to hold that an implied indemnity can extend to consequential losses such as loss of earnings.

331. The decision in *Whitlam* is to the effect that if an employee could recover for such losses pursuant to an implied indemnity, the law books in relation to the existence of a duty of care on the part of the employer would have to be rewritten. Very large parts of the law of employer's liability could be re-written and simplified as the implied indemnity would eclipse the learning on the law of negligence and breach of statutory duty. The law reports are replete with cases where complicated arguments were run including in the appellate courts which would have been unnecessary in the event that the implied indemnity had existed in the form contended for in this case. The employee could say that there was a strict liability because of the scope of the indemnity, obviating the need for the other duty contended for.

332. An example is the case of *Reid v Rush & Tompkins Group plc,* cited above. In that case the employee was injured in a road accident whilst working in Ethiopia caused by the fault of a third-party driver. An implied term was alleged that the employer would advise the employee to obtain appropriate insurance cover for the risk of suffering uncompensated injury in the course of his employment in Ethiopia. The implied term was rejected. If it had been the case that the implied indemnity applied to all injuries and losses of earnings arising from an incident in the course of employment, then the complicated arguments in *Reid* could have been avoided and a simple route to recovery established through the implied indemnity. It was suggested on behalf of Mr Benyatov that the driving may not have been in the course of employment but from his residence to work and therefore the indemnity might not apply. There is nothing in the report to support this. The facts as summarised were that the employee was acting in the course of his employment, and the reasoning is premised on this.

333. Likewise in *Greenway v Johnson Matthey,* cited above, it was not contested that the employer failed to take reasonable care in avoiding exposure of employees to platinum salts. In the Court of Appeal, it was concluded that the employer did not cause the claimants' physical harm. On that premise, Sales LJ (as he then was) said that there was no duty of care to protect the claimants from suffering pure economic loss, namely the loss of relatively high paying jobs on the factory floor and the chance of being promoted to similar/higher positions. Although the Supreme Court overturned the decision in respect of physical harm, the analysis of Sales LJ in respect of pure economic loss was not reversed. All of these complications could have been avoided if the scope of the implied indemnity contended for by Mr Benyatov had been good law. In the words of the Bank's written closing submissions at para. 145, *"it is simply not credible for [Mr Benyatov] to contend that all the eminent lawyers and judges in these and other cases overlooked the implied indemnity that would have availed the unsuccessful claimants"*.

334. In my judgment, all of the above reasoning points strongly to a conclusion that the scope of the implied indemnity is limited to payments or liabilities, that is payments made and payments to be made in discharge of liabilities incurred in the course of or in consequence of the employment or agency. The question then arises as to whether the indemnity ought to be extended in its ambit.

335. The Deputy Judge was impressed by the reference in the textbooks in respect of the indemnity to "losses". At para. 153, he said:

> *"The Defendant's formulation of the limit on the principle is arguably inconsistent with the dictum of Lord Cozens-Hardy MR set out at paragraph 140 above and with the cases where an employee or agent has recovered his own losses in the form of legal defence costs." The reference back to para. 140 of his judgment was to Lord Cozens-Hardy M.R. in Re Famatina Development Corpn Ltd and the well settled rule, in his words, that "an agent had a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority."*

336. In my judgment, these references to losses and liabilities in this context were to payments out e.g. a payment to his lawyers for costs. That is consistent with the cases referred to above such as *Fletcher v Harcot, Adamson v Jarvis, Frixione v Tagliaferro* and *The James Seddon.* In my judgment, it is not to be understood as referring to other losses such as loss of earnings where there is neither a payment to a third party nor a liability requiring money in order to discharge it. Given the absence of indemnities in respect of such losses of earnings or even non-pecuniary losses, it would involve an extension of the law to apply an indemnity to losses not involving a payment past or future of the claimant.

337. In considering the extension of a prima facie duty of care in tort, an incremental approach has been preferred. This was referred to in the speeches in *Caparo Industries Plc v Dickman* [1990] UKHL 2 (Lord Bridge, Lord Roskill and Lord Oliver) as explained by Brennan J in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43-44, where he said: *"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'"* This approach has been restated by Lord Reed in his judgment in *Robinson,* cited above at para. 27, he said the following*: "Following the Caparo case, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case."*

338. Not only would the need for the incremental approach be sidestepped by the implied indemnity, but the law would at a stroke provide remedies where none had previously existed. The novelty of the category of case would not matter, and the analysis of incrementalism would not be required. It would cut across many statutes about employer's liability and would not be consistent with the legislative policy in employer's liability statutes. In *Johnson v Unisys Ltd* [2001] UKSC 13, [2003] 1 AC 518 at para. 37, Lord Hoffmann counselled caution about extending the common law and usurping the role of Parliament in the following terms, namely:

> *"The second reason is that judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord."*

339. Later in his judgment, commenting about a submission that common law duties could be created which might supplement the statutory framework of unfair dismissal by creating a remedy for unfair circumstances attending a dismissal, Lord Hoffmann said the following at paras. 57-58:

> *"57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:*
>
> > *"there is not one hint in the authorities that the...tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? .... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."*
>
> *58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent."*

340. This resonates in the instant case. It is not for the Court to circumvent the statutory framework. Such development of the law must be consistent with legislative policy as expressed in statutes. These considerations are important in respect of the scope of the indemnity as they are in respect of the consideration of whether there is a duty of care in tort. There are practical consequences of a large extension of a prima facie duty of care. An imposition of strict liability through the implied indemnity would impose a huge burden on employers including employers in a very different financial position from the Bank in the instant case. It would have to be seen how, if at all, and at what cost, they would be able to insure against such a liability. Applying an incremental approach, the implied term goes far beyond that which has been imposed. From the researches of Counsel, the imposition of an indemnity for loss of earnings has no precedent. It is not an answer to say that nor does the rejection of such a case have a precedent since claims for losses of earnings are so common in tort cases.

341. It is interesting to note too that one head of claim that was struck out by the Deputy Judge from the indemnity claim was the claim for damages arising out of a failed property transaction on the ground of remoteness. I understand the Judge here to be using remoteness not as a type of damages which cannot be claimed, but as being beyond the scope of the indemnity. Indeed, this appears to be the way which the claim has been pleaded. The facts and matters giving rise to the indemnity in paras. 19.1 and 19.2 of the AMPOC are the 23 matters in para. 25 of the AMPOC, the same matters as are also relied upon in support of the existence of the duty of care. On this basis, it is possible to say that the scope of the indemnity in law is not unlimited. In

my judgment, it ought to be limited to payments and expenses incurred or liabilities requiring a future payment, and its scope ought not to extend beyond this.

342. Should the law be capable of incremental development in respect of an indemnity? There is a question as to whether the law ought to develop in that way, and whether developments of that kind can be left to the law of negligence and/or the contractual obligation to exercise reasonable care. If it is appropriate to have an incremental development in respect of the scope of contractual indemnities, the lead may be the way in which it has been pleaded in this case. This pleads the scope of the indemnity by reference to losses because of the 23 matters in para. 25 of the AMPOC referred to above. Having rejected these matters in the context of the claim in negligence, they are also rejected in the context of the claim for an indemnity. If there is scope for development in another case, where such allegations are made and are sustainable on the facts, then it might be that the indemnity would be an indemnity in fact. Notwithstanding the narrow approach to implied terms in *Marks and Spencer plc v BNP Paribas* above, I leave open, but do not decide, the possibility of incremental development for another case. In the instant case, there is no room for that development of the law.

343. It is now necessary to consider further the addition to Bowstead since the judgment of the Deputy Judge which stated:

> "*"In respect of the latter category (losses suffered through the wrongs of third parties), where the losses were suffered while carrying out an action specifically directed by the principal there is likely to be a right of indemnity if the agent cannot recover from the wrongdoer. The position in respect of the wrongs of others suffered incidentally in the course of the agency is less clear."*

344. This was intended to refer to an indemnity arising out of the wrongs of third parties. The reference to losses may be understood as referring to out of pocket expenses (such as the legal fees in *The James Seddon*), but in the context of the instant dispute the question is whether losses refer not only to payments past and future, but also to losses such as loss of earnings.

345. The submission of the Bank is that there is no indemnity where the losses result from legal wrongs committed by third parties even where they arise from an action specifically directed by the principal. In this case, the action was the carrying on of the business for the Bank in Romania which then gave rise to a prosecution and a conviction, on Mr Benyatov's case due to a miscarriage of justice. Mr Benyatov's pleaded case is that he was *"the victim of treatment involving serious and repeated breaches of his human rights by the State authorities in Romania"*; [AMPOC paras. 1, 6, 40, 48]. The contention was that the implied indemnity does not cover losses resulting from these wrongs of a third party, in the instant case, by the Romanian State.

346. This submission is not consistent with authority. In cases on indemnities, an employee/agent has obtained an indemnity to deal with actions of third parties e.g. the cost of defending suits in false imprisonment: see *Fletcher v Harcott* above, and in defamation in *Famatina* above. In *The James Seddon* above, it was the defence to a charge of murder which was a "manufactured charge" which was brought maliciously and by perjured evidence. In the judgment of Dr Lushington in *The James Seddon* above, he said: *"Having fulfilled this duty, out of the performance of it comes manufactured a false charge. I differ entirely from the argument of Mr. Brett, that this is a remote and not a direct cause. The very cause which originated the charge against the master was the performance of his own duty in correcting these very men for their misconduct, and the false charge emanated instantly from it, and there were no intervening circumstances whatsoever which could cause it to be considered remote. Then the charge was made against him, and it takes the shape of a prosecution, as I understand it, for murder, and large expenses are incurred by the captain in defending himself against this false charge. What is that but defending himself against the consequences of the performance of his own duty, and which, if he had not performed, he would have been greatly to blame?"* That is a case where expenses were incurred in defending a false charge which itself was a legal wrong committed by third parties, and the Court ordered an indemnity because the charge originated from the performance of the duty of the Master of the ship owner's vessel.

347. In *The James Seddon*, there was a reference to there being no intervening circumstances which would cause the false charge to be too remote. The master was defending himself against the consequences of the performance of his own duty. The reference to whether the circumstances were or were not remote was in context a reference to the scope of the indemnity.

348. In this context, the use in Bowstead of the words *"losses suffered by the wrongs of third parties"* in para. 7-058 is not intending to widen the scope of an indemnity beyond costs, expenses and liabilities. The references to "losses" here and in the textbooks and other judicial references does not extend the scope of an indemnity. It does not open up an indemnity in respect of consequential losses going beyond costs, expenses and liabilities.

(c) Indemnity in para. 19.2

349. Para. 19.2 came by way of amendment and is set out above. Mr Benyatov has sought to apply the dictum of Lord Tucker in *Lister cited above at*.595 who said:

> *"It has always been an implied term that the master will indemnify the servant from liability arising out of an unlawful enterprise upon which he has been required to embark without knowing that it was unlawful."*

350. Mr Benyatov submits that the implied term in law at para. 19.2 of AMPOC is narrower than the implied term at para. 19.1. It only applies to a liability for unlawful enterprises. It was submitted for Mr Benyatov that even if the implied term at para. 19.1 only applies to out-of-pocket expenses/liabilities, the implied term at para. 19.2

should not be so limited and would afford compensation for all losses suffered including loss of earnings. The possibility arises that whereas in respect of para. 19.1, the implied term to be confined to out-of-pocket expenses and liabilities to third parties, this might not necessarily be the case in respect of the indemnity at para. 19.2. Since it is narrower in ambit, the danger of its cutting across the statutory and common law relating to employer's liability may not exist. Accordingly, a loss of earnings consequential claim might be confined to the narrow circumstance of exposure to liability arising out of an unlawful enterprise.

351. This dictum of Lord Tucker in *Lister* needs to be understood in context. The decision in Lister was among other things that an employer had no contractual duty to indemnify an employee against liability for negligence in the course of his employment, nor did the employer have a duty to protect the employee from liabilities arising from any tortious acts in the course of his or her employment. However, a qualification to this was that the indemnity was not lost if the employee was required to be involved in an unlawful enterprise and did not know that it was unlawful. This is not therefore a different kind of indemnity. It simply delineates the circumstances in which the broad indemnity is not lost for participation in an unlawful enterprise.

352. In the instant case, the Bank's case is that the indemnity does not apply for involvement in unlawful acts. Mr Benyatov's reply is that (a) he was not involved in unlawful acts, and (b) if and to the extent that his conduct was unlawful, he comes within Lord Tucker's formulation of the implied term. There is nothing to indicate that the formulation in para. 19.2 of AMPOC (insofar as it is based on Lord Tucker's formulation in *Lister)* is a separate implied term or a different form of indemnity. It follows that there is no reason why the scope of this indemnity in law should be any broader than the general indemnity in law. The restriction on the scope of the indemnity as relating to liabilities and out- of- pocket expenses still applies. I reject any suggestion that the scope of the indemnity of para. 19.2 might be broader for the reasons set out above in connection with the general indemnity.

353. There remains to be considered whether the indemnity is broader as an implied term in fact on the facts of a particular case. An aspect of that might be where on the facts there was an instruction to carry out an unlawful act not known to be unlawful by the employee, but perhaps known to be unlawful by the employer. I shall consider an implied term in fact below.

354. There is a question as to whether the indemnity in para. 19.2 is inconsistent with another aspect of the case of Mr Benyatov. His submission is that the only evidence of his participation in an unlawful enterprise is the Romanian conviction which is either inadmissible or is not proof of involvement bearing in mind the way the Bank's repeated pronouncements as to why the conviction is wrong and offends against the European Convention on Human Rights. If that submission is upheld, it is therefore inconsistent with that to rely upon the indemnity in para. 19.2.

355. Mr Benyatov says that he does not have to prove the unlawful act for this purpose. It suffices that it has been treated as an unlawful act in Romania, notwithstanding the case that this has been part of an arbitrary process. In my judgment, the answer is simpler. There is only one implied term in law, not two, for the reasons set out above. The formulation of Lord Tucker is so that the indemnity is not defeated by innocent participation in an unlawful act upon the instruction of an employer. *A fortiori*, the

indemnity is not defeated where, despite the foreign conviction, the alleged unlawful act has not been proven to have taken place at all. The indemnity therefore applies without the need to have recourse to the formulation of Lord Tucker in Lister.

356. Further still, there is a question as to whether the Bank has proven that Mr Benyatov was a party to an unlawful enterprise. If in fact he was the victim of a miscarriage of justice based on breaches of his fundamental human rights, then that would not be an unlawful enterprise. That is the case that the Bank has made at least until its defence to this action in the many years of the court process in Romania. It continues to back Mr Benyatov in his appeal to the ECHR in an appeal to that effect.

357. Mr Benyatov says that the Bank is unable to prove that there was an unlawful enterprise for the following reasons, namely:

(1) The only evidence is the conviction, but the whole case which the Bank has supported is that Mr Benyatov was not guilty, and the case was trumped up and based on an abuse of human rights.

(2) Under the rule in *Hollington v Hewthorn* [1943] KB 587, the foreign conviction is not evidence and therefore cannot be relied upon without more to prove guilt. There is no other evidence of guilt.

358. The Bank says that there are exceptions to any indemnity where the conviction was due to his unauthorised conduct, default or breach of duty. The conviction arose due to breach of Romanian law. This was unauthorised by the Bank. It was a term of the contract of employment by the Global Compliance Manual that Mr Benyatov must know and comply with all applicable laws in the jurisdiction in which he conducted business on behalf of the Bank. He was in breach of contract by his breach of Romanian law. Until the conviction is set aside, it has to respect the decision of a European Union member. The fact that it has been seeking to assist Mr Benyatov to avoid liability does not affect the recognition due to the criminal courts of Romania. The rule in *Hollington v Hewthorn* does not apply since the fact that conviction is directly relevant to the issue of whether Mr Benyatov was party to an unlawful enterprise, which makes it admissible.

359. In my judgment, the Bank is not able to rely upon the foreign conviction due to the rule in *Hollington v Hewthorn*. It is the prohibition on relying on a criminal conviction as evidence of guilt for the purpose of subsequent civil proceedings. There is an exception in respect of a UK conviction in respect of civil proceedings under section 11 of the Civil Evidence Act 1968. However, this does not apply to foreign proceedings. The rule was followed by Supperstone J in the case of *Daley v Bakiyev* [2016] EWHC 1972 (QB) in finding inadmissible the evidence of a conviction in Kyrgyzstan. This will be considered in the next section.

360. The Bank says that it is entitled to rely on the conviction because it is relevant to its case. That is because the Bank wishes to show that the conviction was relevant to prove that it had not authorised the unlawful enterprise. However, this is a circular argument. Without the evidence of the facts of the conviction, there is no evidence of an unlawful enterprise, and so there is no need to rely on the conviction. Further, and in any event, the conviction would only be *prima facia* evidence.

361. In circumstances where both parties have been critical of the conviction and the process in Romania, even if admissible, it is not apparent that any weight can be given on the conviction in these proceedings. There is a summary of the nature of the criticism in the written closing submissions for Mr Benyatov at paras. 191.1 – 191.11. In the light of the approach of the Bank until amendment of its Defence in February 2021 that Mr Benyatov's conduct had been in accordance with international banking standards, the decision to retain him as an employee and not to dismiss him for gross misconduct (in the end, he was dismissed on grounds of redundancy) goes against reliance on the conviction. In the next section, there will be consideration as to whether, even if the conviction were admissible for the purpose sought, the Bank has been able to establish that Mr Benyatov was guilty of participation in an unlawful enterprise by reference to the conviction.

362. For reasons stated above, the indemnity under para. 19.2 is a sub-set of the indemnity at para. 19.1, and exists so as to answer pre-emptively a defence that the indemnity is lost due to the participation in an unlawful activity. For the reasons set out above, the claim to an indemnity under para. 19.1 must fail, and it follows that an indemnity under para. 19.2 too must fail.

(d) Indemnity in fact

363. An alternative argument of Mr Benyatov is that there can be an indemnity in fact, which, as seen in the extract from Chitty above cited is implied into a particular contract in order to give effect to the presumed intention of the parties. This allows a greater concentration on the facts of a particular case, rather than the indemnity in law which might be applicable to a particular relationship. It might be said that in the incremental approach to the law of negligence, there have been cases which have recognised the availability of concurrent rights. It was not a bar to the finding of a duty of care in *Spring v Guardian Assurance* above that the remedy in defamation was barred by the defence of qualified privilege absent malice. In other words, the possibility that a duty of care would sidestep that defence did not prevent the Court from recognising the duty of care. So could it be said that the indemnity should exist even though the duty of care might not be established on the ground of lack of proximity or foreseeability of loss?

364. At the time of the strike out application, the Deputy Judge and, on application for permission, Stuart-Smith LJ posited that an indemnity in fact may be established on the basis of the particular facts as found in this case. Just as the law of negligence might grow incrementally, so it might be said that the scope of an indemnity might be greater dependent on the facts of the case. It was on this basis that the claim under the indemnity was not struck out in the recognition that unusual facts might give rise to an indemnity responsive to the justice of the situation.

365. The facts and matters said to give rise to the implication as a matter of fact and/or business efficacy originally provided in a response to a Request for Further Information relating to para. 19.1 of AMPOC include:

(1) The Contract is a contract of employment where Mr Benyatov was an employee and an agent of the Bank.

(2) Mr Benyatov is an American citizen working for a British entity forming part of a global investment bank, each element of which is said materially to add to the risk profile.

(3) Mr Benyatov was required to work in countries overseas which presented significant risks to its employees, as evidenced by the requirement to observe Local Compliance Manuals and by sections dealing with risk management.

(4) It was envisaged at the time of the Contract that Mr Benyatov would be working in a high-risk country, namely Romania and/or in high-risk transactions, namely the privatisation of significant state-owned companies.

(5) The risks included *"the risk of being subjected to politically or commercially motivated judicial or criminal action including but not limited to arbitrary detention, criminal charges, prosecution, conviction and imprisonment or other corrupt action or interference with an individual's fundamental rights and freedoms."*

(6) Since he was required to have and maintain required regulatory approvals, it was obvious that he would lose the approved person status if subjected to criminal conviction, and therefore his ability to work in his chosen industry.

366. At the heart of these points is a case that the risk profile of Mr Benyatov in Romania as regards the country and/or the transactions in which he was involved was high-risk, such that there should be a broader indemnity in fact than the indemnity in law. The case for an indemnity in fact could not sensibly be determined by the Contract being one of employment or agency and/or relational. That does no more than give rise to an indemnity in law. The critical additional factors relate to the high-risk elements. These factors have not been established as is apparent from the findings in connection with negligence. It was reasonable at the time not to perceive this as a case of an employee being compelled to go to a high-risk country involving a high-risk transaction. Further, the argument about a high-risk profile of Mr Benyatov has been rejected in connection with the negligence claim, and it is rejected in this context too. Further, as regards Romania, the risks of judicial or criminal action or arbitrary detention, criminal charges, prosecution, conviction and imprisonment or other corrupt action to an international bank by itself or its employees acting in an advisory capacity are not made out. Reference is made to the totality of the evidence referred to above and especially the summaries in this regard of the evidence of Mr Quayle, Mr Scheele and Mr Schilling. It follows that the substratum of the alleged indemnity is not made out.

367. Mr Mazzucchelli contrasted the events in this case with one where an employee was exposed to serious risk. He gave evidence about how in 2004-2005, the Bank realised that the political environment in Russia was turning hostile towards Yukos and so dropped its specific mandate with Yukos in the energy sector [T9/87/20-T9/88/13]. If in such a case, the Bank had exposed an employee to high risk of conviction and loss of earnings then the Court might consider whether the indemnity might extend to loss of earnings.

368. In this case, it has not been shown that it was envisaged before the arrest occurred that Romania was a high-risk country, nor that the transactions were themselves high-risk or perceived as such. For the reasons described in the section about negligence, it was not envisaged that Mr Benyatov was subject to politically or commercially motivated judicial or criminal action. This was not a case where either Mr Benyatov or the Bank was on notice about such risk. The factors relied upon in the Further Information about para. 19.1 of AMPOC for establishing an indemnity in fact are very closely connected to the way in which the claim in negligence is put.

369. It is not necessary to consider whether the scope of an implied indemnity in fact could extend to loss of earnings in an appropriate case. It suffices to find, as the Court does, that the basis sought for such a finding is not made out on the facts of this case. It does not necessarily follow that the failure of the claim in negligence means that the claim in respect of the indemnity in fact must fail. Each cause of action must be viewed separately: see *Spring v Guardian Assurance* above. If the Court did have to decide whether incremental development can come through the indemnity, it would take into account that an implied term in fact is very limited bearing in mind the test for an implication in *Marks and Spencer plc v BNP Paribas* above. The Court would have to consider whether any remedy should be fault based through the law of tort or an implied contractual duty of care (extending the duty situations by way of incremental development) or whether incremental development should also apply to strict liability for an indemnity. In the event, the Court will not consider these matters which do not arise for consideration because this claim failed on the facts.

(e) Other arguments about an indemnity

370. A number of other points were made on behalf of Mr Benyatov. First, he said that interest is awarded on sums paid to a third party and so that is an example of a sum of money which is not a payment to a third party. This does not assist Mr Benyatov as an award of interest is derived from the principal sum being awarded. It does not establish that consequential losses in the nature of loss of earnings are to be treated as the subject of an indemnity.

371. Second, the broad formulations in the textbooks refer to losses and liabilities (see the above cited quotations from Chitty, Halsbury and Bowstead cited by the Deputy Judge). This is said to indicate that the indemnity is not limited to money paid or to out-of-pocket expenses. In my judgment, those formulations are not sufficiently specific to refer to losses other than in the nature of a payment or a liability to pay. It is not any form of compensation. In each of the precedents concerned, the indemnity is confined to cases of payments and liabilities to pay. Despite the industry of counsel, no precedent outside this case has been provided where there has been an order for an indemnity in respect not of payments or against liabilities, but in respect of pure loss of earnings.

372. Third, Mr Benyatov's submissions are in line with employment law where there is an extension of the employee's rights, for example in respect of the implied term of trust and confidence. It has been seen above how this has not assisted in rights against negligent employees, but it has assisted where the employer has been guilty of deliberate conduct such as in cases like or analogous to the *Mahmud* case. It is

possible that the indemnity in fact will develop in the same way. However, that incremental development would not assist in the instant case, where at its highest any failure has been in negligence.

373. In my judgment, the scope for such development must be in an indemnity in fact rather than an indemnity in law. However, the case as pleaded relies upon the matters in para. 25 of AMPOC and summarised above as support for the indemnity in law pleaded in paras. 19.1 and 19.2 of AMPOC as well as for the duty of care which is co-extensive in contract and in tort (see paras. 19.3 and 24-25 of AMPOC). If in fact, the scope is for both kinds of indemnity, in my judgment, the conclusion remains the same that there is no scope for development of an indemnity on any basis on the facts of this case. The matters set out in para. 25 of AMPOC are designed to show that the conviction and the consequent losses of earnings were reasonably foreseeable such that they should be the subject of the indemnity and/or such that there should be a duty situation and a responsibility to compensate the employee. Just as the claim in tort has been rejected, so too is any claim for an indemnity however advanced. The facts on which the duty in tort and the indemnity (howsoever formulated) have been based, have not been established.

(f) Conclusion

374. For all these reasons, the claim for the indemnity, whether implied in law or in fact, fails.

XII Effect of criminal convictions on the issues in this case

(a) Do the convictions stand as evidence against Mr Benyatov?

375. The convictions are relied upon by the Bank as follows:

(1) The convictions stand as evidence that Mr Benyatov was involved in wrongdoing and therefore brought his losses upon himself. The wrongdoing included that Mr Benyatov acted unlawfully and in breach of Romanian criminal law by (a) procuring and exploiting confidential or non-public information relating to the privatisation process; (b) combining with others for this purpose; and (c) intending to commit those crimes: see Amended Defence para. 61.3.

(2) Mr Benyatov has not given detailed evidence to show that the convictions do not stand as evidence against him.

(3) The effect is that Mr Benyatov is not entitled to an indemnity because an exception to an indemnity is that a person (however the implied term is put and whatever its scope) is not entitled to be indemnified for the consequences of his own wrongdoing.

(4) Further, there is no duty of care to protect a person from the consequences of their own wrongdoing, and any losses have been caused by Mr Benyatov's wrongdoing.

376. Mr Benyatov says in response that:

(1) The Bank has not proven the case of wrongdoing other than by placing the convictions and the judgments of the Romanian Court before the English Court. The convictions do not stand as evidence against him of anything because of the rule in *Hollington v Hewthorn*. The Bank has not cross-examined Mr Benyatov on his allegedly criminal conduct.

(2) In any event, for years there has been common ground between Mr Benyatov and the Bank that the charges were unjustly preferred and that the trial was a miscarriage of justice. In those circumstances, the convictions are not probative against Mr Benyatov.

(3) There is therefore no factual or evidential basis for finding the exception to an indemnity based on wrongdoing.

(4) Likewise, there is no factual or evidential basis for finding that a duty of care does not apply in this case or that the losses have been caused by Mr Benyatov.

377. Stepping back from the detail, the Bank has been supportive to Mr Benyatov in connection with the arrest, the defence to the prosecution, the appeal against conviction and the appeal to the ECHR. The Bank's long-standing position was that Mr Benyatov had done nothing wrong. It went beyond that. The Bank has made statements as noted above about the innocence of Mr Benyatov. Among other statements is the letter to Mr Lidington dated 13 May 2014 in respect of the Romanian proceedings referred to above. This was not just sympathetic, but the Bank said specifically that *"Fundamentally the evidence does not support the accusations made by the prosecutors."* The Bank has enabled Mr Benyatov to pursue a case to the ECHR to the effect that the convictions are a violation of Mr Benyatov's human rights, as noted above.

378. This was reflected in the pleadings in the Defence, where it was admitted that Mr Benyatov had not acted in contravention of Romanian criminal law but had in fact carried out his work in accordance with international banking standards. In particular, in the Defence:

(1) The Bank admitted that the Claimant had not acted in contravention of Romanian criminal law and instead had carried out his work in accordance with international banking standards. It stated that his convictions in Romania "*relate to work that the Claimant carried out in accordance with internationally accepted standards of business practice*" (para. 7).

(2) The Bank stated that, following the Claimant's conviction, it had written to the Romanian High Court of Cassation and Justice "*informing it that the actions of its employees, including the Claimant, had been in accordance with normal business practice*" (para. 29).

(3) The Defence was signed by a statement of truth by Damien Bisseker [I/2/40] (at that time the Head of Litigation EMEA), who conducted the investigation

at the material time and who had conduct of this matter for the Bank since then.

379. The Amended Defence has resiled from those admissions. It has stated that the Bank understood that Mr Benyatov had carried out his work in accordance with internationally accepted standards of business practice, but which according to the judgment of the Romanian court was not carried out. The Bank pleaded in the Amended Defence that it was not able to admit or deny whether Mr Benyatov's conduct was in accordance with ordinary business practices, but expressly stated that its non-denial was subject to the fact that *"the judgment of the Romanian Court was that the Claimant's conduct was not consistent with ordinary business practices"*: see Amended Defence at para. 53.3. It pleaded that in breaching Romanian law as found by the Romanian Court, Mr Benyatov had acted in breach of his contract of employment and was not therefore entitled to any indemnity: see Amended Defence paras. 61.3 – 61.8. It stated that Mr Benyatov had failed to comply with the contractual duty to know and comply with Romanian law and that his conduct was unlawful: see Amended Defence at paras. 6, 52.2, 61.6, 61.7 and 72.4.

380. The Amended Defence contained numerous matters which did not arise out of the amendments to the Particulars of Claim. In an effort to avoid a long adjournment of the trial, which was intolerable to Mr Benyatov, there was no objection to many of the amendments including the new allegations arising out of the convictions (albeit that the convictions had occurred years before the original Defence). Mr Benyatov submits that the Bank has not had leave to withdraw the admissions in the Defence: see written closing submissions at para. 115. The admissions previously pleaded were after the convictions of Mr Benyatov including the decision of the Appeal Court in Romania. Mr Benyatov also contends that he has suffered real prejudice due to the withdrawal of the admissions and the lateness of the amendment, saying:

> *"the Claimant will obviously be substantially prejudiced if the withdrawals are permitted. His former employer, having defended his conduct as lawful and in accordance with international banking standards for more than 14 years, has suddenly changed its position to be that his conduct was criminal under Romanian law. It is very difficult for the Claimant to engage with the substance of the Romanian proceedings given (i) the due process failings in the Romanian criminal proceedings which meant that he never gained access to all the evidence in the possession of the prosecutor, including any exculpatory information; (ii) the passage of time since the Claimant engaged in the behaviour which is now said to have been unlawful; (iii) the fact that no Romanian law expert evidence is before the Court":* see written closing submissions of Mr Benyatov at para.115.2.

381. The Bank submits that these objections might have been taken by Mr Benyatov, and the Court would have had to rule on them. However, since there was no objection to

the amendments, it submits that this point is not available to Mr Benyatov. That submission is in principle correct. Mr Benyatov's desire to do nothing to delay the trial and not to object to the amendments have worked against him as a result of the Bank's radical change of case.

382. This is a very unsatisfactory backdrop to the Court being asked to rely on a judgment which has been so criticised by the Bank until the recent amendment. It is telling that in a case which has been so thoroughly prepared and which has engendered so much activity that the Bank did not run this point until shortly before the trial. Even now, the amendments have not removed aspects of the pleading which appear to have reflected the past approach to him and not the adversarial present. At para. 7 of the Amended Defence, there remains pleaded *"The Defendant has considerable sympathy for the Claimant and for the other two employees of the Defendant who were convicted with him and others"*, something displayed by the large sums expended on assisting Mr Benyatov's defence and his appeal to the ECHR. However, it is conspicuously missing by the sudden and belated Amended Defence.

383. It must have been on express or implied instructions that Mr Goulding QC submitted that *"it is for the Romanian courts to decide what's contrary to Romanian law"* and that the Bank *"respects the decision of the Romanian courts"* [T1/143/21-25]. It is difficult to reconcile this with the admissions until the time of the Amended Defence or with the public expressions referred to above of support for Mr Benyatov, the criticisms expressed about the evidence not supporting the accusations made by the prosecutor's case and the conduct of Mr Benyatov being in accordance with normal business practice, and with the continuing support of his case before the ECHR.

384. The question is what weight is there to attach to the convictions of the Romanian court and the absence of evidence against Mr Benyatov other than in the judgments of the Romanian Court. Mr Benyatov has submitted that it carries no or little weight having regard to the following points, namely:

(1) the evidence of the convictions, even if admissible, does not stand up against the matters raised by the Bank over the years.

(2) the Bank is not entitled to rely upon the Romanian convictions having regard to the rule in *Hollington v Hewthorn* above, which has been abrogated as regards judgments in the UK by reason of the Civil Evidence Act 1968. This has no application to foreign judgments. On this basis, the convictions are to be disregarded.

(3) the Court should be concerned about giving effect to a judgment of the Romanian Court in circumstances where not only is there an attack on the same due to its being said to be contrary to fundamental human rights, but where that case is due to come before the ECHR and the Bank has - publicly and financially supported the case.

385. As regards the first of these matters, Mr Benyatov raises the following matters, namely:

(1) letters by Mr De Boissard

(a) dated 13 May 2014 (to Mr Lidington, then Minister for Europe), making clear that the Bank considers there was no wrongdoing by Mr Benyatov, but egregious wrongs committed during the Romanian Court process: "*Credit Suisse (aided by Clifford Chance LLP) has analysed all pieces of evidence filed by the investigating prosecutors as part of the trial process. None of this evidence supports the allegations... We are compelled to conclude that Mr Benyatov, Mr Flore and Mr Susak can only be the victims of a prosecution which appears focussed on former ministers and their advisers*".

(b) dated 28 May 2014 to the executive director of the American Chamber of Commerce Romania repeating the above and stating:
"The proceedings relate to the manner in which a number of privatisation mandates and other preliminary procedures were conducted in Romania in the period 2003 to 2006. Credit Suisse always believed that the action against Credit Suisse individuals is entirely without basis. The case raised troubling questions regarding due process for the individuals concerned as well as for the conduct of international business in Romania. Credit Suisse is deeply concerned by the apparent confusion on the part of the prosecutors in this case between normal business practices and serious crimes involving national security and organized crime. The implications of this for Romania and for other businesses operating there are clearly serious and undesirable."

(c) dated 14 July 2014 to the World Bank Country Manager, Romania and Hungary and a further letter of the same date to the director of the EBRD office in Bucharest stating:
"We believe that the Romanian authorities in pursuing this prosecution have fundamentally misunderstood and misrepresented commercial conduct that is inherent and normal for privatisations and interactions between governments and financial market specialists. The Romanian DNA anti-corruption service found no case to answer on the same charges in 2006. An independent review of its own staff conduct commissioned by Credit Suisse from law firm Clifford Chance found the same.

"Credit Suisse is committed to fully respect the independence of the Romanian judiciary, and to allowing the Romanian judicial process to run its natural course. However we have profound concerns about the repeated failures of due process in this trial, and the lack of evidence presented over the last seven years. Aside for the risk of miscarriage of justice for our employees, we believe the conduct of this case to date carries considerable risk for Romania and does not meet the standards it has aspired to meet within the EU."

(2) The ECHR applications dated 1 March 2016 and undated supplementary submissions, setting out numerous violations of human rights and due

process including of the appellate court as regards the absence of adequate reasons including as regards:

(a) key aspects of the case under appeal;
(b) a res judicata argument;
(c) the refusal to allow witnesses for Mr Benyatov;
(d) the legality of the production and introduction of intercepted telephone calls and the accuracy or integrity of the same;
(e) reliance by the appellate court on matters not before the trial court without notice or opportunity to comment;
(f) a change in the alleged criminal offences at the appeal stage without any or any adequate opportunity to comment on the same (and when the offences were introduced in 2014, there being an issue as to whether they were declaratory of offences in force at the time when Mr Benyatov was working for the Bank in Romania);
(g) changes in the judicial panel such that at first instance and on appeal the decision was reached by judges who had not heard the necessary evidence in the case.

(3) Letters from Clifford Chance to the ECHR highlighting how the Romanian Court decisions were unconstitutional in various respects as a matter of Romanian law including letters dated 12 April 2016, 26 May 2017 and 6 December 2019.

(4) It appeared from cross-examination of Mr Benyatov that the Bank was paying for applications on his behalf that the SRI had no legal competence to act in the criminal proceedings and that recordings obtained on national security grounds may not be used in a criminal trial, due to be heard on 23 June 2021, and a further application due to be heard in October 2021 that the SRI obtained and manipulated evidence [T6/83-84].

386. The Bank is in effect submitting that the attempts on its part to assist its former employee do not imply that it accepts the innocence of Mr Benyatov. It simply reflects the fact that it will assist him in pursuing his case, but it does not indicate that it does not respect the decisions of the Romanian Courts, which stand unless and until set aside by any subsequent decision (which may never occur).

387. In my judgment, in the peculiar circumstances of this case, the evidence of the Romanian convictions does not raise a case to answer that Mr Benyatov has acted in the manner found by the Romanian Court. The circumstances are as follows:

(1) The conviction of the Bank (expressed on numerous occasions by representatives of senior management as stated above) that there was no wrongdoing on the part of Mr Benyatov, despite a detailed appreciation of the alleged criminal case against him.

(2) The belief of the Bank that the Romanian authorities have fundamentally misunderstood or misrepresented commercial conduct that is inherent and normal for privatisations and interactions between governments and financial

market specialists and that there was no case to answer in respect of the matters alleged against him;

(3) The case of the Bank that there had been repeated failures of due process in the trial and before the appellate court;

(4) the fact that the Bank continued to employ Mr Benyatov despite the charges against him for many years, and did not dismiss him for misconduct even following the conviction;

(5) the fact that the Bank continued to support him until the late amendment to the Defence without any explanation for the change of position.

388. The Bank has not explained why it is that these convictions are now relied upon whereas until very late in the proceedings, the Bank's case was without reliance on the convictions. Indeed the Bank has been fundamentally critical about the process and the convictions. Against that background, the recent statements of the Bank that it has respect for the decisions of the Romanian Court appear hollow. The evidence relied upon against Mr Benyatov is the convictions themselves. There was no evidence adduced independent of the conviction showing that Mr Benyatov had committed the offences. In my judgment, in the circumstances set out above including all the fundamental criticisms raised by the Bank against the convictions as set out above, the Bank has not raised a case to answer as regards the guilt of Mr Benyatov: alternatively on the basis of the above matters, in my judgment, the Bank has not proven a case to the effect that Mr Benyatov has committed the offences which are the subject of the convictions.

389. This is not a case about whether a court of this jurisdiction will recognise or refuse to recognise the convictions of a Romanian court. That might arise for example in the cases of the Italian court refusing to order extradition in respect of the co-defendant Mr Susak on 2 March 2020 and a refusal to recognise the conviction by the Czech court on 26 March 2020. It is not necessary for this decision to take into account the criticisms in those decisions of the Romanian convictions. It suffices here to say that in view of the matters set out above about the Bank's approach to the convictions (prior to its very late amendment) t the Romanian convictions do not prove without more that Mr Benyatov acted as is now and belatedly contended for by the Bank. This is not a point of more general application, but arises very specifically on the facts of the instant case.

(b) The rule in *Hollington v Hewthorn* .

390. If the Court is wrong in the above analysis, in my judgment, at this level the Court is bound by the rule in *Hollington v Hewthorn* to the effect that a conviction is inadmissible at a second trial. It is no more than the expression of the opinion of the tribunal as to the guilt of the accused, and as such was irrelevant at the second trial. The rule is no longer applicable as regards convictions in the UK by reason of the operation of ss11, 13 of the Civil Evidence Act 1968. The case has been criticised, and it has even been said that it is generally considered to have been wrongly decided:

see *Hunter v Chief Constable of the West Midlands* [1982] A.C. 529 at 543, per Lord Diplock and see also Lord Hoffmann's comment in *Arthur JS Hall & Co v Simons* [2002] 1 A.C. 615 at 702 that the Court of Appeal in *Hollington v Hewthorn* was "generally thought to have taken the technicalities of the matter much too far".

391. In a detailed analysis in Phipson on Evidence 19th Ed. at 43-79, it is stated:

> *"Notwithstanding recent criticisms of the decision which have high authority, Hollington v F Hewthorn & Co Ltd was treated as clear authority by the Privy Council in Hui Chiming v R. [1992] 1 A.C. 34 PC at 43, [that a conviction "amounted to no more than evidence of the opinion of that jury"]. Consequently it is probably safe to say that the rule still applies in all cases not covered by a common law exception (see paras 43–81 to 43–84) or the various statutory exceptions (see paras 43-85 et seq.)*
>
> …
>
> *In Al-Hawaz v The Thomas Cook Group Ltd [Keene J. 27.10.00. New Law Online 2001 019305"] the scope of the rule in Hollington v F Hewthorn & Co Ltd was challenged. It was argued that the decision is only binding authority on the admissibility of previous criminal convictions. Whilst accepting that this originally would have been correct, the court held that the decision had been applied to civil judgments in subsequent cases by higher courts. Moreover, the reasoning of Hollington is logically applicable to earlier civil judgments; both criminal and civil judgments are technically expressions of opinion and inadmissible as such. The court affirmed that the principles adumbrated in Hollington remain applicable to findings in earlier civil cases as well as earlier criminal cases."*

392. I accept this as a correct exposition of the law as it now stands.

393. The Bank relies on the case of *Director of the Assets Recovery Agency v Vertosu* [2009] 1 WLR 2808, which held that *Hollington v Hewthorn* did not apply. That was in the context of section 241 of the Proceeds of Crime Act 2002 on the basis of the presumed intention of Parliament. At para. 43, it was stated by Tugendhat J:

> *"In my judgment, in a case where a defendant to civil recovery proceedings has been convicted, Parliament cannot have intended that a conviction in a court outside the United Kingdom should be treated as irrelevant to prove the matter required by section 241. Such a conviction would have established the identical matter required to be established by section 241(2)(a) and (3)(a)."*

394. The reasoning in *Vertosu* was by reference to a statutory exception and the interpretation of the Court that the statute was to be interpreted in this way. A supporting point in *Vertosu* (at para. 42) was that "*the credit which this court gives to the judgments of foreign courts has changed greatly over the years, in particular in relation to the courts of countries which are members of the Council of Europe, and who are thus subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as is the case with France."* That is a point which might have to yield in this case where there are unresolved issues regarding the observance or otherwise of fundamental freedoms under the Convention. There is a danger about according that credit where the judgment of the Romanian Court is to go to the ECHR and where courts in Italy and the Czech Republic have refused to recognise it. It is not necessary to consider that aspect further in view of the determination that on the facts of this case and in any event in law (*Hollington v Hewthorn*), the Romanian judgment and conviction do not prove that which is now contended for by the Bank.

(c) Conclusion

395. In my judgment, in its late attempt to rely upon the criminal convictions in Romania, the Bank has not proven that Mr Benyatov was guilty of the offences. In any event, for the reasons set out above, I have held that the convictions are inadmissible by reason of the rule in *Hollington v Hewthorn*.

396. It therefore follows that the attempts of the Bank (Amended Defence paras. 61.3 – 61.7) to say that Mr Benyatov's case fails on account of his exceeding the authority given to him and/or that he was not entitled to an indemnity because he acted in an unlawful manner and/or that he acted in breach of contract by acting in an unlawful manner and/or that he brought the loss by acting in an illegal manner must fail.

397. Certain other arguments fall away. Mr Benyatov sought to say that the alleged term that he would observe the laws of the countries in which he worked (and here the Romanian law) were not incorporated effectively into his contract of employment. He also contended that if incorporated, the term was an attempt to exclude or restrict liability under the Unfair Contract Terms Act 1977 and failed to satisfy the requirement of reasonableness. On the premise that the criminal conduct has not been proved against Mr Benyatov in this action, these arguments do not arise for consideration.

XIII Causation of loss

398. In view of the matters set out above the claim fails and questions of causation and quantum do not strictly arise for consideration. Even in making findings as to quantum, they do not deal with causation e.g. the submissions as to causation, contributory negligence and the loss of a chance. It is one thing to reach a conclusion on quantum in case that might assist the parties. It is another thing to reach findings in respect of matters relating to causation of loss which are predicated upon bases which would contradict the findings which I have made. By way of expansion in respect of causation, Mr Benyatov's evidence as to the counterfactual is in his first

statement at para. 36. He says: *"if I had understood that by conducting normal investment banking business in Romania I was exposing myself to a serious risk of arrest (let alone a criminal conviction) I would simply not have gone"*. This is entirely consistent with the case based on Romania being a high-risk country and/or the EMS transaction being a high-risk transaction.

399. Mr Benyatov's case is that if a risk assessment had been conducted, various mitigating steps would have been taken including the Bank withdrawing from the EMS mandate and/or stopping bankers travelling to Romania and/or speaking to the SRI, security services, embassies and a suitable academic and/or briefing Mr Benyatov as to the various risks and/or conducting due diligence of Mr Stantchev.

400. The Bank's response is that if these steps had been taken, it has not been established what would have been the result and whether in fact the Bank would have withdrawn and/or Mr Benyatov would not have travelled to Romania and/or Mr Benyatov would or might not have been convicted. This has led to detailed refutation of the case on causation in the Bank's written closing submissions at paras. 383-426. The strength of the Bank's refutation is that it is apparent from the evidence that neither the country nor the transaction would be regarded as "high risk" with the effect that it has not been proven that any political risk or other assessment would have given rise to advice that Mr Benyatov was exposing himself to a serious risk of arrest or conviction.

401. This then in turn raises questions regarding causation and/or whether any damages would be too speculative and/or subject to discount for loss of a chance. Dealing with these questions would be artificial because it would or might be on premises contradicting the findings made above which led to the rejection of the cases on duty of care and on the Contract. I shall therefore consider quantum, but that is not just subject to the findings on liability, but also subject to the many issues as regards causation that would otherwise have arisen.

XIV Quantum

402. The findings which follow are subject to the fact that Mr Benyatov has failed on liability. The findings on quantum are made on a basis (that has not occurred), namely that liability had been found in the claims. If that had been the case, there has to be some realism about the task of a claimant. The approach for the Court to take was well summarised in the written closing Submissions on behalf of Mr Benyatov at para. 272 as follows:

> *"It is well-established that, when considering damages in a hypothetical counterfactual, the Court must adopt a realistic approach, tailored to the specific facts of the case [see Ratcliffe v Evans [1892] 2 QB 524 CA at page 532-533]. A claimant is not required to "perform the impossible". Rather, the Court estimates the loss by making the best attempt it can to evaluate the chances, great or small, taking all significant factors into account [Parabola Investments Ltd v Browallia Cal Ltd & Others [2010] EWCA Civ 486 at [22] to [23]]. Provided the*

> *Court is satisfied that there will be continuing loss of earnings, the Court should do its best, based on such material as is available, to find a proper and reasonable basis of assessment of the losses in question [Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd [1998] EWCA Civ 3534 at [53]].”*

403. In his witness statement at para. 84, Mr Benyatov said that his claim is *“based on the assumption that I would have earned an average of $4m per annum for the remainder of my career, with an assumed retirement age of 75. These figures are based on the assumption that I would have left investment banking in order to pursue a career in fund management (which is something that I was considering at the time of my arrest, and which is often more lucrative) and on information I have obtained from individuals within the finance industry who are now doing the sorts of work that I believe I would be doing if not for my conviction”* (emphasis added). Even allowing for the difficulties referred to in this paragraph, this seems more speculative than realistic. It is a claim for about US$80 million, making assumptions about a level of earnings up to the age of 75 of far more than that which Mr Benyatov earned in his record years.

404. It involves assumptions as to (1) his level of earnings, (2) his career trajectory and (3) his likely retirement age.

405. I shall start with the assumed retirement age of 75. In the claim as originally pleaded, the projected retirement age was 65. That was in a document which was carefully prepared involving a statement of truth. Mr Benyatov has said that he made a mistake. This is difficult to accept bearing in mind the care that has gone into the documents prepared for this case. It has the hallmarks of an afterthought. It betrays a lack of objectivity, and it gives rise to concerns about other assumptions underlying the quantum claim.

406. Mr Benyatov sets out in evidence a number of reasons why he believes 75 to be a realistic retirement age:

(1) As he entered investment banking as a second career at the age of 29 (older than many of his peers), he considers it likely that he would retire later than many of his peers: see his third witness statement at para. 102.1 and [T6/75/5-14].
(2) He enjoyed his job and did not ‘work to retire’, therefore how much he was earning would have little impact on his decision to stop working: see his third witness statement at para. 102.2.
(3) He is hard working and comes from a culture where people work late into their lives: see his third witness statement at para. 102.3.
(4) The conclusion of his career would have been as a senior finance professional (not necessarily investment banker) and that it is not unusual for senior finance professionals to work into their late 60s or beyond [T6/78/23-25].

407. In my judgment, it is unlikely that Mr Benyatov would have remained at an investment bank until the age of 60. Of the 156 Managing Directors in the Bank's IBD almost a quarter were between 50 and 59 years of age. There were six Managing Directors (around 4% of the total) over the age of 59 in the IBD. That was without a retirement age being in place. Although there is no breakdown of the individuals between the ages of 50-59, it is safe to conclude that there must be some tailing off by reference to age rather than almost everyone retiring at the age of 59.

408. Mr Benyatov says that his career trajectory would have been to look for opportunities as a senior financial professional. As noted above at the end of the section about limitation, Mr Benyatov says that particular fund management opportunities might have been available to him during 2006 to 2010, but he was unable to pursue them because of the Romanian prosecution. He suggests that he might have built up relationships with Russian high net worth or ultra-high net worth individuals. He says that numerous of his predecessors and contemporaries had gone on to pursue opportunities in fund management. They included Mr Rao, Mr Berg and Mr Harris. Mr Michal Susak, whom Mr Benyatov succeeded as Head of Emerging Markets, left the Bank in 2006 to work for Petr Kellner, a wealthy Czech entrepreneur.

409. It was on the basis of their earnings that he believed that it was reasonable to calculate earnings of $4 million per annum. Even taking a realistic basis, there are at least the following difficulties in respect of such a career trajectory. Despite the difficulties of obtaining evidence, there is no contemporaneous documentary evidence of any attempts to obtain such a position. That might be capable of being explained because of the prosecution, but it is a part of the Schedule of Loss that there were such discussions at paras. 3(a)-3(d). There is also evidence in his third witness statement at paras. 93-94. However, in this regard, his evidence in the witness statement did not correspond with the Schedule of Loss. As set out in the Bank's written closing Submissions, Mr Benyatov was not convincing in his oral evidence in trying to reconcile these accounts: see para. 459. If those opportunities did exist and Mr Benyatov had been seeking them, the Court might have expected that there would be at least some emails with recruiters or some other intermediaries, and some corroborative evidence.

410. Further, this is another respect in which there is an artificiality. If such opportunities had existed, it would be expected that Mr Benyatov would or might have left the Bank at the time of the alleged discussions referred to in the Schedule of Loss at paras. 3(a)-3(d). Alternatively, he would or might have left after 2010 when the Bank ceased its involvement in the EMEA work. That he did not and earned smaller sums thereafter must have been due to the pending prosecution. If in fact these opportunities were lost, they would simply add to the claim not brought to which I referred in the limitation section above. The artificiality of excluding this claim does not end with the limitation point. It is that instead of considering the ability to have an alternative career from a point in his 40s, it arises for consideration only when he was approaching 50, that is coinciding with the time of his conviction and redundancy. It can be inferred that the older he was to leave it, the less likely that he would secure such employment. The artificiality is created by the particular formulation of the claim in tort.

411. The Bank was critical of the evidence provided by Mr Benyatov in that it was largely based on assertion. However, allowances have to be made. First, an application to adduce expert evidence about these prospects had been refused by Master Davison on the basis that he could speak to these matters in the course of his evidence. Second, the criticism that he did not seek to compel some of the individuals to give evidence by serving a witness summary is unreasonable. Mr Benyatov did seek to persuade individuals to attend, but he was unable to do so. There were difficulties of compelling such people to give evidence about their remuneration or of giving evidence against the Bank, which they perceived (rightly or wrongly) was not in their commercial interests. The Bank's root and branch opposition to the three witnesses brought to Court through this method (who did not have information personal to them which they needed to protect) very substantially reduces the weight of the criticism.

412. There were questions in respect of the ability of Mr Benyatov outside his sphere of expertise, and such evaluations as he received were subject to detailed commentary. There were exceedingly complimentary statements about Mr Benyatov: most of the comments were upbeat. Mr Benyatov's achievement of getting to the position which he did within the Bank as well as his work in the emerging markets was impressive. However, there were also comments by Mr Menneer which indicated a lack of flexibility or narrowness in strategic view [T2/8/8-15]. Others had concerns about his business being too opportunistic and some concerns about engagement with colleagues.

413. Mr Benyatov has claimed by reference to the top third of the Managing Directors with the Bank based in London for the years 2015-2020 showing about $2.6 million per annum (written closing Submissions at para. 291.6). Further, he has claimed that his earnings should be valued on the basis 'Global Group Heads' for the years 2015-2019, on the basis that he was Group Head of European Emerging Markets, showing an average of over $4 million per annum (written closing Submissions at para. 295). He also provided another table of all managing directors in the same period considering the average remuneration in the 75th to 90th centiles showing about $2.6 million per annum (written closing Submissions at para. 296). On these bases, he seeks to say that even if he had remained at the Bank, his earnings expectation would be in the order of US$3 million per annum. That is based on the top third of Managing Directors in the Investment Bank and even higher still: see Mr Benyatov's closing submissions including the tables at paras. 291.6-291.7 and 295-297.

414. The evidence of Ms Buck was that these figures were not representative for the following reasons, namely:

    (1) The evidence of Group Heads was a reference to people far higher than Mr Benyatov. He was not a 'Global Group Head'. Those who earned about $4 million per annum were one or two levels below a board member, whereas Mr Benyatov was at least five levels below the head of investment banking: see [T11/4/9-16] and [T11/71/23-T11/73/17].

    (2) It was not appropriate to look at mean figures (e.g. the mean of the top third) particularly in the higher brackets because the figures were skewed by some huge outliers whose earnings were far removed from most other employees, making median figures more appropriate.

(3) It was not appropriate in any event to look at the compensation of the top third of managing directors in the IBD in London because they were involved in different fields from Mr Benyatov e.g. mergers and acquisitions.

(4) It was not appropriate to compare Mr Benyatov with all managing directors, but a more appropriate guide was energy in the UK where a table analysis for 2015 compensation for Managing Directors comprised $970,000 for the 50th percentile and $1.2 million for the 75 percentile (Mr Benyatov said that energy privatisations were an aspect of mergers and acquisitions). The Bank also submitted a note on compensation containing figures for MDs in the UK in either energy or combined power/energy for 2015-2019 which comprised c.$1,152,000 for the 50th percentile and c.$1,715,000 for the 75 percentile ("the Bank's note on compensation").

415. Mr Benyatov has also given evidence to the effect that in the period of 2015-2019, the earnings of Managing Directors at the Bank were significantly less than the earnings available at other investment banks in the market. He has said that if he stayed in investment banking, he might have been able to have obtained employment with another bank at a higher salary. He has provided tables showing that compensation in the market was significantly higher than at the Bank in the years 2015-2019 (written closing Submissions at paras. 295-296).

416. The Defendant has calculated the median salaries of Managing Directors in the period of 2012 to 2015 in FID London and in the period of 2015 to 2019 in Credit/GTS London (Banker, Sales, Structurer, Originator) where the median totals in US dollars were between US$1,114,115 to US$1,375,000, save for 2015 which was US$875,000. This gives rise to an average of just over US$1.2 million per annum. This needs to be converted into pound sterling at the relevant time. If a very approximate average exchange rate of US$1.4 to one pound sterling were applied at the relevant time (2012 to 2019), this would give rise to a figure of approximately £850,000 per annum.

417. It is very difficult to reach conclusions based on the number of uncertainties, which include:

(1) for how long Mr Benyatov's career would have gone on whether with the Bank or outside the Bank;

(2) if he had stayed at the Bank, what his earnings would have been, and if they would have been above the median, at what level they would have been;

(3) whether if he had stayed in investment banking but outside the Bank, what prospect he had of earning money, at what level and for how long;

(4) what opportunities there were outside investment banking whether as adviser to a high or ultra-high net worth individual or other opportunities in some financial sector, and if he acquired such a position, for how long he might have retained it.

418. An appropriate starting point is the hard evidence of the amount of money which Mr Benyatov had earned historically with the Bank. I therefore start with the salary table at para. 7.3 of the Bank's Counter-Schedule of Loss from which the Bank has calculated an annual salary in the period of 2005-2014 of £850,000 gross per annum. However, there are problems with that approach. The period of 2005-2010 might be more representative (although as is apparent from the section above on limitation, even 2007 and 2008 may have been more lucrative but for the arrest and incarceration). The period after this might not be representative. In 2011, the Bank made a strategic decision to reduce its presence in emerging markets and Mr Benyatov had to find a new role in the FID. In October 2013, he was placed on garden leave and was made redundant in June 2015, which therefore does not say what he could have earned in investment banking.

419. It might be more reliable to have a weighting in favour of the early years of 2005-2010, showing what Mr Benyatov was capable of achieving. Those years could not be projected ahead as the only representative years because that would ignore the evidence that the level of earnings reflected a particular period for earnings within the Bank for Eastern European privatisation work in which Mr Benyatov specialised at the time. However, there ought also to be a lesser weighting in respect of subsequent years to take into account that the opportunities for Mr Benyatov to seek work outside the Bank were reduced significantly by the then pending criminal proceedings against him and the fact that the nature of his work was in an early stage of change. Instead of taking an average of the years from 2005 onwards for Mr Benyatov, a weighting shall be given to the years of 2005-2010. It is not a mathematical or scientific approach because of the uncertainties referred to in the previous paragraph but one.

420. For the reasons above set out above, I treat with caution the evidence regarding those who went to work for ultra-high net worth individuals. I also treat with caution the tables for 2015 onwards about the projections of Mr Benyatov being among the highest earning employees of the Bank, and about the possibility that he might be among the highest earning employees at another investment bank. I regard these expectations as possible but not likely. Mr Benyatov did have good things said about him, but others including Mr Menneer were more sanguine about his prospects. He was in a relatively narrow field in his Eastern European privatisation work, and it remained to be seen how versatile he would be outside that field.

421. Nevertheless, I have taken into account the pragmatic approach contained at para. 272 of the written closing Submissions of Mr Benyatov (quoted above) and have made allowances to take that into account.

422. I have reached the following conclusions, namely:

(1) Mr Benyatov's career would have gone on to the age of 60. On the premise that there is a tailing off of Managing Directors between the ages of 50 and 59, this would take him to a greater age than the average age at which most managing directors leave the Bank, and it gives some weight to the expectation of Mr Benyatov that he would work for as long as he was able to do so.

(2) In view of the evidence about the tailing off of Managing Directors at the Bank before the age of 60, there must be taken into account the possibility that

Mr Benyatov may not have been able to work all the way to 60 at the Bank or another investment bank.

(3) The assumption that his career would have gone on to the age of 60 allows for the possibility that he would have remained at the Bank or another investment bank or that indeed have found some significant opportunities outside the Bank.

(4) There is on the evidence a substantial possibility that he would have been able to acquire work elsewhere. It is very uncertain for how long that would be or at what level of remuneration. It might have been more or less lucrative than working for the Bank. It might have been until before 60, or he may have been able to go on beyond 60.

423. As regards mitigation of loss, it is for the Bank to prove a failure to mitigate loss. Mr Benyatov's case is that his conviction stood in the way of his obtaining opportunities of employment in the financial sector even where registration was not required. He looked for some investing opportunities with others, but the conviction made it impossible. It has not been shown by the Bank that with the exercise of greater effort, Mr Benyatov would have been able to secure opportunities to earn. The Bank submits that the sum of £200,000 per annum should be taken off the figures. I conclude that the Bank has been unable to challenge the account of Mr Benyatov about the difficulties which he faced or to prove that had he acted in a different way, he would have been able to mitigate his loss as alleged or at all. I therefore make no allowance for mitigation of loss.

424. The Bank has submitted that there is the possibility that Mr Benyatov may succeed in his steps in Romania or before the ECHR to set aside the conviction. It is unexplained why it has taken so long before the ECHR or when it is likely that there will be some resolution. The Bank has also failed to provide any prospects of success in order to support this argument raised by the Bank. In order for a reduction to take place, it would be necessary to prove a real prospect of the conviction being set aside and also that after so many years of unemployment that Mr Benyatov (now 56 years old), would be able to obtain lucrative employment. In my judgment, this is all too speculative, and no deduction will be made. To the extent that he might obtain an order for some compensation for the breach of his rights in Romania from the ECtHR, the amounts awarded are not particularly generous. In the absence of hard evidence in this regard as to the likely timing of such an award, its likely amount and the prospects of success, there will be no deduction.

425. Applying the above, I shall bear in mind that in the period of 6 years from 2005 to 2010, the Claimant earned an average of £1.1 million per annum. That figure is not to be extrapolated forward, but it is to be given an additional weighting. There are also reasons referred to above for not using the figures of 2011 onwards without a weighting down to take into account the limited opportunities of Mr Benyatov caused by the then pending criminal proceedings. I therefore do not bring the earnings down to £850,000 in the manner adopted by the Bank. I also do not adopt the median figures of the Bank in the period of 2012-2019 because of Mr Benyatov's record in 2005-2010 and his corresponding potential. Whilst I accept that Mr Benyatov was

higher than the median or average performer (and therefore do not accept the figures by reference to £850,000 per annum advanced by the Bank), I do not accept the assumptions of the Claimant that he would have been among the highest achieving employees of the Bank at Managing Director level or that he would have gone higher still.

426. The criticisms of the Bank of the tables contained in the final submissions on behalf of Mr Benyatov are substantial, and a more satisfactory starting point is by reference to the actual working money earned by Mr Benyatov with the Bank. In addition, I also have particular regard for the Bank's note on compensation, and the indicative figures in respect of the 75th percentile (on the basis that Mr Benyatov was a higher than average earning Managing Director in his field). If in respect of 2015 to 2019, there is an average exchange rate of 1.33 dollars to the pound, then the figure of c.$1,715,000 would be c.£1,290,000. This is a more reliable table than the table for all Managing Directors or one based on the averages rather than medians of the Claimant.

427. Doing the best on the material available before the Court and with all of the uncertainties, the Court finds that the salary which Mr Benyatov would have received on current values would be £1.25 million per annum. In assessing a final figure, it may be that an adjustment downwards for the years 2015 to date to take into account the changing value of money is necessary, but this would then be adjusted upwards for interest which might then cancel any reduction or lead to an increase or reduction in the amount. As regards future losses, there would then need to be consideration of what, if anything, would be an appropriate multiplier/multiplicand so as to allow for losses until the age of 60.

428. There has been factored in a sum to take into account a chance of receiving more remuneration than this per annum. That is cancelled out by taking into account a chance of receiving less remuneration than this per annum.

429. Likewise, there has been factored into the sum a chance of being able to go on working beyond the age of 60. This is also cancelled out by taking into account a chance of not being able to secure work up to the age of 60. I have treated each of these scenarios as cancelling themselves out, such that the damages assume earning until the age of 60 with nothing thereafter.

430. Upon dealing with consequential matters, I shall consider, if required, the calculations of a more precise sum in respect of quantum to reflect the findings which I have made.

431. It is to be borne in mind that the conclusions on quantum are reached without consideration of the matters touched upon in the section about causation above. Likewise, the conclusions are without consideration of a discount for contributory negligence. It is one thing to reach a conclusion on quantum in case that might assist the parties. It is another thing to reach findings in respect of matters relating to causation of loss which are predicated upon bases which would contradict the findings which I have made.

XV Conclusion

432. For the reasons set out above, the claims made by Mr Benyatov against the Bank are dismissed.

433. It remains to thank Counsel and the legal representatives for their meticulous care in their preparation and presentation of their respective cases and for the assistance which they provided to the Court throughout the trial.